**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TENNESSEE,**
**AT CHATTANOOGA**

FILED

2008 SEP 22 A 10: 31

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| **ROY L. DENTON,** *Plaintiff* | * | **Case No. 1:07-cv-211** |
| | * | |
| | * | **Judge:** ***Collier/ Carter*** |
| **v.** | * | |
| | * | |
| **STEVE RIEVLEY,** *in his individual capacity* *Defendant* | * | |
| | * | |
| | * | |
| | * | ***JURY DEMAND*** |
| | * | |

**PLAINTIFF'S NOTICE OF ALLEGED PLAGIARISM ON THE PART OF MR. RONALD D. WELLS, ATTORNEY**

Comes now, the Plaintiff Roy L. Denton, *pro se*, to give notice to the court that the *"Law and Argument"* as prepared and presented to this court on the part of the Defendant Steve Rievley's attorney, Mr. Ronald D. Wells, found within his *Motion for Summary Judgment*, appears to the plaintiff to be a work of plagiarism. (*See attached Court Doc. No. 42 pgs. 5-13*). Black's Law Dictionary defines "plagiarism" as:

- [t]he act of appropriating the literary composition of another, or parts or passages of his writings, or the ideas or language of the same, and passing them off as the product of one's own mind. To be liable for plagiarism it is not necessary to exactly duplicate another's work, it being sufficient if unfair use of such work is made by lifting of substantial portion thereof . . . ***Black's Law Dictionary 1035 (5th ed. 1979).***

The plaintiff respectfully submits that within the Defendant Steve Rievley's Motion for Summary Judgment virtually the entire Law and Argument beginning at page 5 extending thru to page 13 appear to be predominantly a verbatim reproduction of the opinion written by the Honorable Harry S. Mattice, Jr., United States District Judge in the matter of Cannon v. Hamilton County, Tennessee, **Case No. 1:06-cv-79**. (See attached Exhibit A: Law and Argument

of Ronald D. Wells and attached Exhibit B: Memorandum and Order of Harry S. Mattice, Jr., United States District Judge).

Courts have long determined and commonly held that plagiarism can be a violation of a lawyers ethical code of conduct. Therefore, the plaintiff leaves this matter to this honorable court's discretion to do with it as it may.

Respectfully submitted, this 17th day of September, 2008.

BY: _____

Roy L. Denton
2457 Airport Thruway PMB 106
Columbus, GA 31904
706-221-2918

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that an exact copy of this document has been served upon all parties of interest in this cause by placing an exact copy of same in the U.S. Mail addressed to such parties, with sufficient postage thereon to carry same to it's destination, on this 17th day of Sept., 2008.

_____
Roy L. Denton

Copy mailed to:

Ronald D. Wells, BPR# 011185
Suite 700 Republic Centre
633 Chestnut Street
Chattanooga, TN 37450
Phone:423-756-5051

"EXHIBIT A"

which makes it necessary to resolve the factual dispute at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *White*, 909 F.2d at 943-44; *60 Ivy Street*, 822 F.2d at 1435. The moving party is entitled to summary judgment if the non-moving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex*, 477 U.S. at 323; *Collyer v. Darling*, 98 F.3d 211, 220 (6th Cir. 1996).

The standard for summary judgment mirrors the standard for directed verdict. The Court must determine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52; *see also Lapeer County, Mich. v. Montgomery County, Ohio*, 108 F.3d 74, 78 (6th Cir. 1997). There must be some probative evidence from which the jury could reasonably find for the non-moving party. *Anderson*, 477 U.S. at 252; *Bailey v. Floyd County Bd. of Educ.*, 106 F.3d 135, 140 (6th Cir. 1997). If the Court concludes that a fair-minded jury could not return a verdict in favor of the non-moving party based on the evidence presented, it may enter a summary judgment. *Anderson*, 477 U.S. at 251-52; *University of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280; *LaPointe v. UAW*, Local 600, 8 F.3d 376, 378 (6th Cir. 1993).

## IV. LAW AND ARGUMENT

### 1. The Plaintiff has not alleged, and cannot prove, a factual basis necessary to establish a claim of § 1983 violation of his civil rights by Officer Rievley.

Section 1983 states in pertinent part

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action





PLAINTIFF'S "EX. A"

at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. 1983. Section 1983 enables an individual to file suit against "those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law." *Romanski v. Detroit Entm't L.L.C.*, 428 F.3d 629, 636 (6th Cir. 2005).

To establish a claim pursuant to §1983,a plaintiff must demonstrate two elements: "(1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that he was subjected or caused to be subjected to this deprivation by a person acting under color of state law." *Gregory v. Shelby County*, 220 F.3d 433,441 (6th Cir. 2000). Section 1983 "creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere."*Gardenhire v. Schubert*, 205 F.3d 303, 310 (6th. Cir. 2000).

With respect to Plaintiff's § 1983 claims, Officer Rievley contends that such claims should be dismissed because there were no constitutional violations and he is entitled to qualified immunity. The doctrine of qualified immunity shields " '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.'" *Ewolski v. City of Brunswick*, 287 F .3d 492, 501 (6th Cir.2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The United States Supreme Court has articulated a two-part test for determining whether a law enforcement officer is entitled to qualified immunity. *See Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 598 (2004); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under this test, district courts must

> consider whether "the facts alleged show the officer's conduct violated a constitutional right." If the plaintiff can establish that a constitutional violation occurred, a court should ask "whether the right was clearly established ... in light of

the specific context of the case, not as a broad general proposition."

*Lyons v. City of Xenia,* 417 F.3d 565, 571 (6th Cir.2005) (quoting *Saucier,* 533 U.S. at 201). Once a defendant claims the affirmative defense of qualified immunity, the burden shifts to the plaintiff to demonstrate that the defendant is not entitled to the defense of qualified immunity. *Myers v. Potter,* 422 F.3d 347, 352 (6th Cir.2005). When a defendant moves for summary judgment and asserts the defense of qualified immunity, the plaintiff must "1) identify a clearly established right alleged to have been violated; and 2) establish that a reasonable officer in the defendant's position should have known that the conduct at issue was undertaken in violation of that right." *Pray v. City of Sandusky,* 49 F.3d 1154, 1158 (6th Cir.1995).

● Thus, the key inquiry in determining whether a right was clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier,* 533 U.S. at 202; *see also Ewolski,* 287 F.3d at 501 ("For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'"(quoting *Russo v. City of Cincinnati,* 953 F.2d 1036 (6th Cir.1992))). Although the conduct in question need not have been previously held unlawful, the unlawfulness must be apparent in light of pre-existing law. *Id.* Officials are entitled to qualified immunity" 'when their decision was *reasonable,* even if mistaken.' " *Pray,* 49 F.3d at 1158 (quoting *Castro v. United States,* 34 F.3d 106, 112 (2d Cir.1994)). Further, "'if officers of reasonable competence could disagree on this issue, immunity should be recognized.'" *Id.* (quoting *Malley v. Briggs,* 475 U.S. 335, 349 (1986)).

With respect to his § 1983 claim based on the Fourth, Fifth and Fourteenth Amendments,

Plaintiff alleges that the actions of Officer Rievley constituted false arrest, unlawful entry, and excessive force. *See* Complaint, ¶¶ 36-46. Officer Rievley contends that his actions were lawful and that, in any case, such actions were objectively reasonable given the situation.

***A. Officer Rievley had probable cause to arrest the Plaintiff on a charge of domestic assault.***

With respect to Plaintiff's § 1983 false arrest claim, the threshold question is whether a constitutional violation occurred. The key inquiry in a false arrest claim is whether the arrest was based on probable cause. *See Anderson v. Creighton,* 483 U.S. 635, 663-64 (1987); *Pierson v. Ray,* 386 U.S. 547, 556 (1967); *Stemler,* 126 F.3d at 871. The United States Supreme Court has described "probable cause" as follows

> [p]robable cause exists where "the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

*Brinegar v. United States,* 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States,* 267 U.S. 132, 162 (1925)); *see also Lyons,* 417 F.3d at 573. To establish probable cause, "only a probability or substantial chance of criminal activity, not an actual showing of such activity" is required. *United States v. Moncivais,* 401 F.3d 751, 756 (6th Cir.2005). The existence of probable cause in a § 1983 action ordinarily presents a jury question, "unless there is only one reasonable determination possible." *Gardenhire,* 205 F.3d at 315.

Officer Rievley does not dispute that the right at issue is clearly established: a reasonable officer would be aware that an arrest requires probable cause, as that principle is contained within the text of the Fourth Amendment. U.S. Const. amend. IV; *Lyons,* 417 F.3d at 573 ("It has long been

true that the Fourth Amendment requires probable cause for an arrest."); *Gardenhire,* 205 F.3d at 314-15; *Pray,* 49 F.3d at 1158. The Plaintiff, however, must present sufficient evidence to show that the actions of Officer Rievley were not objectively reasonable in light of clearly established constitutional rights. The question, then, is whether the belief of Officer Rievley that he had probable cause to arrest Plaintiff was objectively reasonable. *See Brinegar,* 338 U.S.at 175-76. As the Plaintiff was charged with domestic assault, if it was objectively reasonable for Officer Rievley to believe that he had probable cause to arrest Plaintiff for this crime, then he is entitled to qualified immunity.

Under Tennessee law, "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member." *State v. Duncan,* 2005 WL 3504899, *4 (Tenn. Crim. App. Dec. 21, 2005) (quoting TENN. CODE ANN. § 39-13-111) (A copy is attached hereto for the Court's convenience). A person commits assault "who (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative. *Id.* (quoting TENN. CODE ANN. § 39-13-101(a)). Furthermore, the domestic assault statute, § 39-13-111, defines "family or household member" as a "spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person, regardless of whether they have been married or resided together at any time." TENN. CODE ANN. § 39-13-111(a). Domestic assault is either a class A or class B misdemeanor. TENN. CODE ANN. § § 39-13-111(c)(1), 39-13-101(b)(1). Tennessee has a general rule against warrantless

arrests for misdemeanor offenses. TENN. CODE ANN. § 36-3-619. If, however, " a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or a felony ... the preferred response of the officer is arrest." TENN. CODE ANN. § 36-3-619.

Given these elements, it was objectively reasonable for Officer Rievley to believe that he had probable cause to arrest Plaintiff. He was dispatched to the Sheriff's Department to respond to a complaint of a domestic violence incident. Brandon Denton told the deputies that his father, the Plaintiff, had hit him and strangled him. *See* Exhibit B. Officer Rievley observed that Brandon had bruising on his face and arms as well as hand prints around his neck and he photographed these injuries as well. *Id.* Officer Rievley confirmed Brandon's story by calling Jessica Carbajal who took Brandon home from work on an hour or so earlier. Exhibit A, ¶ 13. Ms. Carbajal told Officer Rievley that she did not see any bruises or strangulation marks on Brandon when she dropped him off at the home he shared with the Plaintiff shortly after midnight. *Id.* Thus, it was reasonable for Officer Rievley to conclude that Plaintiff's actions had caused Brandon " bodily injury,"as required by the statute.

As the Sixth Circuit court stated in *United States v. Strickland,* 144 F.3d 412, 415 (6th Cir.1998), "the Fourth Amendment does not require that a police officer *know* a crime occurred at the time the officer arrests or searches a suspect ... The Fourth Amendment, after all, necessitates an inquiry into probabilities, not certainty." *Id.* Officer Rievley respectfully submits, therefore, that it is reasonable that an officer, confronted with the situation Officer Rievley faced, could have reasonably concluded that there was probable cause to arrest the Plaintiff for domestic assault. Accordingly, Officer Rievley is entitled to qualified immunity for his arrest of the Plaintiff.

***B. Officer Rievley is entitled to qualified immunity for his warrantless arrest of the Plaintiff.***

The Plaintiff also contends that Officer Rievley violated his Fourth and Fourteenth Amendment rights by arresting him inside his home without a warrant. Complaint, ¶4-6. Officer Rievley respectfully submits that his actions in arresting the Plaintiff did not violate his Fourth and Fourteenth Amendment rights.

***1. Officer Rievley's arrest of the Plaintiff did not violate the Fourth Amendment because it occurred on the front porch of the Plaintiff's home.***

The Fourth Amendment has been interpreted to "prohibit the police from making a warrant less and non-consensual entry into a suspect's home in order to make a routine felony arrest." *Payton V. New York*, 445 U.S. 573, 576 (1980). The rule in *Payton*, however, is not an absolute. Although homes are accorded sanctity under the Fourth Amendment due to the privacy interests of the occupants, those same occupants may be arrested in their home if they have given up their privacy interests by knowingly exposing themselves to the public. *See Segura v. United States,* 468 U.S. 796, 810 (1984); *United States v. Santana*, 427 U.S. 38, 42 (1976) (citing *Katz v. United States*, 389 U.S. 347, 351 (1967)); *see also* Court File No. 32. The facts in *Santana* are similar to the facts in the case at bar. In *Santana*, the officers saw the suspect standing in the doorway of her house. *Santana,* 427 U.S. at 42. As the officers approached the suspect, she ran back into her house whereupon the police officers followed her, eventually arresting her inside her home. *Id.* In upholding the arrest, the Supreme Court stated that the suspect "was not merely visible to the police but was as exposed to public view, speech, hearing, touch as if she had been standing completely outside her house." *Id.*

In the present case, the Plaintiff opened the front door of his home before the Officers could knock on his door and stepped out onto the front porch. *See* Affidavit of Officer Rievley, ¶ 15-16.

From Officer Rievley's Affidavit, it is evident that the Plaintiff was standing on the front porch of his home when he was arrested. Officer Rievley testified in his Affidavit that "I informed Roy L. Denton that he was under arrest. After a short discussion, Roy L. Denton turned away from me toward the door of his house. As Roy L. Denton turned away, I grabbed his right arm. I handcuffed his right arm and then his left arm. After successfully arresting Roy L. Denton, I turned him over to Jason Woody for transportation to the local jail. Gerald Brewer, a Rhea County police officer, and I went into the Denton house in search of Dustin Denton." *See id.* at ¶¶ 17-19. Officer Rievley's testimony makes clear that he did not enter the Plaintiff's house until **after** the Plaintiff had been arrested. *Id.* Thus, there could be no Fourth Amendment violation because there was no warrantless arrest inside the house of the Plaintiff as Officer Rievley never entered the house until after the arrest had already occurred. If there is no constitutional violation, the Plaintiff cannot recover under § 1983. *Wittstock v. Mark A. Va Sile, Inc.*, 330 F.3d 899 (6th Cir. 2003). Accordingly, Officer Rievley respectfully submits that he is entitled to summary judgment on this issue.

2. ***Officer Rievley is entitled to qualified immunity for his warrantless arrest of the Plaintiff.***

Whether the Plaintiff's Fourth Amendment rights were violated is a separate inquiry from whether Officer Rievley is entitled to qualified immunity. *O"Brien v. City of Gand Rapids*, 23 F.3d 990 (6th Cir. 1994). If this Court finds that there was a constitutional violation, the Plaintiff may still be unable to recover under §1983 as Officer Rievley contends that he is entitled to qualified immunity. See *O'Brien*, 23 F. 3d 1000. The Fourth Amendment to the United States Constitution provides

> [t]he right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause,

> supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

*Id.* The Fourth Amendment has been interpreted to "prohibit the police from making a warrantless and non-consensual entry into a suspect's home in order to make a routine felony arrest." *Payton V. New York*, 445 U.S. 573, 576 (1980). The exception to this rule is whether exigent circumstances exists. The Sixth Circuit, however, has not "addressed what impact a domestic violence situation may have on the exigent circumstances justifying a warrant less entry to effectuate arrest." *Cannon v. Hamilton County*, 2007 WL 3238959 (E.D. Tenn. 2007) (A copy is attached hereto for the Court's convenience).

The United States Court of Appeals for the Sixth Circuit has held that the following situations may give rise to exigent circumstances: "(1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, and (4) a risk of danger to the police or others." *U.S. v. Johnson*, 22 F.3d 674,680 (6th Cir. 1994). In a suit for civil damages, whether exigent circumstances existed to excuse a warrant less entry is a question for the jury, unless the underlying facts are essentially undisputed so that a jury could reach but one conclusion. *Hancock v. Dodson*, 958 F.2d 1367,1375 (6th Cir. 1991). Although there may be some dispute as to whether exigent circumstances existed to justify Officer Rievley's warrantless arrest of the Plaintiff, the Plaintiff's claims must still fail because Officer Rievley is entitled to qualified immunity for his actions.

In *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir.1992), the Sixth Circuit, addressing the applicability of qualified immunity stated that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that

"EXHIBIT B"



Cannon v. Hamilton County, Tennessee
E.D.Tenn.,2007.
Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee.
Carla E. CANNON, as administratrix of the Estate of Michael W. Eads, Plaintiff,
v.
HAMILTON COUNTY, TENNESSEE, Hamilton County Sheriff's, Department, et al., Defendants.
**No. 1:06-cv-79.**

Nov. 1, 2007.

Michael M. Raulston, Chattanooga, TN, for Plaintiff.
R. Dee Hobbs, Chattanooga, TN, for Defendants.

***MEMORANDUM AND ORDER***

HARRY S. MATTICE, JR., United States District Judge.
*1 Plaintiff, Carla E. Cannon, as administratrix of the Estate of Michael W. Eads,[FN1] brings this action against Defendants Hamilton County, Tennessee, Hamilton County Sheriff's Department, Sheriff John Cupp, Deputy Jeff Baker, and Deputy Spencer Daniels (collectively the "Defendants"), alleging causes of action for violation of Plaintiff's rights under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution pursuant to 42 U.S.C. § 1983, for conspiracy to violate Plaintiff's civil rights under 42 U.S.C. § 1985, and for fees under 42 U.S.C. § 1988. Plaintiff also asserts causes of action against the Defendants under Tennessee state law for negligence, negligence per se, assault and battery, intentional infliction of emotional distress, and res ipsa loquitor, and under the Tennessee Constitution for inhumane and unduly harsh treatment of a prisoner.

FN1. Carla E. Cannon, administratrix of the estate of Michael W. Eads, was substituted as Plaintiff when Mr. Eads died. For the sake of clarity, the Court's reference to "Plaintiff" will encompass both Mr. Eads and Ms. Cannon.

Before the Court is Defendants' Motion for Summary Judgment. For the reasons explained below, the Defendants' Motion for Summary Judgment is **GRANTED.**

## I. DEFENDANT'S MOTION TO STRIKE

Before turning to the instant Motion for Summary Judgment, the Court will address a preliminary issue. Defendants have filed a Motion to Strike [Court Doc. No. 26] the affidavits of Jack Kennedy, M.D. and David Murray submitted in support of Plaintiff's response to Defendants' motion for summary judgment. For the reasons stated below, Defendants' motion to strike is **GRANTED IN PART** and **DENIED IN PART.**

### A. Affidavit of Jack Kennedy, M.D.

Defendants move to strike the affidavit of Jack Kennedy, M.D. on the grounds that portions of his affidavit are hearsay. Defendants argue that "[t]o the extent that Dr. Kennedy's affidavit is offered to suggest how this event occurred, and based on what Mr. Eads supposedly said to his doctor, it is inadmissible."(Court Doc. No. 27 at 2.) Plaintiff claims that Dr. Kennedy's affidavit is admissible under Rule 803(4) of the Federal Rules of Evidence. (Court Doc. No. 29.)

The Court cannot consider hearsay evidence in connection with a motion for summary judgment. *Carter v. University of Toledo*, 349 F.3d 269, 274 (6th Cir.2003).Rule 803(4) outlines an exception to the hearsay rule for: "Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as

"EXH. B" PLAINTIFF

phone from the yard, and ran across the street to a neighbor's driveway. She again called the police from her cell phone. Plaintiff went to McClendon's car and took the keys. Plaintiff called McClendon on her cell phone and told her that he had left the keys on the hood of the car. McClendon informed Plaintiff that she had called the police. Plaintiff then went into his house and turned off the lights. (Court Doc. No. 16-2 ("Baker Aff.") at 5.)

Deputies Jeff Baker and Spencer Daniels were dispatched in response to McClendon's report of domestic violence. When they arrived, McClendon was in the street in front of Plaintiff's house. She told them what had previously occurred. (Baker Aff. ¶ 3.) Baker and Daniels went to Plaintiff's door but he did not respond. They had the police dispatcher call his home telephone but he did not answer. (*Id.* at ¶ 4.)

Baker and Daniels went around to the side of the house and saw that Plaintiff's sliding glass door was partially open. Deputy Baker saw a rifle propped up against the door jamb and took possession of it. The deputies saw Plaintiff inside the house, sitting on his couch with his hands tucked into the cushions. They instructed Plaintiff to show his hands but Plaintiff did not respond. They drew their weapons, entered Plaintiff's home, and commanded Plaintiff to show his hands. Plaintiff raised his hands, demonstrating that he was unarmed. At the deputies request, Plaintiff stood, but would not answer questions about the incident with McClendon. (*Id.*)

Baker and Daniels told Plaintiff that he was under arrest and attempted to handcuff him but he pulled away. Both Baker and Daniels used an arm-bar technique to restrain Plaintiff and get him in handcuffs. During the scuffle, Plaintiff suffered a scrape on his forehead and a broken wrist. Plaintiff smelled of alcohol and his responses to the deputies were erratic. Plaintiff refused to walk under his own power and the deputies dragged him by the handcuffs to the patrol car. (*Id.* at ¶ 5.)

When he was in the patrol car, Plaintiff realized that he did not have identification on him. Deputy Daniels returned to Plaintiff's house to try to find identification but was unable to locate it. The deputies then escorted Plaintiff back into his house to get his identification. The deputies took off Plaintiff's handcuffs and allowed him to stand in his kitchen and smoke a cigarette. They then escorted Plaintiff back to the patrol car and placed the handcuffs on him again, this time in the front of his body. McClendon was not in Plaintiff's house during the arrest but appeared when he was in the patrol car to protest against the deputies arresting Plaintiff. (*Id.* at ¶ 6.)

*5 Deputy Baker took Plaintiff to Hamilton County Jail. Plaintiff declined emergency treatment but was seen by a nurse at the jail before he was cleared for booking. The nurse cleaned and bandaged the scrape on Plaintiff's forehead. The nurse did not notice, and was not made aware of, any other injuries, including a broken wrist that was later diagnosed by Plaintiff's doctor. Plaintiff signed a form indicating that he was not in need of emergency medical attention and was not suicidal. (Court Doc. No. 16-3 at 1-2, 5.)

Following the arrest, Plaintiff had a broken left wrist, scrapes and bruising on his elbows and knees, and pain in his shoulder. (Court Doc. No. 21.) A week later, Plaintiff complained of fatigue and pain in his lower back and was experiencing numbness in his legs and fingers. (*Id.*)

## III. ANALYSIS

Defendants seek summary judgment as to Plaintiff's claims against them on several grounds.

### A. Claims Under 42 U.S.C. § 1983.

Section 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

42 U.S.C. § 1983 (2000)."Section 1983 makes liable only those who, while acting under color of state law, deprive another of a right secured by the Constitution or federal law."*Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 636 (6th Cir.2005).

To establish a claim pursuant to § 1983, a plaintiff must demonstrate two elements: "(1) that he was deprived of a right secured by the Constitution or laws of the United States, and (2) that he was subjected or caused to be subjected to this deprivation by a person acting under color of state law."*Gregory v. Shelby County*, 220 F.3d 433, 441 (6th Cir.2000).Section 1983"creates no substantive rights; it merely provides remedies for deprivations of rights established elsewhere."*Gardenhire v. Schubert*, 205 F .3d 303, 310 (6th Cir.2000).

Plaintiff alleges in his complaint that his rights under the Fourth, Eighth, and Fourteenth Amendments to the U.S. Constitution were violated. (Court Doc. No. 1, ¶ 44.) At the outset, the Court notes that the Eighth Amendment's protections apply only to post-conviction inmates. *Miller v. Calhoun County*, 408 F.3d 803, 812 (6th Cir.2005); *Barber v. City of Salem*, 953 F.2d 232, 235 (6th Cir.1992). As Plaintiff's § 1983 claims relate only to his arrest and not to any post-conviction treatment, Plaintiff cannot sustain an Eighth Amendment claim. Accordingly, Plaintiff's § 1983 claims under the Eighth Amendment are **DISMISSED WITH PREJUDICE.**

***6** With respect to Plaintiff's § 1983 claims against Defendants in their official capacities, the Court notes that "[a] suit against an individual in his official capacity is the equivalent of a suit against the governmental entity."*Matthews v. Jones*, 35 F.3d 1046, 1049 (6th Cir.1994); *see also Brandon v. Holt*, 469 U.S. 464, 471-72 (1985). Thus, the § 1983 claims against Deputies Baker and Daniels in their official capacities, and against Sheriff John Cupp in his official capacity, are actually claims against Hamilton County and are redundant in light of identical claims brought against the County. Therefore, Plaintiff's § 1983 claims against Baker and Daniels in their official capacities and against Sheriff John Cupp in his official capacity are **DISMISSED WITH PREJUDICE.**

1. *Individual Claims against Deputies Baker and Daniels*

With respect to Plaintiff's § 1983 claims against Baker and Daniels in their individual capacities, Defendants contend that such claims should be dismissed because Baker and Daniels are entitled to qualified immunity. (Court Doc. No. 16 at 7-8.)

The doctrine of qualified immunity shields " '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.' " *Ewolski v. City of Brunswick*, 287 F .3d 492, 501 (6th Cir.2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). The United States Supreme Court has articulated a two-part test for determining whether a law enforcement officer is entitled to qualified immunity. *See Brosseau v. Haugen*, 543 U.S. 194, 125 S.Ct. 596, 598 (2004); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Under this test, district courts must:

consider whether "the facts alleged show the officer's conduct violated a constitutional right."If the plaintiff can establish that a constitutional violation occurred, a court should ask "whether the right was clearly established ... in light of the specific context of the case, not as a broad general proposition."

*Lyons v. City of Xenia*, 417 F.3d 565, 571 (6th

Cir.2005) (quoting *Saucier*, 533 U.S. at 201).

Once a defendant claims the affirmative defense of qualified immunity, the burden shifts to the plaintiff to demonstrate that the defendant is not entitled to the defense of qualified immunity. *Myers v. Potter*, 422 F.3d 347, 352 (6th Cir.2005). When a defendant moves for summary judgment and asserts the defense of qualified immunity, the plaintiff must "1) identify a clearly established right alleged to have been violated; and 2) establish that a reasonable officer in the defendant's position should have known that the conduct at issue was undertaken in violation of that right."*Pray v. City of Sandusky*, 49 F.3d 1154, 1158 (6th Cir.1995).

The key inquiry in determining whether a right was clearly established is "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."*Saucier*, 533 U.S. at 202;*see also Ewolski*, 287 F.3d at 501 ("For a right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " (quoting *Russo v. City of Cincinnati*, 953 F.2d 1036 (6th Cir.1992))). Although the conduct in question need not have been previously held unlawful, the unlawfulness must be apparent in light of pre-existing law. *Id.* Officials are entitled to qualified immunity " 'when their decision was *reasonable*, even if mistaken.' " *Pray*, 49 F.3d at 1158 (quoting *Castro v. United States*, 34 F.3d 106, 112 (2d Cir.1994)). Further, " 'if officers of reasonable competence could disagree on this issue, immunity should be recognized.' " *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 349 (1986)).

*7 With respect to his § 1983 claim based on the Fourth and Fourteenth Amendments, Plaintiff alleges that the actions of Baker and Daniels constituted false arrest, unlawful entry, excessive force, and denial of medical treatment. (Court Doc. No. 1, ¶¶ 36 & 44.) Defendants contend that the actions of Baker and Daniels were lawful and that, in any case, such actions were objectively reasonable given the situation. (Court Doc. No. 2 ¶ 14; Court Doc. No. 16 at 7-8.)

a. *False Arrest*

With respect to Plaintiff's § 1983 false arrest claim, the threshold question is whether a constitutional violation occurred. The key inquiry in a false arrest claim is whether the arrest was based on probable cause. *See Anderson v. Creighton*, 483 U.S. 635, 663-64 (1987); *Pierson v. Ray*, 386 U.S. 547, 556 (1967); *Stemler*, 126 F.3d at 871. The United States Supreme Court has described "probable cause" as follows:

Probable cause exists where "the facts and circumstances within their (the officers') knowledge and of which they had reasonably trustworthy information (are) sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

*Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)); *see also Lyons*, 417 F.3d at 573. "The establishment of probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."*United States v. Moncivais*, 401 F.3d 751, 756 (6th Cir.2005). The existence of probable cause in a § 1983 action ordinarily presents a jury question, "unless there is only one reasonable determination possible."*Gardenhire*, 205 F.3d at 315.

Assuming that no probable cause existed and, therefore, that a constitutional violation occurred, Plaintiff must then present sufficient evidence to show that the actions of Baker and Daniels were not objectively reasonable in light of clearly established constitutional rights. There is no question that the right at issue was clearly established: it is beyond dispute that a reasonable officer would be aware that an arrest requires probable cause, as that principle is contained within the text of the Fourth Amendment. U.S. Const. amend. IV; *Lyons*, 417 F.3d at 573 ("It has long been true that the Fourth

Amendment requires probable cause for an arrest."); *Gardenhire*, 205 F.3d at 314-15;*Pray*, 49 F.3d at 1158. The question, then, is whether the belief of Baker and Daniels that they had probable cause to arrest Plaintiff was objectively reasonable.

Plaintiff was charged with domestic assault and vandalism. (Court Doc. No. 16-4 ¶ 8 & Ex. 6.) If it was objectively reasonable for Baker and Daniels to believe that they had probable cause to arrest Plaintiff for either of these crimes, they are entitled to qualified immunity.

(1) *Domestic Assault*

***8** Under Tennessee law, "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a person who is that person's family or household member."*State v. Duncan*, 2005 WL 3504899, *4 (Tenn.Crim.App. Dec. 21, 2005) (quoting Tenn.Code Ann. § 39-13-111). Assault is defined in § 39-13-101 as:

A person commits assault who (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

*Id.* (quoting Tenn.Code Ann. § 39-13-101(a)). The domestic assault statute, § 39-13-111, defines "family or household member" as a
spouse, former spouse, person related by blood or marriage, or person who currently resides or in the past has resided with that person as if a family, or a person who has a child or children in common with that person, regardless of whether they have been married or resided together at any time.

Tenn.Code Ann. § 39-13-111(a). Domestic assault is either a class A or class B misdemeanor. Tenn.Code Ann. §§ 39-13-111(c)(1), 39-13-101(b)(1). Tennessee has a general rule against warrantless arrests for misdemeanor offenses. Tenn.Code Ann. § 36-3-619. However, "If a law enforcement officer has probable cause to believe that a person has committed a crime involving domestic abuse, whether the crime is a misdemeanor or a felony ... the preferred response of the officer is arrest."Tenn.Code Ann. § 36-3-619.

Given these elements, it was objectively reasonable for Baker and Daniels to believe that they had probable cause to arrest Plaintiff. The deputies were dispatched to a domestic violence incident. McClendon told the deputies that Plaintiff had struck her windshield while she was seated in the car. (Baker Aff. ¶ 3, Ex. A-1.) It was reasonable for the deputies to conclude that Plaintiff's actions had caused McClendon to "reasonably fear imminent bodily injury," as required by the statute. McClendon also told the deputies that Plaintiff was her boyfriend. Although a boyfriend is not technically a "family or household member" unless there is a shared child or residence, the deputies could have reasonably believed that McClendon and Plaintiff qualified as family members under the statute.

"The Fourth Amendment does not require that a police officer *know* a crime occurred at the time the officer arrests or searches a suspect ... The Fourth Amendment, after all, necessitates an inquiry into probabilities, not certainty."*United States v. Strickland*, 144 F.3d 412, 415 (6th Cir.1998). The Court concludes that an officer, confronted with the situation which faced Baker and Daniels, could have reasonably concluded that there was probable cause to arrest Plaintiff for domestic assault. Accordingly, Baker's and Daniels's actions were lawful in light of clearly established law.

(2) *Vandalism*

***9** Under Tennessee law, "[a] person commits vandalism when he or she 'knowingly causes damage to or the destruction of any real or personal property of another ... knowing that the person does not have the owner's effective consent.' " *State v. Sims*,

2005 WL 3132441, *6 (Tenn.Crim.App. Nov. 22, 2005) (quoting Tenn.Code Ann. § 39-14-408(a)).

Given these elements, the Court concludes that Baker and Daniels were objectively reasonable in their belief that probable cause existed to arrest of Plaintiff for vandalism. First, it is uncontested that Plaintiff struck McClendon's windshield, causing it to break. (Baker Aff. ¶ 3, Ex. A-1.) Second, the only reasonable inference that can be drawn from the evidence is that Plaintiff did not have McClendon's consent to strike her windshield. (*Id.*) Thus, the Court concludes that an officer, confronted with the situation which Baker and Daniels encountered, could have reasonably concluded that he had probable cause to arrest Plaintiff and, therefore, that his actions were lawful in light of clearly established law.

As a result, Baker and Daniels are entitled to qualified immunity with respect to Plaintiff's § 1983 false arrest claims against them in their individual capacities, and such claims are **DISMISSED WITH PREJUDICE.**

b. *Unlawful entry into Plaintiff's home*

Plaintiff also alleges that Baker and Daniels violated his Fourth and Fourteenth Amendment right to be free from unlawful search and seizure by entering his home without an arrest or search warrant. (Court Doc. No. 1 ¶ 44, Court Doc. No. 19 at 8.) Whether Plaintiff's Fourth Amendment rights were violated is a separate inquiry from whether the deputies are entitled to qualified immunity for their actions. *See O'Brien v. City of Grand Rapids*, 23 F.3d 990, 995-1000 (6th Cir.1994) (court conducted separate inquiries into whether there were exigent circumstances to justify the suspect's warrantless arrest and, upon finding that the arrest was not justified by exigent circumstances, whether the arresting officers were entitled to qualified immunity for their actions). If there was no constitutional violation, Plaintiff can not recover under § 1983. *Winstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir.2003) (first element of a § 1983 claim is that there was a deprivation of a right secured by the Constitution). If the Court finds that there was a constitutional violation, Plaintiff may still be unable to recover under § 1983 if the Defendants are entitled to qualified immunity. *O'Brien*, 23 F.3d at 1000. The Court will address separately whether the warrantless arrest of Plaintiff violated the Fourth Amendment and whether Baker and Daniels are entitled to qualified immunity.

(1) *Fourth Amendment Violation*

The Fourth Amendment to the United States Constitution provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

***10** U.S. CONST. amend. IV. The Fourth Amendment has been interpreted to "prohibit the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest."*Payton v. New York*, 445 U.S. 573, 576, 100 S.Ct. 1371, 1375 (1980). It is undisputed that Baker and Daniels did not have a warrant to arrest Plaintiff or consent to enter Plaintiff's home. Thus, unless one of the well-defined exceptions to the Fourth Amendment's general warrant requirement apply, Plaintiff may be able to maintain his § 1983 claim for unlawful entry. One such exception is that of "exigent circumstances."

"Exigent circumstances are situations where 'real immediate and serious consequences' will 'certainly occur' if the police officer postpones action to obtain a warrant."*Thacker v. City of Columbus*, 328 F.3d 244, 253 (6th Cir.2003) (quoting *O'Brien v. City of Grand Rapids*, 23 F.3d 990, 997 (6th Cir.1994)). The United States Court of Appeals for

the Sixth Circuit has held that the following situations may give rise to exigent circumstances: "(1) hot pursuit of a fleeing felon, (2) imminent destruction of evidence, (3) the need to prevent a suspect's escape, and (4) a risk of danger to the police or others."*U.S. v. Johnson*, 22 F.3d 674, 680 (6th Cir.1994). In a suit for civil damages (as here), whether exigent circumstances existed to excuse a warrantless entry is a question for the jury, unless the underlying facts are essentially undisputed so that a jury could reach but one conclusion.*Hancock v. Dodson*, 958 F.2d 1367, 1375 (6th Cir.1991).

Deputies Baker and Daniels were not in hot pursuit of Plaintiff when they entered his home. Because Plaintiff was suspected of having committed domestic assault and vandalism by having struck McClendon's car, there was no threat of evidence being lost or destroyed. There is no indication that Plaintiff was attempting to escape. Accordingly, the only possible basis for a finding of exigent circumstances is that Plaintiff posed a danger to the deputies or others. In an affidavit submitted in support of summary judgment, Deputy Baker states that he perceived Plaintiff as a threat to the deputies and as a threat to the safety of others. (Baker Aff. ¶ 4.)

This case is comparable factually to *Hancock v. Dodson*, 958 F .2d 1367 (6th Cir.1991) in which the Sixth Circuit held that a warrantless entry and arrest was justified by exigent circumstances. In that case, the officers were responding to a call involving gunshots fired by a suicidal and possibly homicidal gunman who also told the dispatcher that he would shoot any cops that came to his house. Two officers went around to the back of the house and heard someone inside yelling in an angry tone. One officer was able to see a weapon near the door of the home. The officer entered the home to determine whether there were any victims in the house and retrieve the weapon. The officer could see that the suspect was in the front of the house. The officer proceeded through the suspect's house, toward the front door, and arrested the suspect on the front porch.

***11** The suspect filed a § 1983 suit claiming that the officers had violated his Fourth Amendment right by entering his home to arrest him without a warrant. The district court entered summary judgment in favor of the officers, finding that there were exigent circumstances justifying the entry and that the officers were shielded from liability by qualified immunity.*Id.* at 1375.The Sixth Circuit affirmed the district court's ruling, stating that "the officers were truly faced with an emergency situation, and were entitled to enter the house without a warrant."*Id.* at 1375-76.

In this case, Baker and Daniels were responding to a domestic violence situation. They were aware that Plaintiff had committed a violent act by striking and damaging McClendon's car. Although the deputies had been told that Plaintiff was inside the house, Plaintiff did not respond to repeated attempts to summon him. The deputies went around the house to locate Plaintiff and found a weapon at the doorway of Plaintiff's home. They observed Plaintiff inside the home but could not see his hands. The deputies called to Plaintiff, ordering him to raise his hands, but Plaintiff did not respond. All of these facts are similar to what the Sixth Circuit considered to be exigent circumstances in *Hancock*.

However, there are significant differences between the instant case and *Hancock*.In this case, there is no evidence that Plaintiff had verbally or physically threatened the deputies. He was unresponsive to their commands but, unlike the suspect in *Hancock*, had not threatened to use force against them in any way. Although the deputies located a weapon in his house, there is no evidence that he had used the weapon or threatened to use it. Moreover, at the time they entered Plaintiff's house, the deputies had possession of the only weapon that they had seen and had no reason to believe that Plaintiff had additional weapons.

The Sixth Circuit has held that the mere presence of a weapon inside a home does not create exigent circumstances; rather, there must be a showing of an

intent or willingness to use the weapon to justify a warrantless entry. *Compare United States v. Bates*, 84 F.3d 790, 795 (6th Cir.1996) (exigent circumstances exist when nine shots are fired because this shows that suspect was willing to use the firearm) *to United States v. Killebrew*, 560 F.2d 729, 733-34 (6th Cir.1977) (no exigency when officers were aware that there was a gun inside home but there was no indication that suspect intended to use it). As discussed above, there is nothing in the record before the Court indicating that Plaintiff had threatened to use a weapon. While the facts show that Plaintiff was uncooperative, mere failure to cooperate does not, in and of itself, give rise to exigent circumstances. *See U.S. v. Chambers*, 395 F.3d 563, (6th Cir.2005) (no exigent circumstances when suspect yelled "police" then retreated into home and refused to cooperate with officers).

***12** Baker and Daniels were responding to a call reporting a domestic dispute, which are known to be inherently dangerous and unstable situations. *See U.S. v. Humphrey*, 2007 WL 1341356, *5 (W.D. Tenn May 4, 2007) (noting that domestic violence situations are "without question potentially volatile and dangerous.") The Court's inquiry, however, is "limited to whether exigent circumstances existed at the moment the police entered the residence,"*Ewolski v. City of Brunswick*, 287 F.3d 492, 503 (6th Cir.2002), and, at the time the deputies entered Plaintiff's residence, there was no apparent continuing threat to McClendon. Moreover, there is no evidence in the record before the Court that the deputies were aware that anyone else was inside the home who could have been threatened by Plaintiff. *Compare Causey v. City of Bay City*, 442 F.3d 524, 529-30 (6th Cir.2006) (finding exigent circumstances when officers responded to call that gunshots were fired in a home and no one had entered or left the home since the call was made).

Although there is a preference under Tennessee law for the responding officer to arrest the perpetrator of an act of domestic violence,[FN2] such preference of the Tennessee General Assembly cannot override an individual's rights under the Fourth Amendment of the United States Constitution. The Sixth Circuit has not directly addressed the impact that a domestic violence situation may have on the exigent circumstances justifying a warrantless entry to effectuate an arrest. But courts in other jurisdictions have held, almost uniformly, that once a victim of domestic violence is removed from the situation, the exigency required to justify a warrantless entry is also removed. *See Espiet v. State*, 797 So.2d 598, 602-03 (Fla.App.2001) (no exigent circumstances when domestic violence victim was outside of home and offender had barricaded himself inside home and would not come out); *Commonwealth of Pennsylvania v. Wright*, 742 A.2d 661, 665 (Penn.2000) (no exigent circumstances when victim was removed from the situation); *Singer v. Court of Common Pleas*, 879 F.2d 1203, 1206-07 (3rd Cir.1989) (no exigent circumstances when victim was removed from home and offender refused to come out. Although there was evidence that offender had guns, there was no evidence he threatened to use them.) *But see Walker v. West Caln Township*, 170 F.Supp.2d 522, 528-29 (E.D.Penn.2001) (finding exigent circumstances when victim was outside of home and offender was inside but officer was informed that offender was intoxicated, had firearms, and was unlikely to be cooperative with police).

FN2.Tenn.Code Ann. § 36-3-619.

Whether exigent circumstances existed to justify the Plaintiff's warrantless arrest is an intricate factual determination that must be decided on a case-by-case basis. *U.S. v. Rohrig*, 98 F.3d 1506, 1519 (6th Cir.1996). The Defendants "bear the 'heavy burden' of demonstrating exigency."*U.S. v. Radka*, 904 F.2d 357, 361 (6th Cir.1990) (quoting *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984)). To justify a failure to obtain a warrant, the facts must show that the threat to officers or public was "immediate." *United States v. Morgan*, 743 F.2d 1158, 1162-63 (6th Cir.1984). Although this is an extremely close call, the Court finds that Defend-