

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division

RICHARD R. CADMUS, JR.,)	
Plaintiff,)	Civil Action No. 5:15-cv-00053
)	
v.)	<u>REPORT & RECOMMENDATION</u>
)	
FREDERICK COUNTY SHERIFF'S)	
OFFICE, <i>et al.</i> ,)	By: Joel C. Hoppe
Defendants.)	United States Magistrate Judge

Plaintiff Richard R. Cadmus, Jr., proceeding *pro se*, brought this action for civil rights violations under 42 U.S.C. §§ 1983, 1985, and 1988 and for various torts under Virginia common law. He names as Defendants Leonard Millholland, individually and in his (former) official capacity as Sheriff of the City of Winchester, Virginia; Robert T. Williamson, individually and in his official capacity as Sheriff of Frederick County, Virginia; The Honorable Elizabeth Kellas Burton, Judge of the Juvenile and Domestic Relations (“JDR”) Courts of the Commonwealth of Virginia’s 26th Judicial District, in her individual capacity; John and Jane Does 1 through 25, individually and in their official capacities as Deputy Sheriffs of Frederick County or the City of Winchester; and the Frederick County Sheriff’s Office (“FCSO”). Am. Compl., ECF No. 22.¹ Pending before the Court are the Defendants’ motions to dismiss Cadmus’s Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, ECF Nos. 31, 34, 36,² as well as Cadmus’s motion for limited discovery

¹ Cadmus also occasionally refers to Ann Lloyd, a clerk at the Winchester-Frederick County JDR Court, as a Defendant. Am. Compl. ¶¶ 94, 96. It is unclear whether Cadmus actually intends to name Lloyd, who has not been served, as a Defendant, but to the extent he has, his claims are meritless. Cadmus has not alleged that Lloyd was personally involved in any of the acts giving rise to his claims, and his allegations of supervisory liability are too vague to state a claim for relief.

² Burton filed her first motion to dismiss the amended complaint, ECF No. 34, and then filed an amended motion correcting a typo in the signature block, ECF No. 36. There is otherwise no difference between the two filings, and I therefore will treat them as a single motion.

pursuant to Rule 26, ECF No. 50. These motions are before me by referral under 28 U.S.C. § 636(b)(1)(B).³ ECF No. 7. All parties have fully briefed the issues, I have heard oral argument, and the motions are ripe for decision. After considering the pleadings, the parties' briefs and oral arguments, and the applicable law, I find that Cadmus has failed to state a claim that entitles him to relief and therefore recommend that the presiding District Judge grant Defendants' motions to dismiss and deny Cadmus's motion for limited discovery.

I. Factual Allegations and Claims

When assessing factual allegations for a motion to dismiss, I must view all well-pled facts in the complaint in the light most favorable to the plaintiff. *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). In recognition of Cadmus's *pro se* status and my obligation to hold his pleadings to "less stringent standards than formal pleadings drafted by lawyers," *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam), I will also consider facts presented in his brief in opposition. *Shomo v. Apple, Inc.*, No. 7:14cv40, 2015 WL 777620, at *2 (W.D. Va. Feb. 24, 2015) (considering "both the complaint and the factual allegations in Shomo's response to the motion to dismiss in determining whether his claims can survive dismissal"); *Christmas v. Arc of the Piedmont, Inc.*, No. 3:12cv8, 2012 WL 2905584, at *1 (W.D. Va. July 16, 2012) (accepting as true facts from a *pro se* plaintiff's complaint and brief in opposition to decide a motion to dismiss).

The events giving rise to this case follow from Cadmus's involvement in a domestic incident that occurred on June 9, 2013, and is the subject of a separate case Cadmus has filed in this District. *See Cadmus v. Williamson (Cadmus I)*, No. 5:15cv45, 2016 WL 929279, at *1–3, *16 (W.D. Va. Feb. 1, 2016), *report and recommendation adopted in relevant part*, 2016 WL

³ As the resolution of this discovery motion is potentially dispositive of Cadmus's claims against the John and Jane Does, the Court recommends a disposition under 28 U.S.C. § 636(b)(1)(B), rather than deciding the motion under 28 U.S.C. § 636(b)(1)(A).

1047087 (W.D. Va. Mar. 10, 2016); Am. Compl. ¶¶ 24–35. As a result of that incident, a Frederick County Magistrate entered a protective order against Cadmus that barred him from contact with his mother, Laura Fabrizio. *Cadmus I*, 2016 WL 929279, at *3; Am. Compl. ¶ 35. Prior to this, Fabrizio, who was terminally ill, had been living with Cadmus, who acted as her caretaker. *Cadmus I*, 2016 WL 929279, at *1. Following entry of the protective order, Fabrizio’s health continued to deteriorate, and on August 19 she was taken to Winchester Medical Center, where she died three days later. Am Compl. ¶¶ 36–40. Cadmus alleges that prior to Fabrizio’s death, the protective order against him had been “partially lifted,” *id.* ¶¶ 42–44, although it appears to have been in force to some degree when she died.

On the morning of August 23, Cadmus received a call from a family friend informing him that Fabrizio had died. *Id.* ¶ 45. He drove to the hospital, where he was informed by security guards that the protective order forbade him from going near his mother’s body, and he was escorted off the premises. *Id.* ¶¶ 46–49. Cadmus then drove to the Winchester Judicial Center, entered the JDR Clerk’s office, and asked the clerk to allow him to speak to Judge Burton in order to initiate an emergency hearing to lift the protective order so that he could handle arrangements for his mother’s body. *Id.* ¶¶ 50–53. After some unsuccessful attempts to set a hearing that day (rather than wait for the hearing that had already been set for the following Monday, August 26), Cadmus started to exit the building, and the clerk told him to “have a great weekend.” *Id.* ¶¶ 54–69. Cadmus, upset over his mother’s death, perceived this comment as condescending and stated to the clerk, “Judge Burton is worthless and a disgrace to our community in allowing this ordeal to perpetuate into what it has. Her actions rise to nothing more than a public []nuisance.” *Id.* ¶¶ 70–74. Cadmus alleges that although he was upset, he did

not yell, make threats, or otherwise misbehave, and after making his statement to the clerk, he left the building without incident, passing bailiffs on the way out. *Id.* ¶¶ 75–77.

On August 26, Cadmus went to the JDR Court in Winchester for the scheduled hearing regarding Fabrizio’s protective order (as well as another protective order relating to the same domestic incident entered on behalf of Cadmus’s half-sister, Laura Carver, *see* ECF No. 22-4, at 7, 9–10). Am. Compl. ¶ 99. Cadmus was called into the courtroom, and after a few minutes’ delay, Judge Burton informed Cadmus that she had dismissed both protective orders. *Id.* ¶¶ 101–06. As Cadmus started to leave, however, Judge Burton admonished him regarding his encounter in the clerk’s office three days earlier:

I want you to understand, though sir, that I am the one who called Security [sic] when you were in my clerk’s office the other day because I could not believe how rudely you treated my clerks. If that happens again, I am going to hold you in contempt. Do you hear me sir? You do not yell at my staff members, you do not be mean to my staff members, ever again. Do you hear me sir?

Id. ¶ 108. Cadmus asked for permission to speak, but Judge Burton interrupted and told Cadmus, “I’m not going to allow you to speak . . . now go sit back there . . . and we’ll get to you, sir.” *Id.* ¶¶ 109–10.

Cadmus sat at the back of the courtroom and after a short time informed the court that he had been recording his proceeding on his iPad. *Id.* ¶¶ 111–12. Judge Burton directed Cadmus to turn over the recording to be destroyed, but Cadmus explained that he could not do so because the recording was digital and he objected to the iPad “being seized, searched and destroyed.” *Id.* ¶¶ 113–14. Although he refused to hand over the device to the bailiffs, Cadmus stepped away with his hands raised so that they could take it away themselves. *Id.* ¶ 115. Cadmus also complained that he did not have an opportunity to notify the court about the recording earlier because Judge Burton did not allow him to speak. *Id.* ¶ 118. Judge Burton then directed the

bailiffs to detain Cadmus. *Id.* ¶ 119. Cadmus claims that the bailiffs treated him roughly while arresting him—although he kept his hands raised, “one of the bailiffs ran towards Mr. Cadmus and hit him with his body and caused Mr. Cadmus to go down to one knee.” *Id.* ¶ 120. Bailiffs then “assaulted and battered Mr. Cadmus as he attempted to stand again and grabbed his wrists hard while twisting his arms really high behind his back while hand-cuffing him,” told him to “shut-up” while Judge Burton continued asking him questions, and then “paraded [him] through the crowded courtroom and forcefully threw him through the door behind the Judge’s bench.” *Id.* ¶¶ 121–23.

Cadmus was then brought through the hallway to a holding cell, where he alleges that bailiffs smashed his head into the wall, kicked his legs out from under him, removed his shoes, tightly applied shackles to his ankles and wrists causing “extreme pain,” searched his person, and kept his wrists cuffed uncomfortably behind his back. *Id.* ¶¶ 124–29. Meanwhile, Judge Burton called a recess, ordered the courtroom cleared, and discussed her options with the bailiffs who remained behind.⁴ *Id.* ¶¶ 130–44. Judge Burton, along with the bailiffs, repeatedly tried to access the iPad and delete the recording, but they were unsuccessful. *Id.* ¶¶ 131, 144. At one point, Judge Burton stated that she had spoken with counsel for the Judicial Inquiry and Review Commission and said that she had authority to delete the recording, but she determined that she would not do so. *Id.* ¶¶ 136–37. After Cadmus had been held for approximately eighteen minutes, *id.* ¶ 133, Judge Burton ordered him brought back into the courtroom and asked that he unlock the iPad to show that it was no longer recording, while bailiffs lingered uncomfortably close to him, *id.* ¶¶ 145–46. Cadmus again refused to unlock the iPad or allow it to be searched,

⁴ Cadmus’s iPad, which had been left behind in the courtroom while he was arrested, continued recording throughout the events in question until Cadmus was released. *Id.* ¶ 156. In support of his Amended Complaint, Cadmus filed a copy of this recording. ECF No. 29.

id. ¶ 149, at which point Judge Burton, according to Cadmus, “admitted . . . that he was within his rights to record his own proceeding,” *id.* ¶ 150,⁵ told Cadmus to take her earlier admonishment to heart, and allowed him to leave with the iPad, *id.* ¶¶ 153, 155.

In his Amended Complaint, Cadmus asserts seven⁶ counts against the Defendants. Count I asserts a claim pursuant to 42 U.S.C. § 1983 for unreasonable search and seizure in violation of the Fourth Amendment against Judge Burton and unnamed deputies.⁷ *Id.* ¶¶ 203–23. Count II asserts a claim against Judge Burton and unnamed deputies for conspiracy to violate Cadmus’s civil rights, in violation of the Fourth Amendment and 42 U.S.C. §§ 1985 and 1988. *Id.* ¶¶ 224–45. Count III asserts a claim against Williamson, Millholland, and unnamed deputies for supervisory liability and failure to train, in violation of the Fourth Amendment and § 1983. *Id.* ¶¶ 246–61. Count V alleges retaliation and conspiracy to retaliate, in violation of the First Amendment, by Judge Burton and unnamed deputies.⁸ *Id.* ¶¶ 275–83. Count VI asserts a claim against unnamed deputies for failure to intercede, in violation of § 1983. *Id.* ¶¶ 284–85. Count VII asserts a claim against Judge Burton and unnamed deputies for abuse of process, in violation of Virginia common law. *Id.* ¶¶ 286–94. Count VIII asserts a claim against Judge Burton and unnamed deputies for malicious prosecution and false arrest under Virginia common law. *Id.* ¶¶

⁵ This statement is not audible on the recording Cadmus submitted to the Court.

⁶ Cadmus had also asserted a claim against all Defendants for violating the Equal Protection Clause of the Fourteenth Amendment, *id.* ¶¶ 262–74, but he notified the Court in briefing, Pl.’s Resp. in Opp. to Def. FCSO, Williamson, & Millholland’s Mot. Dismiss (“Br. in Opp. to Sheriffs”) 12, ECF No. 41, and at oral argument that he abandoned this claim.

⁷ All John and Jane Doe defendants are Winchester or Frederick County deputies (Cadmus does not specify which department the deputies worked for) who acted as bailiffs in the JDR Court during the events at issue or otherwise held supervisory roles within their departments. *See id.* ¶ 15.

⁸ Cadmus has abandoned his claim for retaliation and conspiracy to retaliate against Williamson and Millholland. Br. in Opp. to Sheriffs 13.

295–302. Finally, Count IX asserts a Virginia common law claim against Judge Burton and unnamed deputies for intentional infliction of emotional distress. *Id.* ¶¶ 303–10.

II. Motions to Dismiss

Williamson, Millholland, and the FCSO move to dismiss the claims for monetary damages asserted against them in their official capacities for lack of subject matter jurisdiction under a defense of sovereign immunity, pursuant to Rule 12(b)(1),⁹ and they move to dismiss all other claims against them for failure to state a claim upon which relief can be granted, pursuant to Rule 12(b)(6). *See generally* Br. in Supp. of FCSO, Williamson, & Millholland’s Mot. to Dismiss (“Sheriffs’ Br.”), ECF No. 32. Judge Burton, meanwhile, moves to dismiss all the claims against her under a defense of absolute judicial immunity, pursuant to Rule 12(b)(6). *See generally* Br. in Supp. of Burton’s Mot. to Dismiss (“Burton Br.”), ECF No. 35.

A Rule 12(b)(1) motion challenges a court’s subject matter jurisdiction to hear a claim. The plaintiff bears the burden of proving subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). In resolving a Rule 12(b)(1) motion, “the district court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” *Id.* (quoting *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991)). A court should grant the motion “only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” *Id.*

Meanwhile, in order to survive a motion to dismiss under Rule 12(b)(6), a complaint must “state[] a plausible claim for relief” that “permit[s] the court to infer more than the mere

⁹ “Although subject matter jurisdiction and sovereign immunity do not coincide perfectly, there is a recent trend among the district courts within the Fourth Circuit to consider sovereign immunity under Rule 12(b)(1).” *Trantham v. Henry Cty. Sheriff’s Office*, No. 4:10cv58, 2011 WL 863498, at *3 (W.D. Va. Mar. 10, 2011) (citations omitted).

possibility of misconduct.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In making this determination, the Court accepts as true all well-pled facts and construes those facts in the light most favorable to the plaintiff. *Philips*, 572 F.3d at 180. The Court need not accept legal conclusions, formulaic recitation of the elements of a cause of action, or “bare assertions devoid of further factual enhancements,” however, as those are not well-pled facts for Rule 12(b)(6)’s purposes. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

Plaintiffs must plead enough facts to “nudge[] their claims across the line from conceivable to plausible,” and a court should dismiss a complaint that is not “plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Determining whether a complaint states a plausible claim for relief is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 556 U.S. at 679. Federal courts have an obligation to construe *pro se* pleadings liberally, so that any potentially valid claim can be fairly decided on its merits rather than the *pro se* litigant’s legal acumen. *Rankin v. Appalachian Power Co.*, No. 6:14cv47, 2015 WL 412850, at *1 (W.D. Va. Jan. 30, 2015) (citing *Boag v. MacDougall*, 454 U.S. 364, 365 (1982)). Still, “a *pro se* plaintiff must . . . allege facts that state a cause of action, and district courts are not required ‘to conjure up questions never squarely presented to them.’” *Considder v. Medicare*, No. 3:09cv49, 2009 WL 9052195, at *1 (W.D. Va. Aug. 3, 2009) (quoting *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985)), *aff’d*, 373 F. App’x 341 (4th Cir. 2010).

A. *Sovereign Immunity*

The Eleventh Amendment provides the states immunity against suits for damages brought in federal court. *Bland v. Roberts*, 730 F.3d 368, 389 (4th Cir. 2013). In addition to

immunizing the states themselves, Eleventh Amendment sovereign immunity also extends to state officials sued in their official capacities. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. As such, it is no different from a suit against the state itself.” (citations omitted)). This immunity, however, does not extend to municipalities or their officials, *id.* at 70 (citing *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 n.54 (1978)), and instead protects only those officials and entities that are considered to be “arms of the State,” *Bland*, 730 F.3d at 389–90 (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)).

As in his other case, *see Cadmus I*, 2016 WL 1047087, at *5–6, Cadmus argues here that the Sheriffs (and their departments) are municipal officials that are not protected by sovereign immunity. Br. in Opp. to Sheriffs 3–5. This argument is mistaken, however. In Virginia, sheriffs are state officers whose authority is derived from the Virginia Constitution. Va. Const. art. VII, § 4; *Doud v. Commonwealth*, 717 S.E.2d 124, 126 (Va. 2011). Although they are elected by citizens of a county or municipality and perform functions that are local in nature, they are not agents of local government. *Doud*, 717 S.E.2d at 126. Similarly, deputies are agents of the sheriff, rather than agents of the local governing body. *Jenkins v. Weatherholtz*, 909 F.2d 105, 107 (4th Cir. 1990).

The Fourth Circuit and this court have found previously that Virginia sheriffs, their departments, and their deputies, like other constitutional officers, are “arms of the State” for Eleventh Amendment purposes. *Bland*, 730 F.3d at 390; *Smith v. McCarthy*, 349 F. App’x 851, 858 n.11 (4th Cir. 2009) (citing *Will*, 491 U.S. at 71); *Clay v. Campbell Cty. Sheriff’s Office*, No. 6:12cv62, 2013 WL 3245153, at *4 (W.D. Va. June 26, 2013) (citing *Estate of Harvey v.*

Roanoke City Sheriff's Office, No. 7:06cv603, 2007 WL 602091, at *3 (W.D. Va. Feb. 23, 2007)); *Blankenship v. Warren Cty.*, 918 F. Supp. 970, 973–74 (W.D. Va. 1996). Furthermore, sheriffs, like other constitutional officers, are insured by a risk management plan that is funded by the Commonwealth. *See* Va. Code Ann. § 2.2-1839; *Brown v. Caldwell*, No. 7:13cv553, 2014 WL 4540332, at *6 (W.D. Va. Sept. 11, 2014); *Blankenship*, 918 F. Supp. at 974. Thus, any judgment against a sheriff in his official capacity would be payable out of a trust funded by the state treasury. *Brown*, 2014 WL 4540332, at *6.

As was true in his other case, Cadmus does not, and cannot, show that the sheriffs should be considered agents of municipal government. The provision of security for a state court—itsself an arm of the state for Eleventh Amendment purposes, *McKinney v. Virginia*, No. 2:10cv67, 2010 WL 3810628, at *1 (W.D. Va. Sept. 22, 2010)—is a responsibility imposed on the sheriff by statute, Va. Code Ann. § 53.1-120. It is not a function of local law enforcement that has been delegated by the municipal government. Cadmus's claims against the FCSO, which itself is not a distinct, cognizable entity, separate from the sheriff, that is subject to suit, *see Revene v. Charles Cty. Comm'rs*, 882 F.2d 870, 874 (4th Cir. 1989), fails for the same reason. Cadmus contends that his claim against the FCSO should be construed as a claim against the Frederick County Board of Supervisors., *See* Br. in Opp. to Sheriffs 2–3. A sheriff and his office, however, are not legally interchangeable with the local board of supervisors. *See Dowd*, 717 S.E.2d at 126 (“While constitutional officers may perform certain functions in conjunction with units of county or municipal government, neither the officers nor their offices are agencies of such governmental units.”). For these reasons, I recommend that all claims against the FCSO and all claims for monetary damages against Williamson and Millholland in their official capacities be dismissed with prejudice.

B. *Judicial Immunity*

In order to allow judges to act freely upon their convictions, the common law has long recognized immunity for judges from suit for money damages. *Mireles v. Waco*, 502 U.S. 9, 9–10 (1991) (per curiam). Judicial immunity is an absolute immunity: it does not merely protect a defendant from assessment of damages, but also protects her from damages suits entirely. *Id.* at 11. Judicial immunity, though broad, does not cover all acts taken by a judicial officer. Instead, two conditions must be met. First, the judicial officer cannot have acted “in the ‘clear absence of all jurisdiction.’” *King v. Myers*, 973 F.2d 354, 356 (4th Cir. 1992) (quoting *Stump v. Sparkman*, 435 U.S. 349, 357 (1978)). This requirement concerns the judge’s subject matter jurisdiction over the case before her. *Id.* at 357 (citing *Stump*, 435 U.S. at 356). The scope of jurisdiction is construed broadly, and immunity will be unavailable only if jurisdiction was clearly absent, not merely if the judge acted in excess of her jurisdiction. *Id.* at 356–57. Second, the alleged action must have been a “judicial act.” *Id.* at 357. In order to be a judicial act, the action in question must be of a type normally performed by a judge, and it must have been performed while the parties dealt with the judge in her judicial capacity. *Id.* An act is still judicial, and immunity still applies, even if the judge commits “grave procedural errors.” *Id.* (quoting *Stump*, 435 U.S. at 359).

Here, the actions taken by Judge Burton fell well within the protections of judicial immunity.¹⁰ A judge has the authority to take steps to maintain order in her courtroom. *See, e.g.,*

¹⁰ The acts that appear to form the core of Cadmus’s case against Judge Burton (insofar as these acts can be attributed to Judge Burton rather than being carried out by the bailiffs of their own initiative) are her directing the bailiffs (1) to seize Cadmus’s iPad, (2) to arrest Cadmus and remove him from the courtroom, and (3) to attempt to search Cadmus’s iPad or delete any recording of the proceedings. To the extent Cadmus alleges that Judge Burton violated his rights by warning him to be more polite to her clerks, *see, e.g.,* Am. Compl. ¶¶ 219–20, 227, he has not stated a cause of action that would encompass this conduct or any perceived injury resulting therefrom. *Cf. Ammons v. Baldwin*, 705 F.2d 1445, 1448

Va. Code Ann. § 18.2-456 (permitting judges to summarily punish misbehavior in or near the court, or insulting behavior directed at the judge, as contempt); Va. Sup. Ct. R., Pt. 6, § III, Canon 3(B)(3) (“A judge shall require order, decorum, and civility in proceedings before the judge.”). Cadmus contends nonetheless that judicial immunity should not apply here, either because he was entitled to use a recording device in court (and therefore was not violating rules or being disruptive), or because Judge Burton lacked jurisdiction or otherwise did not act in a judicial capacity by addressing conduct that occurred after Cadmus had finished litigating his case. Pl. Br. in Opp. to Burton’s Mot. to Dismiss (“Br. in Opp. to Burton”) 7–17, ECF No. 40. These arguments have no merit.

With regard to jurisdiction, Cadmus seems to allege that Judge Burton lacked jurisdiction to take any action against him because his case involving the protective orders had already been dismissed and because any concerns regarding his conduct in court were not related to the subject matter of domestic relations. Br. in Opp. to Burton 9–10. This characterization of Judge Burton’s jurisdiction is too narrow. Cadmus offers no support for his contention that Judge Burton lost all jurisdiction over his matter the instant she told him that the protective orders would be dismissed. Indeed, his argument is at odds with the principle that jurisdiction should be construed broadly when evaluating judicial immunity.¹¹ More importantly, Cadmus’s argument that his possible misconduct fell outside of the narrow subject-matter jurisdiction of the JDR courts ignores the inherent power of the courts to control the conduct of any individual inside the courtroom. *See Epps v. Commonwealth*, 626 S.E.2d 912, 918 (Va. Ct. App. 2006) (en banc)

(5th Cir. 1983) (finding that any injury caused by judge’s threat to physically harm the plaintiff, without apparent intent to immediately carry out the threat, was *de minimis*).

¹¹ Moreover, Cadmus’s suggestion that jurisdiction over a matter immediately terminates upon oral entry of a final order conflicts with the Rules of the Supreme Court of Virginia, which state that trial courts retain authority to modify, vacate, or suspend a final order or judgment within twenty-one days of its entry. Va. Sup. Ct. R. 1:1.

(“Clearly, the trial court has subject matter jurisdiction to address courtroom and courthouse security issues.”).

Likewise, Cadmus’s argument that Judge Burton’s actions were not “judicial acts” is unpersuasive. Cadmus dealt with Judge Burton in her capacity as a judge, as he was in court for a pending case and informed her of his recording of court proceedings while court was in session. Furthermore, her actions were judicial in nature. A judge’s attempts to control her courtroom, through means such as ordering the removal of disruptive individuals or prohibiting the use of unauthorized devices, fall squarely within her judicial role. It is immaterial whether Judge Burton was justified in finding that Cadmus had acted inappropriately, or even whether she acted in bad faith. *See Stump*, 435 U.S. at 356–57. Likewise, even if the means Judge Burton used to control Cadmus’s behavior could be considered excessive, they would still be judicial acts. *See Dean v. Shirer*, 547 F.2d 227, 231 (4th Cir. 1976) (finding that although judge’s words and actions were “abhorrent,” this did not strip him of judicial immunity). For these reasons, I find that Judge Burton is protected by absolute judicial immunity and recommend that all claims¹² against her for monetary damages be dismissed with prejudice.

C. Failure to State a Claim

After accounting for immunity defenses, Cadmus’s only remaining claims against named defendants are his personal capacity claims against Sheriffs Williamson and Millholland for supervisory liability and failure to train.¹³ Sheriffs Williamson and Millholland argue that

¹² “The standards for judicial immunity under Virginia law are substantively the same as those under federal law.” *Battle v. Whitehurst*, 831 F. Supp. 522, 529 n.7 (E.D. Va. 1993).

¹³ Cadmus sometimes uses these terms interchangeably, along with municipal liability. *See, e.g.*, Br. in Opp. to Sheriffs 6. A theory of municipal liability is not viable here, however. As explained *supra*, the actions of Virginia sheriffs and their subordinates are not attributable to a municipality.

Cadmus has failed to state a claim on these counts, Sheriffs' Br. 4–11, and that they are protected by qualified immunity, *id.* at 12–13.

In a § 1983 action, supervisory officials may not be held vicariously liable for the conduct of their subordinates under a theory of *respondeat superior*. *Iqbal*, 556 U.S. at 676. Instead, the supervisor himself must have acted in a way that makes him in part responsible for the alleged constitutional violation. *Id.*; accord *Danser v. Stansberry*, 772 F.3d 340, 349 (4th Cir. 2014). The supervisor's responsibility for his subordinates' violations is premised upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care." *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984) (citing *Orpiano v. Johnson*, 632 F.2d 1096, 1101 (4th Cir. 1980)). A claim for supervisory liability thus requires three elements:

(1) that the supervisor had actual or constructive knowledge that his subordinate was engaged in conduct that posed a pervasive and unreasonable risk of constitutional injury to citizens like the plaintiff; (2) that the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices; and (3) that there was an affirmative causal link between the supervisor's inaction and the particular constitutional injury suffered by the plaintiff.

Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994) (citations and internal quotation marks omitted).

Here, Cadmus has not alleged a prior pattern of similar conduct that would have put Sheriffs Williamson or Millholland on notice that their deputies presented a danger to citizens' rights. Rather than alleging advance notice, Cadmus premises his claim of supervisory liability on the theory that the violations he alleges here were so severe and so likely to occur that Sheriffs Williamson and Millholland should have known that it was necessary to train their deputies to deal with such a scenario. Thus, he argues, by failing to train their deputies

adequately, the Sheriffs showed deliberate indifference to the possibility of constitutional injury to citizens. Br. in Opp. to Sheriffs 7–12.

Cadmus is correct that inadequate police training may form the basis of § 1983 liability where “in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that [the responsible policymakers] can reasonably be said to have been deliberately indifferent to the need.” *City of Canton v. Harris*, 489 U.S. 378, 390 (1989). Furthermore, in some cases it is possible “that the unconstitutional consequences of failing to train could be so patently obvious that [the defendant] could be liable under § 1983 without proof of a pre-existing pattern of violations,” *Connick v. Thompson*, 563 U.S. 51, 64 (2011). The circumstances in which such “single-incident liability” will be found, however, are rare. *See id.* at 63–72 (finding that district attorney’s office was not liable for failing to train its employees regarding their obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), because it was not “highly predictable” in the absence of a prior pattern of similar conduct that inadequate training would result in the type of *Brady* violations alleged). In *Canton*, the Supreme Court illustrated one scenario that could establish “single-incident” liability:

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force . . . can be said to be “so obvious,” that failure to do so could properly be characterized as “deliberate indifference” to constitutional rights.

Canton, 489 U.S. at 390 n.10 (citation omitted).

By contrast, the facts Cadmus has alleged in this case do not fall within the narrow set of circumstances in which liability for failure to train will arise from a single incident without a prior pattern of misconduct. Most of the actions Cadmus complains of—including his arrest and

detention, as well as the seizure and attempted search of his iPad—are alleged to have been carried out by deputies pursuant to Judge Burton’s instructions. It is not “highly predictable” that bailiffs carrying out a judge’s courtroom instructions will violate citizens’ rights.¹⁴ On the contrary, it would be entirely reasonable for Sheriffs Williamson and Millholland to presume that by following a judge’s orders, their deputies would act within constitutional bounds. Thus, the absence of training for deputies on whether to carry out judicial orders does not exhibit deliberate indifference on the part of the Sheriffs. Instead, to require additional training on the limits of contempt power and the recognition of unlawful orders, as Cadmus suggests, would ultimately undermine a judge’s authority to manage her own courtroom and place the discretion of bailiffs, who unlike a judge are not formally educated in the law, above her own.¹⁵

Unlike his other claims, Cadmus’s allegation that the deputies used excessive force during his arrest and detention cannot be defeated on the grounds that the deputies were simply following Judge Burton’s orders, as there is no allegation that Judge Burton directed them to carry out these acts in any particular manner. *Cf. In re Mills*, 287 F. App’x 273, 279 (4th Cir. 2008) (acknowledging, in the context of quasi-judicial immunity for bailiffs, “the distinction between protection from liability simply for following a judge’s order and protection from liability for carrying out a judge’s order in a manner not sanctioned by the judge”). Even so, there is still no sufficient basis for holding Sheriffs Williamson and Millholland liable for any excessive use of force by their deputies under a theory of failure to train. Cadmus does not allege

¹⁴ I make no finding at this time whether these allegations would state a constitutional violation.

¹⁵ This is not to suggest that bailiffs would always be compelled to follow a judge’s orders without question in circumstances where those orders were egregiously and obviously unlawful and presented a risk of severe harm to citizens. Those circumstances would likely be exceedingly rare, however, and the unconstitutional order in question may be so obviously illegal that specialized training for bailiffs would be unnecessary. Regardless, this case does not present such a scenario.

any facts showing that Winchester or Frederick County deputies were inadequately trained in the appropriate use of force, but instead assumes that the deputies must have been inadequately trained because of their actions during the events in question.¹⁶ Even reading Cadmus's complaint in the light most favorable to him, there is no reason to suspect that any possible violations that occurred here were more likely the result of inadequate training than the result of independent decisions by individual deputies. *See Revene*, 882 F.2d at 875 (finding that the plaintiff failed to allege that the conduct at issue "was anything but an aberrational act by an individual officer"). Moreover, Cadmus does not suggest any specific manner in which the deputies' training may have been deficient and fails to offer facts showing that the allegedly excessive use of force here was so likely to occur in the absence of adequate training that the need for training would be obvious to a reasonable supervisor.

Cadmus has thus failed to prove that Sheriffs Williamson and Millholland should be liable for failing to supervise or train their subordinates adequately. Moreover, because Cadmus does not point to any clearly established law that would put a reasonable person in the Sheriffs' position on notice that they were employing a constitutionally deficient level of supervision and training, those defendants are also protected by qualified immunity. *See Shaw*, 13 F.3d at 801 (noting that a plaintiff can only overcome qualified immunity if he shows that "a reasonable person in [the supervisor's] position would have known that his actions were unlawful"). For these reasons, I recommend that Cadmus's remaining claims against Sheriffs Williamson and Millholland be dismissed without prejudice.

¹⁶ This assertion is particularly puzzling, at least with regard to Cadmus's claim against Williamson, because Cadmus has attached FCSO policies and procedures concerning the use of force as an exhibit to his Amended Complaint. ECF No. 22-1, at 26-49.

III. Motion for Discovery

On February 24, 2016—two days after the Court held oral argument on the Defendants’ motions to dismiss, ECF No. 46—Cadmus moved for permission to conduct limited discovery and for the undersigned Magistrate Judge to stay issuance of a Report and Recommendation on the motions to dismiss until such time as Cadmus completed his discovery. ECF No. 50. Cadmus seeks discovery relating to the finances of Sheriffs Williamson’s and Millholland’s departments, alleging that discovery of these materials is necessary for him to support his argument against those Defendants’ assertion of sovereign immunity. Pl. Br. in Supp. of Mot. for Disc. 1–3, ECF No. 51. He also requests that the Court order counsel for Sheriff Williamson and Millholland “to either accept service of process for all Defendant Does or divulge the identities” of the deputies who were present during the events in question. *Id.* at 3–4.

Cadmus’s arguments supporting his request for jurisdictional discovery regarding the financial arrangements of the Sheriffs’ departments are without merit. The Court has already rejected a similar request for discovery in Cadmus’s other case, noting that “[t]he overwhelming weight of authority in this circuit shows that [a Virginia sheriff] is entitled to Eleventh Amendment immunity as a constitutional officer under state law.” *Cadmus I*, 2016 WL 1047087, at *14–15. In addition, the Court found that Cadmus’s request for discovery prejudiced the defendants in that case because Cadmus had waited months after first receiving notice of the immunity defenses before filing his motion. *Id.* at *15.

Similarly here, Cadmus cannot show that jurisdictional discovery is warranted. As in his other case, Cadmus’s arguments against finding sovereign immunity are futile, and his request for discovery—filed after the conclusion of oral argument and nearly four months after Williamson and Millholland raised an immunity defense in support of their motion to dismiss—

is so untimely that it would be prejudicial to the Defendants if granted. *See Informaxion Sols., Inc. v. Vantus Grp.*, 130 F. Supp. 3d 994, 998 (D.S.C. 2015) (“[A] district court need not allow jurisdictional discovery if such discovery would unnecessarily burden the defendant.”).

Additionally, Cadmus’s request that the Court order defense counsel to accept service for the “John Doe” Defendants or disclose their identities is not permissible under the Federal Rules of Civil Procedure. Even if this is construed as a motion to conduct discovery regarding the identities of these individuals, I find that such a request would be futile. Ordinarily, courts should allow plaintiffs an opportunity to identify unknown defendants through discovery. *Valentine v. Roanoke Cty. Police Dep’t*, No. 7:10cv429, 2011 WL 3273871, at *5 (W.D. Va. July 29, 2011). This opportunity to conduct discovery is unnecessary, however, if “it is clear that discovery would not uncover the identities, or that the complaint would be dismissed on other grounds.” *Id.* (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)).

Here, Cadmus’s attempt to ascertain the identities of the John Doe Defendants is unnecessary because any future claims brought against them would be time barred. “Naming unknown, fictitious, or ‘John Doe’ defendants in a complaint does not toll the statute of limitations until such time as the names of these parties can be secured,” but instead the inclusion of the newly identified defendant in place of John Doe “amounts to a change of parties” under Rule 15(c) of the Federal Rules of Civil Procedure. *Bruce v. Smith*, 581 F. Supp. 902, 905 (W.D. Va. 1984). Thus, an amendment that names a previously unidentified defendant and is filed after the applicable limitations period has run will only be allowed if the amendment “relates back” under Rule 15(c).¹⁷ *Id.*

¹⁷ Here, the applicable limitations period for all of Cadmus’s claims, including his claims brought pursuant to § 1983, is two years. *See* Va. Code Ann. § 8.01-243 (establishing a two-year limitations period for personal injury actions); *Lewis v. Richmond City Police Dep’t*, 947 F.2d 733, 735 (4th Cir. 1991) (finding that Virginia’s two-year statute of limitations applies to claims under § 1983). Therefore,

Relation back is not be permitted in cases where, as here, the plaintiff's failure to ascertain the identities of unknown defendants is a result of his "own inexcusable neglect." *Id.* at 906; *see also Hoback v. Doe*, No. 7:14cv711, 2015 WL 5553745, at *3 (W.D. Va. Sept. 18, 2015) (finding that relation back was not warranted because the plaintiff's failure to name the defendants in his original complaint was caused by lack of knowledge, rather than mistake, and noting that "there is no evidence of misconduct by the dismissed defendants to toll the statute of limitations period"). Here, Cadmus waited until July 27, 2015—less than one month before the limitations period would have run—to file his original complaint, and there is no indication that he made any attempt to ascertain the identities of the unnamed Defendants before the expiration of the two-year limitations period.¹⁸ *Cf. Bruce*, 581 F. Supp. at 906–08 (discussing relation back under analogous circumstances); *Philip v. Sam Finley, Inc.*, 270 F. Supp. 292, 294 (W.D. Va. 1967) (quoting *Jacobs v. McCloskey & Co.*, 40 F.R.D. 486, 488 (E.D. Pa. 1966) ("It is unfortunate that the Plaintiff left himself so slender a margin for error. However, that was his decision, and it was not affected by the conduct of the Defendant.")). Although the Court acknowledges the potential difficulty in identifying unknown defendants, ultimately "the 'burden of finding the proper defendant is on the plaintiff.'" *Hoback*, 2015 WL 5553745, at *3 (quoting *Philip*, 270 F. Supp. at 294). Cadmus has not come forward with a good reason for his failure to identify the Defendants within the limitations period, and the Court will not permit him to attempt to discover this information now. Because Cadmus has not timely served the John Doe Defendants under Rule 4(m) of the Federal Rules of Civil Procedure, I recommend that the

any claims that were filed after August 26, 2015, are untimely unless they relate back to the date Cadmus filed his original complaint.

¹⁸ The only evidence in the record of any attempt by Cadmus to identify the unnamed deputies is a FOIA request he submitted to the Winchester Sheriff's Office on September 24, 2015—nearly a month after the limitations period had run. ECF No. 22-1, at 51–52.

presiding District Judge, after ruling on this Report and Recommendation, give Cadmus notice that these claims will be dismissed without prejudice unless he can present good cause for his failure to effect service.

IV. Conclusion

The claims in Cadmus's Amended Complaint, ECF No. 22, fail to state a cause of action for which the Court can grant relief, and they should be dismissed under Rule 12(b)(1) and (6). I recommend that the presiding District Judge **DISMISS WITH PREJUDICE** all claims against The Honorable Elizabeth Kellas Burton and all claims for damages against Sheriffs Robert Williamson and Leonard Millholland in their official capacities, as these Defendants are protected by absolute immunity, and **DISMISS WITHOUT PREJUDICE** all other claims against Sheriffs Williamson and Millholland in their personal capacities. Furthermore, because the discovery Cadmus seeks at this time would be futile, I recommend that the presiding District Judge **DENY** his motion for discovery, ECF No. 50. Finally, I recommend that the presiding District Judge, after ruling on this Report and Recommendation, give Cadmus notice that his claims against the John Doe Defendants will be dismissed without prejudice for failure to effect timely service upon those Defendants unless he can show good cause for failing to do so.

Notice to Parties

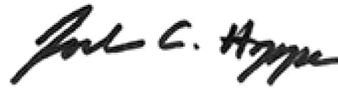
Notice is hereby given to the parties of the provisions of 28 U.S.C. § 636(b)(1)(C):

Within fourteen days after being served with a copy [of this Report and Recommendation], any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Failure to file timely written objections to these proposed findings and recommendations within 14 days could waive appellate review. At the conclusion of the 14 day period, the Clerk is directed to transmit the record in this matter to the Honorable Michael F. Urbanski, United States District Judge.

The Clerk shall send certified copies of this Report and Recommendation to all counsel of record and unrepresented parties.

ENTER: August 5, 2016

A handwritten signature in black ink that reads "Joel C. Hoppe". The signature is written in a cursive, slightly slanted style.

Joel C. Hoppe
United States Magistrate Judge