

IP 04-1591-C t/k Kucenko v. Marion Co. Sheriff
Judge John D. Tinder

Signed on 06/01/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NIKOLAY KUCENKO,)	
)	
Plaintiff,)	
vs.)	NO. 1:04-cv-01591-JDT-TAB
)	
MARION COUNTY SHERIFF,)	
KEVIN NEWMAN,)	
BRADFORD BENTLEY,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

NIKOLAY KUCENKO,)	
)	
Plaintiff,)	
)	
vs.)	1:04-cv-1591-JDT-TAB
)	
)	
MARION COUNTY SHERIFF, KEVIN)	
NEWMAN, and BRADFORD BENTLEY,)	
Defendants.)	

**SUPPLEMENTAL ENTRY ON DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT
(Doc. No. 40)¹**

In this matter, an elderly Russian resident of Indianapolis, Indiana, is seeking damages under 42 U.S.C. § 1983 for the violation of his constitutional rights when Marion County Sheriff deputies responded to an incomplete 911 call by entering his apartment without a warrant and briefly detaining him in handcuffs.

In its Entry of February 9, 2006, the court found that if the deputies indeed entered and subsequently searched his home and detained him as Plaintiff Nikolay Kucenko alleged, the deputies violated the Fourth Amendment’s prohibition against unreasonable searches and seizures. However, the court determined that the doctrine of qualified immunity barred Defendant Deputies Kevin Newman and Bradford Bentley from being held liable because the law was not clearly established that an incomplete

¹ This Entry is a matter of public record and will be made available on the court’s web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

911 call may be insufficient to establish exigent circumstances justifying a warrantless entry into a home and subsequent search.

Left unresolved, however, was Defendants' motion for summary judgment on Kucenko's federal claims under § 1983 against the Marion County Sheriff ("Department") and on his state claims against all Defendants.² The court did not rule on the federal claim against the Department because the Defendants did not raise the issue of the Department's liability under the *Monell* doctrine until their reply brief, when it was too late for Kucenko to respond. Also, the court's jurisdiction over the state claims was supplemental, deriving from its power to decide the federal questions. Therefore, addressing the state claims would have been premature prior to the court's determination of the Department's liability under § 1983.

The remaining issues are now fully briefed, and the court rules as follows.

I. BACKGROUND

At the time of the events that are of concern here, Kucenko was seventy-three years old and had extremely limited knowledge of the English language. On the evening of May 18, 2003, he accidentally dialed 911 while attempting to dial the

² The Amended Complaint names the Marion County Sheriff as a law enforcement agency, not as the office holder, although a suit against the office holder in his or her official capacity is the same as a suit against the governmental entity. As such, the Sheriff is the Marion County Sheriff's Department, whose law enforcement members this year were merged into the Indianapolis Metropolitan Police Department.

international prefix (011) and place a call to his son in Russia.³ When Marion County emergency dispatchers answered, Kucenko realized he had dialed the wrong number and hung up. Nonetheless, the call center linked the call to Kucenko's apartment and dispatched Bentley and Newman to find out if the hang-up was merely an accidental call, as many such calls are, or an interrupted request for help, which they sometimes prove to be.

When the deputies arrived, Kucenko was speaking loudly to his son to overcome a poor connection. He heard Bentley order him to open the door but told the deputy to wait. He called a neighbor and then his son-in-law, who is fluent in English and Russian and who told him to hand the phone to the deputy. About ten minutes after Bentley's arrival, Kucenko opened the door.

Rather than talk to the son-in-law, the deputies disconnected the telephone base unit's plug from its wall jack and then searched the apartment. Kucenko's wife was not home and the door to her bedroom was padlocked. Kucenko did not have a key and when the deputies indicated by their motions that they would kick down the door, Kucenko stood in front of the door and said "not good, not good policeman, not good."

Kucenko was handcuffed while the deputies forced their way inside the locked room by kicking a hole in the door and then prying away the padlock. After Kucenko's

³ In its earlier entry, the Court referred to the date of this incident as May 18, 2004, as this is the date cited in the Complaint (¶ 14) and the Amended Complaint (¶ 14). However, the parties' briefs and exhibits, including an Indianapolis-Marion County Communications Center event log, make clear that this incident began on May 18, 2003. (See Kucenko Dep. 20, Newman Dep. 11, Defs.' Ex. B-1.)

daughter arrived, the deputies released Kucenko and left, after explaining that they had been sent to investigate an incomplete 911 call.

For a detailed statement of the facts with citations to the record, the reader should refer to the earlier entry.

II. STANDARD OF REVIEW

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue of fact is material if it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine if a reasonable fact finder could find for the nonmoving party. *Hottenroth v. Village of Slinger*, 388 F.3d. 1015, 1027 (7th Cir. 2004). If there is evidence that would allow a reasonable jury to return a verdict for the non-moving party, then summary judgment is not appropriate. *Id.*

When deciding a motion for summary judgment, the court must consider all evidence, and draw all reasonable inferences therefrom, in the light most favorable to the nonmoving party. *See Anderson*, 477 U.S. at 255. The moving party “bears the initial responsibility” of identifying specific facts within the record that “demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. When a motion for summary judgment is made and properly supported, the non-moving party may not

rest on the pleadings or denials but must set forth the specific evidence showing there is a genuine issue of material fact that requires a trial. Fed. R. Civ. P. 56(e). A mere scintilla of evidence will not do. *Albiero v. City of Kankakee*, 246 F.3d 927, 932 (7th Cir. 2001) (citing *Anderson*, 477 U.S. at 252). “One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses” *Celotex*, 477 at 323-24. At summary judgment, the judge’s function is to determine if there is a genuine issue for trial. *Anderson*, 477 U.S. at 249.

III. DISCUSSION

A. *Monell* Liability

Kucenko alleges that the Department is liable for the warrantless search of his apartment and his detention, both in violation of his Fourth Amendment rights. (Am. Compl. ¶ 54.)

In general, a governmental entity such as the Department cannot be held liable under § 1983 for the acts solely of its employees or agents. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978). Rather, a plaintiff must show that the government itself, through the execution of its policies or customs, caused the constitutional violation. *Id.*

This showing can take several forms. First, a government may have an express policy that, when enforced, causes a constitutional deprivation. *Palmer v. Marion County*, 327 F.3d 588, 595 (7th Cir. 2003). Second, the governmental entity’s

employees or agents may engage in practices that have become so widespread and settled that they constitute a custom or usage. *Id.* Third, the alleged misconduct causing the injury may be attributable to a final policy-maker whose very acts can be said to represent official policy. *Monell*, 436 U.S. at 694. Fourth, a government's failure to train or supervise employees under circumstances that amount to "deliberate indifference" to the rights of persons, may be viewed as a policy or custom of the government. *City of Canton v. Harris*, 489 U.S. 378, 388 (1989).

It is not so important that a plaintiff neatly fit his theory of liability into one of the forms cited above. Rather, the plaintiff must clearly establish that the governmental entity is being held liable for its own failing rather than individual misconduct of one of its employees or agents. See, e.g., *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 405 (1997) (requiring that when "a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied to ensure that the municipality is not held liable solely for the actions of its employee"); *Canton*, 489 U.S. at 391 (noting that "to adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983"); *Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24 (1985) (holding that proof of a single, unconstitutional violation is not sufficient to impose municipal liability "unless . . . caused by an existing, unconstitutional municipal policy"). The test is simply whether the governmental body's policy, whether formally adopted, reflected in its practices, or "of some nature," causes the constitutional tort. *Monell*, 436 U.S. at 691; see also *City of Springfield v. Kibbee*, 480 U.S. 257, 267-69 (1987)

(O'Connor, J, dissenting) (noting that the government's negligence will not satisfy *Monell's* causation requirement).

In this case, Kucenko has provided sufficient evidence from which a trier-of-fact could reasonably infer that the Department had an unwritten policy requiring officers, when responding to an incomplete 911 call, to enter a residence to make sure that no one inside was injured, even in the absence of exigent circumstances that would justify a warrantless entry. The evidence arises from the testimony of Deputy Chief Sheriff Joseph Bart McAtee, commander of the law enforcement division, who was summoned to testify on the Department's behalf as its designated witness under Federal Rule of Civil Procedure 30(b)(6).

Presented with the circumstances that fairly describe the situation allegedly confronted by Bentley and Newman, McAtee was asked whether it would be consistent with the Department's policy for the deputies to ignore Kucenko's request that they talk to his son-in-law on the phone and to enter the apartment. (McAtee Dep. 8-13.) McAtee responded, "Like I said, the department would expect the officers to go there and ensure that no one was injured in that residence. Once they get there, that's really up to the officers' discretion what they do, to the extent, obviously they can't violate somebody's rights."⁴ (*Id.* at 13.)

⁴ Although McAtee's second comment is somewhat ambiguous, the law is clear that even when a warrantless entry into a home is justified, an officer does not have complete discretion in conducting the search. The Fourth Amendment requires the scope to be reasonable, considering the governmental interest, privacy expectations, the nature of the intrusion, and to some extent the manner of the search. *Green v. Berge*, 354 F.3d 675, 678 (7th (continued...))

McAtee gave his deposition on April 16, 2006, two months after the court ruled that Bentley and Newman would have violated the Fourth Amendment prohibition of unreasonable searches and searches had they entered Kucenko's apartment as he alleged. Yet, on the basis of these comments, a trier-of-fact could conclude the department's policy required the officers to enter Kucenko's apartment on no more than an incomplete 911 call and a general, unsupported concern that someone might be injured. As the court's earlier entry made clear, such an entry would be unlawful. See *U.S. v. Richardson*, 208 F.3d 626, 629 (7th Cir. 2000) (noting that a police officer's "subjective belief that exigent circumstances exist is insufficient to make a warrantless search").

Immediately after making these comments, McAtee characterized Kucenko's yelling on the phone as "screaming." (McAtee Dep. 13, 14.) Yet one person's scream may be another person's loud voice, and this characterization does not substantively qualify his earlier comments. Moreover, a few questions later, McAtee affirms the Department's view that Newman's and Bentley's entry was reasonable. "I would believe that they should make – should go in and look around. In my mind, I think that's reasonable. They're not going in looking for drugs or guns or, you know, anything else. They're looking for a person that's injured, period." (*Id.* at 14-15.)

The Defendants argue that McAtee's comments are not evidence of an official policy. "The most that Kucenko shows is that, after-the-fact, Chief McAtee thought the

⁴(...continued)
Cir. 2004).

deputies in this single case ‘probably’ should have entered and searched Kucenko’s apartment under the limited facts presented at his deposition.” (Defs.’ (Second) Reply 4.) McAtee was merely expressing his own opinions. “When pressed, Chief McAtee said he thought they ‘probably’ should have entered and searched, and that *in his mind* it is reasonable to enter to look for an injured person.” (*Id.* at 2 (emphasis in original).)

Contrary to Defendant’s suggestion, McAtee was not designated merely “as a source of knowledge of departmental policies.” (See *id.* at 4.) He was designated to testify on the Department’s behalf. See Fed. R. Civ. P. 30(b)(6). Whether he responded in the first or third person, his expressed views are the Department’s. See *e.g.*, *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 382 (E.D. Pa. 2006) (stating that Rule 30(b)(6) requires a party to prepare its designated witness to give binding answers on its behalf); *Hard Chrome, Ltd. v. Hetran, Inc.*, 92 F. Supp. 2d 786, 791 (N.D. Ill. 2000) (noting that parties are bound by testimony given by their designated 30(b)(6) witness), *Rainey v. Am. Forest & Paper Ass’n*, 26 F. Supp. 2d 82, 94 (D.D.C. 1998) (stating that a designated witness is not simply testifying about matters of personal knowledge but speaking for the corporation). Kucenko’s attorney provided McAtee with ample notice that he was speaking for the Department.⁵

⁵ This exchange occurred at the start of the deposition:

Q Do you understand you’ve been designated as a 30(b)(6) witness to testify on behalf of the Marion County Sheriff as an entity or an organization with respect to the lawsuit in this case, “Nikolay Kucenko versus Marion County Sheriff”?

A Yes.

Q And are you prepared to do that today?

A Yes.

(McAtee Dep. 3.)

The evidence is not overwhelming that the Department has an unwritten policy requiring officers to enter residences merely on the basis of an incomplete 911 call and a subjective, undifferentiated fear that someone inside might be injured. Rather, McAtee's testimony can often be read in two different ways, and the court is not suggesting which way is more reasonable.

For example, McAtee testified that an incomplete 911 call by a person speaking a foreign language would "probably not" constitute the exigent circumstances necessary to enter someone's home. He further states:

If an officer arrives and he believes somebody inside may be injured or may need some help, the language is going to add to that. You know, not being able to communicate doesn't mean he's not going to go in. Probably, you know, if somebody – if he arrives and the officer can understand what's going on, and then gets a sense that probably there is no one inside injured, you know, that would even probably not – he probably wouldn't enter.

If he gets there and can't understand, then it's not going to take away the fear that he would have that somebody's in there actually injured.

(Id. at 6-7.)

A trier-of-fact could infer from this comment that the Department's policy in responding to 911 calls was to enter a residence if the officer had any fear that someone inside was injured – that the officer had to be satisfied that no one was needing help before he could elect not to enter. This turns the Fourth Amendment considerations on their head. The doctrine of exigent circumstances, as amply discussed in the court's earlier entry, requires an officer to have articulable grounds for entering a person's home without a warrant – not to find reasons for refraining from doing so.

However, several questions before, the deputy chief also noted that an officer's decision to enter a residence is based on all the circumstances, such as the content of the 911 call, any screaming that is going on, noises such as the sound of glass breaking, and presumably other factors. (*Id.* at 4.) A trier-of-fact could reasonably conclude that McAtee, in responding to later questions, was presuming the existence of additional circumstances, that in total, justified an entry under the exception for exigent circumstances. That this alternate conclusion might be drawn, even if it is the more reasonable conclusion, is of no help to the Defendants at this stage of litigation. The possibility of two different conclusions only highlights the existence of a material issue of fact. This is all that is needed to stave off summary judgment.⁶

For the reasons discussed above, the Defendants' motion for summary judgment is **DENIED** with respect to Kucenko's § 1983 claims against the Department.

B. State Claims

Kucenko also brings state claims alleging violations of the Indiana Constitution's prohibition, in Section 11 of Article 1, against unreasonable searches and seizures, and state tort claims alleging illegal entry and false arrest.⁷ (Am. Compl. ¶¶ 1, 55.) The

⁶ Although McAtee's statements are imputed to the Department, they are not a judicial admission but evidence that can be contradicted or used for impeachment purposes. See *A.I. Credit Corp. v. Legion Ins. Co.*, 265 F.3d 630, 637 (7th Cir. 2001); *Hard Chrome*, 92 F. Supp. 2d at 791 .

⁷ Section 11 reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly

(continued...)

Defendants ask the court to dismiss the constitutional claims because a party has no private right of action for damages arising from the state constitution. (Def.'s (First) Reply 13-14.) They assert the illegal entry claim cannot lie because the Indiana Tort Claims Act ("ITCA") precludes liability for injuries arising from the enforcement of laws. (*Id.* at 13.) They argue the false arrest claim also must be dismissed because the deputies had probable cause to detain Kucenko and the existence of probable cause defeats a false arrest claim. (*Id.* at 12-13.) These are not new issues.

As a preliminary matter, the court notes that, to the extent that any of these claims survive summary judgment, they may be brought against the Department only. The ITCA generally shields government employees from personal liability for actions taken in the course of their duties. See Ind. Code § 34-3-3-5. Specifically, if a plaintiff alleges the employee was acting within the scope of his or her employment, the plaintiff may not bring an action against the employee personally until the governmental entity contends that its employee was acting outside the scope of his or her duties. *Id.* § 34-13-3-5(b). In *Bushong v. Williamson*, 790 N.E.2d 467, 471 (Ind. 2003), the Indiana Supreme Court found the statute to be "fairly explicit on this point." Kucenko has alleged that Newman and Bentley were acting within the scope of their employment. (Am. Compl. ¶ 48.) Therefore, the Court will **GRANT** Defendants' summary judgment motion with respect to Kucenko's state claims against Newman and Bentley.

⁷(...continued)
describing the place to be searched, and the person or thing to be seized.
Ind. Const., art. I, § 11.

1. State constitutional claims

Kucenko indirectly acknowledges that the Indiana Supreme Court has not found a private cause of action for damages arising from the Indiana Constitution for a violation of Section 11's prohibition against unlawful seizures. (Pl.'s (First) Response 32-33.) He also notes the numerous federal courts, including this one, have examined this issue and declined to find such a right. (*Id.* at 32 & 32 n.6.) However, he urges this court to create a cause of action.

Kucenko asserts that in *Kellogg v. City of Gary*, 562 N.E.2d 685 (Ind. 1990), the Indiana Supreme Court vacated a jury award of damages on a state constitutional claim arising under Section 32 of Article 1, which guarantees the right to bear arms. (Pl.'s (First) Response 33.) This may or may not be a precise characterization of the state claim brought by the plaintiffs in *Kellogg*.⁸ However, the point that Kucenko wishes to make – that the Supreme Court “would not require the futile act of complying with the statutory tort claim notice provisions if claims could not be brought pursuant to its provisions” – is not persuasive. (See *id.* at 34.) In *Kellogg*, the Indiana Supreme Court expressly declared that it was not ruling on whether the state claim was actionable.

Because the citizens did not comply with the provisions of the ITCA, the trial court's separate award of compensatory and punitive damages under this “state

⁸ Without engaging in unnecessary additional research, this court is unable to determine the theory of the state claims at issue in *Kellogg*. The Indiana Supreme Court's discussion in *Kellogg* of Section 32 pertains to whether the plaintiffs' right to bear arms gave them a property right protected by the Fourteenth Amendment with respect to their federal § 1983 claim. See *Kellogg*, 562 N.E.2d 694-96. The court's brief discussion of the state claims does not state the basis of the “state tort' theory.” *Id.* at 690. Neither of the lower court decisions refer to Section 32. See *City of Gary v. Kellogg*, 519 N.E.2d 570 (Ind. Ct. App. 1988); *Motley v. Kellogg*, 409 N.E.2d 1207 (Ind. Ct. App. 1980).

tort” theory is hereby reversed. Whether the citizens could have maintained a separate cause of action for damages in tort under Indiana law *is a moot issue which we do not decide.*

Kellogg, 562 N.E.2d at 690 (emphasis added).

Although the lack of an implied right of action in the Indiana Constitution for a violation of Section 11 would appear to be settled law, the Indiana Supreme Court recently provided additional guidance on the enforcement of rights guaranteed by the Indiana Constitution. In *Cantrell v. Morris*, 849 N.E.2d 488 (Ind. 2006),⁹ the court discussed the factors it would consider should the court find it necessary to create an implied right of action. Important to this case is the court’s observation that there is no need to create a new cause of action when existing tort law amply protects a right guaranteed by the Indiana Constitution. See *id.* at 498 (“Otherwise stated, a constitutional provision can supply the duty required for a conventional tort claim”), at 506 (“If state tort law is generally available even if restricted by the ITCA, it is unnecessary to find a state constitutional tort”), & *id.* (“We do not regard the tort alleged in this case to be one that requires any unique treatment”).

To the extent that Kucenko has alleged that the Defendants violated his state constitutional rights by entering his home or seizing him, existing tort actions such as trespass and false imprisonment will protect these rights. The fact that these claims may be limited by the ITCA does not lead to the conclusion that the Indiana Supreme Court would create a constitutional tort in this instance. The Indiana Legislature explicitly

⁹ This decision issued after the parties completed their briefing in this case.

embraced these limitations, which codify the doctrine of qualified immunity, by passing the ITCA. See *id.* at 494.

For these reasons the court will **GRANT** Defendants' motion to dismiss Kucenko's claims asserting a cause of action arising under the Indiana Constitution.

2. *Unlawful Entry (Trespass)*

Kucenko does not include a traditional state tort claim alleging unlawful entry in the section of his Amended Complaint listing his claims against the Defendants. (See Am. Compl. ¶¶ 54-56.) However, he asserts that the deputies entered his home illegally. (*Id.* ¶ 1.) And the parties' briefs address issues that would emerge, in the absence of a state constitutional claim, only if a traditional state tort claim was being brought. (See Pl.'s (First) Resp. 30; Defs.' (First) Reply 13.)¹⁰ Therefore the court will address this claim, which is, under Indiana law, an allegation of trespass.

Defendants assert the Department cannot be held liable because the deputies were engaged in law enforcement. (Defs.' Br. 12-13; Defs.' (First) Reply 13.) The basis for their argument is an ITCA provision that shields government entities and their employees from liability arising from the enforcement of a law except in cases of false arrest or false imprisonment. Ind. Code § 34-13-3-3(8). Citing state cases dating back

¹⁰ A traditional trespass (or unlawful entry) claim is not explicitly mentioned in the original or amended complaints or in the Case Management Plan. It appears to surface first in Plaintiff's (First) Response to the Motion for Summary Judgment (Doc. No. 45) 30-32. However, the facts alleged in the complaints are sufficient to give notice that this was a potential theory of the Plaintiff. Under the liberal notice pleading practices allowed by the Federal Rules of Civil Procedure, that is enough to allow such a claim to be addressed at this stage.

to 1981 – but without discussing how the analysis of the law enforcement immunity has changed in subsequent years – the Defendants suggest that Section 3(8) provides law enforcement officers with a broad spectrum of immunity for any acts “committed during the course of law enforcement duties, as long as those acts do not constitute false arrest or imprisonment.” (Defs.’ Br. 13.)

Kucenko reminds the court of the Indiana Supreme Court’s decisions in *Kemezy v. Peters*, 622 N.E.2d 1296 (Ind. 1993) and *Belding v. Town of New Whiteland*, 622 N.E.2d 1291 (Ind. 1993). In *Kemezy*, the court found that this provision did not provide any immunity from claims of excessive force because “[u]nder Indiana law, law enforcement officers owe a private duty to refrain from using excessive force in the course of making arrests.”¹¹ *Kemezy*, N.E.2d at 1297. In *Belding*, the court held that police officers “are not relieved of the duty to drive with due regard for the safety of all persons.” *Belding*, N.E.2d at 1293. Although Kucenko states that some Indiana Court of Appeals’ decisions “cast doubt” on the continued validity of these decisions, he argues “it is still possible, if not likely, that the Indiana Supreme Court will adhere to it[s] previous analysis that police officers and the municipalities that employ them can be held liable for excesses attending the performance of their daily duties.” (Pl.’s (First) Resp. 30-31.)

These arguments, of Defendants and Kucenko, miss the mark. The Indiana Supreme Court’s analysis of law enforcement immunity has indeed changed since 1981, when the court appeared to embrace a broad interpretation. See *Seymour Nat’l Bank v.*

¹¹ Section 3(8) was formerly Section 3(7). For the reader’s ease, the court will refer to this provision by its current codification at Section 3(8) regardless of the time period.

State, 422 N.E.2d 1223, 1226 (Ind. 1981) *clarified on reh'g*, 428 N.E.2d 203 (holding that the statute renders the State immune from “all acts of enforcement save false arrest and imprisonment”). The court examined the development of its analysis in *King v. Northeast Security, Inc.*, 790 N.E.2d 474, 481-83 (Ind. 2003), and it is not necessary here to retrace all the steps of that development – just some.

The starting point is the ITCA statute. The provision reads,

A governmental entity or an employee acting within the scope of the employee’s employment is not liable if a loss results from the following: . . . The adoption and enforcement of or failure to adopt or enforce a law (including rules and regulations), unless the act of enforcement constitutes false arrest or imprisonment.

Ind. Code § 34-13-3-3(8). As such, Section 3(8) embraces two prongs. First, as the Indiana Supreme Court noted in *King*, it only applies to acts arising within the scope of an employee’s employment.¹² *King*, 790 N.E.2d at 482. Second, it only provides immunity pertaining to the adoption and enforcement of a law. *Id.* The Defendants’ interpretation of Section 3(8) would collapse these prongs and immunize any act committed during the course of a law enforcement officers’ duties. However, the Indiana Supreme Court has never embraced such a broad definition of “enforcement of a law.”

The Supreme Court came closest on rehearing in *Seymour*, when it suggested that the provision immunized all conduct stemming from the performance of an officer’s

¹² Interpreted strictly, the statute only immunizes an employee for acts committed within the scope of his or her employment. However, a governmental entity has no respondeat superior liability for acts committed outside the scope of an employee’s employment. See *Stropes by Taylor v. Heritage House Childrens Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244, 247 (Ind. 1989).

duties except those acts that were “so outrageous as to be incompatible with the performance of the duty undertaken.” *Seymour*, 428 N.E.2d at 204. Ten years later, however, the court characterized this language as dicta not in keeping with legislative intent. *Tittle v. Mahan*, 582 N.E.2d 796, 800 (Ind. 1991). It offered a stricter definition in its place. “We perceive the activities included within the term ‘enforcement of a law’ to be limited to those activities attendant to effecting the arrest of those who may have broken the law.” *Id.* at 801.

Two years later, the Indiana Supreme Court disavowed this language of *Tittle*, stating that litigants were scrambling to determine the activities that constituted an attempt to effect an arrest. *Quakenbush v. Lackey*, 622 N.E.2d 1284, 1287 (Ind. 1993). In *Quakenbush*, the Indiana Supreme Court suggested that the law enforcement immunity provision protected an officer when making a decision to investigate a crime or to arrest a particular individual and when making an arrest because these activities “were in the nature of the public duty owed by law enforcement officials to the community as a whole.” *Quakenbush*, 622 N.E.2d at 1289-90 (approving the analysis of the Indiana Court of Appeals in *Seymour National Bank v. State*, 384 N.E.2d 1177, 1186 (Ind. Ct. App. 1979)). *Quakenbush* led to the distinction between a law enforcement officer’s public and private duties, and the holdings in *Kemezy* and subsequent cases that Section 3(8) did not provide immunity for a breach of a private duty.

The *Quakenbush* public/private duty test proved just as problematic as the *Tittle* definition, as the Indiana Supreme Court acknowledged in *Benton v. City of Oakland City*, 721 N.E.2d 224, 230 (Ind. 1999). In *Benton*, the court confined its discussion to

common law immunities. It did not expressly disavow the *Quakenbush* test. However, as the court later acknowledged, *Benton* “implicitly achieved this result.” *King*, 790 N.E.2d at 482. The Indiana Supreme Court did not abandon the *Quakenbush* test, however. Rather, it characterized the public/private duty test “as a tool for applying the ‘adopting or enforcing of a law’ language.” *Id.* Courts could apply the public/private duty test if helpful, or ignore it. *Id.*

So where does this leave the definition of “enforcing a law” under Section 3(8)? This court finds no basis in *King* for reverting to the broad definition provided in the Seymour rehearing (since labeled unwarranted dicta). In *King*, the Indiana Supreme Court resolved an issue pertaining to the scope of Section 3(8) immunity by looking to the statute and case law.¹³ This court will do the same.

First, the language in the statute does not indicate a desire to immunize police officers from all acts stemming from their employment. Police officers perform many functions that do not involve the enforcement of a law. They give motorist directions. They provide assistance to accident victims. And, as in this case, they respond to 911 calls for help.

In *Mullin v. Municipal City of South Bend*, the Indiana Supreme Court acknowledged that the scope of law enforcement protected by the statute “extends well

¹³ The court determined the legislature only intended to immunize a governmental entity for adopting or enforcing a law “that falls within the scope of the entity’s purpose or operational power.” *King*, 790 N.E.2d at 483. Thus, a school district, which was not charged by statute with general law enforcement, was not immune for injuries resulting from its failure to provide security on a school parking lot. *Id.* at 484.

beyond “traditional law enforcement activities such as the arrest and pursuit of suspects.” *Mullin*, 639 N.E.2d 278, 283 (Ind. 1994) (quoting *Quakenbush*, 622 N.E.2d at 1287 n.3). However, the court concluded that the immunity provision was still limited “to those activities in which a governmental entity or its employees compel or attempt to compel the obedience of another to laws, rules or regulations, or sanction or attempt to sanction a violation thereof.” *Id.* (By its terms, the statute would also encompass a failure to compel or attempt to compel such obedience.)

This is the definition employed, subsequent to *Benton*, by the Indiana Court of Appeals in *City of Anderson v. Davis*, 743 N.E.2d 359, 364 (Ind. Ct. App. 2001), and it can be applied to other cases also cited by Defendants. In each case, whether serving an arrest warrant, *City of Anderson v. Weatherford*, 714 N.E.2d 181, 186 (Ind. Ct. App. 1999),¹⁴ failing to enforce the state’s drunk driving laws, *Minks v. Pina*, 709 N.E.2d 379, 383 (Ind. Ct. App. 1999), or damaging a home while attempting to capture a fleeing murder suspect who had fled inside with three hostages, *Ind. State Police v. May*, 469 N.E.2d 1183, 1184 (Ind. Ct. App. 1984), officers were enforcing, or failing to enforce, a person’s obedience to the laws of Indiana.

Significant issues remain in this case about whether the officers were enforcing a law. In applying the *Mullin* definition, the analysis of qualified immunity under Section

¹⁴ Language in *Weatherford* suggests the court was allowing immunity merely because the conduct arose from the course of the officer’s duties. See *Weatherford*, 714 N.E.2d at 185-186. The point, however, is that serving a valid arrest warrant was compelling the plaintiff’s obedience, rightfully or wrongfully, to the law prohibiting a person from contributing to the delinquency of a minor.

3(8) parallels the Fourth Amendment analysis under § 1983. If the deputies had a reasonable belief that Kucenko's wife, or someone else, was injured and inside the apartment, and being prevented from seeking their aid, then the Department was not liable for any harm resulting from their entry into Kucenko's home. If, on the other hand, they entered Kucenko's home merely because they had responded to an incomplete 911 call and saw a locked door (or perhaps because they were irritated that Kucenko took so long to open the door), then they were not attempting to enforce a law.¹⁵ The facts presented to the court thus far do not substantiate "an objective reasonable belief" that someone was in danger. (See Entry of Feb. 9, 2006.) The court cannot conclude as a matter of law that the deputies' entry into Kucenko's home was related to any attempt to enforce a law.

For these reasons, the court **DENIES** Defendants' Motion of Summary Judgment on Kucenko's claim of trespass against the Department.

3. False Arrest

Section 3(8) excludes immunity from a claim of false arrest or false imprisonment. However, police officers still have an affirmative defense that shields them from liability in most instances. Under Indiana law, a police officer may arrest a person when the officer has probable cause to believe that the person is committing or attempting to commit a felony, a domestic battery, or, in the officer's presence, a misdemeanor. Ind. Code. §

¹⁵ As noted in the earlier entry, Kucenko testified he was "talking loud" while on the phone to his son in Russia but ended the call when Bentley knocked on the door and thereafter spoke in a normal volume. (See Kucenko Dep. 21; Kucenko Decl. ¶¶ 5, 12, 15, 30.)

35-33-1-1(a). As with federal unlawful seizure claims, the existence of probable cause defeats a state claim for false arrest or unlawful detention. *Miller v. City of Anderson*, 777 N.E.2d 1100, 1104-05 (Ind. Ct. App. 2002); *Lazarus Dep't Store v. Sutherlin*, 544 N.E.2d 513, 519 (Ind. Ct. App., 1989).

The Defendants are asserting this defense. They argue that Newman and Bentley had probable cause to arrest Kucenko for refusing an officer's order to assist the officer in the execution of his duties and for resisting law enforcement. As with Kucenko's other surviving claims, issues of material fact preclude summary judgment.

According to the Defendants, Kucenko refused the deputies' request to unlock his wife's bedroom and "attempted to guard the door" by standing in front of it. (Defs.' Br. 4.) When deputies motioned their intent to break down the door, "Kucenko protested and stood in front of Newman make a disapproving gesture and repeating loudly in English: 'no good, no good policeman, no good.'" (*Id.* (citing Kucenko Dep. 33, Newman Dep. 24, Bentley Dep. 52-54).) This is the sum of the relevant evidence presented by the Defendant. It is not much, but it might suffice to establish probable cause – if the deputies lawfully entered Kucenko's apartment.

Indiana law provides that a person who, "when ordered by a law enforcement officer to assist the officer in the execution of the officer's duties, knowingly or intentionally, and without a reasonable cause, refuses to assist commits refusal to aid an officer, a Class B misdemeanor." Ind. Code § 35-44-3-7. Kucenko testified that he could not open the door because his wife had the key to the padlock. (Kucenko Decl. ¶ 28.) If

so, he could not comply with the deputies' order to open the door because compliance was impossible. But this would not defeat probable cause unless the officers knew that he did not have the key. Moreover, he admits to standing in front of the door, and a physical act may amount to a refusal to assist. See *Low v. State*, 580 N.E.2d 737, 741 (Ind. Ct. App. 1991). Ordinarily, such actions would lead a reasonable officer to believe that, despite the language barrier, Kucenko was knowingly or intentionally refusing to assist the deputies.

Similarly, under many circumstances, Kucenko's movements would provide probable cause to believe he was resisting law enforcement charge. Indiana Code § 35-44-3-3 provides in part that a person "who knowingly or intentionally[] forcibly resists, obstructs, or interferes with a law enforcement officer . . . while the officer is lawfully engaged in the execution of the officer's duties . . . commits resisting law enforcement, a Class A misdemeanor."

In general, a charge of resisting law enforcement requires some evidence of force. See *Ajabu v. State*, 704 N.E.2d 494, 495 (Ind. Ct. App. 1998). However, a movement that furthers the suspect's goal of disobedience may satisfy this requirement. *Potts v. City of Lafayette*, 121 F.3d 1106, 1113 (7th Cir. 1997). Here, Newman and Bentley could reasonably conclude that, by placing himself in front of the door, Kucenko was forcibly obstructing their effort to enter his wife's bedroom.

The material issue precluding a finding of probable cause is whether the officers knew or should have known that they had entered Kucenko's home unlawfully. Indiana

clearly affords citizens the right to resist unlawful entries into their homes. *See Alspach v. State*, 755 N.E.2d 209, 211 (Ind. Ct. App. 2001). “Further, unlawful entry into one’s home represents the use of excessive force and any arrest pursuant to that entry cannot be considered peaceable. . . . A citizen, therefore, has the right to resist the unlawful entry.” *Id.* (citing *Adkisson v. State*, 728 N.E.2d 175, 179 (Ind. Ct. App. 2000); *Casselman v. State*, 472 N.E.2d 1310, 1315 (Ind. Ct. App. 1985).

Kucenko has provided sufficient evidence from which a jury could conclude that a reasonable police officer would have realized that the entry was unlawful and Kucenko was fully justified in resisting their further attempts to invade his privacy – and his wife’s privacy – once inside. A reasonable officer would also realize that these circumstances provided Kucenko with “reasonable cause” to refuse their request to aid them, as allowed by the refusal-to-aid-an-officer statute.

For these reasons, the court **DENIES** Defendants’ Motion of Summary Judgment on Kucenko’s claim of false arrest against the Department.

IV. CONCLUSION

For the reasons discussed above and in its Entry of February 9, 2006, the court will **GRANT** Defendants’ Motion for Summary Judgment (Doc. No. 40) with respect to all of Kucenko’s claims against Newman and Bentley and his state constitutional claim against the Department. The court denies the motion with respect to Kucenko’s § 1983

(warrantless entry and unlawful detention) and Indiana state law tort claims of trespass and false arrest against the Department.

Entry of judgment will await disposition of the remaining claims, which share a close factual connection to the claims for which summary judgment is appropriate. A telephone conference will be set to select a jury trial date.

ALL OF WHICH IS ENTERED this 1st day of June 2007.

John Daniel Tinder, Judge
United States District Court

Copies to:

Magistrate Judge Tim A. Baker

David Robert Brimm
WAPLES & HANGER
dbrimm@wapleshanger.com

Jaunae M. Hanger
WAPLES & HANGER
hangerj@iquest.net

Richard A. Waples
WAPLES & HANGER
richwaples@aol.com

Anne Elizabeth Brant
OFFICE OF CORPORATION COUNSEL
abrant@indygov.org

James B. Osborn
OFFICE OF CORPORATION COUNSEL
josborn@indygov.org

Laurel S. Judkins
OFFICE OF CORPORATION COUNSEL
ljudkins@indygov.org

John F. Kautzman
RUCKELSHAUS ROLAND KAUTZMAN
BLACKWELL & HASBROOK
jfk@rucklaw.com

John C. Ruckelshaus
RUCKELSHAUS ROLAND KAUTZMAN
BLACKWELL & HASBROOK
jcr@rucklaw.com

