

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CALE S. SCHNAUS,)	
)	
Plaintiff,)	
vs.)	NO. 3:07-cv-00165-RLY-WGH
)	
CHARLES BUTLER,)	
STATE OF INDIANA,)	
INDIANA STATE EXCISE POLICE,)	
INDIANA ALCOHOL AND TOBACCO)	
COMMISSION,)	
RONALD M. MCDONALD,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

CALE S. SCHNAUS,)
Plaintiff,)
)
vs.) 3:07-cv-165-RLY-WGH
)
STATE OF INDIANA, INDIANA STATE)
EXCISE POLICE, INDIANA ALCOHOL AND)
TOBACCO COMMISSION, RONALD M.)
McDONALD, and CHARLES BUTLER,)
Defendants.)
)

ENTRY ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter arises out of the arrest of Cale S. Schnaus (“Plaintiff”) at his home on December 22, 2006. Plaintiff brings this action against the State of Indiana, the Indiana State Excise Police, the Indiana Alcohol and Tobacco Commission, and Ronald M. McDonald (“McDonald”) and Charles Butler (“Butler”) in their official and individual capacities (collectively “Defendants”) under 42 U.S.C. § 1983 for violations of his rights under the United States Constitution. Plaintiff also alleges state law tort claims, as well as violations of his rights under the Indiana Constitution. Defendants now move for summary judgment on all claims. For the reasons set forth below, Defendants’ motion is **GRANTED IN PART** and **DENIED IN PART**.

I. Summary Judgment Standard

Summary judgment is proper when the evidence of record shows that there is “no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When determining whether a genuine issue of material fact exists, the court views the record and all reasonable inferences in the light most favorable to the nonmoving party. *Heft v. Moore*, 351 F.3d 278, 283 (7th Cir. 2003).

The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The nonmoving party, however, may not rest on mere allegations or denials in its pleadings, but “must set forth specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(c). Factual disputes that are irrelevant or unnecessary to the claims before the court will not alone defeat a summary judgment motion. *Anderson*, 477 U.S. at 247-48.

Summary judgment is also proper, indeed it is mandated, when it is clear that the plaintiff will be unable to satisfy the legal requirements necessary to establish his case. *See Celotex*, 477 U.S. at 322. Under this scenario, “there can be no ‘genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Id.* at 323. The moving party is, therefore, entitled to judgment as a matter of law due to the nonmoving party’s failure to make a sufficient showing on an essential element of which he carried the burden of proof. *Id.*

II. Statement of Facts¹

1. McDonald has been a member of the Indiana State Excise Police since 1979. He has received training in the enforcement of laws related to alcohol and tobacco, as well as other law enforcement training. He instructs on a variety of topics.
2. Butler has been a member of the Indiana State Excise Police since 2002 and his duties include enforcing the law.
3. At the time of the incident, Plaintiff was in his mid-twenties, weighed 204 pounds and was six feet and one inch tall. Plaintiff's brother, Ared Schnaus, is two years younger than Plaintiff.
4. On December 22, 2006, McDonald received information from an Evansville Police Department ("EPD") officer that an underage drinking party was going to occur that evening at Plaintiff's residence.
5. The EPD officer had gathered information concerning Plaintiff's party through Facebook. Facebook is a social networking website where people can, among other things, advertise events.
6. The EPD officer told McDonald that an underage drinking party was to occur at 4109 Gayne Avenue, Evansville, Indiana ("4109 Gayne"). McDonald had received information from this EPD officer in the past regarding underage drinking parties that had been reliable.

¹Many of the following facts have been agreed upon by both parties. Where the parties disagree, the disputed facts have been recited in the manner most favorable to the nonmovant, Plaintiff. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000).

7. Plaintiff lived at 4109 Gayne at all times relevant to this action.
8. On the evening of December 22, 2006, McDonald went to Plaintiff's residence.
McDonald confirmed that there was a party occurring in Plaintiff's detached garage when he saw several cars parked outside of the residence and heard party noises emitting from the detached garage.
9. Thereafter, McDonald coordinated a "knock and talk" involving Butler and three EPD officers. The officers intended to identify themselves, explain their investigation, talk with the owner of the residence, look for evidence in plain view, and see if there was any underage drinking occurring.
10. The EPD officers were in uniform. McDonald and Butler were wearing Indiana State Excise issued clothing that identified them as officers—khaki pants and polo style shirts with police emblems embroidered on them. McDonald was also wearing a complete duty belt with badge and a winter coat with a "police" emblem.
11. After arriving at the residence, all of the officers went around back to the detached garage, from where noise could be heard.
12. A chain-link fence surrounds Plaintiff's property. The fence is four feet high and can be seen through.
13. Although the fence goes around the property, it stops at both sides of the driveway, allowing access to the driveway and detached garage.
14. The detached garage sits immediately behind the residence.
15. Butler knocked on the door of the detached garage. Jennifer Schnaus, Plaintiff's sister-in-law, answered the door. Butler, who was unknown to Jennifer Schnaus at that time,

- asked to speak with Cale Schnaus. Butler did not identify himself. (Docket # 44-12 (“Jennifer Dep.”) at 11, 14-15).
16. After Butler asked to speak to Plaintiff, Jennifer Schnaus called for Plaintiff and he came to the door.
 17. Plaintiff had consumed somewhere in the vicinity of less than twelve beers in the hours preceding the incident.
 18. When Plaintiff came to the door, Butler asked him if he was Cale Schnaus. Plaintiff did not respond, but rather attempted to shut the door because he did not know who Butler was. As Plaintiff was closing the door, McDonald came around the corner of the detached garage and began shoving at the door in an attempt to keep Plaintiff from closing it. (Docket # 44-10 (“Plaintiff Dep.”) at 30-31).
 19. Plaintiff did not recognize Butler or McDonald and did not see anything on their persons to indicate that they were law enforcement officers. In fact, he thought that they may have been the same men who had attacked him at a bar a few days prior. (*Id.* at 31-33).
 20. Butler and McDonald pushed the door open and went into the detached garage. (Docket # 44-8 (“Young Dep.”) at 8).
 21. After entering the detached garage, McDonald grabbed Plaintiff and Plaintiff grabbed McDonald in response. Plaintiff then punched McDonald a couple of times. Once Plaintiff was able to get free from McDonald’s grasp, he punched Butler, who was trying to grab Plaintiff. Plaintiff then went back after McDonald. At some point during the scuffle, McDonald hit Plaintiff in his teeth with an open palm. (Plaintiff Dep. at 38-39).

22. After Butler was punched by Plaintiff, he did not punch back and was not a part of the struggle that ensued.
23. McDonald and Plaintiff began wrestling on the ground. At some point while they were on the ground, McDonald began saying, "I'm a police officer." (*Id.* at 43).
24. The detached garage door opened, and one of the EPD officers, Ted Karges, intervened and struck Plaintiff with a flashlight three times on the leg to gain his compliance.
25. Another EPD officer intervened and sprayed Plaintiff in the face with a stun spray. Plaintiff told the officers that he was unfazed by the spray and continued to struggle with the officers as they tried to handcuff him.
26. Finally, handcuffs were placed on Plaintiff. He was taken into custody, transported downtown, and booked into jail.
27. During the scuffle, McDonald's flashlight holder was broken. His glasses were broken on the ground, and his finger was broken. He went to the emergency room at Deaconess Hospital.
28. Butler received scrapes, scratches, and a contusion to his left eye, for which he was seen by a doctor. His flashlight was broken and his pants were ripped.

III. Discussion

As a preliminary matter, the court finds it necessary to clarify the claims being considered on summary judgment. Plaintiff's complaint appears to set forth six different claims against Defendants. However, in their motion for summary judgment, Defendants assert that the only claims properly brought by Plaintiff in his complaint are a Section 1983 claim, a claim for violations of rights under the Indiana Constitution, and a state law tort claim for trespass.

Defendants further assert that, while Plaintiff's complaint alleges violations of Plaintiff's First, Fourth, Fifth, and Fourteenth Amendment rights in relation to his Section 1983 claim, only violations of Plaintiff's Fourth Amendment rights are possibly cognizable under the facts of this matter.

In his response to Defendants' motion, Plaintiff does not object to Defendants' characterization of his case, nor does he discuss any additional claims. It is a "fundamental principle that parties must present their arguments to a court before it enters final judgment." *Anderson v. City of Wood Dale, Ill.*, 2001 WL 477158, at *4 (N.D. Ill. May 3, 2001) (citing *Havoco of America, Ltd. v. Sumitomo Corp. of America*, 971 F.2d 1332, 1336 (7th Cir. 1992)). A party waives any arguments that it does not present in its initial motion for summary judgment or in its response to the opposing party's motion for summary judgment. *Id.* (citing *Havoco*, 2001 WL 477158, at *4; *Arendt v. Vetta Sports, Inc.*, 99 F.3d 231, 237 (7th Cir. 1996); *Bugg v. Int'l Union of Allied Ind. Workers, Local 507*, 674 F.2d 595, 598 n.4 (7th Cir. 1982)). Accordingly, the court only considers the three claims set forth in Defendants' motion for summary judgment. To the extent that Plaintiff's complaint sets forth any additional claims, those claims have been waived.

A. 42 U.S.C. § 1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . subjects or causes to be subjected, any citizen of the United States . . . to the deprivations of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured." 42 U.S.C. § 1983. Although it is not entirely clear from Plaintiff's complaint, it appears that he is attempting to assert a Section 1983 claim against

all Defendants. As a threshold matter, the court considers which specific Defendants, if any, qualify as a “person” under Section 1983.

The United States Supreme Court has expressly held that “neither a State nor its officials acting in their official capacities are ‘persons’ under § 1983.” *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989). This is due to a state’s protection against federal suits under the Eleventh Amendment. *Id.* at 67. As “a state agency *is* the state for purposes of the eleventh amendment,” *Kroll v. Bd. of Trs. of Univ. of Ill.*, 934 F.2d 904, 907 (7th Cir. 1991), a state agency would also not be considered a “person” for purposes of Section 1983. *See Endres v. Indiana State Police*, 349, F.3d 922, 927 (7th Cir. 2003) (“The Indiana State Police, as a unit of state government, is not a ‘person’ as § 1983 uses that term and therefore is not amenable to a suit for damages under that statute.”). Accordingly, the State of Indiana, the Indiana State Excise Police, the Indiana Alcohol and Tobacco Commission, and McDonald and Butler in their official capacities are entitled to summary judgment as a matter of law, as they do not fall within the scope of Section 1983. The court will now consider whether McDonald and Butler in their individual capacities are entitled to summary judgment on other grounds.

“Section 1983 is not itself a source of substantive rights; instead it is a means for vindicating federal rights conferred elsewhere.” *Ledford v. Sullivan*, 105 F.3d 354, 356 (7th Cir. 1997) (citing *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979)). To prevail on his Section 1983 claim against McDonald and Butler in their individual capacities, Plaintiff must establish that (1) he had a constitutionally protected right; (2) he was deprived of that right in violation of the Constitution; (3) McDonald and Butler intentionally caused that deprivation; and (4) McDonald and Butler acted under color of state law. *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513

(7th Cir. 1993); *Patrick v. Jasper County*, 901 F.2d 561, 565 (7th Cir. 1990). As McDonald and Butler do not dispute that they were acting under color of state law at all times relevant to this action, the court need only consider the first three elements.

1. Whether Plaintiff Had a Constitutionally Protected Right

Plaintiff asserts that he had the right to be free from the illegal search of his detached garage, the illegal arrest of his person, and the use of excessive force against him. These are well recognized rights, arising out of the Fourth Amendment's prohibition against unreasonable searches and seizures. *See* U.S. Const. amend. IV. As Defendants do not dispute that Plaintiff possessed these constitutional rights on the night of December 22, 2006, the court turns to whether Plaintiff's rights were actually violated by McDonald and Butler.

2. Whether Plaintiff's Rights Were Violated

Plaintiff alleges three ways in which McDonald and Butler violated his rights under the Fourth Amendment.² First, Plaintiff alleges that McDonald and Butler conducted an unreasonable search of his detached garage by forcing their way inside after he tried to shut the door on them. Second, Plaintiff alleges that the Individual Defendants conducted an unreasonable seizure of his person when they arrested and detained him. Third, Plaintiff alleges that the Individual Defendants used excessive force against him.

a. Unreasonable Search

Defendants do not claim that McDonald and Butler had a warrant to enter Plaintiff's detached garage on the night of December 22, 2006. Nor do Defendants claim the existence of any exigent circumstances which would have allowed McDonald and Butler to enter Plaintiff's detached garage without a warrant. Rather, Defendants argue that McDonald and Butler's entry

²In their motion for summary judgment, Defendants argue that it was lawful for McDonald and Butler to enter Plaintiff's yard and knock on the door of his detached garage. Plaintiff does not counter this argument in his response and, in fact, focuses solely on the entry into the detached garage itself. Accordingly, the court considers any claim that McDonald and Butler violated Plaintiff's rights by entering his yard to have been waived.

into Plaintiff's garage was not a violation of Plaintiff's rights because said entry was "accidental." McDonald and Butler represent that when Plaintiff attempted to shut the door, they instinctively put their hands up to prevent the door from hitting them in the face, and that they then fell inward into the detached garage when Plaintiff suddenly released the door. (Docket # 32-3 ("McDonald Dep.") at 30, 33).

The Defendants offer no case law to support their assertion that a warrantless entry is nevertheless constitutional when the law enforcement official making the entry did so accidentally. Moreover, even assuming, *arguendo*, that Defendants' assertion is correct, there exists a genuine issue of material fact as to whether McDonald and Butler "accidentally" or intentionally entered Plaintiff's detached garage. Although McDonald and Butler claim that they merely fell into the detached garage, Plaintiff contends that they forcefully entered his detached garage. As a reasonable jury could agree with Plaintiff that McDonald and Butler intentionally entered the detached garage, the court cannot find as a matter of law that there was no unreasonable search.³

³In their reply brief, Defendants contend that even if McDonald and Butler did forcefully enter Plaintiff's detached garage, such action should not subject them to Section 1983 liability. Defendants argue that such an entry would only be a *de minimus* violation of the Plaintiff's Fourth Amendment rights because of the lower expectation of privacy in his detached garage, as opposed to his home. This argument is waived, however, as Defendants failed to raise it until the reply brief, leaving Plaintiff no chance to respond. *Wilson v. Giesen*, 956 F.2d 738, 471 (citing *Egert v. Connecticut Gen. Life Ins. Co.*, 900 F.2d 1032, 1035 (7th Cir. 1990)).

b. Unreasonable Seizure

An arrest without a warrant is unconstitutional unless the arresting officer has probable cause. *Washington v. Haupert*, 481 F.3d 543, 547 (7th Cir. 2007). Probable cause “exists where an officer reasonably believes, in light of the facts and circumstances known to the officer at the time of the arrest, that the suspect had committed or was committing an offense.” *Shipman v. Hamilton*, 520 F.3d 775, 778 (7th Cir. 2008). The existence of probable cause “is an absolute defense to a claim of wrongful arrest asserted under section 1983 against police officers.” *Chelios v. Heavener*, 520 F.3d 678, 685-86 (7th Cir. 2008) (citations omitted). Courts measure probable cause “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—seeing what he saw, hearing what he heard.” *Kelley v. Myler*, 149 F.3d 641, 646 (7th Cir. 1998).

Defendants argue that they had probable cause to arrest Plaintiff for battery on a police officer and resisting law enforcement. Plaintiff admits that he threw the first punch in the altercation that took place following McDonald and Butler entering his detached garage. Plaintiff also admits that he struggled as officers tried to handcuff him. In light of Plaintiff’s admissions, there seems to be no question that McDonald and Butler had probable cause to arrest Plaintiff. However, Plaintiff argues that the arrest was nevertheless a violation of his Fourth Amendment rights because he had the right to physically resist the unlawful entry into his detached garage. Plaintiff argues that said right is set forth in *Casselman v. State*, 472 N.E.2d 1310 (Ind. Ct. App. 1985).

Plaintiff does not explain how the alleged right to resist an illegal entry by law enforcement negates the existence of probable cause in this case. The court can only assume that Plaintiff means to argue that a reasonable officer would have known that Plaintiff was not committing an offense when he punched McDonald and Butler, due to the illegal entry and Plaintiff's right to resist. Even if the court were to agree with Plaintiff that a reasonable officer should have been aware of the illegality of the entry and Plaintiff's rights under *Casselman*, the court finds that McDonald and Butler still would have had probable cause to arrest Plaintiff.

In *Casselman*, a deputy sheriff went to Casselman's home to effect service of a writ of attachment of the body in relation to a bankruptcy proceeding. After Casselman opened the door and realized why the deputy sheriff was there, he attempted to shut the door. A shoving and grabbing match ensued, with Casselman eventually retreating into the house. The deputy sheriff followed Casselman into the home and arrested him for resisting law enforcement. *Id.* at 1311-12. The Indiana Court of Appeals overturned Casselman's conviction for resisting law enforcement on the grounds that Casselman had the right to resist the deputy sheriff's unlawful entry into his home. In the instant action, however, Plaintiff was not arrested for merely attempting to shut the door of his detached garage on McDonald and Butler. Rather, Plaintiff was arrested for battery after he punched McDonald and Butler following their entrance into his detached garage. While *Casselman* states that a person has the right to resist the unlawful entry into his home by an officer of the law, the court specifically noted that such resistance could not rise to the level of an assault. *Id.* at 131 (citations omitted). Plaintiff's actions do not fall within the protection of *Casselman*.

By his own admission, Plaintiff punched McDonald and Butler and struggled as officers tried to handcuff him. Accordingly, the court finds that McDonald and Butler had probable cause to arrest Plaintiff. This operates as an absolute bar to Plaintiff's unreasonable seizure claim under Section 1983.

c. Excessive Force

A claim that a law enforcement officer used excessive force in the course of an arrest is analyzed under the Fourth Amendment and its "reasonableness" standard. *Graham v. Connor*, 490 U.S. 386, 395 (1989). Whether the officer's use of force was reasonable under the Fourth Amendment is an "objective inquiry," *Estate of Phillips v. City of Milwaukee*, 123 F.3d 586, 592 (7th Cir. 1997); *Mason v. Hamilton County*, 13 F.Supp.2d 829, 833 (S.D. Ind. 1998), evaluated "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Bell v. Irwin*, 321 F.3d 637, 639 (7th Cir. 2003); *Graham*, 490 U.S. at 396. "The test of reasonableness . . . requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. Unless material facts are in dispute, the reasonableness of force is a legal issue to be decided by the court. *Bell*, 321 F.3d at 640.

In the instant action, the undisputed facts show that Plaintiff threw the first punch when he punched McDonald, that he also punched Butler, that he wrestled on the ground with McDonald, that he was unfazed by stun spray, and that he struggled with officers as they tried to handcuff him. Furthermore, Plaintiff admits that Butler never punched him, and alleges only that

McDonald hit him once in the face with an open palm. There is no evidence that Plaintiff suffered significant injuries or required medical attention, while McDonald suffered a broken finger and Butler a contusion to his left eye. Even viewed in the light most favorable to Plaintiff, the court finds that the actions of McDonald and Butler were objectively reasonable. Accordingly, Plaintiff cannot rely on excessive force as the basis for his Section 1983 claim.

3. Whether the Violation was Intentional

As the court has found that Plaintiff cannot base his Section 1983 claim on false arrest or excessive force, the court need only consider whether McDonald and Butler intentionally violated Plaintiff's Fourth Amendment rights when they entered his detached garage. The parties' accounts as to how McDonald and Butler entered Plaintiff's detached garage greatly differ. McDonald and Butler claim that they accidentally fell into the detached garage when Plaintiff suddenly released the door. If this is true, McDonald and Butler did not intentionally violate Plaintiff's rights and the Section 1983 claim must fail. However, Plaintiff claims that McDonald and Butler forced their way into the detached garage after he tried to close the door on them. If this is true, McDonald and Butler did intentionally violate Plaintiff's rights and Plaintiff should succeed on his Section 1983 claim. This is clearly a question of genuine material fact for a jury to determine.

4. Qualified Immunity

As an alternative basis for summary judgment, Defendants argue that McDonald and Butler are entitled to qualified immunity. The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have

known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Whether a government official is entitled to qualified immunity is a legal question for the court. *Purtell v. Mason*, 527 F.3d 615, 621 (7th Cir. 2008) (citations omitted).

In *Saucier v. Katz*, 533 U.S. 194 (2001), the United States Supreme Court set forth a two-step analysis for determining qualified immunity.⁴ First, the court determines whether the facts as alleged by the plaintiff make out a constitutional violation. *Id.* at 201. If there was no constitutional violation, a Section 1983 claim cannot survive and “there is no necessity for further inquiries concerning qualified immunity.” *Id.* However, if there was a constitutional violation, the court then determines whether the constitutional right was clearly established. *Id.* “The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)).

As discussed above, *supra* Part III.A.2.a, Plaintiff has alleged a violation of his constitutional right under the Fourth Amendment to be free from unreasonable searches. However, the court is unable to make a determination as to the second prong of the *Saucier* analysis at this time. There is a question of fact as to whether McDonald and Butler accidentally or intentionally entered Plaintiff’s detached garage. If McDonald and Butler did indeed enter the detached garage by accident, the court cannot say that a reasonable officer in that situation would know that he was acting unlawfully by falling into someone’s detached garage and McDonald

⁴The Court recently reconsidered the previously mandatory sequence of *Saucier* and concluded that courts “should be permitted to exercise their sound discretion in deciding which of the two prongs of the analysis should be addressed first in light of the circumstances in a particular case at hand.” *Pearson v. Callahan*, 129 S.Ct. 808, 818 (2009). In this case, the court shall address the two steps in the sequence set forth in *Saucier*.

and Butler would be entitled to qualified immunity. However, the law is quite clear that an officer cannot enter a person's property without either a warrant or the existence of exigent circumstances. *See Payton v. New York*, 445 U.S. 573, 588-90 (1980). If McDonald and Butler intentionally forced their way into the detached garage, they violated a clearly established right and are not entitled to qualified immunity. Accordingly, the court denies Defendants' motion for summary judgment on the grounds of qualified immunity as this time.

B. State Law Claims

The court now turns to Plaintiff's claims under Indiana law. As discussed above, *supra* Part III, the court addresses only Plaintiff's claims for violations of his rights under the Indiana Constitution and for trespass. To the extent that Plaintiff stated any additional state law claims in his complaint, such claims have been waived.

1. Violations of Indiana Constitution

Plaintiff claims that his rights under the Indiana Constitution were violated by Defendants on the night of December 22, 2006. However, "no Indiana court has explicitly recognized a private right of action for monetary damages under the Indiana Constitution." *Smith v. Indiana Dept. of Correction*, 871 N.E.2d 975, 985 (Ind. Ct. App. 2007). Furthermore, the judges of the Southern District have consistently declined to find an implied right of action for damages under the Indiana Constitution. *See Fidler v. City of Indianapolis*, 428 F.Supp.2d 857, 865 (S.D. Ind. 2006) (compiling cases). Accordingly, the court finds that all Defendants are entitled to summary judgment on Plaintiff's claim for violations of his rights under the Indiana Constitution.

2. Trespass

Plaintiff claims that McDonald and Butler trespassed on his property in violation of Indiana law when they entered his detached garage. Before addressing the merits of Plaintiff's claim, the court must consider whether Defendants are entitled to immunity for this claim under the Indiana Tort Claims Act ("ITCA"). IND. CODE § 34-13-1-1, *et seq.* The ITCA provides that "[a] government entity or an employee acting within the scope of the employee's employment is not liable if the loss results from ... [t]he 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 false imprisonment." IND. CODE § 34-13-3-3(8).

Plaintiff argues that Defendants are not entitled to immunity under the ITCA because McDonald and Butler exceeded the scope of their employment when they unlawfully entered Plaintiff's detached garage. However, the Indiana Supreme Court has held that "'conduct ... of the same general nature as that authorized, or incidental to the conduct authorized,' is within the employee's scope of employment." *Bushong v. Williamson*, 790 N.E.2d 467, 473 (Ind. 2003) (quoting *Celebration Fireworks, Inc. v. Smith*, 727 N.E.2d 450, 453 (Ind. 2000)). In fact, "even criminal acts may be considered as being within the scope of employment if 'the criminal acts originated in activities so closely associated with the employment relationship as to fall within its scope.'" *Id.* (quoting *Stropes v. Heritage House Childrens Ctr. of Shelbyville, Inc.*, 547 N.E.2d 244, 247 (Ind.1989)).

There is no dispute that McDonald and Butler were acting within the scope of their employment when they approached Plaintiff's detached garage to investigate the possible underage drinking occurring inside. The court finds that McDonald and Butler's actual entry into the detached garage was also within the scope of their employment. Although Plaintiff

alleges that the entry was unlawful, he does not dispute that it was a continuation of McDonald and Butler's lawful investigation. Accordingly, Defendants are entitled to immunity under the ITCA. The court, therefore, grants Defendants' motion for summary judgment on Plaintiff's trespass claim, as to all Defendants.

IV. Conclusion

For the reasons set forth above, Defendants' Motion for Summary Judgment (Docket # 32) is **GRANTED IN PART** and **DENIED IN PART**. The only claim remaining for trial is Plaintiff's Section 1983 claim against McDonald and Butler in their individual capacities for the unreasonable search of Plaintiff's detached garage.

SO ORDERED this 14th day of May 2009.

s/ *Richard L. Young*
RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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