IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

JAMES R. THOMAS
and LINDA S. THOMAS,

Plaintiffs, Case No.: 3:14-cv-00172-TJC-PDB

vs.

CITY OF PALM COAST; JIM LANDON, in his official and individual capacities; NESTOR ABREU, in his official and individual capacities; BARBARA GROSSMAN, in her official and individual capacities; DEBRA CHAUDOIN, in her official and individual capacities; MICHAEL DONOVAN, in his official and individual capacities; SHELLY ADORANTE, aka Michelle Adorante Sandell, in her official and individual capacities; EVA BOIVIN, in her official and individual capacities; and MICHAEL HADDEN, in his official and individual capacities,

Defendants.
_____/

DEFENDANTS CITY OF PALM COAST, JIM LANDON, NESTOR ABREU, BARBARA GROSSMAN, MICHAEL DONOVAN, EVA BOIVIN, AND MICHAEL HADDEN'S JOINT MOTION TO DISMISS COMPLAINT AND MOTION TO STRIKE CLAIMS FOR PUNITIVE DAMAGES, WITH MEMORANDUM OF LAW IN SUPPORT THEREOF

Defendants, City of Palm Coast ("City"); Jim Landon, in his official and individual capacities; Nestor Abreu, in his official and individual capacities; Barbara Grossman, in her official and individual Capacities; Michael Donovan,

in his official and individual capacities; Eva Boivin, in her official and individual capacities; and Michael Hadden, in his official and individual capacities, by and through their undersigned counsel, and pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Middle District Local Rule 3.01, hereby jointly move to dismiss Plaintiffs' Amended Complaint for failure to state a claim upon which relief can be granted and to strike Plaintiffs' claims for punitive damages, and state:[1]

ALLEGATIONS IN THE COMPLAINT

1. In their fifteen-count Complaint, Plaintiffs, James R. Thomas and Linda S. Thomas, sue Defendants for the following:

(i) First Claim for Relief - 42 U.S.C. § 1983 - Fourth and Fourteenth Amendment Violations - Protection Against Unreasonable Searches and the Right to be Secure in Their Home, by both Plaintiffs against the City, Landon, Abreu, Grossman, Chaudoin, Donovan, Shelly Adorante (aka Michelle Adorante Sandell), Boivin, and Hadden [Doc. 1, p. 18];

[1] Debra Chaudoin and Shelly Adorante, aka Michelle Adorante Sandell, are also named in the Complaint as Defendants, sued in both their official and individual capacities. As of the filing of this Motion to Dismiss, however, Chaudoin and Adorante have not been served with the Complaint.

(ii) Second Claim for Relief - 42 U.S.C. § 1983 - Fourteenth Amendment Violations - Substantive Due Process Violations, by both Plaintiffs against the City, Landon, Abreu, Grossman, Chaudoin, Donovan, Adorante, Boivin, and Hadden [Doc. 1, pp. 19-20];

(iii) Third Claim for Relief - 42 U.S.C. § 1983 - Failure to Train, Supervise, and Discipline Employees, by both Plaintiffs against the City and City Manager Landon, in both his official and individual capacities. Plaintiffs also seek punitive damages in this claim. [Doc. 1, pp. 20-22];

(iv) Fourth Claim for Relief - 42 U.S.C. § 1983 - Failure to Train, Supervise, and Discipline Employees, by both Plaintiffs against Defendant Abreu in his official and individual capacities. Plaintiffs also seek punitive damages in this claim. [Doc. 1, pp. 22-24];

(v) Fifth Claim for Relief - 42 U.S.C. § 1983 - Failure to Train, Supervise, and Discipline Employees, by both Plaintiffs against Defendant Grossman, in her official and individual capacities. Plaintiffs also seek punitive damages in this claim. [Doc. 1, pp. 24-26];

(vi) Sixth Claim for Relief - 42 U.S.C. § 1983 - Failure to Train, Supervise, and Discipline Employees, by both Plaintiffs against Defendants

Chaudoin and Donovan, in their official and individual capacities. Plaintiffs also seek punitive damages in this claim. [Doc. 1, pp. 27-29];

(vii) Seventh Claim for Relief - Negligence, by both Plaintiffs, against all Defendants [Doc. 1, p. 29];

(viii) Eighth Claim for Relief - Intentional Infliction of Emotional Distress, by both Plaintiffs against all Defendants [Doc. 1, p. 30];

(ix) Ninth Claim for Relief - Negligent Infliction of Emotional Distress, by both Plaintiffs against all Defendants [Doc. 1, p. 31];

(x) Tenth Claim for Relief - Governmental Intrusion on the Plaintiffs' Right of Privacy and into the Personal Lives of the Plaintiffs, by both Plaintiffs against all Defendants [Doc. 1, pp. 31-32];

(xi) Eleventh Claim for Relief - Invasion of Privacy, by both Plaintiffs against all Defendants [Doc. 1, pp. 32-33];

(xii) Twelfth Claim for Relief - Negligent Training and Supervision by both Plaintiffs against the City, Landon, Abreu, Grossman, Chaudoin, and Donovan [Doc. 1, pp. 33-34];

(xiii) Thirteenth Claim for Relief - Malicious Prosecution by both Plaintiffs against all Defendants [Doc. 1, pp. 34-36];

(xiv) Fourteenth Claim for Relief - Defamation by Plaintiff Linda Thomas against Defendant Adorante [Doc. 1, pp. 36-37]; and

(xiv) Fifteenth Claim for Relief - Trespass to Land by both Plaintiffs against Defendants Adorante, Boivin, and Hadden [Doc. 1, pp. 37-38].

3. For the reasons that follow, all of Plaintiffs' Claims for Relief should be dismissed, and their claims for punitive damages should be stricken.

MEMORANDUM OF LAW

Standard of this Court's Review

It is well-established that "[i]n deciding a Rule 12(b)(6) motion to dismiss, the Court must accept all well-pleaded factual allegations in a complaint as true and take them in the light most favorable to plaintiff." *Hill v. Lee County Sheriff's Office*, No. 2:11-cv-242-FtM-29SPC, 2012 WL 4356818, at *1 (M.D. Fla. Sept., 24, 2012) (citations omitted). If the allegations of the complaint "plausibly suggest that the plaintiff has a right to relief, raising the possibility above a speculative level" the complaint will survive dismissal. *Id*. (citations omitted). If the allegations do not meet that burden, then the complaint should be dismissed. *Id*. (citations omitted).

I. PLAINTIFFS' FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF, TO THE EXTENT THEY ARE BROUGHT UNDER 42 U.S.C. § 1983 AGAINST LANDON, ABREU, GROSSMAN, DONOVAN, BOIVIN, AND HADDEN IN THEIR OFFICIAL CAPACITIES, SHOULD BE DISMISSED WITH PREJUDICE, BECAUSE SAID CLAIMS ARE DUPLICATIVE OF THE CLAIMS BROUGHT AGAINST THE CITY IN THOSE COUNTS.

It is well-established that a suit against a defendant governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent. *McMillian v. Monroe Cnty., Ala.*, 520 U.S. 781, 785 n.2, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (citations omitted). In other words,

> a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the state itself.

Will v. Michigan Dep't of State Police, 491 U.S. 58*,* 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989); *accord Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 3105, 87 L. Ed. 2d 114 (1985) (a suit under section 1983 against a government official in his or her official capacity is simply "another way of pleading an action against an entity of which an officer is an agent"). Accordingly, claims against governmental officials in their official capacity should be dismissed as redundant of claims against the official's employing governmental entity. *See, e.g., Shuck v. Clark*, No. 8:05-cv-2042-T-30TBM, 2006 WL 2246167 (M.D. Fla. Aug. 4, 2006) (claims against director of civil

service board for the City of Lakeland were redundant of claims against the City of Lakeland, and therefore, said claims against the director were dismissed with prejudice).

In Plaintiffs' First, Second, and Third Claims for Relief, Plaintiffs sued the City, as well as Landon, Abreu, Grossman, Donovan, Boivin, and Hadden in their official capacities. Plaintiffs' claims against Landon, Abreu, Grossman, Donovan, Boivin, and Hadden in their official capacities are redundant of the claims that Plaintiffs brought against the City, and therefore, Plaintiffs' First, Second, and Third Claims for Relief against Landon, Abreu, Grossman, Donovan, Boivin, and Hadden in their official capacities should be dismissed with prejudice. *See Shuck*, 2006 WL 2246167.

II. PLAINTIFFS' FOURTH, FIFTH, AND SIXTH CLAIMS FOR RELIEF, AGAINST ABREU, GROSSMAN, AND DONOVAN, IN THEIR OFFICIAL CAPACITIES, FOR FAILURE TO TRAIN, SUPERVISE, AND DISCIPLINE EMPLOYEES, ARE DUPLICATIVE OF PLAINTIFFS' THIRD CLAIM FOR RELIEF AGAINST THE CITY, AND THEREFORE, SAID CLAIMS SHOULD BE DISMISSED WITH PREJUDICE.

In their Fourth, Fifth, and Sixth Claims for Relief, Plaintiffs assert that Abreu, Grossman, and Donovan failed to train, supervise, and discipline their subordinates. Their claims are based upon the following allegation regarding the chain of command: Landon supervises Abreu, Grossman, Donovan,

Boivin, and Hadden; Abreu supervises Grossman, Donovan, Boivin and Hadden; Grossman supervises Donovan, Boivin, and Hadden; and Donovan supervises Boivin and Hadden. Plaintiffs' Fourth, Fifth, and Sixth Claims for Relief are duplicative of Plaintiffs' Third Claim for Relief against the City and Landon because if there was any failure to train, supervise, or discipline anyone in that chain of command, said failure travels up the chain of command to the City for liability purposes. Accordingly, Plaintiffs' Fourth, Fifth, and Sixth Claims for Relief should be dismissed with prejudice.

III. PLAINTIFFS' FIRST, SECOND, AND THIRD CLAIMS FOR RELIEF AGAINST THE CITY SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

A plaintiff may establish a case of municipal liability under section 1983 by showing the municipality has an unconstitutional policy, custom or practice, or that it fails to train its employees. *See, e.g., Samedi v. Miami-Dade County*, 134 F. Supp. 2d 1320, 1348 (S.D. Fla. 2001) (citation omitted). "[W]hen execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[,] the government as an entity is responsible under § 1983." *Monnell v.Dep't of Soc. Servs.*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d

611 (1978). Only a decision-maker with final authority to create a policy can open the government to section 1983 municipal liability for government employees' actions taken pursuant to that policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986) (plurality opinion). "The final decision maker may be either someone who has legislative authority, or someone else who was delegated final decision making authority such that her edicts or acts may fairly be said to represent official policy." *McMillan v. Monroe County*, 520 U.S. 781, 784, 117 S. Ct. 1734, 138 L. Ed. 2d 1 (1997) (citation omitted).

If a plaintiff cannot demonstrate that an official policy supports her section 1983 claim, she may still sue the municipality under section 1983 if she will be "able to prove that the challenged action was [taken] pursuant to a . . . 'custom or usage.'" *Pembauer*, 475 U.S. at 481 n.10. "A custom sufficient to sustain municipal liability under section 1983 must be sufficiently wide spread and permanent and well settled, such that it is deemed authorized by the policymaking officials because they must have known about it but failed to stop it." *Samedi*, 134 F. Supp. 2d at 1350 (citations and internal quotation marks omitted).

Alternatively, a plaintiff may establish municipal liability under section 1983 by showing that the municipality failed to train or supervise its employees who committed the torts complained of in the substantive underlying section 1983 claim. *Id.* at 1351 (citation omitted). "When a failure to train is tantamount to a municipality's 'deliberate indifference' to the rights of a section 1983 plaintiff, then the failure can be properly considered to be the municipality's policy or custom." *Id*. (citations omitted).

In their Complaint, Plaintiffs have not adequately alleged that the City had a policy authorizing or condoning the conduct about which they complain, or that the City's final policy-maker created, authorized, or merely condoned said policy. Further, Plaintiffs have not adequately alleged that there was a "widespread" and "permanent and well settled" custom of engaging in the conduct about which they complain. Plaintiffs have, thus, failed to adequately allege municipal liability based upon custom or usage. Lastly, Plaintiffs assert in merely a conclusory fashion that the City and Landon failed to train, and/or supervise, and/or discipline, and/or condoned the unconstitutional actions of Landon's subordinates. Plaintiffs' bald assertions, with no supporting factual allegations, are simply an inadequate basis upon which to base a claim for municipal liability under section 1983. "Threadbare recitals of the elements

of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). Plaintiffs have not properly alleged municipal liability in their First, Second, and Third Claims for Relief against the City, and those claims should, therefore, be dismissed.

IV. PLAINTIFFS SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH, TWELFTH, THIRTEENTH, AND FIFTEENTH CLAIMS FOR RELIEF BROUGHT UNDER FLORIDA LAW AGAINST THE CITY AND DEFENDANTS LANDON, ABREU, GROSSMAN, DONOVAN, BOIVIN, AND HADDEN MUST BE DISMISSED BECAUSE PLAINTIFFS FAILED TO COMPLY WITH THE MANDATORY NOTICE REQUIREMENTS OF FLA. STAT. 768.28(6)(a).[2]

It is well-established that under Florida law, "[a]n action may not be instituted on a claim against the state or one of its agencies or subdivisions unless the claimant presents the claim in writing to the appropriate agency. . . . within 3 years after such claim accrues and . . . the appropriate agency denies the claim in writing." Fla. Stat. § 768.28(6)(a). Said mandatory statutory notice must also be provided to a municipal official sued in his official capacity or an official sued in his individual capacity for actions taken in the course and scope of his employment. *Diversified Numismatics, Inc. v. City of*

[2] The Fourteenth Claim for Relief is by Linda Thomas against Shelly Adorante only.

Orlando, 783 F. Supp. 1337 (M.D. Fla. 1990) (citation omitted). "[T]he requirements of notice to the agency and denial of the claim pursuant to paragraph (a) are conditions precedent to maintaining an action . . .." Fla. Stat. § 768.28(6)(b); *see also Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1022-23 (Fla. 1979). Florida law requires strict compliance with the notice requirement of section 768.28(6). *See, e.g.*, *Rumler v. Dep't of Corrections*, 546 F. Supp. 2d 1334, 1344 (M.D. Fla. 2008). A complaint that is brought without providing the requisite statutory notice must be dismissed. *Commercial Carrier Corp*., 371 So. 2d at 1023; *Diversified Numismatics, Inc.*, 783 F. Supp. at 1347. Further, "[w]here the time for [the required] notice has expired so that it is apparent that the plaintiff cannot fulfill the requirement, the trial court has no alternative but to dismiss the complaint with prejudice." *Levine v. Dade County Sch. Bd.*, 442 So. 2d 210, 213 (Fla. 1983).

Here, Plaintiffs' Compliant does not allege compliance with the statutory notice of claim provisions of section 768.28(6), or compliance with all conditions precedent. All of Plaintiffs' claims brought under Florida law, i.e., Plaintiffs' Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth Claims for Relief, against the City and all other named Defendants should be dismissed. This dismissal should be with

prejudice because the three-year time limit set forth in section 768.28(6)(a) has passed, and therefore, Plaintiffs cannot fulfill this requirement.

V. PLAINTIFFS SEVENTH, EIGHTH, NINTH, TENTH, ELEVENTH, TWELFTH, THIRTEENTH, AND FIFTEENTH CLAIMS FOR RELIEF BROUGHT UNDER FLORIDA LAW AGAINST DEFENDANTS LANDON, ABREU, GROSSMAN, DONOVAN, BOIVIN, AND HADDEN IN THEIR INDIVIDUAL CAPACITIES, SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

Assuming arguendo that the notice requirements of section 768.28(6)(a) had been met, Plaintiffs' claims under Florida law should still be dismissed for failure to state a cause of action. Under Fla. Stat. section 768.28,

> No officer, employee, or agent of the state or of any of its subdivisions shall be held *personally* liable in tort or named as a party defendant in any action for any injury or damage suffered as a result of any act, event, or omission of action in the scope of her or his employment or function, *unless such officer, employee, or agent acted in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property*.

Fla. Stat. § 768.28(9)(a) (emphasis added). Here, Plaintiffs allege that all Defendants acted within the course and scope of their employment. [Doc. 1, p. 4, ¶ 15]. Plaintiffs have not sufficiently alleged that any of the Defendants named in Claims Seven, Eight, Nine, Ten, Eleven, Twelve, Thirteen, and Fifteen acted "in bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety,

property." Accordingly, said Claims against Defendants in their individual capacities should be dismissed.

VI. PLAINTIFFS' FIRST, SECOND, THIRD, FOURTH, FIFTH, AND SIXTH CLAIMS FOR RELIEF AGAINST DEFENDANTS LANDON, ABREU, GROSSMAN, DONOVAN, BOIVIN, AND HADDEN IN THEIR INDIVIDUAL CAPACITIES SHOULD BE DISMISSED BECAUSE SAID DEFENDANTS ARE SHIELDED FROM SUIT BY QUALIFIED IMMUNITY.

It is well-established that "[q]ualified immunity protects government actors performing discretionary functions from being sued in their individual capacities." *Chesser v. Sparks*, 248 F.3d 1117, 1121-22 (11th Cir. 2001) (citations omitted). Government officials are shielded from liability to the extent that "their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known." *Id.* at 1122 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)). "The essence of qualified immunity analysis is the public official's objective reasonableness, regardless of his underlying intent or motivation." *See Harlow*, 457 U.S. at 819. "If reasonable public officials could differ on the lawfulness of the defendants' actions, the defendants are entitled to immunity." *Kingsland v. City of Miami*, 382 F.3d 1220, 1231 (11th Cir. 2004) (citation omitted).

In *Saucier*, the Supreme Court mandated a two-step analysis for resolving qualified immunity claims. *Saucier v. Katz*, 533 U.S. 194, 201, 121, S. Ct. 2151, 2156, 150 L. Ed. 2d 272 (2001). First, the court must decide whether the facts that a plaintiff has alleged "show the [defendant's conduct] violated a constitutional right." *Id*. Second, the court must decide "whether the right was clearly established." *Id.* "Clearly established" is law that is sufficiently established so as to provide public officials with "fair notice" that the conduct alleged is prohibited. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 2515, 153 L. Ed. 2d 666 (2002) ("For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." (internal citations and quotation omitted)). Such notice can be given in various ways. *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002).

First, notice can be given by broad statements of principle set forth in case law. *Randall v. Scott*, 610 F.3d 701, 715 (11th Cir. 2010). "[I]f some authoritative judicial decision decides a case by determining that 'X Conduct'

is unconstitutional without tying that determination to a particularized set of facts, the decision on 'X Conduct' can be read as having clearly established a constitutional principle." *Vinyard*, 311 F. 3d at 1351. Second, notice can be given in a case based on materially similar facts. *Randall*, 610 F.3d at 715. "[I]f the circumstances facing a government official are not fairly distinguishable [from fact-specific precedent that has established law] . . . the precedent can clearly establish the applicable law." *Vinyard*, 311 F. 3d at 1352. Lastly, notice of unlawfulness can exist if the conduct so obviously violates the Constitution that prior case law is unnecessary. *Randall*, 610 F.3d at 715-16 (citation omitted). Under this standard, the "peculiar facts of [the] case must be so far beyond the hazy border between excessive and acceptable that every objectively reasonable [official] had to know that [he or she] was violating the Constitution without caselaw on point." *Id*. at 716 (citation and internal quotation marks omitted). If a plaintiff's allegations fail to meet these standards, then his or complaint is properly dismissed. *See, e.g., Randall*, 610 F.3d 701.

Plaintiffs' allegations against the Defendants fail to adequately allege the violation of any constitutional rights. And if their actions in enforcing the City's Code provisions did violate any constitutional rights, then those rights

were not clearly established at the time of said violation. Accordingly, this Court should find that Defendants are protected by qualified immunity, and therefore, that Plaintiffs' First, Second, Third, Fourth, Fifth, and Sixth Claims for Relief against Defendants Landon, Abreu, Grossman, Donovan, Boivin, and Hadden in their individual capacities should be dismissed with prejudice.

VII. PLAINTIFFS' SEVENTH CLAIM FOR RELIEF, NEGLIGENCE, AGAINST ALL DEFENDANTS, SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

"[T]o state a claim for negligence under Florida law, a plaintiff must allege that the [Appellees] owed the plaintiff a duty of care, that [Appellees] breached that duty, and that the breach caused plaintiff to suffer damages." *Nettles v. City of Leesburg--Police Dept.*, 415 Fed. Appx. 116, 122 (11th Cir. 2010) (quoting *Lewis v. City of St. Petersburg,* 260 F.3d 1260, 1262 (11th Cir.2001)).

Plaintiffs failed to allege any duty that Defendants owed to them, and how that duty was allegedly breached. Plaintiffs' Seventh Claim for Relief should, therefore, be dismissed.

VIII. PLAINTIFFS' EIGHTH CLAIM FOR RELIEF, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST THE CITY SHOULD BE DISMISSED BECAUSE SAID CLAIM IS BARRED BY FLA. STAT. § 768.28(9)(A).

In order to state a claim for intentional infliction of emotional distress under Florida law, a plaintiff must allege: "(1) deliberate or reckless infliction of mental suffering; (2) by outrageous conduct; (3) which conduct must have caused the suffering; and (4) the suffering must have been severe." *Iqbal v. Dep't of Justice*, No. 3:11-cv-369-J-37JBT, 2013 WL 5421952, at *7 (M.D. Fla. Sept. 26, 2013) (quoting *Hart v. United States*, 894 F.2d 1539, 1548 (11th Cir. 1990)). Stated differently, "the test for determining the level of 'outrageousness' necessary to sustain a cause of action is whether the conduct complained of was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.'" *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 279 (Fla. 1985). Whether the alleged conduct meets this standard is not a question of fact but is a question of law for the Court to determine and may be addressed in a motion to dismiss. *Vance v. Southern Bell Tel. & Tel. Co.*, 983 F.2d 1573, 1575 n.7 (11th Cir. 1993); *Golden v. Complete Holdings, Inc.*, 818 F. Supp. 1495, 1499-1500 (M.D. Fla.

1993). Furthermore, a plaintiff's subjective response to the conduct complained of is not controlling because the court must view the conduct from an objective viewpoint. *Ponton v. Scarfone*, 468 So. 2d 1009, 1011 (Fla. 4th DCA 1985).

Under Fla. Stat. § 768.28(9)(a), cities are shielded by sovereign immunity from suit when certain tort causes of action are brought against them. Specifically, as stated above, section 768.28(9)(a) provides that "[t]he state or its subdivisions shall not be liable in tort for the acts or omissions of an officer, employee, or agent . . . committed with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property." Fla. Stat. § 768.28(9)(a). Since the "intent to cause or reckless disregard to the probability of causing emotional distress" requirement of the intentional infliction of emotional distress claim is equivalent to the "willful and wanton conduct" covered by Fla. Stat. § 768.28(9)(a) as within the scope of conduct subject to sovereign immunity, the claim of intentional infliction of emotional distress against the City is barred by sovereign immunity. *See Zabriskie v. City of Kissimmee*, No. 6:10-cv-70-Orl-19KRS, 2010 WL 3927658, at *4 (M.D. Fla. Oct. 4, 2010) (citations omitted). Plaintiffs' Eighth Claim for Relief against the City should, therefore, be dismissed.

IX. PLAINTIFFS' EIGHTH CLAIM FOR RELIEF, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, AGAINST ALL DEFENDANTS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

As stated above, "the test for determining the level of 'outrageousness' necessary to sustain a cause of action for intentional infliction of emotional distress is whether the conduct complained of was 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 279 (Fla. 1985). Plaintiffs' allegations fail to satisfy this burden, and therefore, their Eighth Claim for Relief should be dismissed in its entirety.

X. PLAINTIFFS' NINTH CLAIM FOR RELIEF, NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, AGAINST ALL DEFENDANTS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In *Willis v. Gami Golden Glades, LLC*, the Florida Supreme Court declared:

> In Florida, the prerequisites for recovery for negligent infliction of emotional distress differ depending on whether the plaintiff has or has not suffered a physical impact from an external force. If the plaintiff has suffered an impact, Florida courts permit recovery for emotional distress stemming from the incident during which the impact occurred, and not merely the impact itself. If, however, the plaintiff has not suffered an impact, the complained-of mental distress must be "manifested by

> physical injury," the plaintiff must be "involved" in the incident by seeing, hearing, or arriving on the scene as the traumatizing event occurs, and the plaintiff must suffer the complained-of mental distress and accompanying physical impairment "within a short time" of the incident.

967 So. 2d 846, 850 (Fla. 2007) (internal footnote omitted); *see also Florida Dep't of Corrections v. Abril*, 969 So. 2d 201, 206-07 (Fla. 2007) (discussing exceptions to impact rule). Thus,

> [t]here are two paths to recovery: (1) one experiences a physical impact during the incident and suffers emotional distress stemming from the incident; or (2) one does not experience a physical impact but is involved in the incident and experiences emotional distress so severe that it manifests as physical injury.

Seybold v. Clapis, No. 6:12-cv-1630-Orl-37GJK, 2013 WL 44950080, at *2 (M.D. Fla. Aug. 20, 2013).

Here, Plaintiffs did not allege a physical impact, and therefore, in order to recover on their claim for Negligent Infliction of Emotional Distress, they must have been "involved in the incident" and must have experienced "emotional distress so severe that it manifests as physical injury." *Id*. Intangible mental injuries are insufficient to meet the physical injury requirement. *R.J. and P.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 364 (Fla. 1995) (finding that complaints of hypertension, pain, suffering, mental anguish, and loss of capacity for the enjoyment of life were insufficient to

satisfy the physical impact rule); *see also Elliott v. Elliott*, 58 So. 3d 878 (Fla. 1st DCA 2011) (finding that headaches, sleep apnea, stress, insomnia, anxiety, loss of appetite, hair loss, and bowel trouble were insufficient to satisfy the physical impact rule for a claim for negligent infliction of emotional distress).

Plaintiffs' claim in this case that they suffered "shock, outrage, grief, loss of sleep, humiliation, anger, worry, and nausea" are legally insufficient to state a cause of action for negligent infliction of emotional distress. Under the facts Plaintiffs have alleged, they simply could not amend their Complaint to state a claim for relief for Negligent Infliction of Emotional Distress, and therefore, their Ninth Claim for Relief should be dismissed with prejudice.

XI. PLAINTIFFS' TENTH CLAIM FOR RELIEF, GOVERNMENT INTRUSION ON THE RIGHT TO PRIVACY, AGAINST ALL DEFENDANTS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Florida law does not recognize an actionable tort for "government intrusion on the right to privacy." This Claim for Relief should, therefore, be dismissed with prejudice.

XII. PLAINTIFFS' ELEVENTH CLAIM FOR RELIEF, INVASION OF PRIVACY, AGAINST ALL DEFENDANTS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Florida has recognized the tort of invasion of privacy. *See Cason v. Baskin*, 155 Fla. 198 (1945); *Allstate Ins. Co. v. Ginsburg*, 863 So. 2d 156 (Fla. 2003). Plaintiffs' allegations are, however, insufficient to state a claim for invasion of privacy. Plaintiffs' Eleventh Claim for Relief should, therefore, be dismissed.

XIII. PLAINTIFFS' TWELFTH CLAIM FOR RELIEF, NEGLIGENT TRAINING AND SUPERVISION, AGAINST LANDON, ABREU, GROSSMAN, AND DONNOVAN SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

To state a claim for negligent training against a municipality, a plaintiff must show that the municipality was negligent in the implementation or operation of the training program. *Mercado v. City of Orlando*, 407 F.2d 1152, 1162 (11th Cir. 2005). To state a claim for negligent supervision, a plaintiff must show that the municipality had knowledge that the subject municipal employee had "harmful propensities" or was otherwise unfit to serve the city in his intended position of employment. *Id.* at 1162. If the plaintiff fails to

satisfy these burdens, his claim for negligent training and his claim for negligent supervision should be dismissed. *See, e.g., id.*

Plaintiffs' allegations fail to show that the City, Landon, Abreu, Grossman, and Donovan were negligent in the implementation of any training program, or that they had knowledge that any of their subordinates had "harmful propensities" or were otherwise unfit to serve the City in their positions of employment. Plaintiffs' Twelfth Claim for Relief should, therefore, be dismissed.

XIV. PLAINTIFFS' THIRTEENTH CLAIM FOR RELIEF, MALICIOUS PROSECUTION, AGAINST ALL DEFENDANTS SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Under Florida law, in order to prevail in a malicious prosecution action, a plaintiff must establish that: (1) the commencement or continuance of an original criminal or civil judicial proceeding against the present plaintiff; (2) the defendant in the present proceeding was the legal cause of the original proceeding against the plaintiff (who was the defendant in the original proceeding); (3) the termination of the original proceeding constituted a bona fide termination of that proceeding in favor of the present plaintiff; (4) there was an absence of probable cause for the original proceeding; (5) there was

malice on the part of the present defendant; and (6) the plaintiff suffered damage as a result of the original proceeding. *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1355 (Fla. 1994); s*ee also Kingsland*, 382 F.3d at 1234; *Sharp v. City of Palatka*, 529 F. Supp. 1342, 1347-48 (M.D. Fla. 2007). "The failure of a plaintiff to establish any one of these six elements is fatal to a claim of malicious prosecution." *Alamo Rent-A-Car, Inc.*, 632 So. 2d at 1355. Plaintiffs' claim fails to sufficiently allege these elements, and therefore, should be dismissed.

XV. PLAINTIFFS' FIFTEENTH CLAIM FOR RELIEF, TRESPASS TO LAND, AGAINST BOIVIN AND HADDEN, SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In Florida, to establish a claim for trespass, a plaintiff must show: (l) an intentional entry upon, injury to or use of their land by one having no right or authority; (2) that they were the owner or in possession of the land at the time of the trespass; (3) a lack of consent for the interference with the property; and (4) resulting in actual harm. *Borneisen v. Capital One Financial Corp.,* No. 8:09–CV–02539–T–17TGW, 2011 WL 2730972, at *6 (M.D. Fla. Jul. 13, 2011) (citation omitted); *see also Department of Environmental Protection v. Hardy*, 907 So. 2d 655 (Fla. 5th DCA 2005) (an injury to or use of the land of another

by one having no right or authority). Plaintiffs' allegations fail to sufficiently plead a cause of action for trespass because they did not, and cannot, allege actual harm. Consequently, Plaintiffs' Fifteenth Claim for Relief should be dismissed with prejudice.

XVI. PLAINTIFFS' CLAIMS FOR PUNITIVE DAMAGES, IN THEIR THIRD, FOURTH, FIFTH, AND SIXTH CLAIMS FOR RELIEF, AGAINST THE CITY AND AGAINST CITY MANAGER LANDON, ABREU, GROSSMAN, AND DONOVAN SHOULD BE STRICKEN.

In their Third, Fourth, Fifth, and Sixth Claims for Relief, Plaintiffs seek punitive damages from the City (Third Claim for Relief), City Manager Landon in his official and individual capacities (Third Claim for Relief), Abreu in his official and individual capacities (Fourth Claim for Relief), Grossman in her official and individual capacities (Fifth Claim for Relief), and Donovan in his official and individual capacities (Sixth Claim for Relief). Plaintiffs' claims for punitive damages against the City and Landon, Abreu, Grossman, and Donovan in their official capacities are not authorized by law, and therefore, should be stricken.

It is well-established that municipalities are immune from punitive damages under both federal and state law. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271 (1981) ("[W]e hold that a municipality is

immune from punitive damages under 42 U.S.C. § 1983."); *Murphy v. Flagler Beach,* 846 F.2d 1306, 1309 (11th Cir. 1988) (holding that punitive damages are not recoverable against a municipality in a section 1983 action); *Berek v. Metropolitan Dade County*, 396 So. 2d 756, 759 (Fla. 3d DCA 1981) (holding that Florida has not waived sovereign immunity as to punitive damages against municipalities and therefore, punitive damages were not recoverable under section 768.28, Florida Statutes); *Zabrieskie v. City of Kissimmee*, No. 6:10-cv-70-Orl-19KRS, 2010 WL 3927658, at *5 (M.D. Fla. Oct. 4, 2010) (dismissing claims for punitive damages against the city because municipal defendants are immune from punitive damages under both section 1983 and Florida law). The City of Palm Coast is a municipality incorporated under the laws of the State of Florida. Accordingly, under both section 1983 and Florida law, Plaintiffs' claims for punitive damages against the City should be stricken.

Additionally, as stated above, a suit against a defendant governmental officer in his official capacity is the same as a suit against the entity of which the officer is an agent. *McMillian*, 520 U.S. at 785 n.2 (citations omitted). Since municipalities are immune from punitive damages under 42 U.S.C. § 1983 and under Florida law, municipal employees sued in their official capacities are likewise immune from punitive damages. *City of Newport*, 453

U.S. at 271; *Murphy,* 846 F.2d at 1309; *Berek*, 396 So. 2d at 759; *see also Young Apartments, Inc. v. Town of Jupiter, FL*, 529 F.3d 1027, 1047 (11th Cir. 2008) ("In a § 1983 action, punitive damages are only available from government officials when they are sued in their individual capacities."). Accordingly, this Court should also strike the claims for punitive damages against Landon, Abreu, Grossman, Chaudoin, and Donovan in their official capacities.

Plaintiffs' claims for punitive damages against Landon, Abreu, Grossman, Chaudoin, and Donovan in their individual capacities should likewise be stricken because Plaintiffs' allegations in their Complaint are not sufficient to support a claim for punitive damages.[3]

Based upon the foregoing, Defendants request that this Court strike Plaintiffs' claims for punitive damages in their entirety.

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[3] Based on the language in Paragraph 2 under Plaintiffs' "Relief Requested", contained on page 38 of the Complaint, a reader could conclude that Plaintiffs also seek punitive damages in each of their state tort claims (counts seven through fifteen). If such is the case, such claim for punitive damages should also be stricken for failure to comply with Fla. Stat. § 768.72.

XVII. PLAINTIFFS' ATTORNEYS FEE DEMAND SHOULD BE STRICKEN.

In Paragraph four of the "Relief Requested" section contained on page 38 of the Complaint, Plaintiff seeks attorneys fees. Because Plaintiffs are bringing this lawsuit "Pro Se" they are not entitled to attorneys fees and the demand should be stricken from the Complaint.

WHEREFORE, based upon the foregoing, Defendants City of Palm Coast, Jim Landon, Nestor Abreu, Barbara Grossman, Michael Donovan, Eva Boivin, and Michael Hadden respectfully request that this Honorable Court dismiss each of the Claims for Relief in Defendants' Complaint, and that this Court also strike Plaintiffs' claims for punitive damages.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of March, 2014, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, and that I served by email and regular U.S. Mail copies of the foregoing on Linda S. Thomas, 72 Smith Trail, Palm Coast, FL 32164, thomases@earthlink.net, and James R. Thomas, 771 Carolyn Ave., Little Torch Key, FL 33042, thomases@earthlink.net.

/s/ Jeffrey S. Weiss
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