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BMS/tlp

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

Benjamin Mann, Plaintiff, v. City of Urbana Police Officers Jennifer Difanis, Colby G. Wright, Sara M. Links, Seth R. King, Jay Loschen, Chad Burnett, Don C. McClellan, Adam Marcotte, John Franquemont, Sgt. Zach Makalik, and as yet Unknown Officers, the City of Urbana, a municipal corporation, and University of Illinois Police Officer Chris Elston, Defendants.	)	No.: 17-cv-2300

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

NOW COME the Defendants, JENNIFER DIFANIS, COLBY G. WRIGHT, SETH R. KING, JAY LOSCHEN, DON C. MCCLELLAN, ADAM MARCOTTE, JOHN FRANQUEMONT, ZACH MIKALIK, and THE CITY OF URBANA, A MUNICIPAL CORPORATION, by Brian M. Smith of Heyl, Royster, Voelker & Allen, P.C., their attorneys, and for their Motion state as follows:

I. REPLY TO PLAINTIFF'S ADDITIONAL MATERIAL FACTS

154. Difanis, King, Franquemont consider some of the named Defendant Officers as friends. (Ex. 14, Dep. of J. Difanis, 8:14-16); (Ex. 2, Dep. of S. King, 8:12-14); (Ex. 12, Dep. of J. Franquemont, 8:8-10).

REPLY: Undisputed, immaterial.

Defendants cannot identify what UMF #154 has to do with the issues in this litigation (e.g., whether the officer's had probable cause to arrest Plaintiff during the subject incidents).

155. Difanis knew other Champaign officers back in 2017, including a Champaign patrol sergeant who is one of her best friends. (Ex. 14, Dep. of J. Difanis, 79:12-23).

REPLY: Undisputed, immaterial.

The Champaign Police Department is not a party to this litigation, no CPD officer responded to the subject incidents, and Defendants cannot identify what UMF #155 has to do with the issues in this litigation (e.g., whether the officer's had probable cause to arrest Plaintiff during the subject incidents).

156. There are times when Urbana police officers, Champaign police officers, and/or University of Illinois police officers are present at a scene. (Ex. 2, Dep. of S. King, 26:11-28:1); (Ex. 5, Dep. of C. Wright, 13:19-14:4).

REPLY: Undisputed, immaterial.

The Champaign Police Department is not a party to this litigation, no CPD officer responded to the subject incidents, and Defendants cannot identify what UMF #156 has to do with the issues in this litigation (e.g., whether the officer's had probable cause to arrest Plaintiff during the subject incidents).

157. Difanis, Franquemont, and Marcotte have heard about the lawsuits involving Matt Rush through news reports on the television, in the newspaper, Facebook ads, and/or generally online. (Ex. 14, Dep. of J. Difanis, 78:18-79:5); (Ex. 12, Dep. of J. Franquemont, 25:16-21); (Ex. 8, Dep. of A. Marcotte, 25:16-18). "[I]t went on for quite a while. There was a lot of articles or news." (Ex. 14, Dep. of J. Difanis, 79:10-11).

REPLY: Undisputed, immaterial.

Plaintiff's theory for his First Amendment Retaliation claim is that the conduct of the defendant officers was motivated by a desire to retaliate against Plaintiff for his lawsuit against former Champaign police officer Matt Rush. (UMF #12). The relevant fact, therefore, is whether any officers knew that *Plaintiff* had a lawsuit against Matt Rush, such that the officers *could* be motivated to retaliate by it. These material facts are addressed through UMFs #13–16.

Here, Plaintiff is specifying the particular means that some defendant officers knew there were lawsuits against Matt Rush. None of this testimony, however, shows that these officers were aware of *Plaintiff's* connection to the "Rush lawsuits". *See citations in UMF #14*, *supra*. Thus, there facts only establish what UMF #14 already has: that some officers were generally aware that a CPD officer named Matt Rush had been sued.

158. Franquemont knew that Mann had a lawsuit against Matt Rush as early as January 2017, before the July 30, 2017 incident. (Ex. 12, Dep. of J. Franquemont, 26:14-19).

REPLY: Undisputed and material. *See* UMF #16.

159. Franquemont remembers one of the lawsuits against Matt Rush involving Precious Jackson was "big talk around the police department." (Ex. 12, Dep. of J. Franquemont, 26:23-25).

REPLY: Undisputed and immaterial, for the same reasons as AMF #157. It should also be noted that Officer Franquemont's cited testimony is not anchored to any specific period of time.

160. It was well-known in the Urbana-Champaign area that Matt Rush was getting in trouble with the police department. (Ex. 8, Dep. of A. Marcotte, 25:12-15).

REPLY: Undisputed and immaterial.

Undisputed that this is what Defendant Marcotte said in his deposition, although it is unclear whether Marcotte is competent to testify as to what is "well-known" in the Urbana-Champaign area.

Immaterial, for the same reasons as AMF #157.

161. Everyone was aware who worked in the Champaign and Urbana Police Departments about Matt Rush. (Ex. 8, Dep. of A. Marcotte, 26:12-27:3). Marcotte knew that Rush was sued and the City of Champaign had to pay out over six figures to settle lawsuits related to Rush. (Ex. 8, Dep. of A. Marcotte, 27:8-14).

REPLY: Undisputed and immaterial.

Undisputed that Defendant Marcotte said this in his deposition, although Defendant does not believe Marcotte is a competent witness to testify as to the knowledge of "everyone" in the Urbana Police Department or the Champaign Police Department (where Marcotte does not work). The fact Marcotte was aware of the Rush lawsuits was established in UMF #14.

Immaterial, for the same reasons as AMF #157.

March 19, 2017 Incident

162. Mann and Wade had left a wedding announcement that evening and were heading to the apartment located at 810 Oakland Ave in Urbana. (Ex. 1, Dep. of B. Mann, 45:15-20).

REPLY: Undisputed as to citation, material that Plaintiff and Ms. Wade were heading to an apartment at 810 Oakland Ave in Urbana, immaterial as to their motivation for doing so, as this has no implication for whether the Defendants' actions/liability.

163. When they pulled into the parking lot, a woman later identified as Koraysia Pierce suddenly backed her car out without looking back. (Ex. 1, Dep. of B. Mann, 45:14-46:1).

REPLY: Undisputed as to citation and material to the extent this information was communicated to the defendant officers. *See Part II.A, infra*.

164. Mann quickly stopped his car before any contact was made between the cars. (Ex. 1, Dep. of B. Mann, 46:2).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

165. Pierce then rolled down her window and started cursing at Mann and Wade. (Ex. 1, Dep. of B. Mann, 46:2-4).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

166. After some words were exchanged, Mann left and pulled into the parking space assigned to apartment 201. (Ex. 1, Dep. of B. Mann, 46:4-15).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

167. Wade was making her way into the apartment building when Pierce suddenly reversed her car, pulled up right behind Mann's car, and blocked his car in. (Ex. 1, Dep. of B. Mann, 47:3-10).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

168. Mann was sitting in his car with the driver's side door open when Pierce blocked his car in. (Ex. 1, Dep. of B. Mann, 47:11-16).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

169. Pierce then hollered out the window and told Mann not to go anywhere because some people were coming to hurt him. (Ex. 1, Dep. of B. Mann, 47:20-24).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

170. Mann then fully got into his car, shut the door, and reversed his car maybe four inches, pushing her car out of the way so that he was not trapped in. (Ex. 1, Dep. of B. Mann, 47:25-48:5). Mann was trying to make sure he could escape if need be so that he could turn out if he needed to. (Ex. 1, Dep. of B. Mann, 49:12-20; 52:5-9).

REPLY:

Undisputed and material that Mann made contact between his and Ms. Pierce's car. (*See* UMF # 59(c), 71(a)(i)).

As for Mr. Mann's rationale for contacting Ms. Pierce's case: immaterial, because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.* In fact, when taking to officers at the scene, Mr. Mann denied making contact with Ms. Pierce's car. *See* UMF #59(c).

171. Mann got out of his car and Pierce got out of her car. Pierce was screaming at him that some guys were coming to hurt him. (Ex. 1, Dep. of B. Mann, 48:7-10).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

172. At this point, Mann threatened and was trying to protect himself. (Ex. 1, Dep. of B. Mann, 56:2-9).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

173. Wade said some people are here and one of them has a gun. (Ex. 1, Dep. of B. Mann, 48:13-14; 60:7-9).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

174. Mann called the police immediately, reporting that some men were there with a gun. (Ex. 1, Dep. of B. Mann, 48:14-18; 58:1-5). Seaton also called the police because he witnessed three men approach Mann and Wade and started attacking them. (Ex. 20, Dep. of T. Seaton, 21:1820).

REPLY: Undisputed as to citation and material that there was a reported gun at the scene; otherwise, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

Defendants also note that Ms. Pierce also called 911 during her interaction with Mr. Mann, as reflected in the METCAD ticket (Ex. 30), and Mann's deposition transcript. (Ex. 1, Dep. of B. Mann, 73:24–74:2).

175. While he was on the phone with the police, Pierce ran up in Mann's face and was screaming and hollering at him. Pierce was behaving erratically. (Ex. 1, Dep. of B. Mann, 59:1015). Pierce was screaming in Mann's face ready to attack him. (Mann, 65:20-24). Pierce was going berserk and was threatening and hollering at people the entire time. (Mann, 70:3-12).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

176. Seaton heard a girl cussing loudly. Then he saw a girl aimed and facing someone, cursing and swearing. He then heard this girl calling friends on her phone to come and attack Mann and Wade. (Ex. 20, Dep. of T. Seaton, 22:10-25:15).

REPLY: Undisputed as to citation, immaterial because these are facts beyond the knowledge of the responding officers. *See Part II.A, infra.*

The exception is Officer Links, who interviewed Seaton and heard his version of events after Plaintiff Mann was arrested on March 19, 2019. (Ex. 20, Dep. of T. Seaton, 33:10–22); (Ex. 21).

177. Mann pushed Pierce back away from him because he felt threatened. (Mann, 59:10-15; 62:15-20; 73:7-13). Mann did not hit Pierce. (Ex. 1, Dep. of B. Mann, 62:12-14, 214:5-12).

REPLY: Undisputed as to citation, immaterial because this AMF does not discuss information Plaintiff told or otherwise communicated to the Defendant Officers. *See Part II.A, infra*; *see also* UMF #57–61.

178. One attacked had dreadlocks, with a handkerchief around his face, and a long-sleeved coat on with what appeared to be barrel hanging out the front. (Ex. 1, Dep. of B. Mann, 58:17-23).

REPLY: Undisputed as to citation, immaterial because this AMF does not discuss information Plaintiff told or otherwise communicated to the Defendant Officers. *See Part II.A, infra*; *see also* UMF #57–61.

179. There were three men total who showed up, and one of the men hit Mann from behind. (Ex. 1, Dep. of B. Mann, 59:8-16).

REPLY: Undisputed as to citation, immaterial because this AMF does not discuss information Plaintiff told or otherwise communicated to the Defendant Officers. *See Part II.A, infra*; *see also* UMF #57–61.

180. Seaton saw three men arrive from both the north and south sides of the building, surround Mann and Wade, and started punching them and "laying into them with fists, knuckles[.]" (Ex. 20, Dep. of T. Seaton, 26:24-27:7). Seaton told Links the same account. (S. Links's Supplemental Report of Incident Dated March 19, 2017, at 2).

REPLY: Undisputed and immaterial, because Officer Links did not learn this information until after Mr. Mann was arrested, and therefore it does not bear on the probable-cause determination leading up to Mr. Mann's arrest. (*See* Reply to AMF #176).

181. Another one of the men, hit Wade in the side of her head with the gun. Wade fell to the ground. Wade got up again and started yelling, and the man hit her again. (Ex. 1, Dep. of B. Mann, 60:16-25).

REPLY: Undisputed as to citation, immaterial because this AMF does not discuss information Ms. Wade told or otherwise communicated to the Defendant Officers. *See Part II.A, infra*; *see also* UMF #67.

182. During the fight, Mann heard sirens. He saw two of the attackers run off. (Ex. 1, Dep. of B. Mann, 61:3-6). Seaton saw Pierce take off in her vehicle and all three attackers flee on foot, so that when the police came, only Mann and Wade were standing there. (Ex. 20, Dep. of T. Seaton, 27:11-17, 27:22-23).

REPLY: Undisputed and material that Mann and Wade were the only individuals on the scene when Difanis and King arrived. *See* UMF #29, 47–49.

Undisputed and immaterial what Seaton saw, as his observations were not communicated to the officers until after Plaintiff had been arrested. *See* Reply to AMF #176, 180.

Undisputed and immaterial what Mann saw to the extent this AMF does not say whether this information was communicated to the Defendants. *See Part II.A, infra*.

183. Mann and Wade stayed right where they were. Once the sirens got closer, Mann and Wade tried to wave the police down. (Ex. 1, Dep. of B. Mann, 61:6-9).

REPLY: Undisputed and material that Mr. Mann and Ms. Wade stayed on scene.

Undisputed and immaterial that Mr. Mann and Ms. Wade tried to wave the police down, to the extent the Defendant officers did not personally observe this. *See Part II.A, infra.*

184. King was dispatched to 810 Oakland Ave #201 for a domestic. METCAD dispatched the following information: "A black female, with weaves in her hair, was trying to attack the reporting person, Benjamin Mann, while blocking Mann's car with her black car. Mann did not know the female who was blocking his car. Mann advised he felt threatened and it sounded physical in the background." (Ex. 17, S. King's Report of Incident Dated March 19, 2017, at 3).

REPLY: Undisputed and material. *See also* UMF #17–18.

Defendant King's report continues that "On ring back, it sounded as though the male was battering a female, a female screamed 'He just hit me,' and the line disconnected." (Ex. 17, S. King's Report of Incident Dated March 19, 2017, at 3). This squares with the METCAD

ticket (Ex. 30, p.2, at 19:33:15), and Plaintiff Mann's testimony regarding Ms. Pierce's phone call to 911 during the subject incident. (Ex. 1, Dep. of B. Mann, 73:24–74:2,10–11; 76:1–3).

185. Once the police arrived, Mann was trying to get their attention to let them know he and Wade had just been attacked. (Ex. 1, Dep. of B. Mann, 78:10-17).

REPLY: Undisputed and material.

186. Both Mann and Wade were screaming at Difanis that they had been attacked and that she was letting the attackers go. (Ex. 14, Dep. of J. Difanis, 90:24-25). Mann told the officers, "They just attacked my girl. They got a gun." (Ex. 1, Dep. of B. Mann, 68:24-69:2).

REPLY: Undisputed that Mann and/or Wade ultimately told Difanis that they had been attacked, and that Difanis and King were letting the attackers go. *See* UMF #38; *see also* Reply to UMF #28.

Disputed that Mann told Difanis "They just attacked my girl. They got a gun." The cited testimony from Mr. Mann captures a statement he made while on the phone with 911, before Difanis and King arrived on the scene. (Ex. 1, Dep. of B. Mann, 63:18–64:4, 18; 68:24–69:2; 69–73).

187. The officers were not listening to them. (Ex. 1, Dep. of B. Maim, 78:19-21). The officers' attention went from the three attackers to him once they found out he was Benjamin Mann. (Ex. 1, Dep. of B. Mann, 85:9-16).

REPLY: Undisputed that this is Mr. Mann's perspective/allegation.

Disputed that officers were not listening to Ms. Wade or Mr. Mann. The officers initially could not understand what Mr. Mann or Ms. Wade were saying (UMF #28), but ultimately conducted an investigation that included interviewing Mr. Mann and Ms. Wade. (UMF #57–61, 65–68).

Disputed that the officer's investigation shifted "once they found out [Plaintiff] was Benjamin Mann". It is undisputed that no officer responding to the March 19, 2017 incident knew who Benjamin Mann was before responding to the subject incident. (UMF #5–6). It is also undisputed that all officers in the March 19, 2017 incident had no reason to attach any significance to the name "Benjamin Mann", which appears to be an insinuation of AMF #187. (UMF #15–16).

188. When the officers told Mann and Wade to put their hands up, Mann and Wade put their hands up right away. (Ex. 1, Dep. of B. Mann, 99:4-16); (Ex. 20, Dep. of T. Seaton, 78:24-79:5, 213:22-214:1).

REPLY: Undisputed that Difanis told Mann and Wade to put their hands up. *See* UMF #37.

Disputed and immaterial that Mann or Wade put their hands up right away.

Disputed, because Difanis testified Mann and Wade were "waiving their hands in an animated fashion", and did not have their hands in "full view" after she told them to put their hands up. (Ex. 14, Dep. of J. Difanis, 91:10–14, 92:8–21). *See also* (Ex. 2, Dep. of S. King, 34:18–35:2) ("They would not show us their hands", but not remembering what Mann or Wade *were* doing with their hands).

Immaterial because whether Mann and Wade put their hands up or not does not speak to whether the Defendant Officers had probable cause to arrest Plaintiff on March 19, 2017. Instead, it speaks to the uncertainty all involved faced when Difanis and King first responded to the scene.

189. Difanis handcuffed Wade. After Mann talked to King, King agreed to take the handcuffs off of Wade and let them both return to the apartment. (Ex. 1, Dep. of B. Mann, 78:22-79:8; 82:5-7); (Ex. 2, Dep. of S. King, 40:25-41:2).

REPLY: Undisputed and material that Wade and Mann returned to their apartment after speaking with the responding officers. (*See* UMF #69).

Undisputed and immaterial that Difanis handcuffed Wade, and that King let Difanis out of the handcuffs. Immaterial, because Ms. Wade is not a party to this litigation, so the propriety of placing her in handcuffs is not an issue in this litigation.

Disputed and immaterial that King let Wade out of the handcuffs "[a]fter Mann talked to King."

Disputed, because King let Wade out of the handcuffs once Wade had "calmed down," and then proceeded to interview Ms. Wade about what had happened. (Ex. 2, Dep. of S. King, 39:25–40:9). After concluding this interview, Wade returned to her apartment. (*Id.* at 40:25–41:10). King did not take a statement from Plaintiff — Sgt. Loschen did. *Id.*; UMF #58–61. Mann does not recall with certainty what officer he spoke with, or specify when the handcuffs were taken off in relation to Mann's conversation with this officer. (Ex. 1, Dep. of B. Mann, 79:2–5). From this, it appears to be undisputed that Ms. Wade was not in handcuffs when she provided her statement to Defendant King.

Immaterial, because the timeframe that *Wade* was in handcuffs does not speak to *Plaintiff*'s asserted claims. Ms. Wade is not a party to this litigation.

190. When Difanis encountered Pierce in the parking lot, she did not pat Pierce down for weapons. (Ex. 14, Dep. of J. Difanis, 96:15-112:18).

REPLY: Undisputed that Difanis did not testify about patting down Ms. Pierce, and material, insofar as a pat-down would have provided additional information to Sgt. Difanis with regards to her investigation of the March 19, 2017 incident.

191. Pierce told Difanis that she does not live in the apartment complex Town and Country. (Ex. 14, Dep. of J. Difanis, 98:18-21).

REPLY: Undisputed and material, at least insofar as this was information Sgt. Difanis learned during her investigation into the subject incident.

192. Mann did not know Pierce prior to March 19, 2017. (Ex. 1, Dep. of B. Mann, 45:47).

REPLY: Undisputed and immaterial, as this fact does not speak to the basis of Plaintiff's lawsuit: the information known to the officers as they conducted their investigation, or their actions during the same. *See Part II.A, infra*.

193. Pierce told Difanis that there were not any other subjects involved. (Ex. 26, J. Difanis's Supplemental Report of Incident Dated March 19, 2017, at 3).

REPLY: Undisputed and material.

194. Difanis claims Pierce did not tell her that she hit Mann. (Difanis, 106:12-13). However, Difanis reported that Pierce told her "she used both hands to push Benjamin backward and away from her." (Ex. 26, J. Difanis's Supplemental Report of Incident Dated March 19, 2017, at 3).

REPLY: Undisputed and material that Ms. Pierce told Sgt. Difanis that she did not hit Mr. Mann, but did tell Sgt. Difanis that she used her hands to push Benjamin away from her while Mr. Mann was reportedly punching her in the face. (Ex. 26, J. Difanis' Supp'l Rpt., p.3, ¶5).

195. Difanis never had Pierce write down her statement. (Ex. 14, Dep. of J. Difanis, 115:2-3)

REPLY: Undisputed and immaterial, as the material fact is what Ms. Pierce told Sgt. Difanis, not whether Ms. Pierce contemporaneously memorialized her statement.

196. Difanis and King did not see Mann and Pierce's cars make contact. (Ex. 14, Dep. of J. Difanis, 91:3-9); (Ex. 2, Dep. of S. King, 34:5-7, 61:11-13).

REPLY: Undisputed and material.

197. Difanis did not witness the physical confrontation between Mann, Wade, Pierce, and the three unknown individuals. (Ex. 14, Dep. of J. Difanis, 105:15-25).

REPLY: Undisputed and material.

198. Difanis believed that because Pierce could not move quickly, lunge, or lean to one side, "the idea that she was able to launch a physical attack on Mr. Mann was unlikely." (Ex. 14, Dep. of J. Difanis, 116:21-117:1). Difanis never saw if Pierce had the ability to run or lunge.

(Ex. 14, Dep. of J. Difanis, 117:23-118:2). Difanis has no medical training beyond CPR. (Ex. 13, Dep. of J. Difanis, 117:2-6).

REPLY: Undisputed and material that Difanis believed it was "unlikely" that Ms. Pierce could launch a physical attack on Mr. Mann, for the reasons stated. (UMF #51(h), 54, 71(c)).

Undisputed and material that Difanis never saw Ms. Pierce run or lunge, insofar as this would have provided additional information for Sgt. Difanis' investigation. *But see* (UMF #51(h), 54); (Ex. 26, J. Difanis' Supp'l Rpt., p.4, ¶1) (noting Ms. Pierce "walked with a very pronounced limp").

Undisputed and <u>immaterial</u> that Sgt. Difanis had no medical training beyond CPR. Sgt. Difanis' job was to determine whether there was probable cause a crime was committed based on her training, experience, and common sense — not to render a medical opinion about a given person's condition.

199. After speaking with Pierce, Difanis went to speak with King and Loschen. (Ex. 14, Dep. of J. Difanis, 112-18-113:1); (Ex. 4, Dep. of J. Loschen, 43:22-44:6).

REPLY: Undisputed and material.

200. Difanis, King and Loschen had a conversation where they all "sort of reached the same conclusion." (Ex. 14, Dep. of J. Difanis, 122:8-9).

REPLY: Undisputed and material.

201. Difanis, King and Loschen "collectively" decided that based on "the statements and the physical evidence on the scene, that Koraysia's statement was more credible than statements gathered from Mr. Mann or Samantha and that Mr. Mann would be placed under arrest." (Ex. 14, Dep. of J. Difanis, 121:10-14); (Ex. 2, Dep. of S. King, 43:5-8); (Ex. 4, Dep. of J. Loschen, 44:1621).

REPLY: Undisputed and material that Ms. Pierce's statement was deemed more credible, and that it was decided that Mr. Mann was to be arrested. (UMF #71–72).

202. While in the apartment, Mann was looking for his spare set of eyeglasses. His glasses were knocked off his face during the altercation with the unknown men in the parking lot. (Ex. 1, Dep. of B. Mann, 79:9-12). Mann's vision was blurry. (Ex. 1, Dep. of B. Mann, 121:2324).

REPLY: Undisputed and <u>immaterial</u> that Mann's vision was blurry, that he was looking for his eyeglasses while the Defendant Officers were not in his apartment, or that his eyeglasses had been knocked off of his face during the parking lot altercation. <u>Immaterial</u>, because the Defendant Officers were not aware of these facts (see Part II.A, *infra*), and counsel cannot identify any implication these facts would have for Plaintiff's claims.

203. The police then knocked on Mann's door and Wade answered it. The police told Wade that they wanted to talk to Ben. (Ex. 1, Dep. of B. Mann 79:13-15). At this point, King did not tell Mann that he was under arrest. (Ex. 2, Dep. of S. King, 46:11-14).

REPLY: Undisputed and material. *See* UMF #75–76.

204. Mann told them to give him a second to find his glasses. (Ex. 1, Dep. of B. Mann, 79:15-17); (Ex. 2, Dep. of S. King, 46:15-19). Mann was never walking away from the officers or walking toward a back bedroom. (Ex. 1, Dep. of B. Mann, 115:11-12).

REPLY: Undisputed and immaterial that Mann told the officers he was looking for his eye glasses. Immaterial, because regardless of what Mann was looking for, the point is that he was in the apartment and standing when the officers entered.

Disputed and immaterial that Mann never walked away from the officers.

Disputed, because Officer King testified he saw Plaintiff "was walking towards the back hallway" of the apartment after King had told Plaintiff to "come outside." (Ex. 2, Dep. of S. King, 45:22–46:10).

Immaterial, because regardless of whether Mann was walking to the back of the apartment or not, King had permission to enter the apartment (UMF #76), and thus did not need an exigency to enter and effectuate Mann's arrest.

205. The officers quickly rushed up behind him, grabbed him, tripped him, slammed him to the ground, and put a knee on his back. (Ex. 1, Dep. of B. Mann, 79:9-19, 96:8-13, 121:13122:2).

REPLY: Undisputed and material that the officers quickly approached Plaintiff from behind, grabbed his arms, ultimately took him to the ground, and that Officer King's knee made contact with Plaintiff's back as King and Plaintiff both fell to the ground. (*See* UMF #78–79); (*see* Response to UMF #82, 84, 85) (not disputing that Plaintiff moved his hand toward his pocket after being grabbed by Officer King).

Undisputed and material Officer King's leg played a role in his takedown of Plaintiff. Officer King testified that he did not remember using his legs to trip Plaintiff, but he could not recall. (Ex. 2, Dep. of S. King, 49:17–20). Whether King "tripped" Plaintiff is a matter of semantics.

Just as Plaintiff objects to Defendants' use of the term "takedown" instead of "slam" (Response to UMF #82, 84), Defendants object to describing a "takedown" as a slam. It is undisputed that King did a takedown, and as a consequence of this takedown, Mann fell forward and landed onto the ground. Neither party is suggesting Mann ended up on the ground due to chance. This is dispute appears to be a semantic one, and therefore of little (if any) consequence to this Court's analysis.

Defendants also object to the claim that King "put a knee on [Plaintiff's] back." Plaintiff's testimony is accurately cited, but Plaintiff was not in a position to see how or to know why King's knee landed on his back. The only testimony on this point is King's, who testified that he did not intend to put his knee on Plaintiff's back, but did so as a consequence of falling toward the ground alongside Mann secondary to the takedown. (Ex. 2, Dep. of S. King, 50:3–10).

King was not concerned if Mann could breathe while he was on his stomach. (Ex. 2, Dep. of S. King, 51:3-6).

REPLY: Disputed to the extent AMF #206 mischaracterizes Officer King's cited testimony as to his own perceptions or thought process. In his deposition, Officer King was asked whether he was "concerned at all if Mann could breathe while he [Mann] was on his stomach"; King answered "I didn't have any reason to be concerned. He seemed okay." (Ex. 2, Dep. of S. King, 51:3–6). Stated differently, Officer King's testimony shows that he was not indifferent to Plaintiff's ability to breathe, but rather perceived no issues with Plaintiff's ability to breathe while on the ground.

206. King did not see Mann's hand enter his pocket or waistband. (Ex. 2, Dep. of S. King, 48:24-49:4). Wright did not see Mann reach towards his waistband. (Ex. 5, Dep. of C. Wright, 75:17-20). Loschen said he saw Mann reach both hands toward his waistband before King and Wright grabbed his arms. (Ex. 4, Dep. of J. Loschen, 47:22-48:5).

REPLY: Undisputed and material that King did not see Mann's hand enter Mann's pocket or waistband. *But see* Response to UMF #80 (not disputing that Plaintiff was reaching for his pants after being grabbed by the officers, but only to put a fake tooth in his pocket); UMF #82 ("*Before* Plaintiff's left hand entered his pocket/waistband, King grabbed a hold of Plaintiff's arm with both of his hands[.]") (emphasis added).

Undisputed and material that Wright did not see Plaintiff reach for his waistband after Wright had secured Plaintiff's right arm. *But see* (Ex. 38, Supp'l Rept. of C. Wright, p. 3, ¶4) ("Benjamin tried to pull his right arm away from me, but I had a firm grip on his arm[.]").

Undisputed and material that Loschen saw Mann reach for his (Mann's) waistband, but <u>disputed</u> insofar as Loschen testified initially testified that Plaintiff's hand went towards his waist *after* being grabbed by King and Wright. (Ex. 4, Dep. of J. Loschen, 46:8–18). This is consistent with Loschen's report. (Ex. 17, Supp'l Rept. Of J. Loschen, p. 3, ¶3). More importantly, Plaintiff has admitted that he was reaching for his pant pocket after being grabbed by Officer King (Response to UMF #80).

207. Mann's body was used to strike a glass shelf. (Ex. 1, Dep. of B. Mann, 101:17-23).

REPLY: Undisputed and material (to the issue of damages) that a glass shelf was struck by King's and Mann's feet was during the takedown.

Disputed that "Mann's body was used to strike a glass shelf" — i.e. that the officers intentionally took Mann to the ground in such a way so that he would hit the glass shelf. Officer King testified that, as he was falling to the ground with Mann, he believed one of *his* (King's) feet "hit a shelf, a glass shelf that had some glass figurines, decorations on it." (Ex. 2, Dep. of S. King, 20–24). Plaintiff agreed King may have hit the shelf, but said his (Mann's) feet also hit the glass shelf while being taken to the ground. (Ex. 1, Dep. of B. Mann, 101:17–102:4).

208. Mann's ankle was twisted pretty badly. The officers had to help lift and walk Mann out of the apartment. (Ex. 1, Dep. of B. Mann, 122:7-10).

REPLY: Undisputed and material (for damages) that Mann testified his ankle was "twisted really bad" after the takedown. (Ex. 1, Dep. of B. Mann, 122:8–9).

Undisputed that the officers helped Mann (who was on the ground with his hands cuffed behind his back) up to his feet. (Ex. 2, Dep. of S. King, 53:19–21).

Undisputed that the officers escorted Plaintiff out of his apartment.

209. Mann told the officers about his ankle, but the officers did not call an ambulance for him. (Ex. 2, Dep. of S. King, 53:11-18, 54:3-10); (Ex. 5, Dep. of C. Wright, 62:6-11, 65:6-11).

REPLY: Undisputed and material (for damages) that an ambulance was not called for Plaintiff.

Disputed and immaterial that Mann told the officers his ankle "was twisted pretty badly" — which is presumably what AMF #210 is referring to when it states Mann told the officers "about his ankle." Officer King recalled Mann saying "one of his ankles was sore." (Ex. 2, Dep. of S. King, 53:11–14). Neither Officer King nor Officer Wright recalled Plaintiff mentioning any ankle injury. (Ex. 5, Dep. of C. Wright, 62:2–11). Immaterial because whether an ambulance was called or not does not speak to any element of Plaintiff's claims counsel can identify (e.g., whether King's use of force was "excessive"; whether probable cause existed to arrest Plaintiff).

210. Mann never resisted in any way. (Ex. 1, Dep. of B. Mann, 101:9-16). Mann was not kicking, punching, or flailing his arms. (Ex. 2, Dep. of S. King, 51:7-17); (Ex. 5, Dep. of C. Wright, 64:8-17). Mann was not verbally threatening the officers during the arrest. (Ex. 2, Dep. of S. King, 52:11-13; Ex. 5, Dep. of C. Wright, 65:20-21).

REPLY: Disputed (on semantics) and material that Mann "never resisted in any way." It appears to be undisputed that Plaintiff's left arm reached for his pant pocket after Officer King had already grabbed Plaintiff's left arm. (Response to UMF #80). Plaintiff does not consider this to be "resistance", but that is a disagreement with how to label Plaintiff's movement, not whether the movement occurred at all. The dispute is thus over semantics, and not a substantive "dispute".

The remainder of AMF #211 is undisputed and material.

211. King and Wright were not at all afraid that Mann was going to hit him during the arrest. (Ex. 2, Dep. of S. King, 52:14-16); (Ex. 5, Dep. of C. Wright, 65:24-66:1).

REPLY: Undisputed and material that King and Wright were not afraid that Mann was going to hit them during the arrest. *But see* UMF #81.

212. Mann never reached for a weapon at any point while the officers were on scene. (Ex. 1, Dep. of B. Mann, 213:6-10).

REPLY: Undisputed and immaterial. Whether Mann intended to reach for a weapon or to drop a tooth in his pocket does not impact the analysis that is material to Plaintiff's claims — specifically, whether Officer King believed Mann was reaching for a weapon, and whether this belief was reasonable. *See Part II.A, infra*.

213. The officers did not recover any weapons on Mann. (Ex. 1, Dep. of B. Mann,115:11-12); (Ex. 2, Dep. of S. King, 72:22-25, 84:9-11).

REPLY: Undisputed and immaterial to Plaintiff's claims. As already discussed, the relevant legal analysis focuses not on whether Plaintiff actually had a weapon on his person, but whether Officer King reasonably believed Plaintiff did.

214. For a few weeks, Mann's ankle swelled up to the size of a golf ball or tennis ball. Mann was not able to comfortably walk around on his ankle. He was limping around. (Ex. 1, Dep. of B. Mann, 216:17-217:13).

REPLY: Undisputed and material (for damages).

215. King charged Mann with aggravated battery, resisting a police officer, and reckless driving. (Ex. 2, Dep. of S. King, 58:25-61:3); (Ex. 29, Champaign County State's Attorney's Office Charging Document for Incident Dated March 19, 2017); (Ex. 28, Notice of Arrest Without Warrant for Incident Dated March 19, 2017).

REPLY: Undisputed and material.

216. Mann's vehicle had car insurance. (Ex. 1, Dep. of B. Mann, 214:13-18).

REPLY: Undisputed and immaterial, because whether Mann's vehicle was actually insured or not is not the relevant fact (*see Part II.A, infra*). Instead, what matters is whether Sgt. Loschen reasonably believed Plaintiff's car lacked insurance due to a report from dispatch. (UMF #95).

217. King testified at Mann's trial. (Ex. 2, Dep. of s. King, 77:25-78:1).

REPLY: Undisputed and immaterial, as whether King testified at Mann's criminal trial does not bear on whether King had probable cause for any charge Mann was arrested for.

218. The aggravated battery charges and reckless driving charges were dropped at trial. (Ex. 38, 2017 CM 237 Docket Sheet, at 3).

REPLY: Undisputed and material for Plaintiff's "malicious prosecution" theories; immaterial as to all other claims, as whether charges were dropped does not mean there was not probable cause for the same.

220. Mann was found not guilty of resisting or obstructing a police officer. (Ex. 38, 2017 CM 237 Docket Sheet, at 5).

REPLY: Undisputed and material for Plaintiff's "malicious prosecution" theories; immaterial as to all other claims, as the fact Mann was not found guilty "beyond a reasonable doubt" does not mean probable cause was absent for his arrests.

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221. Mann and Wade were not fighting that day. Mann did not yell at Wade at all that day. (Ex. 1, Dep. of B. Mann, 126:23-25). Man was sleeping when he awoke to some sounds, but those sounds did not come from him or Wade. (Ex. 1, Dep. of B. Mann, 127:7-13).

REPLY: Undisputed and immaterial, as these facts were not within the knowledge of the Defendant Officers during the subject incident, and thus do not bear on their potential liability. *See Part II.A, infra*.

222. Seaton could hear crying and whimpering, but because he could not see anything, it is possible that they crying did not come from Wade. (Ex. 20, Dep. of T. Seaton, 37:5-14).

REPLY: Undisputed and immaterial, as there is no record evidence establishing that Mr. Seaton told Sgt. Difanis that is was Samantha Wade specifically who was making what appeared to be moaning/groaning sounds. Rather, the record shows Mr. Seaton told Sgt. Difanis that he heard what sounded like a "female" moaning/groaning in the unit above his — Mr. Seaton did not specify that he believed this "female" was Ms. Wade. (See citations in UMF #118(c)).

There is no evidence showing the statements Plaintiff cites were communicated to Sgt. Difanis. Instead, Mr. Seaton testified that Difanis' report accurately summed up his conversation with Difanis, and the report does not mention these details. (Ex. 20, Dep. of T. Seaton, 41–43); (Ex. 22).

223. Ryan Henry, Seaton's roommate, was home that night and he did not hear anything. (Ex. 20, Dep. of T. Seaton, 12-22).

REPLY: Undisputed and immaterial.

First, the record does not show that Sgt. Difanis was made aware of Mr. Henry's observation during the subject incident. (*See* Reply to AMF #222).

Second, the record shows Mr. Henry was asleep when the noises were being made, and therefore it is unsurprising he said he did not hear them. (Ex. 20, Dep. of T. Seaton, 38:12–22).

224. Franquemont was first to arrive at 810 Oakland Ave in Urbana in response to the call of a domestic. (Ex. 12, Dep. of *J.* Franquemont, 34:16-19). Rather than immediately head inside the apartment building to check on anyone's welfare, Franquemont stayed outside of the building "just to kind of listen." (Ex. 12, Dep. of J. Franquemont, 34:25-35:5).

REPLY: Undisputed and material. *See* UMF #99–100 (Franquemont was waiting for backup before entering apartment).

225. When Marcotte and McClellan arrived on scene, Franquemont explained to them that he did not see anything and could not hear anything. (Ex. 12, Dep. of J. Franquemont, 35:22-36:4).

REPLY: Undisputed and material that Franquemont testified to this. However, <u>disputed</u> to the extent that Franquemont continued in his testimony that he told the officers that "I didn't see anything or I couldn't hear anything. All I saw was the one apartment light on and that all the other lights were out." *See* UMF #100; (Ex. 12, Dep. of J. Franquemont, 36:1–12).

226. When Franquemont, Marcotte and McClellan made their way into the building, they were not aware of an arrest warrant for Mann. (Ex. 12, Dep. of J. Franquemont, 36:19-22).

REPLY: Undisputed and material.

227. Before anyone opened the door, Franquemont did not know who the occupants were inside. (Ex. 12, Dep. of J. Franquemont, 37:13-17).

REPLY: Undisputed and material.

228. Once Mann opened the door, Franquemont asked if the officers could step in and make sure everyone was okay. (Ex. 12, Dep. of J. Franquemont, 38:6-15). The officers did not mention an arrest warrant for Mann at this point. (Ex. 1, Dep. of B. Mann, 130:9-13, 218:25219:5).

REPLY: Undisputed and material.

229. Franquemont could partially see Wade. (Ex. 12, Dep. of J. Franquemont, 39:1519). She did not appear to be unconscious and he did not see any blood on her shirt. In fact, Wade was speaking calmly. (Ex. 33, J. Franquemont's Supplemental Report of Incident Dated July 30, 2017, at 2). It did not appear to him that any emergency was taking place. (Ex. 12, Dep. of J. Franquemont, 13-24).

REPLY: Undisputed and material that Franquemont partially saw Ms. Wade, that she did not appear to be unconscious or have blood on her shirt that Franquemont could see, and that Ms. Wade appeared to be speaking calmly.

Undisputed and material that Franquemont did not perceive any active emergency, but disputed only insofar as Franquemont testified he could not tell whether or not the female was okay. (Ex. 12, Dep. of J. Franquemont, 64:25–65:5, 67:24–69:2); *see also* (Ex. 9, Dep. of Z. Mialik, 37:4–6) ("[Franquemont] said [the woman in the apartment] didn't appear to be in distress, but he couldn't say for certain whether or not she was.")

230. Mann told Franquemont that everything was fine, everything was cool, and nothing was going on there. (Ex. 1, Dep. of B. Mann, 128:16-24).

REPLY: Undisputed and material.

231. Mann told Franquemont he could not enter his residence and started to shut the door. Then, Franquemont put his foot in the door. (Ex. 1, Dep. of B. Mann, 128:25-129:6); (Ex. 12, Dep. of J. Franquemont, 38:16-39:11).

REPLY: Undisputed and material. *See* UMF # 107, 110, 111.

232. Once Franquemont put his foot in the door, McClellan grabbed the doorknob, and Wade started to say that she was fine and that she was okay. (Ex. 12, Dep. of J. Franquemont, 40:21-41:2).

REPLY: Disputed only to the extent Franquemont testified that he was "pretty sure" Wade said something to that effect at that time. (Ex. 12, Dep. of J. Franquemont, 40:25–41:1).

233. Not only did Franquemont stick his foot in the door, but he also used his body weight and his arm to push against the door. (Ex. 12, Dep. of J. Franquemont, 42:2-15).

REPLY: Undisputed and material.

234. McClellan also stuck his foot in the doorway and applied his body weight to the door. (Ex. 12, Dep. of J. Franquemont, 42:24-43:8).

REPLY: Undisputed and material.

235. Franquemont would normally not force entry into a home if he did not hear any yelling, screaming, or loud noise at the home, despite someone reporting that there was yelling, screaming or loud noises coming from that home. (Ex. 12, Dep. of J. Franquemont, 22:5-11).

REPLY: Undisputed and immaterial, because Franquemont possessed additional information beyond what the hypothetical in AMF #235 mentions.

236. Franquemont believed the officers did not have probable cause to enter the apartment to check on anyone's welfare because there were no exigent circumstances present. (Ex. 12, Dep. of J. Franquemont, 56:8-57:5).

REPLY: Undisputed and immaterial, as it was not Franquemont who made the decision to enter the apartment (*see* UMF #135–136), and, moreover, whether an exigency existed focuses on the perspective of a "reasonable officer", not a given officer's subjective opinion. Thus, Franquemont's personal opinion on whether an exigency existed is immaterial.

237. Franquemont had just previously testified against Mann at trial for a separate incident in which Mann was found not guilty. (Ex. 12, Dep. of J. Franquemont, 32:15-33:1).

REPLY: Undisputed and material.

238. Sergeant Mikalik and Difanis also arrived at the scene. (Ex. 12, Dep. of J. Franquemont, 43:20-22).

REPLY: Undisputed and material.

239. Mann started a cell phone video then called 911. (Ex. 1, Dep. of B. Mann, 153:811). The 911 operator did not mention that the officers were acting pursuant to an arrest warrant for Mann. (Ex. 1, Dep. of B. Mann, 219:6-9). He spoke to Mikalik on the phone who said the officers were just there to do a wellness check. (Ex. 1, Dep. of B. Mann, 131:15-25).

REPLY: Undisputed and material.

240. Mikalik also talked to Mann through the door. (Ex. 12, Dep. of J. Franquemont, 45:23-24). At one point during their conversation, Mann called out, "Is anyone in here hurt?" Wade replied, "No." (Ex. 12, Dep. of J. Franquemont, 46:18-21).

REPLY: Undisputed and material.

241. Wade said she was fine and she told the officers to go away. (Ex. 14, Dep. of J. Difanis, 138:8-9). Wade said on the cell phone video, "I'm right here. I'm not injured." (Ex. 24, Cell Phone Video Dated July 30, 2017, 13:50-14:07); (Ex. 1, Dep. of B. Mann, 160:6-9).

REPLY: The video speaks for itself. Otherwise, undisputed and material.

242. Difanis left the Franquemont, Marcotte, and McClellan at the door to continue to try to make attempts to speak with Mann and Wade. (Ex. 14, Dep. of J. Difanis, 140:17-19). Franquemont just stood by the door and waited for further instructions. (Ex. 12, Dep. of J. Franquemont, 47:14-16).

REPLY: Undisputed and material, including that Franquemont stood by for further instructions after attempting to canvass the neighboring apartments for information. (Ex. 12, J. Franquemont, 47:11–16).

243. Franquemont and Marcotte did not hear anything that indicated to him that there was an emergency or that anyone was in imminent danger inside the apartment. (Ex. 12, Dep. of J. Franquemont, 48:2-8); (Ex. 9, Dep. of A. Marcotte, 35:15-36:12).

REPLY: Undisputed and material.

244. The officers were there in total for at least an hour if not more. (Ex. 12, Dep. of J. Franquemont, 48:22-23).

REPLY: Undisputed and material that an hour or more passed between Franquemont first arriving on the scene until the last officer left the scene.

245. Difanis returned to her squad car to see if she could locate contact information for Wade. Difanis found two numbers, neither of which worked. Then Difanis ran Mann's name through ARMs to retrieve his date of birth. (Ex. 14, Dep. of J. Difanis, 142:19-143:19).

REPLY: Undisputed and material.

246. One she had Mann's date of birth, Difanis ran his name and birthdate through LEADS, and an arrest warrant out of DeKalb County came up. (Ex. 14, Dep. of J. Difanis, 143:20-145:4).

REPLY: Undisputed and material.

247. Difanis asked METCAD for the specific address on the warrant. (Ex. 14, Dep. of J. Difanis, 147:19-20).

REPLY: Undisputed and material.

248. Difanis needed to know "not just whether it was Urbana, Illinois, I needed to know the address on the warrant, because if the address is where we were and where he was, then it would give us the right to force entry to make the arrest. If it's another address in the City of Urbana, you know, that's—that changes that." (Ex. 14, Dep. of J. Difanis, 147:23-148:4).

REPLY: Undisputed, but <u>immaterial</u> insofar as the authority conferred by a warrant is established by law, not an officer's opinion.

249. Difanis knew it was Wade's apartment and that Wade's name was on the lease for the apartment where the officers were located. (Ex. 14, Dep. of J. Difanis, 138:2-3; 153:4-5). Franquemont did not know that Benjamin lived at the apartment, and did not recall any other officers or sergeants mentioning that they knew Mann lived at the apartment. (Ex. 12, Dep. of J. Franquemont, 49:19-50:4). Seaton learned from the apartment manager that Mann was not on the lease for the apartment. (Ex. 20, Dep. of T. Seaton, 50:11-3, 51:4-17).

REPLY: Undisputed and <u>immaterial</u> that Difanis believed the apartment was Ms. Wade's, because she also knew that Plaintiff was "[Ms. Wade's] boyfriend and he lives

there" due to the March 19, 2017 incident. (Ex. 14, Dep. of J. Difanis, 152:24–153:19). Also immaterial for the reason articulated in the next paragraph.

Undisputed and immaterial that Franquemont did not know Plaintiff lived in the apartment or recall hearing other officers say the same. Immaterial, because the officer's only needed to know that the subject of the arrest warrant (Plaintiff) was currently within the apartment.

Undisputed and immaterial that Seaton found out Plaintiff's name was not on the apartment lease, this was not information provided to the officers during their investigation. (*See Part II.A, infra*). See also the reasoning articulated in the previous paragraph.

250. The warrant out of DeKalb County listed an address of 807 S. Urbana Ave in Urbana, IL 61820. (Ex. 31, Unredacted DeKalb County Arrest Warrant).

REPLY: Undisputed and immaterial, because Sgt. Difanis did not have a physical copy of the warrant in front of her and did not see the warrant during the subject incident; rather, she had to rely on what was told to her by dispatch and DeKalb County. (Ex. 14, Dep. of J. Difanis 146–148); (Ex. 37, METCAD Ticket, July 30, 2017) ("DEKALB CO CONFIRMED THAT THE WARRANT HAS THE ADDY OF 810 OAKLAND ATTACHED TO IT. BUT NO APT NUMBER").

251. Officers were at the apartment for approximately 45 minutes before a warrant for Mann was discovered. (Ex. 37, METCAD Dispatch Ticket for Incident on July 30, 2017, at 2).

REPLY: Undisputed and material.

252. While officers were stationed outside of the apartment, the officers could see Wade walking freely through the apartment. (Ex. 14, Dep. of J. Difanis, 149:16-19).

REPLY: Undisputed and material that Difanis testified that unnamed officers could see Ms. Wade (apparently through a window) until a shade was pulled down, blocking the officer's view. (Ex. 14, Dep. of J. Difanis, 149:8–22).

253. Mann called 911 himself to complain that officers were harassing him and that he was being bothered by police. (Ex. 14, Dep. of J. Difanis, 149:23-25).

REPLY: Undisputed and material.

254. Difanis believed that by law, she and the other officers were not required to have the exact unit number in order to force entry into the apartment. (Ex. 14, Dep. of J. Difanis, 151:16-17).

REPLY: Undisputed and immaterial, as the authority a warrant provides is conferred by law, not the officer's personal opinion.

255. University of Illinois police officer Chris Elston was called to the scene because he had a taser. (Franquemont, 54:11-13).

REPLY: Undisputed and material.

256. Once McClellan burst through Mann's door with a battering ram, Maim was arrested. (Ex. 14, Dep. of J. Difanis, 155:6-8). Mann did not resist arrest. (Ex. 14, Dep. of J. Difanis, 155:9-10); (Ex. 12, Dep. of J. Franquemont, 58:24-59:2); (Ex. 32, A. Marcotte's Supplemental Report Dated July 30, 2017, at 2).

REPLY: Undisputed and material.

257. Franquemont charged Mann with aggravated battery and resisting a police officer. (Ex. 34, D. McClellan's Report for Incident Dated July 30, 2017, at 1); (Ex. 36, Champaign County State's Attorney's Office Charging Document for Incident Dated July 30, 2017); (Ex. 35, Notice of Arrest Without Warrant for Incident Dated July 30, 2017).

REPLY: Undisputed and material.

258. The State dismissed all charges against Mann. (Ex. 39, 2017 CM 650 Docket Sheet).

REPLY: Undisputed and material for Plaintiff's "malicious prosecution" theories; <u>immaterial</u> as to all other claims, as the discretion exercised by the State's Attorney does not speak to the presence or absence of probable cause for a given arrest.

II. ARGUMENT

A. UMFs and AMFs: Plaintiff routinely offers facts that are beyond the Defendant Officers' knowledge, and therefore immaterial to Plaintiff's claims.

Plaintiff frequently attempts to "dispute" an Undisputed Material Fact, or to present an Additional Material Fact, that falls outside the knowledge of possessed by the Defendant Officers. *See, e.g.*, (Responses to UMF #55, 55, 71, 81, 95, 97, 118, 121, 128); (Replies to AMF # 163–183, 192, 213, 217, 221, 223, 249, 250). There are two issues with these "disputes":

First, information beyond the knowledge of the officers is immaterial. Given Plaintiff's claims, this Court analyzes the facts and information known to the officer at the time of his or her alleged misconduct — be it for evaluating probable cause for arrest or the reasonableness of deployed force. *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (probable cause); *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (use of force). For example, the presence or absence of probable cause "depends not on the facts as an omniscient observer would perceive them but on the facts as they would have appeared to a reasonable person *in the position of the arresting officer*—see what he saw, hearing what he heard." *Carmichael v. Vill. of Palantine, Ill.*, 605 F.3d 451, 457 (7th Cir. 2010) (emphasis original)*; Illinois v. Gates*, 462 U.S. 213, 243 n.13 (1983) ("[P]robable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."); *see also Common v. City of Chicago*, 661 F.3d , 944–946 (7th Cir. 2011) (excessive force; "'[I]f the officer says 'I saw the suspect reach quickly for his pocket', then proof of the contents of the pocket does not contradict the officer's testimony.") (internal citations omitted). Thus, an officer's conduct cannot be informed by information they are not privy to.

Second, Plaintiff cannot dispute information *told* to the officers about a given incident by presenting his version of what "really" happened during the incident. To dispute what a witness told an officer, Plaintiff would have to show the witness did not, in fact, tell a Defendant a certain

piece of information, or show that a Defendant did not or could not observe something. Here, however, Plaintiff instead "disputes" the officer's second-hand knowledge by claiming this second-hand knowledge does not square with what Plaintiff says "actually" happened. But an officer need not personally observe what "actually" happened, and instead can rely on the statements of witnesses with first-hand knowledge. *See, e.g.*, *Williamson v. Curran*, 714 F.3d 432, 441 (7th Cir. 2013) (citing cases). Thus, the facts Plaintiff cites to dispute what witnesses told the Defendants do not "dispute" the witness's statement.

B. March 19, 2017: King's use of force was reasonable.

Plaintiff makes a few points meriting reply. (*Arguendo*, Defendants will assume that Officer King "tripped" Plaintiff as part of his takedown. (AMF #205)).

First: Plaintiff argues a "leg sweep"/"trip" is an excessive amount of force, even though it is undisputed Mr. Mann was reaching for his waistband/pocket *after* being restrained by King. (d/e #98, 40); *see* (Reply to AMF #207). Plaintiff cites no authority for this proposition, but rather cites cases where there was a dispute whether the arrestee was moving at all. *See* (d/e #98, 38–39). *Cf. Boothe v. Sherman*, 190 F. Supp. 3d 788, 798 (N.D. Ill. 2016). The few cases within this Circuit counsel can find discussing leg sweeps are off-base. For example, Mr. Mann was not handcuffed at the time of the purported leg-sweep,[1] and Mr. Mann was doing more than "merely turning [his] head" during an arrest.[2] Moreover, Defendant Loschen, a control-tactics instructor, testified that leg sweeps and straight-arm takedowns are both options when dealing with a resister who is only tensing up their muscles — which is less physical resistance than pulling a restrained arm away

[1] *Cf. Gregory v.* Oliver, 226 F. Supp. 2d 943, 950–951 (N.D. Ill. 2002) (denying summary judgment).
[2] *Cf. Serna v.* Sears, 2017 U.S. Dist. LEXIS 49935, *13–15 (N.D. Ill. 2017) (denying summary judgment).

from the arresting officer to reach for a waistband/pocket. (Ex. 4, Dep. of J. Loschen, 17–18); *see id.* at 24–25 (explaining position as control-tactics instructor). The difference between a "straight-arm takedown" or a "leg sweep" is therefore immaterial.

Second: for the *Graham* factors, Plaintiff argues (1) Plaintiff was arrested for "minor" crimes, as evidence by the fact he was allowed to return to his apartment; and (2) that Mann posed no threat to officer safety when he was taken to the ground. (d/e #98, p. 40–41). For the first point, Sgt. Loschen allowed Mann to return to his apartment *before* speaking with Sgt. Difanis and learning there was evidence Mann had committed a crime. (UMF #69). Furthermore, it seems remarkable to argue that aggravated battery (which Plaintiff was arrested for) is a "minor" crime. 720 ILCS 5/12-3.05(h) (defining aggravated battery as a felony). Finally, King believed Mann posed a threat to his safety, as Mann appeared to be reaching for a weapon when moving his hand towards his pocket. (UMF #81; Reply to AMF #213); *see also* (Ex. 19, Decl. of J. Blum, Ex. A, p. 8–9); Part II.A, *supra*. Officers make split-second, life-death decisions: how many would take the risk that Mann was dropping a prosthetic tooth in his pocket, and do nothing when a restrained suspect reaches for his waistband?

C. March 19, 2017: It was reasonable for the officers to credit Ms. Pierce's witness account.

The officers listened to Plaintiff, Ms. Wade, and Ms. Pierce, examined the physical evidence, and determined Ms. Pierce's statement was more credible. (UMF #71). Plaintiff argues it was unreasonable for the Defendants to credit Ms. Pierce's witness statement, because Tim Seaton's witness account was consistent with Plaintiff's, and there was no evidence buttressing Ms. Pierce's account. (d/e #98, at p.47).

First, Seaton is a red herring. Mr. Seaton was not interviewed until after Plaintiff was arrested and removed from the scene. (UMF #92). Defendant King and the other officers could not have known Mr. Seaton's account when they entered Plaintiff's apartment on March 19, 2017. Thus, Mr. Seaton's account played no role in Plaintiff's arrest and the Defendants' underlying probable cause determination. Moreover, the fact Seaton was interviewed after Plaintiff's arrest is also immaterial — an officer's duty to investigate stops once probable cause is established. *See Sow v. Fortville Police Dept*., 636 F.3d 293, 302 (7th Cir. 2011).

Second, Ms. Pierce's statement that Mr. Mann punched her was corroborated by the injuries Difanis saw on Ms. Pierce's face, the lack of injuries noted on Mr. Mann and Ms. Wade, and the damage to Ms. Pierce's and Mr. Mann's car. (UMF #51(g), 52, 53, 63, 67, 71). Mr. Mann also lied to Sgt. Loschen about the car damage (and essentially admitted as much in his deposition), providing a strike against Plaintiff's version of events. (UMF #71(a)). Finally, Ms. Pierce had difficulty walking around, suggesting she was not an assailant. (UMF #51(h), 54, 71(c)). Plaintiff argues Ms. Pierce's injuries did not stop her from "attacking Mann herself," which Plaintiff claims Ms. Pierce told Difanis. (d/e #98, p.49). However, Ms. Pierce told Sgt. Difanis that she pushed Mr. Mann off of/away from her while *he* was punching *Ms. Pierce* in the face. (Reply to AMF #194). Thus, Difanis learned that Ms. Pierce attempted to take a protective measure while being attacked — which is consistent with Difanis' conclusion that Ms. Pierce was not the aggressor in the altercation with Mr. Mann.

D. March 19, 2017: Sgt. Difanis does not need to be a medical professional to have probable cause that Ms. Pierce was disabled, and that Plaintiff knew of this disability.

Plaintiff argues (without authority) that Difanis, because she is not a doctor or medically trained, could not have known that Ms. Pierce was "disabled", such that Plaintiff could have been

charged with "aggravated battery". (d/e #98, p. 49). Moreover, Plaintiff claims Difanis had no reason to believe *Mr. Mann* knew Ms. Pierce was "disabled." (Note that this argument is only material for Plaintiff's malicious prosecution theory, which requires offense-specific probable cause determinations).

First: probable cause does not require an officer's certainty in her belief, or even that the officer is *correct* — rather, probable cause relies on what the arresting officer sees, is told, etc. *See* Part II.A, *supra*. Moreover, officers are permitted to rely on witness statements when investigation potential crimes. *Id.* Police do not have to conduct a hyper-detailed investigation, or hold a trial, before making an arrest. *See Riccio v. Riggle*, 2005 U.S. Dist. LEXIS 8516, *30–31 (N.D. Ill. 2005) (citing cases). Given these principles, it is clear that Difanis simply needed to have a reasonable belief that Ms. Pierce was disabled. Here, Difanis *saw* Ms. Pierce exhibit manifest signs of a physical disability (difficulty walking), and was *told* by Ms. Pierce about this disability and how it come about — a story corroborated by Ms. Pierce's family when they arrived on scene. (51(h), 54); *see also testimony cited in* UMF #56). Counsel has not identified a case requiring an on-scene officer to obtain a reasonable degree of medical certainty about a victim's disability before making an "aggravated battery" arrest.

Second: Since Ms. Pierce's disability was physically manifest to Sgt. Difanis, Difanis could assume it would also have been manifest to Plaintiff during their altercation. Mr. Mann told the officers that Ms. Pierce had walked up to him and attacked him — meaning Mr. Mann saw Ms. Pierce walk. Stated differently, Difanis saw that Ms. Pierce had an obvious physical disability, and Mr. Mann had an opportunity to see that disability play out. The officers consequently had probable cause that Mr. Mann knew Ms. Pierce was "disabled" for purposes of aggravated battery.

E. July 30, 2017: The arrest warrant did not need to have the correct address on it to provide the Defendants grounds to enter the apartment.

Plaintiff argues that Sgt. Difanis knew the address on the arrest warrant from DeKalb County — which the UPD discovered during the July 30, 2017 incident — had the wrong address on it, but nonetheless forced entry into Plaintiff's apartment. (d/e #98, 42–43).

Preliminarily, Plaintiff does not address the fact that an arrest warrant attaches to a *person*. This is why an *arrest* warrant provides probable cause to enter a dwelling so long as the officer has reason to believe the warrant's subject is inside the dwelling. *See* (d/e #80, p. 38).

To address Plaintiff's argument specifically: although it was unknown to the defendants, the DeKalb warrant did not, in fact, have the 810 Oakland Avenue address on it. This fact is immaterial, however, because none of the Officers actually saw a physical copy of the warrant on July 30th, or otherwise knew the address was incorrect. (*See* UMF #128, AMF #250). Instead, Sgt. Difanis relied on information conveyed to her through dispatch and the LEADS system. Dispatch verified the warrant with DeKalb County, who in turn ultimately advised that the address on the warrant was for 801 Oakland Avenue in Urbana. Dispatch then passed this info to Difanis. (*See* UMF #124, 126–127); *(see also* Reply to AMF #250). In sum, Sgt. Difanis was relying on information told to her through dispatch and the LEADS system — which Seventh Circuit precedent shows this was a reasonable thing for Difanis to have done. (*See* d/e #80, p.40–41). If there was an error somewhere in the LEADS system or the individuals in DeKalb County who confirmed the warrant, any such error is not a part of Plaintiff's suit.

F. No evidence shows the Defendants knew of Plaintiff's "Rush lawsuit" (aside from Franquemont)

It is undisputed that all defendants testified they were unaware of Plaintiff's lawsuit against Champaign police officer Matt Rush during the subject incidents. The sole exception is Officer John Franquemont, who knew because Plaintiff personally informed him during a previous arrest. Thus, the Defendants' conduct could not have been motivated by Plaintiff's previous lawsuit, and Plaintiff's First Amendment Retaliation claim fails.

In rebuttal, Plaintiff argues that the officers are lying. (d/e #98, p.55) ("Although the officers have every reason not to admit to the truth . . . ."). As evidence for this allegation of perjury, Plaintiff argues that because there was a general awareness among some of the Defendants and law enforcement community that a Champaign officer named Matt Rush was being sued by a number of plaintiffs, the Defendants *must* have known about Plaintiff's lawsuit *specifically*. This is despite all of the testimony to the contrary. Plaintiff's general allegations of knowledge are not supported by any specific evidence, and are tantamount to an accusation that all of the officers lied under oath in their depositions — except for John Franquemont. Allegations/speculation are not enough to defeat the evidence showing the Defendant Officers (save for Franquemont) were not aware of Plaintiff's lawsuit against Matt Rush.

G. First Amendment Retaliation: Plaintiff apparently acknowledges that qualified immunity is warranted for his First Amendment Retaliation Claim

Defendants argued that, if probable cause if found, they are entitled to qualified immunity on Plaintiff's First Amendment Retaliatory arrest claim. (d/e #80, p. 56–57). Plaintiff did not address this argument in his Response, so the point is conceded.

H. "Malicious Prosecution": Any federal claim under this theory appears to be unsatisfied, and under Illinois law, there is an absence of malice because the officers conducted a good-faith investigation.

1. Federal "malicious prosecution"

Plaintiffs have not clarified their federal "malicious prosecution" theory, which does not exist under federal law. *See* (d/e #80, at p.53). Being generous, Plaintiffs could theoretically be advancing a Fourth Amendment "unlawful pretrial detention" claim, which is what the Seventh Circuit has understood the Supreme Court to have created in *Manual v. City of Joliet*, 137 S. Ct. 911 (2017). *See Lewis v. City of Chicago*, 914 F.3d 472, 479 (7th Cir. Jan. 23, 2019). As best counsel can tell (and counsel concedes his search necessarily could not be exhaustive due to time constraints), the elements of such a claim have not been defined within the Seventh Circuit, aside from the tort's accrual date and that probable cause defeats it.[3] What is clear, however, is that such a claim is a "plain-vanilla Fourth Amendment claim under § 1983, because the essential constitutional wrong is *the absence of probable cause that would justify the detention*." *Id.* (emphasis added) (internal quotations/citations omitted). This language strongly suggests an "unlawful pre-trial detention" Fourth Amendment claim is *not* offense specific (unlike Illinois' tort of malicious prosecution). By analogy, a Fourth Amendment "false arrest" claim also focuses on whether a defendant has been unlawfully detained, and thus examines whether the suspect

[3] *See, e.g.*, *Manual v. City of* Joliet, 903 F.3d 667, 668 (7th Cir. 2018) (deciding only accrual date for such a claim); *Bertha v. Hain*, 2019 U.S. App. LEXIS 27980, *11–12 (7th Cir. Sept. 18, 2019); *Anderson v. City of Rockford*, 2019 U.S. App. LEXIS 22216, at *44 (7th Cir. Jul. 25, 2019) (affirming summary judgment on Fourth Amendment "wrongful detention" claim on probable cause grounds without specifying other elements); *Wright v. Runyan*, 2019 U.S. App. LEXIS 23902, at *3–4 (7th Cir. Aug. 12, 2019). The Supreme Court has likewise not addressed the issue. *McDonough v. Smith*, 139 S. Ct. 2149, 2157 n.3 (June 20, 2019).

could have been lawfully arrested for a crime, instead of the specific offense the officers arrested the suspect for. *Holmes v. Vill. Hoffman Estates*, 511 F.3d 673, 682 (7th Cir. 2007).

If Defendants are correct that an "unlawful pretrial detention" claim is treated the same as a "false arrest" claim, then Plaintiff's claim (to the extent he makes it) regarding his "unlawful pretrial detention" is likewise not offense specific. Therefore, probable cause for any arrest during either subject incident would defeat Plaintiff's claim. Should this Court desire additional briefing on the specific issue, Defendants would ask leave to provide it.

2. Illinois "malicious prosecution" claim

As already argued, the Plaintiffs do not adequately establish any "malice" on the part of the Defendants. (d/e #80, p. 52–53). Given Plaintiff's Response, it is worth emphasizing that this conclusion remains true for the July 30th incident especially. There, the officer's conduct was motivated by an affirmative duty to investigate reported domestic violence. Illinois law mandates officers "immediately use all reasonable means to prevent further abuses" once the officers have "reason to believe" domestic violence has occurred.[1] 750 ILCS 60/304(a); *see also Sneed v. Howell*, 306 Ill. App. 3d 1149, 1159 (5th Dist. 1999) (noting the Act "puts an affirmative duty on the police to respond to and investigate complaints" of domestic violence). This is because the General Assembly concluded domestic violence is a "serious crime," *id.* § 102(a), and further mandated that officers be trained to "look[] beyond the physical evidence to the psychology of domestic violence situations, such as the dynamics of the aggressor-victim

[1] Although Illinois law is not binding on this Court, as a general matter, "the mandates of the Domestic Violence Act" have been used by the Seventh Circuit to find that an arresting officer's actions were reasonable. *See, e.g.*, *Simmons v. Pryor*, 26 F.3d 650, 654-655 (7th Cir. 1993) (finding post-arrest actions of defendant-officer "reasonable" when, *inter alia*, the officer's conduct was consistent with the Domestic Violence Act); *Riccio v. Riggle*, 2005 U.S. Dist. 8516, *27-28 (N.D. Ill. 2005).

relationship[.]". *Id.* Sec. 60/301.(b). The officers testified to this dynamic: without visually confirming that Ms. Wade was safe, they could not rule out the possibility that Ms. Wade was (for example) being coerced into denying any domestic violence had occurred. *E.g.*, (Ex. 12, Dep. of J. Franquemont, at 67–69); (Ex. 9, Dep. of Z. Mikalik, 64–66). The officers were not able to tell if Ms. Wade was visibly unhurt when Plaintiff closed his door. There is no evidence suggesting the officers tried to keep Mr. Mann's door open for any reason other than to discharge their affirmative duty to investigate domestic violence, and verify Ms. Wade's welfare.

For both incidents, the evidence shows that the Defendants conducted a good-faith investigation of reported criminal behavior, and arrests were made based on where their investigation took them. If somehow the Defendants did not have probable cause to arrest Plaintiff, then the error was one of judgment, not "malice". Defendants are therefore entitled to summary judgment on Plaintiff's state-law malicious prosecution theory.

III. CONCLUSION

WHEREFORE, for the above and foregoing reasons, Defendants, respectfully request that summary judgment be entered in their favor and against the Plaintiff, together with costs and such other relief as this Court deems appropriate and just under the circumstances.

Respectfully submitted,

Jennifer Difanis, Colby G. Wright, Seth R. King, Jay Loschen, Don C. McClellan, Adam Marcotte, John Franquemont, Zach Mikalik, and the City of Urbana, a municipal corporation, Defendants

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PROOF OF SERVICE

I hereby certify that on October 7, 2019, I electronically filed the foregoing Defendants' Reply to Plaintiff's Response to Motion for Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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I also hereby certify that I have mailed by United States Postal Service the foregoing to the following non-CM/ECF participant: None.

s/Brian M. Smith
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