

STATEMENT OF THE FACTS

On the evening of July 20, 2000, Howard Greene ("Greene") was watching television inside his house located in Columbia, South Carolina (the "City").¹ At about 6 p.m. that evening, Greene saw a City police car pull over outside the house. City police officer Michael Thomas ("Officer Thomas") got out of the car and shouted a request to know who called the police. Officer Thomas then approached three persons in the vicinity and loudly asked who was smoking marijuana. The three persons told Officer Thomas that they were not smoking any marijuana.

Hearing the commotion outside, Greene came and stood in the doorway of his house to see what was happening. Upon seeing Greene, Officer Thomas walked straight to Greene and asked him who was smoking marijuana. Like the three bystanders, Greene affirmatively responded that he did not know. Insisting that he smelled marijuana on Greene, Officer Thomas ordered Greene to turn around and proceeded to handcuff him. Once the handcuffs were in place, Officer Thomas performed a search of Greene's person. The only thing found by the search was \$500. When questioned about the money, Greene responded that he had the cash because he planned on taking his three children out to Chuckie Cheese and to buy them shoes.

Officer Thomas then ordered a cadet officer, also present at the scene, to take off Greene's shoes and to search them. The cadet followed Officer Thomas's directive. At that point, Officer Thomas put Greene inside the police cruiser. Officer Thomas then requested

¹Richard DeSoto is the Chief of Police for the City of Columbia (hereinafter referred to as "Chief DeSoto").

Greene to escort him into Greene's house, which Greene refused to do. When Greene went back up to his house to close the door, Officer Thomas was already inside. After searching Greene's house, Officer Thomas returned to the police car and drove away with Greene still inside.

While driving, Officer Thomas asked the cadet what they should do with Greene. The cadet did not respond, but Officer Thomas suggested that they take Greene into the woods and beat him. Officer Thomas then pulled over on Owen Field Airport Road and proceeded to take the handcuffs off Greene. Then Officer Thomas threatened that if Greene ever told anyone about this, he would hunt him down and kill him. Still without his shoes, Greene requested his shoes back before leaving. Officer Thomas returned the shoes and then told Greene to "get like a dog." As Greene began to walk away, Officer Thomas came up behind him and said "I better see you at Chuckie Cheese."

That very night, Greene filed a complaint with the City Police Department regarding the above-described events. (*See* Statement from Howard Greene, dated July 20, 2000.) One month later, James P. Anderson ("Anderson"), Greene's attorney, requested the City Police Department ("Department") to produce any documents and/or findings in or by the Department regarding Greene's complaint pursuant to the Freedom of Information Act ("FOIA"). (*See* Letter from Anderson to Chief DeSoto, dated Aug. 19, 2000.) In response, Edgar Spivey ("Spivey"), Assistant City Attorney, informed Anderson that Greene had received a copy of his complaint, that he would be informed of the results of the Department's investigation when the investigation was completed, and that no other

information was required to be released under FOIA. (*See* Letter from Spivey to Anderson, dated Aug. 24, 2000.) Then, in a letter dated Sept. 2, 2000, the Internal Affairs Division of the Department ("Internal Affairs") informed Greene that it had conducted a "thorough investigation" and "sustained" Greene's complaint. (*See* Letter from Internal Affairs to Greene, dated Sept. 2, 2000.) Furthermore, the Department asserted that it took "appropriate actions" in light of their findings. (*Id.*) Other than that, the Department refused to provide Greene any further information on the subject. (*See id.*; Letter from Spivey to Anderson, dated Aug. 24, 2000.)

QUESTION PRESENTED

Based on the above facts, what are Greene's possible causes of action, under either state or federal law, against the City of Columbia and/or Police Chief Richard DeSoto and/or Officer Thomas?

LAW AND ANALYSIS²

I. South Carolina's Tort Claims Act (SCTCA), S.C. Code Ann. §§ 15-78-10 et seq. (Cum. Supp. 2001)

Initially, please note that the SCTCA does not create a substantive cause of action against the City but, rather, is merely a limited waiver of governmental immunity. *Moore v. Florence County Sch. Dist.*, 314 S.C. 335, 444 S.E.2d 498 (1994). As such, the SCTCA provides the exclusive remedy for any tort committed by an employee of a governmental entity while acting within the scope of his official duties. *See* S.C. Code Ann. §§ 15-78-70(a), 15-78-200. Significantly, the maximum amount of money recoverable under the SCTCA is \$300,000 per incident, regardless of the number of defendants involved. S.C. Code Ann. § 15-78-120(a)(1).

As a general matter, any governmental entity is liable for its torts in the same manner and to the same extent as a private person would be, subject to certain exceptions contained in the SCTCA. S.C. Code Ann. § 15-78-40. The exemptions most relevant to the instant case include the following: "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion or judgment of the governmental entity or employee," "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm,

²The doctrine of election of remedies does not necessarily bar various related causes of action, such as those discussed herein, if such claims are based on different facts, happened at different times, and/or have different prima facie cases. *See, e.g., Jones v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 456 S.E.2d 429, 432 (Ct. App. 1995) ("[A]ction for false imprisonment is not based upon the same elements as action for assault and battery"; moreover, subject actions occurred "at different times and were the result of separate and distinct actions" by defendant).

or a crime involving moral turpitude," and "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any . . . prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." S.C. Code Ann. § 15-78-60(5), (17), (25). However, the burden of establishing a limitation of liability or an exception to a waiver of immunity under the SCTCA is on the government entity asserting it as an affirmative defense. *Strange v. South Carolina Dep't of Hwys. & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994).

"Gross negligence" is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. *Worsley Co. v. Town of Mount Pleasant*, 339 S.C. 51, 528 S.E.2d 657 (2000). Gross negligence connotes a failure to exercise even a slight degree of care. *Rice v. School Dist. of Fairfield*, 317 S.C. 87, 452 S.E.2d 352 (Ct. App. 1994). Thus, to establish a cause of action for gross negligence, three essential elements must be proven: (1) duty of care owed by defendant to plaintiff; (2) breach of that duty in failing to exercise even a slight degree of care; and (3) an injury to plaintiff proximately resulting from that breach of duty. *Id.*; *cf. Loadholt v. South Carolina State Budget & Control Bd., Div. of Gen'l Servs., Ins. Reserve Fund*, 339 S.C. 165, 528 S.E.2d 670 (Ct. App. 2000) (sheriff's torts, e.g., IIED, assault, battery, false imprisonment, although committed against his subordinate employees, were not covered by government's general tort liability insurance policy because sheriff's tortious conduct was done while "acting within the scope of his official duties," within meaning of insurance policy); *see Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921, 922 (Ct. App. 1994)

(plaintiff conceded that IIED claim against school barred by SCTCA); *Roberts v. City of Forest Acres*, 902 F. Supp. 662, 670-71 (D. S.C. 1995) (SCTCA applied to all of plaintiff's state law claims (including false imprisonment, assault and battery, and intentional infliction of emotional distress) against city and police officer).

Unfortunately, however, the Defendants herein likely have a valid statute of limitations defense under the SCTCA. This is crucial to Greene's case because, as indicated above, the SCTCA is the exclusive remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. *See* S.C. Code Ann. §§ 15-78-70(a), 15-78-200. A claim brought under the SCTCA must be brought within two years of the alleged violations, although a claimant has three years if they filed a verified (sworn) complaint within one year of the loss or injury. *See* S.C. Code Ann. §§ 15-78-80(d), 15-78-110; *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000). Because the alleged violations occurred on July 20, 2000, Greene's claims are time-barred unless instituted by January 8, 2002, unless he filed a verified complaint, in which case he would have until January 8, 2003 to file suit. Although Greene filed a written complaint with the Police Department within one year of the alleged loss or injury, it was not "verified." Unfortunately, an unsworn complaint is insufficient to trigger the three-year statute of limitations. *See Pollard v. County of Florence*, 314 S.C. 397, 444 S.E.2d 534 (Ct. App. 1994) (verified claims procedure must be strictly complied with in order to trigger extended statute of limitations period; thus, document that is not verified does not qualify as a claim under SCTCA).

A. False Arrest and Imprisonment

"The essence of the tort of false imprisonment consists of depriving a person of his liberty without lawful justification." *Jones v. City of Columbia*, 301 S.C. 62, 389 S.E.2d 662, 663 (1992). Clearly, then, "[a]n action for false imprisonment cannot be maintained where one is arrested by lawful authority." 389 S.E.2d at 663. "In order to prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Gist v. Berkeley County Sheriff's Dep't*, 336 S.C. 611, 521 S.E.2d 163, 167 (Ct. App. 1999). "The fundamental issue in determining the lawfulness of an arrest is whether there was probable cause to make the arrest." 521 S.E.2d at 165 (citing *Wortman v. City of Spartanburg*, 310 S.C. 1, 425 S.E.2d 18 (1992) (internal quotation omitted); accord *Gist*, 521 S.E.2d at 663. "Probable cause is defined as a good faith belief that a person is guilty of a crime when this belief rests upon such grounds as would induce an ordinarily prudent and cautious person, under the circumstances, to believe likewise." *Gist*, 521 S.E.2d at 165 (quoting *Wortman*); accord *Jones*, 389 S.E.2d at 663.³

In *Thompson v. Smith*, 289 S.C. 334, 345 S.E.2d 500 (Ct. App. 1986), the Court decided a case analogous to the instant one. In that case, the plaintiff was arrested and detained at about 2:00 a.m. for allegedly driving on a suspended license. 345 S.E.2d at 501. At about 4:30 a.m., the police learned that the plaintiff's license was in fact valid but,

³"The issue of probable cause is a question of fact and ordinarily one for the jury." *Gist*, 521 S.E.2d at 165; *Jones*, 389 S.E.2d at 663.

nevertheless, kept the plaintiff in jail for another hour. *Id.* Although the court reversed the jury verdict on other grounds, the Court "hasten[ed] to add" the following:

In addition to probable cause to make the arrest it is a question of fact . . . as to whether the officers acted reasonably in detaining [the plaintiff] approximately one hour after becoming informed that [the plaintiff]'s license was in force. If the jury should determine that the police did not act reasonably prompt in releasing [the plaintiff] after becoming aware of his innocence, then from the time that the police became aware of [the plaintiff]'s innocence, no question of probable cause exists and [the plaintiff] would be entitled to damages for false imprisonment for this period of time.

Id. at 502. By the same token, even if Officer Thomas did have probable cause to search Greene's house for marijuana, upon finding absolutely no evidence of marijuana therein or on Greene's person, it is indisputable that Officer Thomas had no probable cause to further detain Greene. Consequently, at the very least, Greene is entitled to damages for false imprisonment from the time Officer Thomas left Greene's house and when Officer Thomas allowed Greene to leave his presence. *See also Gathers v. Harris Teeter Supermarket, Inc.*, 282 S.C. 220, 317 S.E.2d 748, 755 (Ct. App. 1984) ("The tort of false imprisonment may be committed by words alone, or by acts alone or by both, and by merely operating on the will of the individual, or by personal violence, or by both. . . . It is not necessary that there should be any injury done to the individual's person, or to his character, or reputation.") (citations omitted).

Significantly, the SCTCA does not "impose a standard of gross negligence on the torts of false arrest and imprisonment." 317 S.E.2d at 755 (citing S.C. Code Ann. § 15-78-60).

B. Assault and Battery

"[A]n assault occurs when a person has been placed in reasonable fear of bodily harm by the conduct of the defendant, and a battery is the actual infliction of any unlawful, unauthorized violence on the person of another, irrespective of degree." *Jones v. Winn-Dixie Greenville, Inc.*, 318 S.C. 171, 456 S.E.2d 429, 432 (Ct. App. 1995). Indisputably, Officer Thomas's actions in this case clearly constituted an assault and battery on Greene. *See also Roberts*, 902 F. Supp. at 671 n.2 (if a police officer uses more force than reasonably necessary under the circumstances, the officer may be liable for assault and/or battery) (citation omitted); *cf. State v. Coleman*, 342 S.C. 172, 536 S.E.2d 387, 389 (Ct. App. 2000) (in criminal law, assault and battery of a high and aggravated nature (ABHAN) is "an unlawful act of violent injury accompanied by circumstances of aggravation," such as "the use of a deadly weapon"). Therefore, barring immunity under the SCTCA, Greene likely has a valid claim for assault and battery.

C. Intentional Infliction of Emotional Distress

The essential elements of a prima facie case of intentional infliction of emotional distress (IIED)⁴ are as follows:

⁴*Negligent* infliction of emotional distress [as opposed to IIED] is limited to bystander recovery." *Doe v. North Greenville Hosp.*, 318 S.C. 459, 458 S.E.2d 439, 442 (Ct. App. 1995) (emphasis added) (citing *Kinard v. Augusta Sash & Door Co.*, 286 S.C. 579, 336 S.E.2d 465 (1985) (setting forth elements required to establish negligent infliction of emotional distress)). Moreover, "there is no separate tort for outrage"; rather, IIED and outrage "are one and the same." *Fleming v. Rose*, 338 S.C. 524, 526 S.E.2d 732, 739 (Ct. App. 2000).

(1) the defendant intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; (2) the defendant's conduct was so extreme and outrageous that it exceeded all possible bounds of decency and must be regarded as atrocious and utterly intolerable in a civilized community; (3) the actions of the defendant caused the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.

Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732, 739 (Ct. App. 2000) (citing *Ford v. Hutson*, 276 S.C. 157, 276 S.E.2d 776, 778 (1981) (adopting Restatement (Second) of Torts § 46)).

Clearly, based on Officer Thomas's conduct in this case, Greene can easily satisfy three of the four elements of an IIED claim. The one potentially difficult element to prove, however, is the third: outrageousness. *But see also Ford*, 276 S.E.2d at 780 (although "physical illness or some other non-mental damage is not essential to [an IIED] recovery . . . where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious"). It is the duty of the court to determine whether or not the alleged conduct "may reasonably be regarded as so extreme and outrageous as to permit recovery" before submitting the issue to the jury. *See Fleming*, 526 S.E.2d at 739 (citations omitted). As evidenced by the relevant case law, outrageousness is undoubtedly the most difficult element to prove in an IIED claim. *But see Ford*, 276 S.E.2d at 780 ("Conduct growing out of a business relationship may be so outrageous and shocking as to be actionable" as an IIED claim). As noted in *Fleming*, the outrageousness element of an IIED claim generally requires "hostile or abusive encounters" or "coercive or oppressive conduct." 526 S.E.2d at 739 (citations omitted). Therefore, it is not likely that Greene's IIED claim would succeed on the facts of this case. *Compare McSwain v. Shei*, 304

S.C. 25, 402 S.E.2d 890 (1991) (sufficient IIED outrageousness where employer forced employee to perform exercises in public which exposed her incontinence problem to others), *and Ford*, 276 S.E.2d 776 (sufficient IIED outrageousness where home buyer repeatedly subjected plaintiff real estate agent to public browbeatings, obscenities, and threats over a two-year period, and entered plaintiff's home without permission verbally attacking her in front of guests), *with Holtzscheiter v. Thomson Newspapers, Inc.*, 306 S.C. 297, 411 S.E.2d 664 (1991) (libel, standing alone, insufficient to establish IIED outrageousness); *Strickland v. Madden*, 323 S.C. 63, 448 S.E.2d 581, 584-85 (Ct. App. 1994) (doctor mistakenly telling plaintiff, in good faith, that her father died "was highly inappropriate, but [did] not rise to the level of outrage" for IIED purposes); *Shipman v. Glenn*, 314 S.C. 327, 443 S.E.2d 921, 922 (Ct. App. 1994) (supervisor's repeated ridiculing of speech impediment of employee with cerebral palsy and threatening her with loss of her job was not sufficiently outrageous to support IIED claim); *Corder v. Champion Road Mach. Int'l Corp.*, 283 S.C. 520, 324 S.E.2d 79 (Ct. App. 1984) (retaliatory discharge for filing workers' compensation claim, without more, insufficient to establish IIED outrageousness)⁵; *see also Roberts*, 902 F. Supp. at 672 (plaintiff was stopped and cited for speeding; plaintiff was speeding because he was late to a business meeting because he was at the hospital the night before visiting his sick father all night; when officer did not care about plaintiff's explanation, he "became upset" and "words

⁵Additionally, a mere FOIA violation, standing alone, would likely be insufficiently outrageous to support an IIED claim. *Cf. Shupe v. Settle*, 315 S.C. 510, 445 S.E.2d 651, 655-56 (Ct. App. 1994) (president of homeowners' association's refusal to grant plaintiff access to books and records of association, in contravention of association bylaws, were not sufficiently extreme and outrageous to support IIED claim).

were exchanged"; consequently, the officer charged the plaintiff with "disorderly person" in addition to speeding; both charges were later dropped; *as a matter of law*, the officer's conduct was not sufficiently outrageous to support IIED).

D. Negligence or Recklessness

Negligence is "the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation; or doing what such a person, under the existing circumstances, would not have done." *Jones v. American Fid. & Cas. Co.*, 210 S.C. 470, 43 S.E.2d 355, 359 (1947).

Recklessness is defined as "conduct where the actor is in fact consciously aware that he is acting negligently." *Roberts*, 902 F. Supp. at 673 (quoting F. Patrick Hubbard & Robert L. Felix, *South Carolina Law of Torts* 42 (1990)).

II. South Carolina's Freedom Of Information Act (FOIA), S.C. Code Ann. §§ 30-4-10 et seq. (1991 & Cum. Supp. 2001)

Subject to specified exceptions therein, FOIA provides that "[a]ny person has a right to inspect or copy any public record of a public body." S.C. Code Ann. § 30-4-30(a). Moreover, FOIA clearly provides a cause of action for a citizen to petition the circuit court and seek equitable relief to enforce its provisions within one year of the alleged violation. *See* S.C. Code Ann. § 30-4-100(a); *see, e.g., Quality Towing, Inc. v. City of Myrtle Beach*, 345 S.C. 156, 547 S.E.2d 862, 864-65 (2001); *City of Columbia v. American Civil Liberties Union of South Carolina, Inc.*, 323 S.C. 384, 475 S.E.2d 747 (1996) [hereinafter *ACLU*]

(discussed *infra*). Additionally, a prevailing or even a partially prevailing FOIA plaintiff may be awarded reasonable attorney's fees and the costs of litigation. *See* S.C. Code Ann. § 30-4-100(b).

The only exemptions which may arguably be relevant in the instant case are "[i]nformation of a personal nature where the public disclosure thereof would constitute unreasonable invasion of personal privacy," "[m]atters specifically exempted from disclosure by statute or law." S.C. Code Ann. § 30-4-40(a)(2), (4). Even if a record may contain some exempt material, however, that does not give the governmental entity the right to refuse disclosure entirely. "Rather, the exempt and nonexempt materials shall be separated and the nonexempt material disclosed." *Beattie v. Aiken County Dep't of Soc. Servs.*, 319 S.C. 449, 462 S.E.2d 276, 279 (1995). Furthermore, when applying FOIA to a specific case, the court must be mindful that "FOIA is remedial in nature and should be liberally construed to carry out the purpose mandated by the legislature." *Quality Towing, Inc.*, 547 S.E.2d at 864-65.

The legislature's purpose in enacting FOIA is codified in S.C. Code Ann. § 30-4-15:

The General Assembly finds that it is vital in a democratic society that public business be performed in an open and public manner so that citizens shall be advised of the performance of public officials and the decisions that are reached in public activity and in the formulation of public policy. Toward this end, provisions of [FOIA] must be construed so as to make it possible for citizens . . . to learn and report fully the activities of their public officials at a minimum cost or delay to the persons seeking access to public documents or meetings.

In *ACLU*, the Supreme Court heard an FOIA case involving a request for a copy of the police department's internal investigation report concerning one of its officers. The Court explicitly held that internal investigation reports of law enforcement agencies are not *per se*

exempt just because they contain some personal information. 475 S.E.2d at 749. Rather, like any other FOIA exemption determination, a request for an internal investigation report must be considered on a case-by-case basis. *Id.* Furthermore, an internal investigation report is not exempt as a "discussion" under § 30-4-70(a)(1). *Id.* Section 30-4-70(a)(1) allows meetings to be closed to the public when such meetings discuss, among other things, the employment, demotion, or discipline of an employee. *Id.*

The plain language of § 30-4-70(a)(1) does not exempt from disclosure a "public record" as that term is defined by § 30-4-20. Section 30-4-70(a)(1) does no more than to allow public bodies to conduct certain "discussions" closed to the public. Thus, as the report is a public record as defined by § 30-4-20, the question of its exemption must be resolved by reference to § 30-4-40 ("Matters exempt from disclosure") [and not § 30-4-70(a)(1)].

Id. Therefore, Greene has at least a legitimate, if not winning, FOIA argument in this case.

III. 42 U.S.C. § 1983—Fourth Amendment

A. Statute of Limitations

Although § 1983 does not itself contain a statute of limitations provision, it has been determined that the relevant state law statute of limitation for personal injury applies to all § 1983 actions. *See Wilson v. Garcia*, 471 U.S. 261 (1985). Under South Carolina law, the general statute of limitations for personal injury actions is three years. *See S.C. Code Ann. § 15-3-530(5)* (Cum. Supp. 2001). Therefore, Greene's civil rights action, pursuant to § 1983, is not time-barred.

B. Section 1983 Principles—Generally

Section 1983 does not provide any substantive rights but, rather, merely provides a method to vindicate federal rights elsewhere conferred. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Although generally brought in federal court, there is nothing preventing a plaintiff from bringing a § 1983 suit in state court. *See Howlett v. Rose*, 496 U.S. 356 (1990) (state courts cannot refuse to take jurisdiction over § 1983 and other federal claims); *see, e.g., Washington v. Whitaker*, 317 S.C. 108, 451 S.E.2d 894 (1994). In order to present a claim under § 1983, a plaintiff must establish that (1) the defendant acted under color of state law, (2) the defendant intentionally deprived plaintiff of a right protected under the Constitution or laws of the United States, and (3) the defendant's actions were the proximate cause of the deprivation. *Parks v. Wilson*, 872 F. Supp. 1467, 1469 (D.S.C. 1995). The proximate cause inquiry does not require any special explanation as it is the same as that in all other civil cases. Furthermore, the defendants herein clearly acted under color of state law in that the defendants are a police officer, a police chief, and a municipality. Thus, the primary question in this case is whether Officer Thomas violated Greene's constitutional rights.

C. Fourth Amendment Principles⁶

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S.

⁶An allegation that one was charged and/or prosecuted without probable cause must be analyzed under the Fourth Amendment; a Fourteenth Amendment substantive due process argument cannot be raised in that context. *See Albright*, 510 U.S. at 271-74.

Const. amend. IV.⁷ By its express terms, the Fourth Amendment provides that citizens should be free from "unreasonable searches and seizures." *Wildauer v. Frederick County*, 993 F.2d 369, 372 (4th Cir. 1993); *Washington*, 451 S.E.2d at 899. Thus, the analysis of a Fourth Amendment claim is a two-step process: (1) was there a "search" and/or "seizure," and, if so, (2) was it "unreasonable?"

"A Fourth Amendment seizure occurs whenever there is a governmental termination of freedom of movement through means intentionally applied." *Vathekan v. Prince George's County*, 154 F.3d 173, 179 (4th Cir. 1998) (quoting *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis omitted)). "A seizure occurs even when an unintended person or thing is the object of the detention or taking." *Vathekan*, 154 F.3d at 179 (quoting *Brower*, 489 U.S. at 596); *see also Rucker v. Harford County*, 946 F.2d 278, 281 (4th Cir. 1991) ("a fourth amendment seizure may occur notwithstanding that the person restrained was mistakenly thought to be another, because he nevertheless is the intended object of the specific act of physical restraint"), *cert. denied*, 502 U.S. 1097 (1992). Thus, it is of no consequence that Officer Thomas mistakenly thought that Greene was the person smoking marijuana, for Greene was clearly the intended object of Officer Thomas's seizure. *See, e.g., Vathekan*, 154 F.3d at 178 (seizure was purposeful even though officer would not have seized plaintiff had he known she was innocent). Indisputedly, then, Greene was seized by Officer Thomas within the meaning of the Fourth Amendment.

⁷"The Fourth Amendment [is] applicable to the States through the Fourteenth Amendment." *Henderson v. Simms*, 223 F.3d 267, 271 (4th Cir. 2000) (citing *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961)), *cert. denied*, 531 U.S. 1075 (2001).

"A search . . . occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *Tarantino v. Baker*, 825 F.2d 772, 775 (4th Cir. 1987) (quoting *United States v. Jacobsen*, 466 U.S. 109, 113 (1984)). Irrefutably, one's person and one's home clearly entail a legitimate expectation of privacy. *See Tarantino*, 825 F.2d at 778 ("The expectation of privacy in close proximity to a residence is presumptively heightened because of the 'intimate activity associated with the sanctity of a man's home and the privacies of life.'") (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)) (internal quotations omitted). Thus, it cannot be disputed that Officer Thomas conducted a search of Greene's person as well as Greene's home.

Having determined that Greene's house was searched and that Greene's person was both searched and seized, the pertinent question becomes whether or not the challenged actions were "reasonable" under the circumstances. "In determining whether a search and seizure is reasonable, [the court] must balance the government's need to search with the invasion endured by the plaintiff." *Wildauer*, 993 F.2d at 372 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)). Thus, a law enforcement officer's arbitrary infliction of injury is constitutionally cognizable and remediable pursuant to § 1983. *See, e.g., Jenkins v. Averett*, 424 F.2d 1228, 1231-32 (4th Cir. 1970) (police officer's gross or culpable negligence in accidentally shooting plaintiff was constitutional violation within purview of § 1983). Moreover, "'reasonableness' relates both to the expectation allegedly had by the owner or occupant of an area searched and to that person's objective manifestation to potential

searchers that he has such an expectation." *Tarantino*, 825 F.2d at 776 (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harland, J., concurring)).

As indicated above, Greene's claims are based upon his Fourth Amendment right not to have his person and home searched absent probable cause or consent.⁸ "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Kyllo v. United States*, 121 S. Ct. 2038, 2041 (2001) (citation omitted; internal quotations omitted). Thus, given the context of the search and seizure in this case, a heightened standard applies. "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Id.* at 2042. In other words, "the search of a home without a warrant is *per se* unreasonable, unless the police can show . . . the presence of 'exigent circumstances.'" *United States v. Gwinn*, 219 F.3d 326, 332 (4th Cir.) (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971)), *cert. denied*, 531 U.S. 1025 (2000). Consequently, when law enforcement conducts a search or seizure in or around a citizen's home, the officers must have "probable cause," rather than a mere "reasonable suspicion," to legally do so. *Rogers v. Pendleton*, 249 F.3d 279, 287 (4th Cir. 2001). "Probable cause . . . is 'defined in terms of facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.'" *Henderson v. Simms*, 223 F.3d 267, 271 (4th Cir. 2000) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975)), *cert. denied*, 531 U.S. 1075

⁸Entry into one's home for purposes of a criminal search may require disclosure that the search can be refused. *See Wildauer*, 993 F.2d at 372 (citing *Florida v. Bostick*, 501 U.S. 429, 436 (1991) ("[T]he appropriate inquiry is whether a reasonable person would feel free to decline the officer's requests or otherwise terminate the encounter.")).

(2001); *see also Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000) ("Probable cause exists when there are reasonably trustworthy facts which, given the totality of the circumstances, are sufficient to lead a prudent person to believe that the items sought constitute fruits, instrumentalities, or evidence of crime and will be present at the time and place of the search.").

In the instant case, Officer Thomas will likely argue that he had probable cause to search Greene's person and home because he allegedly smelled marijuana on him while he was standing in the doorway to his home. However, Greene vehemently denied that he had any marijuana on his person or inside his home. *See Doe*, 225 F.3d at 451 (probable cause, and, thus, reasonableness, requires something "more than a guess" that is "based . . . on specific and reliable facts"). In fact, Officer Thomas's searches confirmed Greene's assertions in that they failed to yield any evidence of marijuana or marijuana use. *Id.* Therefore, Officer Thomas clearly did not have probable cause to search Greene's person and/or house and, thus, conducted the searches "unreasonabl[y]" in violation of the Fourth Amendment. *See Henderson*, 223 F.3d at 271 ("Whether probable cause exists in a particular situation, always turns on two factors in combination: the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct. . . . Probable cause therefore could be lacking in a given case . . . either because of an . . . officer's insufficient factual knowledge, or legal misunderstanding, or both.") (citations omitted; internal quotations omitted).

Even assuming, *arguendo*, that Officer Thomas did have probable cause to search Greene's person and/or house, Officer Thomas certainly did not have any probable cause to seize and detain Greene after conducting a fruitless search of both his person and his home. Neither of those searches yielded anything of consequence and, certainly, nothing to indicate criminal activity. *See Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990) ("[A] police officer may not detain an individual simply on the basis of suspicion in the air. No matter how peculiar, abrasive, unruly or distasteful a person's conduct may be"); *see also United States v. Hyppolite*, 65 F.3d 1151, 1158 (4th Cir. 1995) ("The Fourth Amendment generally requires more than an officer's interpretation of the reactions of an uncooperative suspect to establish probable cause."), *cert. denied*, 517 U.S. 1162 (1996). Undeniably, then, Officer Thomas clearly seized Greene without probable cause and, thus, seized Greene "unreasonabl[y]" in violation of the Fourth Amendment. *See Turner v. Dammon*, 848 F.2d 440, 445 (4th Cir. 1988) ("It is the utter absence of objective justification for the [subject searches] that raises constitutional concerns. The . . . officers offer[ed] no basis from which any reviewing authority can gauge the reasonableness of their actions. That, of course, is the very definition of official lawlessness and the very behavior that the Fourth Amendment, by its express terms, forbids.").

D. Qualified Immunity Under § 1983

Qualified immunity "protects government officials performing discretionary functions '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." *Doe*, 225 F.3d at 446 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Qualified immunity exists to protect officers in the performance of their duties unless they are 'plainly incompetent' or they 'knowingly violate the law.'" *Doe*, 225 F.3d at 446 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). Because qualified immunity is an affirmative defense, however, the party asserting it has the burden of proof. *Norwood v. Bain*, 143 F.3d 843, 857 (4th Cir. 1998). To determine whether or not a particular individual is entitled to qualified immunity involves a two-step analysis: (1) was a constitutional violation alleged? and, if so, (2) whether such right was clearly established at the time of the offense? *Doe*, 225 F.3d at 446. For a discussion of the alleged constitutional violation in this case, see Part III.C., *supra*. Thus, the only remaining question for qualified immunity analysis is whether or not such a constitutional right was clearly established.

"To be clearly established, the law must be 'sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Doe*, 225 F.3d at 454-55 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). However, "[a] prior case holding identical conduct to be unlawful is not required . . . so long as the unlawfulness of the conduct is manifest under existing authority." *Vathekan*, 154 F.3d at 179 (citation omitted; internal quotations omitted); *see also Tarantino*, 825 F.2d at 774 ("Police officers can be expected to have a modicum of knowledge regarding the fundamental rights of citizens.") (quoting *Saldana v. Garza*, 684 F.2d 1159, 1165 (5th Cir. 1982), *cert. denied*, 460 U.S. 1012 (1983)).

Given the egregious facts of this case, it is not surprising that there are no other cases exactly on point. *See Vathekan*, 154 F.3d at 179, *supra*. However, "[t]he constitutional right to be free from unreasonable interference by police officers is incontrovertible" and has long protected citizens from arbitrary intrusion by the police. *Jenkins v. Averett*, 424 F.2d 1228, 1231 (4th Cir. 1970). It is beyond dispute that in January 2000, when Officer Thomas searched and seized Greene and searched Greene's home, it was clearly established that law enforcement was not free to enter Greene's home over his objection to conduct a general search for evidence of a crime without having probable cause to do so. *See Doe*, 225 F.3d at 453 ("It is safe to say that in August 1998 [17 months before January 2000], it was clear that law enforcement officials were not free to barge into an area . . . where the public was not invited and over the objection of the [owners] conduct a general search for evidence of a crime without the slightest hint of probable cause."). As indicated above, "[t]he expectation that one generally remains free from warrantless searches in the privacy of the home is at the heart of the Fourth Amendment." *Id.* (citing *Silverman v. United States*, 365 U.S. 505, 511-12 (1961)).

E. Supervisory Liability Under § 1983

"Under § 1983, supervisory liability may be established upon a showing that the defendant implicitly authorized, approved or knowingly acquiesced to" the alleged illegal activity. *Washington*, 451 S.E.2d at 899 (citation omitted). Thus, depending on the facts,

Chief DeSoto is potentially subject to liability for Officer Thomas's misdeeds. Consequently, additional facts are necessary to determine Chief DeSoto's liability in this case.

F. Municipal Liability Under § 1983

A plaintiff may only recover damages from the municipality itself under § 1983 if there was an actual constitutional violation committed by an individual municipal official. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *see also Sigman v. Town of Chapel Hill*, 161 F.3d 782, 788 (4th Cir. 1998) (in absence of constitutional violation by police officer, neither that officer's supervisor nor his employing municipality can be held liable therefor); *accord Roberts*, 902 F. Supp. at 669. Provided that a municipal official is held to have violated the plaintiff's constitutional rights, the municipality employing such official may be subject to liability for the official's actions. *See Vathekan*, 154 F.3d at 180 (municipal liability under § 1983 "is derivative of, but narrower than, the liability of individual officers") (citations omitted; internal quotations omitted); *Leatherman v. Tarrant County Narcotics Intelligence & Coord. Unit*, 507 U.S. 163, 166 (1993) ("[U]nlike various government officials, municipalities do not enjoy immunity from suit—either absolute or qualified—under § 1983.").

In *Monell v. Department of Soc. Servs.*, 436 U.S. 658 (1978), local governments were held to be "persons" who can be sued under § 1983. *Austin v. Paramount Parks, Inc.*, 195 F.3d 715, 727 (4th Cir. 1999); *Washington*, 451 S.E.2d at 897. Municipalities may not, however, be held liable on a *respondeat superior* basis for the constitutional injuries inflicted

by their officials and employees. *Austin*, 195 F.3d at 727; *Monell*, 436 U.S. at 691-95. Rather, a municipality is subject to § 1983 liability "when it causes a constitutional deprivation through an official policy or custom." *Austin*, 195 F.3d at 727 (citation omitted); *see also Monell*, 436 U.S. at 694 (municipality must be "the moving force of the constitutional violation"); *Washington*, 451 S.E.2d at 897. "Municipal policy may be found in written ordinances and regulations, in certain affirmative decisions of individual policymaking officials, or in certain omissions on the part of policymaking officials that manifest deliberate indifference to the rights of citizens." *Austin*, 195 F.3d at 727. "Municipal custom . . . may arise when a particular practice is so persistent and widespread and so permanent and well settled as to constitute a custom or usage with the force of law." *Id.* (citation omitted; internal quotation marks omitted).

In a variety of contexts since the *Monell* decision, the Supreme Court has "considered whether an alleged injury caused by municipal employees acting under color of state law provided a proper basis for imposing liability on a city." *Collins v. City of Harker Heights*, 503 U.S. 115, 121 (1992). For instance, in *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), the Court held that a municipality's failure to adequately train its law enforcement officers is actionable under § 1983. *Accord Washington*, 451 S.E.2d at 897. In *Oklahoma City v. Tuttle*, 471 U.S. 808, 821 (1985), the Court held that "a single unusually excessive use of force" by an officer without any policymaking authority did not establish municipal liability. Later, in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986), the Supreme Court provided several principles to delineate when "municipal liability may be imposed

[under § 1983] for a single decision by municipal policymakers." *See also Austin*, 195 F.3d at 729 (question of whether a particular governmental employee had final decisionmaking authority for purposes of § 1983 municipal liability is a question of state and local law) (citing *McMilliam v. Monroe County, Alabama*, 520 U.S. 781, 786 (1997); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989)); *Hall v. Marion Sch. Dist. # 2*, 860 F. Supp. 278 (D.S.C. 1993) (a single decision of a municipal policymaker may suffice as official policy which triggers municipal liability). First, a municipality is only liable for "acts which the municipality has officially sanctioned or ordered." *Pembaur*, 475 U.S. at 480. Second, a municipality is only liable due to acts of municipal officials with "final policymaking authority." *Id.* at 483. Third, to determine whether a municipal official has "final policymaking authority," the Court must look to state law. *Id.* And finally, "the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." *Id.* at 482-83. In *City of St. Louis v. Praprotnik*, 485 U.S. 112, 130 (1988), the Court further clarified the guidelines established in *Pembaur* when it held that "the mere failure to investigate the basis of a subordinate's discretionary decisions does not amount to a delegation of policymaking authority."

Based on the facts provided, it seems unlikely that municipal liability will attach to Officer Thomas's conduct in this case. *See, e.g., Doe*, 225 F.3d at 456 (affirming dismissal of county and rejecting plaintiff's claim of an official policy or custom and/or failure to train; municipal liability cannot be based upon "[i]solated, unprecedented incidents").

G. Damages Under § 1983

1. Damages In General

"Compensatory damages may be recovered in § 1983 actions for proven violations of constitutional right, but only for any actual harms caused by the violation and not for the violation standing alone." *Norwood*, 143 F.3d at 855.⁹ Compensable actual harm in a § 1983 case "may include economic loss, physical injury, or emotional distress." *Id.* In the instant case, Greene may seek damages based on emotional distress. *See Sevigny v. Dicksey*, 846 F.2d 953, 959 (4th Cir. 1988) (evidence supported more than \$100,000 compensatory damages for "extreme emotional distress, including the anxiety of having [plaintiff's] fitness as a parent officially investigated"); *cf. Norwood*, 143 F.3d at 855 (emotional distress damages denied where "[t]he only evidence of emotional distress came in the form of testimony by [the plaintiffs] that they felt annoyance, humiliation, and indignity at being subjected to the searches. None testified that their emotional upset was caused by oppressive or threatening conduct by the . . . officers; instead, from all that appears, [the officers'] conduct was civil and non-threatening throughout the process."). Even in the absence of actual (or presumed) damages, however, an established constitutional violation requires an award of at least nominal damages. *See, e.g., Norwood*, 143 F.3d at 856 (awarding nominal

⁹*But see id.* at 856 ("presumed damages" available in limited circumstances where injuries are likely to have occurred but difficult to establish) (citing *Carey v. Piphus*, 435 U.S. 247 (1978); *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 310-11 (1986)). However, the prospect for recovering such damages in the instant case is quite bleak. *See, e.g., Norwood*, 143 F.3d at 856 ("By definition, [presumed damages are] not presented where the specific right claimed to have been violated is one whose violation will, if it results in any actual harm, present no difficulty in proving either the harm or its extent. Violation of the specific Fourth Amendment right not to be unreasonably searched . . . is just such a right.").

damages of \$1). Moreover, a prevailing party in a § 1983 case may request, and the court is authorized to allow, the payment of attorney's fees by the opposing party or parties. *See* 42 U.S.C. § 1988.

2. Punitive Damages

"A wrongful search, seizure, arrest, or confinement can result in an award of punitive damages even where no physical harm results." 1 Sheldon H. Nahmod, *Civil Rights and Civil Liberties Litigation: The Law of Section 1983* § 4:50 (4th ed. 2001). For instance, in *Sevigny*, 846 F.2d at 955, 959, the Fourth Circuit upheld a jury verdict which included a \$21,000 punitive damages award against a police officer who arrested the plaintiff without probable cause. Evidence was presented that the officer accused the plaintiff of lying even though he could have checked her story through two witnesses whom he ignored, the officer charged her with inconsistent offenses without investigation, and the officer initiated an investigation of her care of her children, all of which caused the plaintiff extreme emotional distress. *Id.* at 959. Applying North Carolina law, such actions amply supported the punitive damages award. *Id.* (citations omitted).

Although punitive damages are available against the individual offender, a supervisor may only be subject to punitive damages if he or she "ordered or personally participated in the acts, or knew or should have known that the acts were taking place and acquiesced in them." *Fisher v. Volz*, 496 F.2d 333, 349 (3d Cir. 1974). Moreover, punitive damages are not available against the City at all. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247

(1981) (municipalities not subject to punitive damages for bad-faith actions of its officials). *But see Washington*, 451 S.E.2d at 898 (§ 1983 plaintiffs obtained jury verdict against city that included punitive damages which were affirmed on appeal given that city had waived any objection to propriety of punitive damages) (distinguishing *Fact Concerts, Inc.*).

CONCLUSION

In light of the foregoing discussion and analysis of authorities, any potential state law tort claims are likely barred by the SCTCA, but any federal law claims are still viable. Specifically, Greene likely has several claims for Fourth Amendment violations: the unlawful seizure of his person, the unlawful search of his person, and the unlawful search of his house. Given the circumstances of this case, Officer Thomas is probably not entitled to qualified immunity. However, it is unlikely that Chief DeSoto and/or the City can be held liable for Officer Thomas's misdeeds.