

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
BIG STONE GAP DIVISION**

<b>BETTY SLAGLE MINTON, et al.,</b>	)	
<b>Plaintiffs</b>	)	
	)	<b><u>REPORT AND</u></b>
	)	<b><u>RECOMMENDATION</u></b>
<b>v.</b>	)	<b>Case No. 2:13cv00036</b>
	)	
<b>NATHAN ALAN KENNEDY, et al.,</b>	)	
<b>Defendants</b>	)	

This case is before the court on Defendant Wesley Williams’s Motion To Dismiss, Plea Of Sovereign Immunity, And Memorandum In Support Thereof, (Docket Item No. 13), and Defendant Nathan Alan Kennedy’s Motion To Dismiss, (Docket Item No. 15), (collectively “the Motions to Dismiss”). The Motions to Dismiss are before the undersigned magistrate judge by referral pursuant to 28 U.S.C. § 636(b)(1)(B). As directed by the order of referral, the undersigned now submits the following report and recommended disposition.

*I. Facts & Procedural History*

The plaintiffs filed an Amended Complaint on August 9, 2013, (Docket Item No. 11), in this § 1983 action, alleging that the defendants’ actions violated various federal constitutional, common law and statutory state rights of the plaintiffs, Betty Slagle Minton, (“Minton”), and Emory Arnold Robinette, (“Robinette”). Robinette, 74 years of age, and Minton, 79 years of age, allege that on August 15, 2012, they were at Robinette’s house in Pennington Gap, Virginia, between 8:00 and 10:00 p.m. Minton was in bed asleep. When Robinette heard a noise outside, he went to his yard to investigate and to protect his property if necessary, as he had

experienced prior vandalism to his property. When Robinette realized the disturbance was at a neighboring residence, he returned to his own house, where he awakened Minton and asked her to call the police. There were no blue lights or other indications of police presence observed by Robinette at the neighboring residence, although Kennedy was already on the scene of the disturbance. When Minton called 9-1-1 and requested that police investigate the disturbance at the neighboring residence, she was informed that police should already be there. Minton and Robinette proceeded to the back door of Robinette's house, and Minton unlocked the door and opened it to see what was going on outside. Robinette was standing behind her. Neither plaintiff was armed, and both plaintiffs were unaware that Kennedy and Williams already had entered Robinette's property and were on the porch, directly beside the back door. Immediately, and without warning or verbal command, Kennedy grabbed Minton's cane, which caused her to begin to fall. Williams reached through the door, over Minton, and grabbed Robinette, knocking down and dragging both elderly plaintiffs outside.

At the beginning of this incident, Robinette, recognizing that the defendants were law enforcement officers, raised both hands to show that he was unarmed. Robinette was forcibly thrown by Kennedy against a vehicle which was parked in the driveway. Minton was knocked down and was struck by Kennedy. When Kennedy knocked Minton down, she struck her head on the concrete stoop, chipping the concrete. Kennedy raised the cane he had taken from Minton and started to use it as a weapon to strike Robinette as he lay against the vehicle. Minton yelled "Don't hit him in the head. He's had brain surgery." At that point, Kennedy lowered the cane and did not strike Robinette. According to the Amended Complaint, Kennedy shoved, kicked and hit both plaintiffs brutally and mercilessly. Kennedy also kicked Minton in the breast where she had recently had

a mastectomy. This, in conjunction with the prior blow to her head, rendered Minton unconscious.

Kennedy placed Robinette in custodial restraints. Kennedy, Williams, or both, searched and took property from Robinette's residence without a search warrant. These items were never returned. While in custody, the defendants either coerced or forged Robinette's signature on a form waiving his *Miranda* rights and on a confession statement regarding this incident. Robinette's hands and feet were shackled, he was semi-conscious, and he has no memory of these documents. However, contradictory to police protocol, the signature on the waiver form differs from the remainder of the handwriting on the form. Kennedy charged Robinette with misdemeanor obstruction of justice, misdemeanor brandishing a firearm and felony assault on a police officer. He was found not guilty of the misdemeanor charges, and a grand jury failed to indict him on the felony charge. Minton was not charged with any crime.

Robinette suffered severe internal injuries from the beating, kicking and custodial restraints which were forcibly placed on and around his body. Both plaintiffs' legs were injured such that they both have to primarily get around using walkers or wheelchairs, despite being primarily independent prior to this incident. Both plaintiffs seek compensatory and punitive damages from the defendants, and the defendants are sued in their individual and official capacities.

## *II. Analysis*

In their Amended Complaint, the plaintiffs attempt to assert claims for violations of the Fourth, Fifth and Fourteenth Amendments, as well as state law

claims for assault and battery, trespass to real estate and chattels, false arrest/imprisonment and a violation of Va. Code § 19.2-59.<sup>1</sup> The plaintiffs bring this suit pursuant to 42 U.S.C. § 1983, which imposes civil liability on any person acting under color of state law who deprives another person of rights and privileges secured by the Constitution and laws of the United States. The defendants argue that the plaintiffs have failed to state claims upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6).

Rule 12(b)(6) provides for dismissal of a complaint for “failure to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6). In *Bell Atl. Corp. v. Twombly*, the Supreme Court stated that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The “[f]actual allegations must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555 (citations omitted). Additionally, the Court established a “plausibility standard” in which the pleadings must allege enough to make it clear that relief is not merely conceivable but plausible. *See Twombly*, 550 U.S. at 555-63.

The Court further explained the *Twombly* standard in *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009):

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations

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<sup>1</sup> The plaintiffs previously also claimed violations of the Eighth Amendment’s prohibition on cruel and unusual punishment, but now ask the court to voluntarily dismiss these claims.

contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. ... Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. ...

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

(Internal citations omitted).

Thus, for the purpose of ruling on the Motions to Dismiss, this court will assume that all well-pleaded factual allegations contained in the plaintiffs' Amended Complaint are true, and all reasonable inferences will be drawn in favor of the plaintiffs. *See Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4<sup>th</sup> Cir. 1999). In deciding a Rule 12(b)(6) motion, the court may consider "matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint." *Moore v. Flagstar Bank*, 6 F. Supp. 2d 496, 500 (E.D. Va. 1997) (quotation omitted).

#### *A. Official Capacity Claims*

Both Kennedy and Williams argue that the plaintiffs have failed to state claims against them in their official capacities. Citing to *Kentucky v. Graham*, 473 U.S. 159, 166 (1985), the Supreme Court, in *Hafer v. Melo*, 502 U.S. 21, 25 (1991), held that a suit under § 1983 against a state official in his official capacity should be treated as a suit against the state. In the case of Officer Williams, a

Virginia State Police trooper, counsel correctly argues that the state enjoys Eleventh Amendment immunity from any action for damages against it unless Congress has abrogated that immunity or the state has waived the immunity. *See McConnell v. Adams*, 829 F.2d 1319, 1328 (4<sup>th</sup> Cir. 1987). There has been no evidence of such abrogation or waiver of immunity presented. That being the case, I find that Williams, in his official capacity as a Virginia State Police trooper, is immune from suit for money damages. Further, as counsel for Williams argues, because the Amended Complaint has requested only monetary damages, Williams is absolutely immune from suit in this matter in his official capacity.

As Officer Kennedy is a police officer with the Pennington Gap, Virginia, Police Department, counsel correctly argues that in order to find him liable in a § 1983 action in his official capacity, the plaintiffs must show that “action pursuant to official municipal policy [or custom] of some nature caused [the] constitutional tort,” and only when that policy or custom is “the moving force of the constitutional violation” is the government entity liable. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691, 694 (1978). “Because the real party in interest in an official-capacity suit is the government entity and not the named official, ‘the entity’s “policy or custom” must have played a part in violation of federal law.’” *Hafer*, 502 U.S. at 25 (quoting *Graham*, 473 U.S. at 167 (quoting *Monell*, 436 U.S. at 694)). “*Monell* reasoned that recovery from a municipality is limited to acts that are, properly speaking, acts ‘of the municipality’ – that is, acts which the municipality has officially sanctioned or ordered.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986). That being the case, the Supreme Court in *Pembaur*, reasoned that “municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances.” 475 U.S. at 480. According to *Pembaur*, “*Monell’s* language makes clear that it expressly

envisioned other officials ‘whose acts or edicts may fairly be said to represent official policy.’... and whose decisions therefore may give rise to municipal liability under § 1983.” 475 U.S. at 480. “‘Official policy’ often refers to formal rules or understandings – often but not always committed to writing – that are intended to, and do, establish fixed plans of action to be followed under similar circumstances consistently and over time.” *Pembaur*, 475 U.S. at 480-81. “Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered.” *Pembaur*, 475 U.S. at 481. Whether an official had final policymaking authority is a question of state law. *See Pembaur*, 475 U.S. at 483. Thus, “municipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.” *Pembaur*, 475 U.S. at 483-84 (citing *Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985)).

Taking the well-pleaded facts as alleged in the Amended Complaint as true, I find that there is no allegation that the actions taken by Kennedy, i.e. seizing elderly individuals by excessive force without provocation or warning and upon no probable cause, were officially sanctioned or ordered by an individual with final policymaking authority.

It is for these above-stated reasons that I find that the Amended Complaint fails to state claims against either Williams or Kennedy in their official capacities, and I recommend that their Motions to Dismiss be granted as to all such claims.

## *B. Qualified Immunity*

Williams also seeks dismissal of the Amended Complaint against him based on qualified immunity.<sup>2</sup> Qualified immunity is an affirmative defense that shields public officers performing discretionary duties from liability for civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is “immunity from suit rather than a mere defense to liability.” *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis in original).

A right is clearly established when a legal question has “been authoritatively decided by the Supreme Court, the appropriate United States Court of Appeals, or the highest court of the state. ...” *Wallace v. King*, 626 F.2d 1157, 1161 (4<sup>th</sup> Cir. 1980). As long as the conduct’s unlawfulness is manifest under existing authority, the exact conduct does not need to be specifically proscribed. *See Wilson v. Layne*, 526 U.S. 603, 614-15 (1999). In order to determine whether an officer’s conduct is immunized, the court must consider two questions: (1) whether a constitutional right would have been violated on the facts alleged; and (2) whether at the time of the alleged violation the right was clearly established. *See Smith v. Smith*, 589 F.3d 736, 739 (4<sup>th</sup> Cir. 2009) (citing *Saucier v. Katz*, 533 U.S. 194, 200 (2001)), *overruled in part by Pearson v. Callahan*, 555 U.S. 223, 236 (2009). However, it is within the court’s discretion to determine which prong of the test to address first. *See Pearson*, 555 U.S. at 236. The officer is entitled to immunity if the right were

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<sup>2</sup> Kennedy does not argue in his Motion to Dismiss that he is entitled to dismissal of the Amended Complaint based on qualified immunity grounds. Thus, the discussion regarding qualified immunity is limited to claims against Williams.

not clearly established at the relevant time or if a reasonable officer would not have known that his conduct violated that right. *See White v. Downs*, 1997 WL 210858, at \*5 (4<sup>th</sup> Cir. Apr. 30, 1997).

A determination of whether the legal rule was clearly established at the relevant time turns on the level of abstraction at which the legal rule is assessed. *See White*, 1997 WL 210858, at \*5. “The Fourth Amendment right to be searched and seized only upon a showing of probable cause, absent a recognized exception, is clearly established.” *White*, 1997 WL 210858, at \*5. It is, however, improper to analyze the applicable right at this level of generality and “would bear no relationship to the ‘objective legal reasonableness’ that is the touchstone of *Harlow*.” *White*, 1997 WL 210858, at \*5 (quoting *Anderson v. Creighton*, 483 U.S. 635, 639 (1987)); *see also Taylor v. Waters*, 81 F.3d 429, 434 (4<sup>th</sup> Cir. 1996). Instead, the inquiry must be more focused in order to make it possible for officials “reasonably [to] anticipate when their conduct may give rise to liability for damages. ...” *White*, 1997 WL 210858, at \*5 (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1984)). In determining whether a right is clearly established for qualified immunity purposes, the court examines facts alleged by the plaintiff, not those asserted by the defendant. *See Buonocore v. Harris*, 65 F.3d 347, 357 (4<sup>th</sup> Cir. 1995) (citing *Mitchell*, 472 U.S. at 526).

### *C. Fourth Amendment Excessive Force Claims*

First, the defendants argue that the Amended Complaint fails to state a claim for excessive force under the Fourth Amendment. The Fourth Amendment to the United States Constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable ... seizures, shall

not be violated.” U.S. CONST. amend. IV. “The Fourth Amendment prohibition on unreasonable seizures bars police officers from using excessive force to seize a free citizen.” *Jones v. Buchanan*, 325 F.3d 520, 527 (4<sup>th</sup> Cir. 2003) (citations omitted). However, law enforcement does have a right to use some degree of physical coercion or threat thereof to effect an arrest or investigatory stop. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). In analyzing an excessive force claim, courts must determine whether an officer has used excessive force to effect a seizure based on a standard of “objective reasonableness.” *Bailey v. Kennedy*, 349 F.3d 731, 743 (4<sup>th</sup> Cir. 2003) (quoting *Graham*, 490 U.S. at 399). To make this reasonableness determination, a court must “weigh the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (quoting *Tennessee v. Garner*, 471 U.S. 1, 8 (1985)). Also, the officer’s use of force must be judged from the perspective of the officer on the scene rather than the 20/20 vision of hindsight, and the reasonableness calculation must make allowances for the fact that police officers are many times forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving about the amount of force that is necessary in a particular situation. *See Elliott v. Leavitt*, 99 F.3d 640, 642 (4<sup>th</sup> Cir. 1996); *Greenidge v. Ruffin*, 927 F.2d 789, 791-92 (4<sup>th</sup> Cir. 1991). This test requires a determination of the reasonableness of an officer’s actions and is not capable of precise definition or mechanical application. Instead, it requires careful attention to the facts and circumstances of each particular case. *See Graham*, 490 U.S. at 396. Those facts and circumstances include: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *See Graham*, 490 U.S. at 396. The Fourth Circuit also has held that the extent of the plaintiff’s injury is a relevant

consideration. *See Jones*, 325 F.3d at 527 (citations omitted).

*1. Defendant Kennedy's Alleged Use of Excessive Force*

*a. Plaintiff Minton*

Kennedy does not dispute that the Amended Complaint sufficiently states a claim for a violation of Robinette's Fourth Amendment right to be free from excessive force while being seized. Kennedy does, however, argue that the Amended Complaint fails to state such a claim regarding Minton. For the following reasons, I disagree.

Kennedy argues that Minton can state no such claim against him because she was not "seized" within the meaning of the Fourth Amendment. Instead, she was merely a "bystander" to the seizure of Robinette, who was injured in the process of that seizure. Counsel argues that such injury to a bystander does not support a constitutional claim under § 1983. It is well-settled that a seizure within the meaning of the Fourth Amendment always "requires an intentional acquisition of physical control." *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen" may we "conclude that a 'seizure' has occurred." *Schultz v. Braga*, 455 F.3d 470, 480 (4<sup>th</sup> Cir. 2006) (quoting *United States v. Mendenhall*, 446 U.S. 544, 552 (1980)). Liberty has been restrained, and "a person has been 'seized' within the meaning of the Fourth Amendment ... if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Schultz*, 455 F.3d at 480 (quoting *Mendenhall*, 446 U.S. at 554). In *Hicks v. Leake*, 821 F. Supp. 419, 421 (W.D. Va. 1992), this court held that "specific intent to restrain must be alleged and proven in

order to establish a claim for an excessive force violation of the Fourth Amendment.” Thus, it does not extend to “accidental effects” or “unintended consequences of government action.” *Brower*, 489 U.S. at 596. Although a seizure may “occur[] even when an unintended person or thing is the object of the detention or taking, ... the detention or taking [of the person or thing] must itself be willful. This is implicit in the word ‘seizure,’ which can hardly be applied to an unknowing act.” *Schultz*, 455 F.3d at 480 (quoting *Brower*, 489 U.S. at 596).

The Fourth Circuit has declined to extend the protections of the Fourth Amendment to an innocent bystander, who was unintentionally killed by a police officer attempting to seize a fleeing criminal. *See Rucker v. Harford County, Md.*, 946 F.2d 278, 281 (4<sup>th</sup> Cir. 1991). In *Rucker*, the Fourth Circuit stated that because the victim “was not the intended object of the shooting by which he was injured,” he had not been “‘seized’ within contemplation of the [F]ourth [A]mendment.” 946 F.2d at 281. Likewise, other courts have similarly refused to allow hostages to bring Fourth Amendment claims against police officers who accidentally shot them while attempting to seize their captors, even though the means applied (the gunfire) was intentional, because there was no intent to seize the hostage. *See Schultz*, 455 F.3d at 480 (citing *Childress v. City of Arapaho*, 210 F.3d 1154, 1157 (10<sup>th</sup> Cir. 2000) (holding that innocent hostages injured by police gunfire could not bring an action under the Fourth Amendment because there was no intent to “seize” the hostages); *Medeiros v. O’Connell*, 150 F.3d 164, 168-69 (2<sup>nd</sup> Cir. 1998) (holding that no Fourth Amendment seizure occurred when a hostage was injured by police gunfire because the victim was not the object of an intentional act of seizure); *Landol-Rivera v. Cosme*, 906 F.2d 791, 798 (1<sup>st</sup> Cir. 1990) (holding that the Fourth Amendment is not implicated when a hostage is inadvertently shot during a police pursuit of a robbery suspect because “the individual alleging harm was [not] the

object of the challenged police conduct”). In sum, “a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual’s freedom of movement,” such as in the case of an innocent passerby who is injured when he is inadvertently struck by the force employed, “nor even whenever there is a governmentally caused and governmentally *desired* termination of an individual’s freedom of movement,” such as in the case of a fleeing felon who is unknowingly and unintentionally stopped by an officer. *Brower*, 489 U.S. at 596-97 (emphasis in original). Rather, a Fourth Amendment seizure occurs “only when there is a governmental termination of freedom of movement through means intentionally applied.” *Brower*, 489 U.S. at 597. It is not necessary that the seizure be effectuated exactly as intended when the force is applied, but the person must nonetheless have been “stopped by the very instrumentality set in motion or put in place in order to achieve that result.” *Brower*, 489 U.S. at 599.

Here, the Amended Complaint alleges that Kennedy “grabbed Plaintiff Minton’s cane, which caused her to begin to fall.” (Amended Complaint at 4.) The Amended Complaint alleges that both elderly plaintiffs were targeted for force, seizure, and arrest even though Robinette was the only one ultimately charged with a crime. The Amended Complaint further states that

“Minton was knocked down and was struck by Defendant Kennedy [and] ... she struck her head on the concrete stoop, which chipped the concrete. Using the pretext that he was disarming and subduing Plaintiff Minton, Defendant Kennedy used excessive force on [her]. ... Defendant Kennedy ... shoved, kicked, and hit both Plaintiffs brutally and mercilessly. Defendant Kennedy kicked Plaintiff Minton in the breast where she had recently had a mastectomy. This, along with the blow to her head ... knocked Plaintiff Minton unconscious.”

(Amended Complaint at 4-5.) I find that the allegations in the Amended Complaint sufficiently show that Minton was “seized” within the meaning of the Fourth Amendment and was not merely a bystander to the seizure of Robinette. The plaintiffs allege that Kennedy “grabbed” Minton’s cane. This implies an intentional action. Intentionally grabbing the cane of an elderly woman at night and without warning plausibly demonstrates Kennedy’s intent to terminate Minton’s freedom of movement. Even assuming, arguendo, that this action did not constitute a seizure of Minton, I find that the other allegations in the Amended Complaint that Kennedy “knocked Plaintiff Minton down” that he “shoved, kicked, and hit” her and that he “kicked Plaintiff Minton in the breast where she recently had a mastectomy” illustrate Kennedy’s intention to terminate her freedom of movement. I find that these facts plausibly demonstrate that Kennedy would not perform these actions to effect the seizure of Robinette, but to seize Minton. Moreover, the Amended Complaint alleges that these actions, in combination, caused Minton to lose consciousness. Once Minton lost consciousness, she most certainly would have been successfully “seized” within the Fourth Amendment’s contemplation.

Having found that the Amended Complaint sufficiently alleges that Minton was seized for Fourth Amendment purposes, the court now must consider whether it sufficiently states that the seizure was effected by the use of excessive force. As stated above, the governing standard is one of objective reasonableness, determined by weighing the three factors set forth in *Graham*. For the following reasons, I find that it does.

The first *Graham* factor is the severity of the crime at issue. The Amended

Complaint alleges that Minton did not commit a crime and that Kennedy did not have probable cause to suspect her of committing a crime. In particular, the Amended Complaint states, in multiple places, that neither plaintiff did anything “wrong, unlawful, or threatening.” (Amended Complaint at 6.) Likewise, the Amended Complaint states that there was no probable cause to suspect Minton had committed a crime in that it states that “[t]here was no legitimate, legal, or constitutionally permissive reason for Defendants to be at Plaintiff Robinette’s residence since the disturbance was reported to be at a neighboring residence, and Plaintiffs were secure inside the residence.” (Amended Complaint at 4.) According to the Amended Complaint, all Minton did was call 9-1-1 to request that police respond to the disturbance at the neighboring residence and walk to the back door and unlock it to try to see what was happening at the neighboring residence. Thus, I find that the first *Graham* factor weighs in favor of Minton. Likewise, as the Amended Complaint alleges that Minton had committed no crime, nor did Kennedy have any probable cause to believe that she had done so, it is unlikely that he reasonably could have viewed Minton as an immediate threat. Thus, I find that the second factor also weighs in favor of Minton. The third factor – whether the plaintiff was resisting arrest or attempting to flee – also weighs in favor of Minton. The Amended Complaint alleges that immediately upon Minton’s opening the door, the unprovoked “attack” by Kennedy ensued. The Amended Complaint further alleges that this “attack” took place after both defendants had actual knowledge that neither plaintiff was armed nor posed any threat or danger. Based on these facts, I find that Kennedy has no viable argument that Minton resisted arrest or attempted to flee.

It is for all of these reasons that I find that Minton has sufficiently plead facts in the Amended Complaint so that the three *Graham* factors weigh in her

favor. Therefore, I find that Minton has sufficiently alleged that Kennedy's use of force in seizing her was not objectively reasonable and constituted excessive force in violation of the Fourth Amendment, and I recommend that the court deny Kennedy's Motion to Dismiss as to this claim.

## 2. *Defendant Williams's Alleged Use of Excessive Force*

### a. *Plaintiff Minton*

Williams argues, as did Kennedy, that he did not seize Minton because any contact he had with Minton was an "accidental effect" or "unintended consequence," insufficient under *Brower*, 489 U.S. at 596. Williams also argues that, according to the Amended Complaint, it was Kennedy, not he, who restrained Minton. (Amended Complaint at 4-5.) Williams emphasizes that the Amended Complaint fails to allege that he was involved or was even still present at the time Minton was restrained.

Here, I find that the Amended Complaint fails to allege the requisite specific intent to restrain by Williams as to Minton. *See Hicks*, 821 F. Supp. at 421. In particular, the Amended Complaint states only that "Defendant Williams reached through the door, *over Plaintiff Minton*, and grabbed Plaintiff Robinette, knocking down and dragging both elderly Plaintiffs outside." (Amended Complaint at 4.) I find that this statement clearly conveys that Williams intended to seize Robinette, not Minton, as he specifically reached over Minton, who was standing in front of Robinette, in order to get to Robinette, his intended target. Based on the facts alleged in the Amended Complaint, the fact that Minton was knocked down and dragged outside by Williams appears to be nothing more than an unintended consequence of Williams's seizure of Robinette. Once both Robinette and Minton

were outside, the Amended Complaint does not allege that Williams directed any other action toward Minton. The only other allegations contained in the Amended Complaint as to Williams are that “Defendants’ actions were intentionally directed toward both elderly Plaintiffs in that both were targeted for force, seizure, and arrest...,” and that “Defendant Kennedy ... was assisted, aided, and abetted by Defendant Williams. ...” (Amended Complaint at 4, 5.) However, these are legal conclusions which this court is not obliged to accept as fact. It is for all of these reasons that I find that the alleged facts fail to show that Minton was seized within the meaning of the Fourth Amendment by Williams, and she, therefore, could not have been the victim of excessive force under the Fourth Amendment. Therefore, I recommend that Williams’s Motion to Dismiss be granted as to Minton’s Fourth Amendment excessive force claim against him.

*b. Plaintiff Robinette*

For the reasons stated above, I find that the Amended Complaint does adequately state facts alleging that Williams seized Robinette within the meaning of the Fourth Amendment. The Amended Complaint alleges that Williams reached through the door and grabbed Robinette, knocking him down and dragging him outside. There are no facts stated in the Amended Complaint that Robinette ever arose on his own volition after that time. In fact, the Amended Complaint states that “[a]t the beginning of [the] unprovoked attack, Plaintiff Robinette – seeing that Defendants were law enforcement officers – raised both his hands to demonstrate he was un-armed.” (Amended Complaint at 4.) There is no allegation that Robinette ever tried to get away from Williams. For these reasons, I find that the Amended Complaint sufficiently alleges that Williams had the specific intent to restrain Robinette. Additionally, the facts alleged in the Amended Complaint

sufficiently show that Williams, by means of physical force, terminated Robinette's freedom of movement. It is for all of these reasons, that I find that the Amended Complaint sufficiently states that Williams seized Robinette for Fourth Amendment purposes. That being the case, the issue becomes whether this seizure was objectively reasonable. A consideration of the three *Graham* factors here reveals that it was not.

According to the facts alleged in the Amended Complaint, no crime had been committed by either Robinette or Minton, nor did Williams have any reason to believe such was the case. Instead, the plaintiffs merely called 9-1-1 for police intervention after discovering a disturbance at a neighboring residence. Thus, the first *Graham* factor weighs in favor of Robinette. Likewise, the defendants also had no reason to believe the plaintiffs posed an immediate threat to the safety of the officers or others. Therefore, the second *Graham* factor also weighs in favor of Robinette. Moreover, there are no facts alleged in the Amended Complaint to show any attempt to resist or evade arrest or flight on Robinette's part. According to the Amended Complaint, the plaintiffs were attacked "immediately" upon opening the back door. The Amended Complaint does not allege facts showing that Williams was directly involved in any of the events that occurred after that time, but the facts as alleged do not show that Robinette ever attempted to resist or evade arrest or flee. Furthermore, according to the Amended Complaint, this "attack took place after both Defendants had actual knowledge that neither elderly Plaintiff was armed nor posed any threat or danger." (Amended Complaint at 5.) Lastly, the extent of Robinette's injuries was quite significant. The Amended Complaint alleges that Robinette suffered severe internal injuries and injuries to his legs requiring the use of a walker or a wheelchair to get around. It is for all of these reasons that I find that a reasonable officer in Williams's position would not have

immediately seized Robinette, an elderly man, upon the opening of the back door, by knocking him down and dragging him from his home, based on the facts as alleged in the Amended Complaint. Therefore, I recommend that the court deny Williams's Motion to Dismiss Robinette's Fourth Amendment excessive force claim against him.

Because I have found that Robinette has sufficiently plead a violation of the Fourth Amendment's prohibition against the use of excessive force in effecting his seizure, I now must determine whether, for qualified immunity purposes, the right was clearly established at the time such that it would have been clear to a reasonable officer in Williams's position that his conduct was unlawful in the situation he confronted. I find that it was. In August 2012, Williams's alleged conduct included immediately seizing Robinette, an elderly man, upon the opening of the back door of his home, with enough force to knock both Robinette and Minton down, dragging them both outside of the home, even though Williams had no reason to believe Robinette had committed or was committing a crime, posed no immediate threat to the safety of officers or others and had not shown any attempt to resist or evade arrest or to flee. I find that such conduct was manifestly unlawful under existing authority at the relevant time. Therefore, I find that Williams is not entitled to qualified immunity on this claim at this time.

#### *D. Fifth & Fourteenth Amendment Claims for Excessive Force & Otherwise*

The plaintiffs allege that the defendants violated the Fifth and Fourteenth Amendments by the same conduct outlined above and analyzed under the Fourth Amendment. The defendants are correct that the "Fourth Amendment governs claims of excessive force during the course of an arrest, investigatory stop, or other

‘seizure’ of a person.” *Riley v. Dorton*, 115 F.3d 1159, 1161 (4<sup>th</sup> Cir. 1997) (abrogated on other grounds by *Wilkins v. Gaddy*, 559 U.S. 34, 35 (2010)). The Fifth and Fourteenth Amendments govern excessive force claims of pretrial detainees and arrestees. *See Graham*, 490 U.S. at 392-93; *Young v. Prince George’s County, Md.*, 355 F.3d 751, 758 (4<sup>th</sup> Cir. 2004); *Robles v. Prince George’s County, Md.*, 302 F.3d 262 (4<sup>th</sup> Cir. 2002). The conduct alleged above clearly occurred during the course of an arrest or seizure of the plaintiffs. Therefore, I find that the Fourth Amendment analysis controls the excessive force claim as it relates to the events surrounding the alleged seizures of the plaintiffs.

However, Plaintiff Robinette alleges a separate violation of the Fifth Amendment, applicable to the states by virtue of incorporation under the Fourteenth Amendment, insofar as he contends that Kennedy violated his right against self-incrimination by either “coerc[ing] and/or forg[ing] Plaintiff Robinette’s signature on a form waiver of his constitutional rights and on a ‘confession’ statement about this incident.” (Amended Complaint at 6.) I find Robinette’s argument that *Gray v. Spillman*, 925 F.2d 90 (4<sup>th</sup> Cir. 1991), allows the court to find a violation of Fifth Amendment rights even when a coerced statement is not used against the individual in a criminal proceeding unpersuasive. I find that this issue was definitively resolved by the Supreme Court in *Chavez v. Martinez*, 538 U.S. 760 (2003). In *Chavez*, the Court held that a § 1983 suit was precluded where the plaintiff was allegedly coercively interrogated, but was never prosecuted based on that interrogation. *See* 538 U.S. 760. Specifically, in *Chavez*, the Supreme Court held that the plaintiff’s § 1983 suit failed to state a claim for a violation of the Fifth Amendment. *See* 538 U.S. 760. The Court stated that “a violation of the constitutional *right* against self-incrimination occurs *only* if one has been compelled to be a witness against himself in a criminal case.” *Chavez*, 538 U.S. at

770 (first emphasis in original; second emphasis added). A “criminal case” at the very least requires the initiation of legal proceedings. *Chavez*, 538 U.S. at 766 (citing *Blyew v. United States*, 80 U.S. 581, 595 (1872) (“The words ‘case’ and ‘cause’ are constantly used as synonyms in statutes and judicial decisions, each meaning *a proceeding in court, a suit, or action*” (emphasis added))). “... [P]olice questioning does not constitute a ‘case.’ ... Statements compelled by police interrogations ... may not be used against a defendant at trial, ... but it is not until their use in a criminal case that a violation of the self-incrimination clause occurs, *see United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990) (“The privilege against self-incrimination guaranteed by the Fifth Amendment is *a fundamental trial right* of criminal defendants. Although conduct by law enforcement officials prior to trial may ultimately impair that right, *a constitutional violation occurs only at trial.*” (emphasis added; citations omitted)); *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (describing Fifth Amendment as a “trial right”); *Withrow*, 507 U.S. at 705 (O’Connor, J., concurring in part and dissenting in part) (describing “true Fifth Amendment claims” as the “extraction *and use* of compelled testimony” (emphasis altered)). Therefore, the Court in *Chavez* refused to allow a § 1983 suit to proceed on the ground that no constitutional violation had occurred since the compelled testimony was never admitted in court, noting that “violations of judicially crafted prophylactic rules [like *Miranda* warnings] do not violate the constitutional rights of any person.” 538 U.S. at 772.

Here, according to the Amended Complaint, Robinette was never made to be a witness against himself in violation of the Fifth Amendment’s Self-Incrimination Clause because his statements were never admitted as testimony against him in a criminal case. Nor was he ever placed under oath and exposed to “the cruel trilemma of self-accusation, perjury or contempt.” *Chavez*, 538 U.S. at 767

(quoting *Michigan v. Tucker*, 417 U.S. 433, 445 (1974) (quoting *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964))). The text of the Self-Incrimination Clause simply does not support the view that the mere use of compulsive questioning, without more, violates the Constitution. *See Chavez*, 538 U.S. at 767. It is for all of these reasons, that I find that, even if Kennedy coerced a statement from Robinette or forged a waiver of Robinette's constitutional rights while in custody, no constitutional violation occurred because this statement was not used against Robinette in any criminal proceeding. That being the case, I recommend that the court grant Kennedy's Motion to Dismiss as to this claim by Robinette.

#### *E. Punitive Damages In § 1983 Actions*

Both plaintiffs seek an award of punitive damages from both defendants in the amount of \$500,000.00. The Supreme Court has held that "punitive damages are available in a 'proper' § 1983 action. ..." *Smith v. Wade*, 461 U.S. 30, 35 (1983) (quoting *Carlson v. Green*, 446 U.S. 14, 22 (1980)). In *Smith*, the Supreme Court held that a jury may be permitted to assess punitive damages in a § 1983 action when a defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to federally protected rights of others and such threshold applies even when the underlying standard of liability for compensatory damages is one of recklessness. *See Smith*, 461 U.S. at 56. The Fourth Circuit reaffirmed this holding in *Goodwin v. Metts*, 885 F.2d 157, 165 (4<sup>th</sup> Cir. 1989) (quoting *Smith*, 461 U.S. at 56) (overruled on other grounds), holding that "[p]unitive damages are available in [§] 1983 actions only 'when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of

others.” Likewise, more recently, in 2007, in *Valladares v. Cordero*, 2007 WL 2471067, at \*6 (E.D. Va. Aug. 27, 2007), the district court denied the defendant’s motion to dismiss a claim for punitive damages claim in a § 1983 action based on the defendant’s argument that the plaintiff had failed to show evil motive or intent. In that case, the court specifically stated that the majority’s holding in *Smith* “specifically rejected the actual intent standard and stated that a plaintiff may also claim punitive damages when an individual acts with reckless or callous indifference to another’s federally protected rights.” 2007 WL 2471067, at \*6 (citing *Smith*, 461 U.S. at 56).

“Malice” and “reckless indifference” do not refer to the egregiousness of a defendant’s conduct, but rather to his knowledge that he may be acting in violation of federal law. See *Matarese v. Archstone Pentagon City*, 795 F. Supp. 2d 402, 449 (E.D. Va. 2011), *aff’d in part, vacated in part on other grounds*, 468 F. App’x 283 (4<sup>th</sup> Cir. Feb. 28, 2012). In this context, it has been likened to the standard for deliberate indifference. See *Cooper v. Dyke*, 814 F.2d 941, 948 (4<sup>th</sup> Cir. 1987). Deliberate indifference requires that an official know of and disregard an excessive risk of violating an individual’s federally protected right. See *Farmer v. Brennan*, 511 U.S. 825, 836 (1994). The official must both be aware of facts from which the inference could be drawn that such a substantial risk exists, and he must also draw that inference. See *Farmer*, 511 U.S. at 837.

Here, both Williams and Kennedy argue that the plaintiffs’ claims for punitive damages fail, in part, because the Amended Complaint states that they are not seeking to recover against them “for malicious acts, willful acts, wanton acts, and/or criminal acts.” (Amended Complaint at 28.) The court agrees that the Amended Complaint so states. However, this is only one way that the plaintiffs

may show that they are entitled to punitive damages under § 1983. If they can show that the defendants' actions involved a reckless or callous indifference to the plaintiffs' federally protected rights, then they also are entitled to punitive damages. I find that the well-pleaded allegations in the Amended Complaint sufficiently demonstrate conduct by the defendants that plausibly show a reckless or callous indifference to their right to be free from a seizure by excessive force.

As stated herein, the undersigned found that the Amended Complaint sufficiently states claims for Fourth Amendment excessive force violations against Kennedy by both Robinette and Minton and against Kennedy by Minton. The Amended Complaint alleges that the defendants knew that the plaintiffs were not armed before they seized them from the residence. The Amended Complaint also alleges that, upon recognizing the defendants as law enforcement, Robinette showed his hands to demonstrate that he was unarmed. Given these allegations, I find that sufficient facts have been alleged to demonstrate that the defendants knew of and disregarded an excessive risk of violating both Robinette's and Minton's federally protected rights to be free from seizure by excessive force in violation of the Fourth Amendment when they seized them from Robinette's residence. Therefore, I also find that the Amended Complaint sufficiently states claims for punitive damages as to these claims, as well. Thus, I recommend that the court deny Kennedy's Motion to Dismiss both Robinette's and Minton's punitive damages claims, and I further recommend that the court deny Williams's Motion to Dismiss Robinette's punitive damages claim. However, because I found earlier that the Amended Complaint fails to state a claim for a Fourth Amendment seizure by excessive force against Williams by Minton, I recommend that the court grant Williams's Motion to Dismiss Minton's punitive damages claim.

## *F. State Law Claims*

### *1. Assault & Battery*

Pursuant to Virginia Code Annotated § 18.2-57, “Any person who commits a simple assault or assault and battery is guilty of a Class 1 misdemeanor, . . .” Because Virginia Code § 18.2-57 “does not define assault, we [must] look to the common law definition of the term.” *Clark v. Commonwealth*, 676 S.E.2d 332, 336 (Va. Ct. App. 2009) (quoting *Carter v. Commonwealth*, 606 S.E.2d 839, 841 (Va. 2005)). Virginia “has merged the common law crime and tort of assault so that today, a common law assault [punishable as a criminal offense] occurs when either set of elements is proved.” *Clark*, 676 S.E.2d at 336 (quoting *Carter*, 606 S.E.2d at 841). “An assault occurs under the traditional criminal definition ‘when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm.’” *Clark*, 676 S.E.2d at 336 (quoting *Carter*, 606 S.E.2d at 841). “An assault occurs under the merged tort law definition when an assailant ‘engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim.’” *Clark*, 676 S.E.2d at 336 (quoting *Carter*, 606 S.E.2d at 841). “Under either definition, the bodily harm threatened need not be serious or deadly harm.” *Clark*, 676 S.E.2d at 336 (citation omitted). “[T]o prove assault under either definition, a sufficient causal nexus must exist among the elements of the offense – under the criminal definition, the perpetrator must commit the overt act with the intent to inflict bodily harm and have the present ability to inflict that harm; under the tort definition, the perpetrator must commit the overt act with the intent to place the victim in fear of bodily harm and the overt act must create reasonable fear in the victim.” *Clark*, 676 S.E.2d at 337.

A battery is a “wil[l]ful or unlawful touching” of another. *Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927). It is not necessary that the touching “result in injury to the [victim’s] corporeal person. It is sufficient if it does injury to the [victim’s] mind or feelings.” *Wood*, 140 S.E. at 115. “Not every touch is a battery,” *Wood*, 140 S.E. at 115, and a touching is not a battery if it is “justified or excused,” *Perkins v. Commonwealth*, 523 S.E.2d 512, 513 (Va. Ct. App. 2000) (citing *Gnadt v. Commonwealth*, 497 S.E.2d 887, 888 (Va. Ct. App. 1998)). “Whether a touching is a battery depends on the intent of the actor, not on the force applied.” *Adams v. Commonwealth*, 534 S.E.2d 347, 350 (Va. Ct. App. 2000) (citing *Wood*, 140 S.E. at 115). “One cannot be convicted of assault and battery ‘without an intention to do bodily harm – either an actual intention or an intention imputed by law.’” *Adams*, 534 S.E.2d at 350 (quoting *Davis v. Commonwealth*, 143 S.E. 641, 643 (Va. 1928)). The unlawful intent may be imputed if the touching is “done in a rude, insolent, or angry manner.” *Adams*, 534 S.E.2d at 350 (quoting *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924)). “This intent may be gathered from the conduct of the aggressor, viewed in the light of the attending circumstances.” *Wood*, 140 S.E. at 115. Additionally, circumstantial evidence of intent may include the conduct and statements of the alleged offender. *See Adams*, 534 S.E.2d at 351; *see also Montague v. Commonwealth*, 684 S.E.2d 583, 589 (Va. 2009) (citing *Commonwealth v. Vaughn*, 557 S.E. 2d 220, 223 (Va. 2002)). Furthermore, the finder of fact may infer that the assailant “intends the natural and probable consequences of his acts.” *Adams*, 534 S.E.2d at 351 (quoting *Campbell v. Commonwealth*, 405 S.E.2d 1, 4 (Va. Ct. App. 1991) (en banc)).

*a. Assault & Battery of Robinette by Kennedy*

Taking the well-pleaded facts of the Amended Complaint as true, I find that Robinette has sufficiently stated a claim against Kennedy for assault. After Minton unlocked the back door, Kennedy grabbed Minton's cane, Williams reached through the door over Minton and grabbed Robinette, knocking both plaintiffs down and dragging them outside. At the beginning of the skirmish, Robinette raised both hands to show that he was unarmed. However, Kennedy forcibly threw Robinette against a vehicle parked in the driveway. Kennedy proceeded to raise the cane he had taken from Minton to use as a weapon to strike Robinette as he lay against the vehicle, but Minton stopped him by yelling "Don't hit him in the head. He's had brain surgery." I find that these facts sufficiently show that Kennedy committed overt acts, including the throwing of Robinette against a vehicle parked in the driveway and the raising of the cane he had taken from Minton and beginning to use it as a weapon to strike Robinette. The Virginia Supreme Court has recognized that the following overt acts may be sufficient under the criminal definition: "striking at [the victim] with a stick or other weapon, or without a weapon, though he be not struck, or even by raising up the arm or a cane in a menacing manner. ..." *Clark*, 676 S.E.2d at 337 n.4 (quoting *Harper v. Commonwealth*, 85 S.E.2d 249, 255 (Va. 1955)). I further find that the facts alleged sufficiently establish that Kennedy intended to place Robinette in fear of bodily harm because Robinette was an elderly man, and if Kennedy already had hold of Robinette, it can reasonably be inferred that the natural and probable consequence of his actions of forcefully throwing Robinette against a parked vehicle and raising Minton's cane as if to begin to strike him, stopping only after Minton pleaded with him because Robinette had undergone prior brain surgery would place Robinette in reasonable fear of bodily harm. The Amended Complaint

specifically alleges that the defendants' actions caused Robinette fear and reasonable apprehension for his safety and welfare. (Amended Complaint at 9.) It is for these reasons, I find that the Amended Complaint states a claim for assault against Kennedy by Robinette, and I recommend that the court deny Kennedy's Motion to Dismiss as to this claim.

I further find that the Amended Complaint states a claim against Kennedy for battery as to Robinette. Again, taking the well-pleaded facts alleged in the Amended Complaint as true, Kennedy was on Robinette's property without probable cause, and after Williams forcibly dragged Robinette from his residence, knocking him down in the process, Kennedy forcibly threw Robinette against a parked vehicle. I find that these facts alone sufficiently demonstrate that Kennedy unlawfully touched Robinette in a rude, insolent or angry manner to establish a battery under Virginia law. Therefore, I also recommend that the court deny Kennedy's Motion to Dismiss as to this claim.

*b. Assault & Battery of Minton by Kennedy*

As for Kennedy's actions toward Minton, I find that the Amended Complaint alleges sufficient facts to state a claim for assault. More specifically, Minton alleges that Kennedy grabbed her cane, causing her to fall. Kennedy also kicked Minton in the breast where she recently had undergone a mastectomy. According to the Amended Complaint, Kennedy did so after Minton already had been dragged out of the residence and hit her head on the concrete stoop. I find that Kennedy's grabbing Minton's cane and kicking Minton, a 79-year-old woman, in the breast constitute overt acts intended to place Minton in fear of bodily harm because this would be a natural and probable consequence of his actions, as

described above. Moreover, the Amended Complaint specifically alleges that the defendants' actions caused Minton to be in fear and reasonable apprehension for her safety and welfare. (Amended Complaint at 9.) Thus, I find that the Amended Complaint sufficiently states a claim for assault against Kennedy as to Minton, and I recommend that the court deny Kennedy's Motion to Dismiss with respect to this claim.

I further find that the Amended Complaint sufficiently states a claim for battery of Minton by Kennedy. As stated above, the Amended Complaint alleges that Kennedy was on Robinette's property without probable cause and that he grabbed Minton's cane, causing her to begin to fall once she opened the back door of the residence. Courts have held that the slightest touching of a person, including his cane, if done in a rude, insolent or angry manner, constitutes a battery. *See United States v. White*, 606 F.3d 144, 148 (4<sup>th</sup> Cir. 2010); *Crosswhite*, 124 S.E. at 244. I find it apparent that the facts, as alleged, demonstrate an illegal touching of Minton by Kennedy done in a rude, insolent or angry manner. Therefore, I recommend that the court deny Kennedy's Motion to Dismiss this claim, as well.

*c. Assault & Battery of Robinette by Williams*

As for Williams, I find that the Amended Complaint does not state a claim for assault of Robinette because it merely alleges that Williams reached through the door, over Minton, and grabbed Robinette, knocking down and dragging both elderly plaintiffs outside. First, I find that this allegation does not evidence an overt act intended to inflict bodily harm. Also, there is nothing about the statement that evinces an intent to place Robinette in fear of bodily harm. Although Robinette and Minton were both knocked down and dragged out of the residence

as Robinette was being removed therefrom, there are no allegations in the Amended Complaint that evidence an intent by Williams to do this. Instead, it appears as if Williams was removing Robinette, and both Robinette and Minton were knocked down. I find that the allegations in the Amended Complaint show nothing more than that Williams intended to remove Robinette from the residence. This finding is further supported by the Amended Complaint's lack of factual allegations regarding any actions taken toward Robinette by Williams subsequent to his removal from the residence. It is for all of these reasons that I find that the Amended Complaint fails to state an assault claim by Robinette against Williams, and I recommend that the court grant Williams's Motion to Dismiss regarding the same. It is clear under Virginia law that an individual charged with assault and battery may be found guilty of assault, yet acquitted of battery. However, every battery includes an assault. *See Hardy v. Commonwealth*, 17 Va. (1 Gratt.) 592 (1867). Having found that the Amended Complaint fails to state a claim for assault against Williams as to Robinette, the facts, as alleged, necessarily cannot be sufficient to state a battery claim. Thus, I recommend that the court grant Williams's Motion to Dismiss as to the battery claim by Robinette, as well.

*d. Assault & Battery of Minton by Williams*

Lastly, I find that the Amended Complaint fails to state claims for both assault and battery of Minton by Williams. The only allegation stated in the Amended Complaint regarding Williams and Minton is that when Williams reached through the door, over Minton, in order to get to Robinette, he knocked her down and dragged her outside in the process of bringing Robinette out of the residence. No other actions are alleged to have been directed at Minton by Williams. I find that these facts do not demonstrate the necessary overt act

intended to place Minton in fear of bodily harm. Instead, the facts show that Minton was likely inadvertently knocked down and dragged out of the residence while Officer Williams was removing Robinette therefrom. Therefore, I find that the Amended Complaint fails to state a claim for assault by Williams against Minton, and I recommend that the court grant Williams's Motion to Dismiss as to this claim. Likewise, because the facts do not show that Williams intended any bodily harm to Minton, or that the touching was done in a rude, insolent or angry manner, the Amended Complaint fails to state a claim for battery by Williams against Minton, and I recommend that the court grant Williams's Motion to Dismiss as to this claim, as well.

## *2. False Imprisonment / False Arrest*

The terms false arrest and false imprisonment are used interchangeably in Virginia. The claims of false imprisonment and false arrest are distinguishable in terminology only, the only difference being the manner in which they arise: a person may be falsely imprisoned by another without being arrested, but a person falsely arrested is also concurrently falsely imprisoned. *See Smith v. Button*, 43 Va. Cir. 379 (Va. Cir. Ct. Sept. 24, 1997). Under Virginia law, false imprisonment is “the direct restraint by one person of the physical liberty of another without adequate legal justification.” *Figg v. Schroeder*, 312 F.3d 625, 637 (4<sup>th</sup> Cir. 2002) (quoting *Jordan v. Shands*, 500 S.E.2d 215, 218 (Va. 1998)); *see also Lewis v. Kei*, 708 S.E.2d 884, 890 (Va. 2011) (citing *Montgomery Ward & Co. v. Wickline*, 50 S.E.2d 387, 388 (Va. 1984)). In the context of an arrest, if such arrest is lawful, then a plaintiff cannot prevail on a false imprisonment claim. *See Lewis*, 708 S.E.2d at 890 (citing *DeChene v. Smallwood*, 311 S.E.2d 749, 752 (Va. 1984)). In other words, in stating a claim for false imprisonment, there must be some

allegation that the process that led to the arrest was unlawful. *See Cole v. Eckerd Corp.*, 54 Va. Cir. 269 (Va. Cir. Ct. Dec. 20, 2000) (citing *Coughlan v. Jim McKay Chevrolet, Inc.*, 18 Va. Cir. 265 (Va. Cir. Ct. Nov. 13, 1989) (citing *Motley v. Va. Hardware & Mfg. Co.*, 287 F. Supp. 700 (W.D. Va. 1968))). The requisite restraint may be accomplished by “words or acts, which [the individual] fears to disregard, and neither malice, ill will, nor the slightest wrongful intention is necessary to constitute the offense.” *Cole*, 54 Va. Cir. 269 (quoting *Wickline*, 50 S.E.2d at 387).

A police officer may legally arrest without a warrant for a crime committed in his or her presence, and the arrest is valid where the officer had probable cause to believe the crime was committed in his or her presence. In such a case, the officer has a qualified immunity from a suit for false imprisonment or false arrest. *See Yeatts v. Minton*, 177 S.E.2d 646 (Va. 1970) (stating that where an officer observes acts that give him reasonable cause to believe a misdemeanor has been committed in his presence, an arrest is lawful, and an individual cannot be falsely imprisoned pursuant to a lawful arrest). However, when an arrest warrant is not valid or when an arrest is otherwise improper, then a police officer may be liable for false arrest or false imprisonment. *See Crosswhite*, 124 S.E. at 246. It is not essential that a citizen be confined in jail or placed in the custody of an officer to state a claim for false imprisonment. *See S.H. Kress & Co. v. Musgrove*, 149 S.E. 453, 455 (Va. 1929); *Zayre of Va., Inc. v. Gowdy*, 147 S.E.2d 710, 713 (Va. 1966). If a person is under a “reasonable apprehension that force will be employed unless he willingly submits, and he does submit to the extent that he is denied freedom of action, this, in legal contemplation, constitutes false imprisonment.” *Musgrove*, 149 S.E. at 455; *Gowdy*, 147 S.E.2d at 713.

*a. False Imprisonment by Kennedy*

Here, Kennedy does not argue that the Amended Complaint fails to state a claim against him for false arrest as to Robinette. That being the case, I find it unnecessary to address this issue. Kennedy does, however, claim that the Amended Complaint fails to state a claim against him for false imprisonment as to Minton, arguing that she was neither arrested nor restrained. For the following reasons, I disagree. As already found herein, the Amended Complaint states sufficient facts demonstrating that Minton was “seized” for purposes of the Fourth Amendment excessive force analysis. Thus, I already have found that Minton’s freedom of movement was intentionally terminated by Kennedy when he grabbed her cane, causing her to fall, striking her and by kicking her in the breast where she had undergone a recent mastectomy. I now find that these very same actions sufficiently demonstrate a direct restraint by Kennedy of Minton’s physical liberty without adequate legal justification. As previously found, there was no legal justification for Kennedy’s restraint of Minton’s physical liberty, as there was no probable cause that either Minton or Robinette was committing or had committed a crime. Although Minton was not jailed or formally placed in custody of law enforcement, I find that the facts alleged plausibly demonstrate that she was under a reasonable apprehension that force would be used against her unless she willingly submitted, and she did so submit. According to the Amended Complaint, once the door was opened, and Kennedy grabbed her cane, Minton, a 79-year-old woman who had been awakened at night due to a disturbance at a neighboring residence, could reasonably have been apprehensive that failing to submit would lead to an even further use of force by Kennedy. Furthermore, the Amended Complaint shows that she did so submit. In particular, there are no allegations that Minton ever attempted to retreat to the residence or that she attempted to leave the

scene of the incident. Therefore, she did not attempt to resist or to flee, thereby resulting in a denial of her freedom of action. Thus, I find that the Amended Complaint alleges facts sufficient to state a claim for false imprisonment by Kennedy as to Minton, and I recommend that the court deny his Motion to Dismiss with respect to this claim.

*b. False Imprisonment by Williams*

Williams argues that the Amended Complaint fails to state a false imprisonment claim against him because no facts are alleged that he detained either of the plaintiffs. Instead, Williams argues that the Amended Complaint states it was Kennedy who took the plaintiffs into custody. However, as stated herein, a plaintiff need not be in the formal custody of an officer to state a claim for false imprisonment. *See Musgrove*, 149 S.E. at 455; *Gowdy*, 147 S.E.2d at 713. Here, the Amended Complaint states facts alleging that Williams reached over Minton and grabbed Robinette, knocking him down and dragging him outside. Those are the only facts alleged in the Amended Complaint as to Williams's actions. Once outside, it appears that it was Kennedy who took charge of the situation. Thus, the issue is whether these actions by Williams constitute a restraint of Robinette's liberty without legal justification. As already found herein, the Amended Complaint states sufficient facts demonstrating that Robinette was seized by Williams for Fourth Amendment excessive force purposes. That being the case, I already have found that his freedom of movement was intentionally terminated by Williams when he reached through the door and grabbed him, knocking both he and Minton down and dragging them from the residence. I now find that the same actions demonstrate the direct restraint by Williams of Robinette without adequate legal justification. As previously noted, the Amended Complaint alleges that there

was no legal justification for Williams's restraint of Robinette's physical liberty, as there was no probable cause to find that Robinette was committing or had committed a crime. Moreover, although there is no allegation that Williams placed Robinette in formal custody, I find that the facts alleged plausibly demonstrate that he was under a reasonable apprehension that force would be used against him unless he willingly submitted. Taking the well-pleaded facts in the Amended Complaint as true, once Robinette was knocked down and dragged outside by Williams, he could reasonably have been apprehensive that failing to submit would lead to further use of force by Williams. Additionally, the allegations in the Amended Complaint show that he did so submit. In particular, Robinette never attempted to retreat into his residence, nor did he attempt to leave the scene of the incident. Thus, he did not attempt to resist or flee, thereby resulting in a denial of his freedom of action. Therefore, I recommend that the court deny Williams's Motion to Dismiss as to this claim.

As for Minton, however, I find that the Amended Complaint fails to state a claim for false imprisonment by Williams. More specifically, as noted above, the Amended Complaint alleges Minton was merely knocked down and dragged outside as Williams was removing Robinette from the residence. Therefore, the Amended Complaint fails to state facts demonstrating that Williams *directly restrained* Minton's physical liberty. Instead, if anything, Minton's physical liberty was *indirectly* restrained by Williams. Therefore, I find that the Amended Complaint fails to state a claim for false imprisonment of Minton against Williams, and I recommend that the court grant his Motion to Dismiss as to that claim.

### 3. *Trespass to Real Property & Chattels*

The Amended Complaint contains claims for trespass to real property and trespass to chattels by Robinette and a claim for trespass to chattels by Minton. A civil common law action in Virginia for trespass is “any unauthorized entry onto property which results in interference with a property owner’s possessory interest” therein. *Hunsberger v. Wood*, 564 F. Supp. 2d 559, 573 n.8 (W.D. Va. 2008), *rev’d. and remanded on other grounds*, 570 F.3d 546 (4<sup>th</sup> Cir. 2009); *see also Spicer v. City of Norfolk*, 46 Va. Cir. 535 (Va. Cir. Ct. Dec. 31, 1996); *Cooper v. Horn*, 448 S.E.2d 403, 406 (Va. 1994). To recover for trespass to land, a plaintiff must prove an invasion that interfered with the right of exclusive possession of the land and that was the direct result of some act committed by the defendant. Any physical entry upon the surface of the land constitutes such an invasion, whether the entry is a walking upon it, flooding it with water, casting objects upon it or otherwise. *See Spicer*, 46 Va. Cir. 535 (quotation and citation omitted). Virginia allows an action for trespass based upon an entry that is unintentional, accidental, inadvertent or mistaken. *See Spicer*, 46 Va. Cir. 535 (citing *Cooper*, 448 S.E.2d at 407; *Chesapeake & Oh. Ry. v. Greaver*, 66 S.E. 59, 60 (Va. 1909)). “[A] police officer’s entry that is consistent with the Fourth Amendment is not a common law trespass” under Virginia law. *Hunsberger*, 564 F. Supp. 2d at 571 (citing *McClannan v. Chaplain*, 116 S.E. 495 (Va. 1923) (“the only entry by officers which is held ... to be unlawful is that which occurs when the officers are making an ‘unreasonable’ search or seizure. Such a search or seizure is forbidden by the common law and by the Fourth Amendment. ...”)).

Here, I find that the Amended Complaint states sufficient facts to survive both Williams’s and Kennedy’s Motions to Dismiss. Williams and Kennedy argue

that the interference with Robinette's real estate and chattels was authorized by law as a reasonable search either under the exigent circumstances exception to the warrant requirement or the protective sweep exception to the warrant requirement. However, in order to find either of these arguments persuasive, I first must find that there was probable cause or reasonable suspicion to believe that a crime had occurred at Robinette's residence in order for the officers to have even been on Robinette's property in the first place. Taking the well-pleaded facts alleged in the Amended Complaint, and set forth herein, as true, I cannot find that such probable cause or reasonable suspicion existed. Thus, I also do not find these arguments applicable or persuasive.

Kennedy also argues that the 9-1-1 call placed by Minton constituted an "invitation" for police to enter upon Robinette's property, thereby precluding any trespass claim against the defendants, as their presence was not "unauthorized." Even assuming that Minton's call to 9-1-1 constituted such an invitation for law enforcement to come to Robinette's residence to discuss with Minton and Robinette what they had observed and to check to see if the location was secure, according to the facts alleged in the Amended Complaint, this is not what occurred. In *McClannan*, special police officers lawfully entered upon private premises in search of an illegal still. *See* 116 S.E. 495. However, after such lawful entry, they exceeded their authority by doing some act which they had no right to do, resulting in them being considered trespassers ab initio. *See McClannan*, 116 S.E. at 499. I find like circumstances here. Even assuming that the initial entry by Kennedy and Williams onto Robinette's property was lawful based on the 9-1-1 call inviting officers to the property, the facts as alleged in the Amended Complaint show that the scope of any such invitation to discuss the disturbance at the neighboring residence was exceeded when Kennedy and Williams "attacked" the plaintiffs

without provocation at the back door of Robinette's residence. I find that the facts alleged are sufficient to conclude that, at that point, Kennedy and Williams became trespassers under the common law. For these reasons I recommend that the court deny both Kennedy's and Williams's Motions to Dismiss the trespass to real estate claims as to Robinette.

Under Virginia law, the tort of trespass to chattels occurs when a person has "illegally seized the personal property of another and converted it to his own use." *Dominion Res. Servs., Inc. v. 5K Logistics, Inc.*, 2009 WL 2461396, at \*2 (E.D. Va. Aug. 7, 2009) (quoting *Vines v. Branch*, 418 S.E.2d 890, 893-94 (Va. 1992); see also *Raven Red Ash Coal Co. v. Ball*, 39 S.E.2d 231, 235 (Va. 1946). Typically, such tort occurs when a party "intentionally uses or intermeddles with personal property in the rightful possession of another without authorization." *5K Logistics*, 2009 WL 2461396, at \*2 (quoting *AOL v. IMS*, 24 F. Supp. 2d 548, 550 (E.D. Va. 1998)). "A person who commits such a tort is liable to its rightful possessor for actual damages suffered by reason of the loss." *5K Logistics*, 2009 WL 2461396, at \*2 (citing *Vines*, 418 S.E.2d 890). In other words, the chattel must be impaired as to its condition, quality or value. See *AOL, Inc. v. LCGM, Inc.*, 46 F. Supp. 2d 444, 452 (E.D. Va. 1998); *SecureInfo Corp. v. Telos Corp.*, 387 F. Supp. 2d 593 (E.D. Va. 2005) (even if competitor's actions interfered with software developer's possessory interest in its confidential proprietary information for its own enrichment, absent allegation that materials taken were damaged or diminished in value, competitor's unauthorized access to and downloading of contents of software program did not constitute trespass to chattels). In *Van Alstyne v. Elec. Scriptorium, Ltd.*, 560 F.3d 199, 208 (4<sup>th</sup> Cir. 2009) (quoting RESTATEMENT (SECOND) TORTS § 218), the Fourth Circuit held that

“[o]ne who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, but only if ... (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.”

Here, I find that the facts alleged in the Amended Complaint adequately demonstrate that when Kennedy grabbed Minton’s cane, she began to fall, causing her to hit her head hard enough to chip the concrete stoop. That being the case, I find that the Amended Complaint states adequate facts showing that the intentional intermeddling by Kennedy with Minton’s cane caused her bodily harm, thereby, alleging sufficient facts to state a claim against Kennedy for trespass to chattels as to Minton. Therefore, I recommend that the court deny Kennedy’s Motion to Dismiss as to this claim. However, I find that the Amended Complaint fails to state a claim for trespass to chattels by Williams as to Minton because there are no allegations that Williams ever seized Minton’s cane or intentionally used or intermeddled with it without her authorization. That being the case, I recommend that the court grant Williams’s Motion to Dismiss as to this claim.

Robinette also alleges that Kennedy, Williams, or both, illegally searched and took property from his residence without a search warrant. He further adds that the items taken were not returned. The Amended Complaint does not identify what property was taken. However, neither Robinette nor Kennedy denies that Robinette’s residence was searched or that personal property was seized therefrom. I have found herein that the Amended Complaint states sufficient facts to demonstrate that the search of Robinette’s residence was illegal because Kennedy and Williams were on Robinette’s property in the first instance without probable cause, and once on Robinette’s property, they had no probable cause to believe that

he or Minton had committed or was committing a crime. No probable cause for the belief that Robinette or Minton had committed or were committing a crime means Robinette's arrest was unlawful, and, therefore, any search of the residence hinged upon that arrest, also was unlawful. Thus, I find that the Amended Complaint sufficiently alleges facts demonstrating that Kennedy, Williams, or both illegally seized Robinette's personal property and converted it to his/their own use. Additionally, Robinette alleges in the Amended Complaint that, as of the time of its filing on August 9, 2013, the personal property had not been returned to him. Thus, I find that he has sufficiently alleged a deprivation of the use of the chattel for a substantial time. It is for all of these reasons that I find that the Amended Complaint alleges adequate facts to state a claim for trespass to chattels against Kennedy, Williams or both, and I recommend that the court deny Williams's and Kennedy's Motions to Dismiss as to these claims.

#### *4. Violation of Virginia Code §19.2-59*

Lastly, Robinette argues that Kennedy and Williams violated Virginia Code § 19.2-59 by illegally seizing certain of his chattel property without a warrant, and failing to return those items despite his complete exoneration of all criminal charges filed against him by Kennedy. Pursuant to §19.2-59:

“[n]o officer of the law ... shall search any place, thing or person, except by virtue of and under a warrant issued by a proper officer. Any officer ... searching any place, thing or person otherwise than by virtue of and under a search warrant, shall be guilty of malfeasance in office. Any officer ... violating ... this section shall be liable to any person aggrieved thereby in both compensatory and punitive damages.”

The Virginia Supreme Court has held that §19.2-59 affords no greater

restrictions on warrantless searches than required under the Fourth Amendment. *See Hunsberger*, 564 F. Supp. 2d at 571. Both Kennedy and Williams argue that, because the search of Robinette's property was part of a protective sweep, it was constitutionally permissible and, thus, does not constitute a claim under §19.2-59. It is true that a protective sweep pursuant to arrest is a recognized exception to the warrant requirement, which may include a protective weapons search of a dwelling upon less than probable cause. *See Maryland v. Buie*, 494 U.S. 325 (1990). In *Buie*, the Court stated that “[a] ‘protective sweep’ is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.” 494 U.S. at 327. The Court held that “[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Buie*, 494 U.S. at 337. Thus, it stands to reason, that a protective sweep is not valid if the arrest upon which the protective sweep is based is, itself, not valid. For reasons stated herein, I find that the Amended Complaint alleges facts sufficient to demonstrate that Kennedy and Williams did not have probable cause to believe that Robinette was committing or had committed a crime. Therefore, there are sufficient facts alleged to show that they were not legally on his property and that his subsequent arrest was not valid. That being the case, any protective sweep conducted in conjunction therewith also cannot be valid, thereby rendering unpersuasive any argument hinging on the protective sweep exception to the warrant requirement.

Williams also argues that the exigent circumstances exception to the warrant requirement justified the search of Robinette's residence. “[The exigent

circumstances] exception applies when there is a compelling need to prevent the imminent destruction of important evidence, and there is no time to obtain a warrant.” *Missouri v. McNeely*, 133 S.Ct. 1552, 1569 (2013) (Roberts, Chief J., concurring in part and dissenting in part). Several sets of exigent circumstances excusing the need for a warrant have been identified by the Supreme Court. For instance, there is an “emergency aid exception” to the warrant requirement. *McNeely*, 133 S.Ct. at 1570 (citing *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)). There is also a “fire exception” to the warrant requirement. *See McNeely*, 133 S.Ct. at 1570 (citing *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). Also, there is a “hot pursuit exception” to the warrant requirement. *See McNeely*, 133 S.Ct. at 1570 (citing *United States v. Santana*, 427 U.S. 38 (1976)). In all cases, a determination must be based on the “totality of the circumstances.” *McNeely*, 133 S.Ct. at 1570.

Williams argues that the exigency in this particular situation was that the officers thought that there was a firearm on the scene. Additionally, because Minton was not being taken into custody, she would be allowed to return to the residence, creating the possibility that contraband could be removed or destroyed, as well as a possible danger that she would have access to any firearms that might be present in the house. Williams argues that the presence of a firearm is a fair inference from the charges Kennedy ultimately brought. However, for purposes of the Motions to Dismiss, the court must look to the well-pleaded facts alleged in the Amended Complaint. According to it, although Robinette was charged with brandishing a firearm, there are no facts alleged substantiating any claim that a firearm was present at the scene. In fact, Robinette alleges in the Amended Complaint that, at the beginning of the unprovoked “attack” by Kennedy and Williams, when he recognized that they were law enforcement officers, he showed

his hands to demonstrate that he was unarmed. Additionally, the Amended Complaint further alleges that Robinette was later found not guilty on the brandishing charge. Based on such, I find that Robinette has alleged sufficient facts to withstand Williams's and Kennedy's Motions to Dismiss with respect to the claims that they violated §19.2-59, and I recommend that the court deny their Motions to Dismiss in this regard.

### 5. *Punitive Damages in Virginia*

An award of punitive damages under Virginia law must be based on actual malice. *See Univ. Support Servs., Inc. v. Galvin*, 32 Va. Cir. 47 (Va. Cir. Ct. July 8, 1993) (citing *Peacock Buick v. Durkin*, 277 S.E.2d 225 (Va. 1981); *Jordan v. Sauve*, 247 S.E.2d 739 (Va. 1978)). Actual malice may be proved by showing that the defendants' actions were motivated by "ill will, malevolence, grudge, spite, wicked intention or a conscious disregard of the rights of another." *Peacock Buick*, 277 S.E.2d at 227; *see also Lee v. Southland Corp.*, 244 S.E.2d 756, 759 (Va. 1978). Punitive damages are not favored in Virginia. *See Owens-Corning Fiberglass Corp. v. Watson*, 413 S.E.2d 630, 639 (Va. 1992). Punitive damages are only to be awarded in cases of "the most egregious conduct." *Owens-Corning Fiberglass Corp.*, 413 S.E.2d at 639. A defendant's entire conduct must be considered in determining whether it showed a conscious disregard for the safety of others. *See Huffman v. Love*, 427 S.E.2d 357, 360 (Va. 1993). If reasonable persons could reach different conclusions based on the evidence, the trial court may not remove the issue of punitive damages from the jury's consideration. *See Huffman*, 427 S.E.2d at 360. The purpose of punitive damages is to provide "protection of the public, as a punishment to [the] defendant, and as a warning and example to deter him and others from committing like offenses." *Huffman*, 427

S.E.2d at 361 (quoting *Baker v. Marcus*, 114 S.E.2d 617, 620 (Va. 1960)).

Viewing the well-pleaded allegations in the Amended Complaint as true, and making all reasonable inferences therefrom in the light most favorable to the plaintiffs, I find that they have sufficiently stated claims for state law punitive damages. In particular, I find that reasonable persons could reach different conclusions regarding whether Kennedy's conduct was motivated by a conscious disregard of the rights of Minton. More specifically, I find that reasonable persons could find that Kennedy's actions, including grabbing a 79-year-old woman's cane at night, without warning and without any probable cause to believe that a crime had been committed or was being committed, causing her to fall, striking her, causing her to hit her head so hard that she chipped a concrete stoop, and kicking her in the breast, all culminating in her losing consciousness, constituted a conscious disregard for her rights. Additionally, I find that Kennedy's actions toward Robinette, as described in the Amended Complaint, constitute the egregious type of conduct sought to be punished and deterred by an award of punitive damages under Virginia law. According to the Amended Complaint, Kennedy, without warning or provocation, attacked Robinette, a 74-year-old man, even after Robinette had shown that he was unarmed, dragged him out of his home, beat and kicked him, threw him against a parked vehicle and, apparently would have struck him with a cane had he not been stopped by Minton. All of this occurred despite no resistance by Robinette.

On the other hand, I find that reasonable persons could not reach different conclusions regarding whether Williams's conduct was motivated by actual malice with respect to either plaintiff. For example, in retrieving Robinette from the residence, both plaintiffs were knocked down and dragged out, but there are no

facts alleged to suggest that Williams's conduct was particularly egregious. It appears that once Robinette was retrieved from the home, Williams's apparent goal, Williams no longer had any interaction with either plaintiff. Likewise, while I have found sufficient allegations to state a claim against Williams for a violation of Virginia Code § 19.2-59, the facts as alleged merely state that Kennedy, Williams, or both, illegally seized property from Robinette's residence without a warrant, and this property has yet to be returned to him. Again, I find nothing particularly egregious about such conduct to rise to the level of a conscious disregard of the rights of Robinette.

For these reasons, I recommend that the court deny Kennedy's Motion to Dismiss with respect to state law punitive damages claims by both Robinette and Minton, but I recommend that the court grant Williams's Motion to Dismiss regarding the same.

It is for all of the reasons stated herein that I recommend that the Motions to Dismiss be granted in part and denied in part.

### **PROPOSED FINDINGS OF FACTS AND CONCLUSIONS OF LAW**

As supplemented by the above summary and analysis, the undersigned now submits the following formal findings, conclusions and recommendations:

1. Williams, in his official capacity as a Virginia State Police trooper, is immune from suit for money damages;
2. Kennedy, in his official capacity as an officer with the Pennington Gap, Virginia, Police Department, is immune from suit because there

is no allegation that his actions were officially sanctioned or ordered by an individual with final policymaking power;

3. The Amended Complaint sufficiently states a claim against Kennedy for a violation of Minton's Fourth Amendment right to be free of seizure by excessive force;
4. The Amended Complaint fails to sufficiently state a claim against Williams for a violation of Minton's Fourth Amendment right to be free of seizure by excessive force;
5. The Amended Complaint sufficiently states a claim against Williams for a violation of Robinette's Fourth Amendment right to be free of seizure by excessive force;
6. Williams is not entitled to qualified immunity on this claim as a matter of law based on allegations before the court at this stage;
7. The Amended Complaint fails to state claims for violations of the plaintiffs' Fifth or Fourteenth Amendment rights based on the same conduct as the Fourth Amendment seizure by excessive force claims;
8. The Amended Complaint fails to sufficiently state a claim against Kennedy for a violation of the Fifth Amendment prohibition against self-incrimination by Robinette;
9. The Amended Complaint sufficiently states claims for punitive damages under § 1983 by both Robinette and Minton against Kennedy and by Robinette against Williams;
10. The Amended Complaint fails to sufficiently state a claim for punitive damages under §1983 by Minton against Williams;
11. The Amended Complaint sufficiently states claims for assault and battery against Kennedy by both Robinette and Minton;
12. The Amended Complaint fails to state claims for assault and battery against Williams by both Robinette and Minton;

13. The Amended Complaint sufficiently states a claim for false imprisonment against Kennedy by Minton;
14. The Amended Complaint sufficiently states a claim for false imprisonment against Williams by Robinette;
15. The Amended Complaint fails to state a claim for false imprisonment against Williams by Minton;
16. The Amended Complaint sufficiently states claims for trespass to real estate against both Kennedy and Williams by Robinette;
17. The Amended Complaint sufficiently states a claim for trespass to chattels against Kennedy by Minton;
18. The Amended Complaint fails to state a claim for trespass to chattels against Williams by Minton;
19. The Amended Complaint sufficiently states claims for trespass to chattels against both Kennedy and Williams by Robinette;
20. The Amended Complaint sufficiently states claims for violations of Virginia Code § 19.2-59 against both Kennedy and Williams by Robinette;
21. The Amended Complaint sufficiently states a claim for punitive damages under Virginia law against Kennedy by both Robinette and Minton;
22. The Amended Complaint fails to state a claim for punitive damages under Virginia law against Williams; and
23. The plaintiffs' request that their claims for violations of their Eighth Amendment rights be voluntarily dismissed.

### **RECOMMENDED DISPOSITION**

Based on the above-stated reasons, I recommend that the court grant the

Motions to Dismiss in part and deny the Motions to Dismiss in part, consistent with this Report and Recommendation.

**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 finding or recommendation 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 to recommit the matter to the magistrate judge with instructions.

Failure to file written objection 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 James P. Jones, United States District Judge.

The Clerk is directed to send copies of this Report and Recommendation to all counsel of record.

DATED: This 14<sup>th</sup> day of November, 2013.

/s/ Pamela Meade Sargent  
UNITED STATES MAGISTRATE JUDGE