IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
1:22-cv-00221-MR-WCM

RUPA VICKERS RUSSE, **Plaintiff,** **v.** **MADISON COUNTY SHERIFF'S DEPARTMENT;** Madison County Sheriff **JAMES HARWOOD** in his official Capacity; Deputy **D. JOYNER,** in his individual and official capacity**; COUNTY OF MADISON, NORTH CAROLINA**; **JOHN DOE CORPORATION,** in its capacity as surety on the official bond of the Sheriff's Department of Madison County; and **JANE DOE CORPORATION,** in its capacity as Madison County liability insurer, **Defendants.**	)	**MEMORANDUM AND RECOMMENDATION**

This matter is before the Court on (1) a Partial Motion to Dismiss (the "Partial Motion to Dismiss," Doc. 19), filed by the Madison County Sheriff's Department (the "Sheriff's Department"), Madison County Sheriff James Harwood ("Sheriff Harwood"), and Madison County (the "County"); and (2) a Motion for Preliminary Injunction (Doc. 6), filed by Rupa Vickers Russe

("Plaintiff"). The Motions have been referred to the undersigned pursuant to 28 U.S.C. § 636 for the entry of a recommendation.

I. Procedural Background

Plaintiff filed her original Complaint on October 19, 2022 against the Sheriff's Department; Sheriff Harwood, in his official capacity; Deputy D. Joyner, in his individual and official capacity ("Deputy Joyner"); the County; John Doe Corporation, in its capacity as Surety on the official bond of the Sheriff's Department; and, Jane Doe Corporation, in its capacity as Madison County's Liability Insurer. Doc. 1.

On January 16, 2023, Plaintiff filed a "Motion to Certify Service of Defendant County and Motion to Extend Fed. R. Civ. P. 4 Service of Process Deadline," Doc. 4, by which Plaintiff requested that the Court "grant Plaintiff certification of the service on Defendant Madison County and grant an extension of 90 days to allow Plaintiff to serve the remaining Defendant parties as allowed by North Carolina R. Civ. P. 4." Id. at 4.

By Order filed on January 19, 2023, the Court allowed Plaintiff's motion in part and extended the time for Plaintiff to serve Defendants through and including March 17, 2023. Doc. 5.

Also on January 19, 2023, Plaintiff filed the Motion for Preliminary Injunction. Doc. 6.

On January 22, 2023, Plaintiff filed a Motion for Early Discovery, which sought leave to conduct early discovery from the County and the Sheriff's Department "for the limited purpose of identifying Defendants who have not yet been served because their identity is unknown to Plaintiff." Doc. 7-1 at 4.

On January 27, 2023, the Court granted the Motion for Early Discovery and, for the purpose of facilitating service of the Complaint and Summonses, gave Plaintiff leave to serve up to five interrogatories prior to the opening of court-enforceable discovery. Doc. 8.

On February 6, 2023, the Sheriff's Department, the County, and Sheriff Harwood filed waivers of service. Docs. 9-11.

On February 21, 2023, Plaintiff filed her Amended Complaint, which is now the operative complaint in this action. Doc. 18. Plaintiff's Amended Complaint names the same defendants as did her original Complaint.

On April 3, 2023, the Sheriff's Department, the County, and Sheriff Harwood (the "Moving Defendants") filed the Partial Motion to Dismiss along with a supporting memorandum. Docs. 19, 20. Plaintiff has responded, and the Moving Defendants have replied. Docs. 23, 24.

Plaintiff's Motion for Preliminary Injunction is also fully briefed. Docs. 14, 16.

II. Plaintiff's Allegations

The chronology of Plaintiff's allegations is difficult to follow at times, but the Amended Complaint appears to allege in summary as follows:

A. Events of September 2019[1]

In approximately mid-September 2019, Plaintiff and her daughter, Zoe, who was 16 years old at the time,[2] "had their first ever dispute" over Zoe's use of her cell phone. Doc. 18 at ¶ 15. When Plaintiff picked up the cell phone off of Zoe's bed and attempted to walk out of the room, Zoe "jumped on" Plaintiff and attempted to wrestle the phone out of her hands, "causing 911 to be autodialed." Id.

"Madison County Sheriff's Deputy Lieutenant Elkins"[3] and Deputy Frances G. Denton responded. Lt. Elkins advised Plaintiff that, because the

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[1] Though the Amended Complaint initially references this date as being "approximately one month prior to October 19, 2022," other allegations indicate these events allegedly occurred in the Fall of 2019.

[2] Plaintiff's daughter has since reached the age of majority and therefore is identified by name. See Fed.R.Civ.P. 5.2; Chan-Sosa v. Jorgenson, No. 15-cv-00008-SI, 2016 WL 845292, at *1 n. 1 (N.D. Cal. March 4, 2016) (noting that Rule 5.2 requires redactions of the names of minors in public filings, but that because the individual had since reached the age of majority, the "presumption in favor of public access to records governs").

[3] As Plaintiff's Amended Complaint refers to Elkins as a "Deputy Lieutenant," the undersigned will assume for purposes of this Memorandum that he is a lieutenant and will refer to him as such.

phone belonged to her daughter, the Sheriff's Department could not assist Plaintiff in taking it away. Id.

At some point, and apparently while Lt. Elkins and Deputy Denton were speaking with Plaintiff, Zoe's paternal grandmother drove to the end of Plaintiff's driveway.[4] Id. Plaintiff alleges that Lt. Elkins told Plaintiff he wanted Plaintiff to let Zoe "cool off" by leaving with her grandmother; Plaintiff alleges that she "reluctantly voluntarily allowed her daughter" to do so. Id.

Two days later, Plaintiff texted Zoe to arrange for her to return home. Id.[5]

Zoe, however, informed Plaintiff that she "had taken a '50-B' … out against [Plaintiff] and would not be coming home." Id.[6]

Plaintiff then contacted Lt. Elkins who advised that he understood Zoe's grandmother had taken Zoe to Buncombe County to seek a restraining order against Plaintiff the day that Plaintiff had voluntarily let Zoe go with her grandmother. Id. When Plaintiff asked Lt. Elkins why a 50-B application had been made in Buncombe County instead of Madison County, Lt. Elkins stated

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[4] At other points in the Amended Complaint, Plaintiff describes her relationship with Zoe's grandmother, including their "decade-long conflict" about various domestic matters. Id. at ¶ 18.

[5] Though the Amended Complaint is not clear in this regard, the undersigned presumes that Zoe stayed with her grandmother prior to this time.

[6] It appears that Plaintiff is referring to N.C.G.S. § 50B-2, which provides for, among other things, ex parte protective orders in domestic violence matters.

that he had told Zoe's grandmother that he would not support such a request in Madison County based on the facts "he was aware of." Id. at ¶ 16.[7]

Plaintiff then contacted the Buncombe County Sheriff's Department and went to Buncombe County to be served immediately. Id. at ¶ 17. When she received the papers, however, she noticed that "the ex parte box was not checked, and there was no emergency ex parte in place" and that the notice "was for a standard 10 day 50-B hearing." Id. In addition, because "a 50-B hearing was ordered, a Buncombe County DSS case was automatically opened pursuant to Buncombe County DSS policy." Id. at ¶ 16.

At approximately 8 PM "the next Sunday," Deputy Joyner appeared at Plaintiff's home and told Plaintiff that "an ex parte" had been issued against her and that if Deputy Joyner saw Plaintiff with Zoe he would arrest Plaintiff. Id. at ¶ 23. Plaintiff alleges that she calmly pointed to the paperwork and explained that it was not an order, because the appropriate boxes had not been checked, at which point Deputy Joyner interrupted her and stated loudly that it was an ex parte order and that if he saw Plaintiff with Zoe, he would arrest Plaintiff. Id. at ¶ 23.

[7] Plaintiff also alleges that "[t]he 50-B did not grant an ex parte," though Zoe, in her reply text, had told Plaintiff that "there was an ex parte." Id. at ¶ 17. The undersigned interprets Plaintiff's reference to "an ex parte" as an attempt to reference an ex parte *order* of the court, as opposed to an *application* for such an order.

Plaintiff appears to allege that, during the days before a scheduled hearing on the 50-B issues, she and Zoe communicated "and came to an agreement about how they were going to personally handle the conflict" and agreed that court involvement was not necessary. Id. at ¶ 17.

Plaintiff also alleges that Zoe did not appear at the 50-B hearing but that Zoe's grandmother, who had been appointed as Zoe's Guardian Ad Litem, did appear and made misrepresentations to the court about Plaintiff. Id. at ¶ 17. Because Zoe did not appear at the hearing, the judge postponed the proceedings until December 2019. Id.

B. Events through October 19, 2019

The continuance of the 50-B hearing did not prevent Plaintiff "from regaining custody" of Zoe and in the weeks leading up to October 19, 2019, Zoe returned to Plaintiff's "custody and care." Id. at ¶ 19.[8] Zoe, however, "became increasingly despondent, unloving, and disrespectful" to Plaintiff. Id. at 19.

At some point during this time, Plaintiff discovered she had access to Zoe's email account, reviewed the messages, and "found dozens of recently sent emails" from Zoe's grandmother that were critical of Plaintiff, that encouraged Zoe to run away from Plaintiff's home and to "hide from, and lie to the police," and that dealt with other domestic matters. Id. at ¶ 20.

[8] The undersigned interprets these statements to mean that Zoe returned home to live with Plaintiff.

On October 12, 2019, a social worker from Buncombe County DSS informed Plaintiff that she was recommending the Buncombe County case be closed without any intervention recommended. Id. at ¶ 21. The social worker also informed Plaintiff that Zoe's behaviors "were a problem" and explained that Plaintiff could have Zoe deemed an "undisciplined juvenile" by the court if needed. Id. at ¶ 21 Plaintiff, however, "took steps to have a therapist assist [Zoe] during this time and had one intervention that seemed somewhat helpful." Id. at ¶ 21.

"[O]n three occasions prior to and including the morning of October 19, 2019," Plaintiff sought assistance from Madison County Magistrate Olaf Goddard. Id. at ¶ 22.[9] Magistrate Goddard denied Plaintiff's requests for assistance each time, however. Id. at ¶ 22.

Sometime after 10:30 PM on October 18, 2019, "in a last attempt to get assistance from a Madison County Magistrate to assist her in preventing" Zoe from running away the next day,[10] Plaintiff went to the Sheriff's Department and spoke with Magistrate Goddard who told Plaintiff there was nothing he

[9] Specifically, Plaintiff alleges that she "disclosed the emails to the Magistrate and requested assistance in issuing a restraining order to stop [Zoe's grandmother] from continuing communications with [Zoe] due to the content of the communications which was causing emotional strife in the home, and interfering with" Plaintiff and Zoe's relationship. Id. at ¶ 22.

[10] The Amended Complaint indicates that Plaintiff believed Zoe's grandmother was suggesting Zoe run away on October 19.

could do to assist her in preventing Zoe's grandmother from helping Zoe run away. Id. at ¶ 26.

On the morning of October 19, 2019, Plaintiff, who had "agreed to drive [Zoe] to work," found Zoe's paternal aunt "sitting on [Plaintiff's] property" blocking the driveway. Id. at ¶ 27. Plaintiff was subsequently able to leave her property and drove with Zoe to the Sheriff's Department where she once again spoke with Magistrate Goddard who informed Plaintiff that he would not assist her in preventing Zoe's aunt from returning to Plaintiff's property. While she was at the Sheriff's Department, Plaintiff spoke briefly to Deputy Denton and "exchanged looks with Deputy Joyner…." Id. at ¶ 28.

Plaintiff and Zoe left and drove back toward home. Id. at ¶ 29. During the trip, Zoe began videotaping Plaintiff with her cell phone. Id. Plaintiff instructed her to stop, Zoe refused, and Plaintiff pulled over and attempted to take the phone from Zoe, at which point Zoe "began kicking [Plaintiff's] head, which had been injured in a car accident in 2016…." Id. During this incident, 911 "was called." Id.

Deputy Denton arrived in response and told Plaintiff "you are lucky I got here first." Id. at ¶ 30. Deputy Joyner then arrived "speeding and stopped in front of Plaintiff," jumped out of his vehicle, and told Plaintiff that he was investigating her for child abuse and that if he found anything she would be

arrested. Id. at ¶ 30.[11] Deputy Denton then informed Deputy Joyner that Zoe had redness on her chest. Id.

Deputy Joyner told Plaintiff to come to the Sheriff's Department for questioning. Id. at ¶ 31.

Plaintiff complied and arrived at the Sheriff's Department "sometime between 12 noon and 2:30 PM on Saturday, October 19, 2019." Id. at ¶ 32. She waited voluntarily in the lobby while Zoe, without any family member present with her, was taken to the "back area of the Department." Id.

Sometime before 2:30 PM, Deputy Joyner told Plaintiff to follow him and Plaintiff walked, unhandcuffed, "to the back area" and into a room with a small desk and chairs. Id. at ¶ 35. Upon entering the room, Deputy Joyner said "I [suppose] you are going to plead the 5th, right?" id. at ¶ 35 (alteration in Amended Complaint), and Plaintiff replied yes. Deputy Joyner then said he was going to speak with Zoe and had Plaintiff wait in another room with an open door. Id. at ¶ 35.

After about 45 minutes, Plaintiff walked into the hallway and informed "the trainee" that she was going home and that Deputy Joyner knew where she lived. Id. at ¶ 36. At the same time, Deputy Joyner came walking down the

[11] Subsequently, Plaintiff appears to allege that Deputy Joyner was accompanied by a "young male trainee." Id. at ¶ 32.

hallway with Zoe, who was in tears, and told Plaintiff she was under arrest and being detained. Id.

Deputy Joyner then handcuffed Plaintiff and walked her through the lobby to the Madison County Jail where two jailers immediately began discussing if Plaintiff was going to be strip-searched. Id. at ¶ 36. Deputy Joyner then instructed "Jailor Morrow"[12] to strip search Plaintiff. Id. Plaintiff was not patted down prior to this instruction. Id.

Plaintiff's handcuffs were then removed, and she was taken to a private room with Jailor Morrow. Upon entering the room, Plaintiff asked "is this necessary?" to which Jailor Morrow replied that it was standard procedure. Id. at ¶ 37. Jailor Morrow instructed Plaintiff to remove her clothes, "bend over cough and squat and cough." Id. at ¶ 37. Plaintiff was then told to dress. Id.

Next, Plaintiff was fingerprinted, had a mugshot photograph taken, and was placed in a private cell without other occupants for three to four hours. Id.

At approximately 6 PM, Deputy Joyner opened the cell, handcuffed Plaintiff, removed her, informed her she was being arrested, read Plaintiff her Miranda rights, and served her with an arrest warrant. Id. at ¶ 38. She was told she was being charged with simple assault. Deputy Joyner then walked her to Magistrate Goddard who also informed Plaintiff that she was being

[12] The Amended Complaint does not state whether this individual was a male or female.

charged with assault and set her bail at $1,000. Id. Plaintiff was then allowed to make a phone call to a bail bondsman. Id at ¶ 39.

Plaintiff was released at approximately 9:30 PM that evening. Id. at ¶ 40.

C. Subsequent Events

"Due to the restrictions placed on Ms. Russe's bail conditions by Magistrate Goddard that required the Madison County D.S.S. oversee all visitations between Ms. Russe and [Zoe], and the judicial system delays related to that charge caused by COVID and multiple extensions for the hearing sought by the prosecutor because Deputy Joyner was unavailable on the hearing dates, [Plaintiff] never regained custody and care" of Zoe prior to Zoe's 18th birthday. Id. at ¶ 42.[13]

Additionally, Plaintiff's bail conditions required Madison County DSS to oversee Plaintiff's visitation with Zoe, which required Madison County DSS to "open a case file." Id. ¶ 44.

On October 22, 2019, Buncombe County DSS "referred the case file for intervention and in-home services." Id.

Sometime around the beginning of the COVID-19 pandemic, Zoe's grandmother "decided to kick [Zoe] out of her home" and Madison County DSS

[13] It appears that, for at least some time following October 19, Zoe lived with her grandmother. See id. at ¶ 45.

presented Plaintiff with the options of either having Zoe placed in an institutional home through foster care or signing a waiver allowing Zoe to be placed with "a family-known individual." Id. at ¶ 45. Plaintiff was told that if she did neither, Madison County DSS would pursue termination of her parental rights. Id. It appears that Plaintiff chose to have Zoe placed with "a family-known individual." Id. at ¶¶ 45-46.

In March of 2020, the State of North Carolina dismissed the assault charge against Plaintiff. Id. at ¶ 46. Sometime thereafter, and following "a self-imposed cooling off period," Plaintiff sought to have Zoe "returned home." Id. at ¶ 46. "The Buncombe County Sheriff's Deputies refused, laughing at [Plaintiff], and stating that [Plaintiff] had signed away her custodial rights by signing the document from the Madison County DSS." Id. at ¶ 46 (Plaintiff "was never reunited, nor has ever seen or spoken with [Zoe] since").[14]

In "approximately November 2021," Plaintiff's simple assault charge was "expunged from her record." Id. at ¶ 48.

Plaintiff's Amended Complaint includes the following claims:

> 1. "Unconstitutional Strip Search (42 U.S.C. § 1983, U.S. Const. Amend. IV, VIII, and XIV violations)" (against all Defendants);
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> 2. "Malicious Prosecution (42 U.S.C. § 1983, U.S. Const. Amend. IV and XIV violations, N.C. Gen. Stat.

[14] Presumably, Zoe was placed with "a family-known individual" who resided in Buncombe County. Id. at ¶ 46.

> §§ 14-33(a), and N.C. Gen. Stat. § 1-52(13))" (against all Defendants);
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> 3. "Unreasonable Arrest (18 U.S.C. § 242, N.C. Gen. Stats. §§ 15A-401(b)(2)(b), § 14-33(a) and U.S. Const. Amend. XIV violations)" (against Deputy Joyner, the Sheriff's Department, Sheriff Harwood, and John Doe Corporation); and
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> 4. "Interference with Parental/Child Relationship (U.S. Const. Amend. XIV)" (against Deputy Joyner, the Sheriff's Department, Sheriff Harwood, and John Doe Corporation).

III. The Partial Motion to Dismiss

The Moving Defendants seek the dismissal of Plaintiff's second, third, and fourth claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[15]

A. Legal Standard

When considering a motion made pursuant to Rule 12(b)(6), the court accepts the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. See Nemet Chevrolet, Ltd. v.

[15] The Moving Defendants are the only defendants who have appeared in this matter; the Partial Motion to Dismiss is not made on behalf of Deputy Joyner or the Jane and John Doe Defendants. See Doc. 19 at n. 1. Also, the Moving Defendants have not moved to dismiss Plaintiff's "unconstitutional strip search" claim and have not asserted that the Sheriff's Department may not be sued. See e.g., Williams v. McFadden, et al., No. 3:22-cv-630-MOC, 2023 WL 4919691, at *3 (W.D.N.C. Aug. 1, 2023).

Consumeraffairs.com, Inc., 591 F.3d 250, 253 (4th Cir. 2009); Francis v. Giacomelli, 588 F.3d 186, 192 (4th Cir. 2009).

The court, however, is not required to accept "legal conclusions, elements of a cause of action, and bare assertions devoid of further factual enhancement." Consumeraffairs.com, 591 F.3d at 255; see Giacomelli, 588 F.3d at 192. That is, while "detailed factual allegations" are not required, the complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); see Consumeraffairs.com, 591 F.3d at 255. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); accord Consumeraffairs.com, 591 F.3d at 255. In short, the well-pled factual allegations must move a plaintiff's claim from conceivable to plausible. Twombly, 550 U.S. at 570; Consumeraffairs.com, 591 F.3d at 256.

B. Discussion

1. Materials Considered

Attached to Plaintiff's Amended Complaint are numerous exhibits which appear to include: (1) social media posts related to Deputy Joyner (Doc. 18-1 at 1-2); (2) documents related to Plaintiff's simple assault charge (a Warrant for Plaintiff's arrest (Doc. 18-2 at 3), a Petition for Expunction (Doc. 18-2 at 2), and

a Dismissal (Doc. 18-2 at 1)); (3) documents which purport to show the family dynamic between Plaintiff, Zoe, and Zoe's grandmother (a social media post by Zoe (Doc. 18-2 at 4), email communications between Zoe and Zoe's grandmother (Doc. 18-2 at 5-16), and excerpts from what appears to be Zoe's diary (Doc. 18-3 at 1-7)); (4) documents related to the "50-B" (Zoe's petition for a domestic violence Order of Protection (Doc. 18-2 at 18-19)); (5) a formal written complaint Plaintiff submitted to Sheriff Harwood regarding the events of October 19 (Doc. 18-2 at 20); and (6) documents that appear to be communications between Plaintiff and representatives of DSS (Docs. 18-4, 18-5).

In analyzing the Partial Motion to Dismiss, the undersigned has considered the official public records attached to Plaintiff's Amended Complaint but has not relied on documents which purport to show the family dynamic between Zoe, Plaintiff, and Zoe's grandmother, or documents which reflect Plaintiff's communications with DSS. See Witthohn v. Fed. Ins. Co., 164 Fed. Appx. 395, 396 (4th Cir. 2006) ("a court may consider official public records, documents central to plaintiff's claim, and documents sufficiently referred to in the complaint so long as the authenticity of these documents is not disputed"); Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 234 (4th Cir. 2004) ("Although as a general rule extrinsic evidence should not be considered at the 12(b)(6) stage, we have held that when a defendant

attaches a document to its motion to dismiss, a court may consider it in determining whether to dismiss the complaint [if] it was integral to and explicitly relied on in the complaint and [if] the plaintiffs do not challenge its authenticity.")(internal quotation marks omitted)(alterations in original); Greene v. Mullis, 829 Fed. Appx. 604 (Mem) (4th Cir. 2020) (unpubl.) ("We may also consider authentic, relevant documents attached to the complaint and the motion to dismiss, and take judicial notice of matters of public record, including court orders and filings in Greene's prior cases"); Parker v. Homestead Studio Suites Hotel, No. 5:05–cv–69–BR, 2005 WL 3968291, at *1 (E.D.N.C. May 13, 2005) ("the district court may also take judicial notice of matters of public record without converting a 12(b)(6) motion into a motion for summary judgment"); see also Blankenship v. Manchin, 471 F.3d 523, 529 (4th Cir. 2006) ("We must accept the allegations in the complaint . .. unless they ... contradict matters properly subject to judicial notice or by exhibit").

2. "Malicious Prosecution" and "Unreasonable Arrest"

The Moving Defendants argue that Plaintiff's "malicious prosecution" and "unreasonable arrest" claims should be dismissed because Plaintiff has not alleged adequately that there was a lack of probable cause for her arrest or subsequent charge of simple assault.

The undersigned reads the Amended Complaint as asserting state law tort claims for false arrest and malicious prosecution and claims pursuant to

Section 1983 for violation of Plaintiff's Fourth Amendment rights. See Wallace v. Kato, 549 U.S. 384, 387-88, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007) (acknowledging that "Section 1983 provides a federal cause of action" for Fourth Amendment false arrest, and stating that "[f]alse arrest and false imprisonment overlap; the former is a species of the latter"); Lambert v. Williams, 223 F.3d 257, 261 (4th Cir. 2000) (a "malicious prosecution claim under § 1983 is properly understood as a Fourth Amendment claim for unreasonable seizure which incorporates certain elements of the common law tort").[16]

For any of these claims, Plaintiff must allege sufficiently that there was no probable cause either for her arrest (with respect to her "unreasonable arrest" claim(s)), or for her subsequent charge of simple assault (with respect to her "malicious prosecution" claim(s)). See North Carolina v. McCurry, 175 F.3d 1016 (table), 1999 WL 152622 *1 (4th Cir. 1999) ("To succeed on an action for false arrest [pursuant to 42 U.S.C. § 1983], [plaintiff] must demonstrate that his arrest was not supported by probable cause") (citing Street v. Surdyka,

[16] To the extent Plaintiff is attempting to state claims for violations of federal criminal law, Plaintiff has not demonstrated that she may bring such claims in a civil case. See Johnson v. Thomas, No. 4:10–CV–151–BR, 2011 WL 1344008, at *5 (E.D.N.C. Apr 8, 2011) ("Furthermore, several of plaintiff's claims are based on alleged violations of three federal criminal statutes, 18 U.S.C. §§ 4, 241, and 242. However, none of the criminal statutes upon which plaintiff relies authorize a private cause of action.") (citation omitted); Doe v. Broderick, 225 F.3d 440, 448 (4th Cir. 2000) ("criminal statutes do not ordinarily create individual rights").

492 F.2d 368, 372–73 (4th Cir. 1974)); Williams v. City of Jacksonville Police Dep't, 165 N.C.App. 587, 596 (2004) ("[p]robable cause is an absolute bar to a claim for false arrest") (citations omitted)); Lambert v. Williams, 223 F.3d 257, 262 (4th Cir. 2000) ("What we termed a 'malicious prosecution' claim in [Brooks v. City of Winston-Salem, N.C., 85 F.3d 178 (4th Cir. 1996)] is simply a claim founded on a Fourth Amendment seizure that incorporates elements of the analogous common law tort of malicious prosecution"); Williams v. Kuppenheimer Mfg. Co., 105 N.C.App. 198, 200 (1992) ("In order to recover in an action for malicious prosecution [under state law], plaintiff must establish that defendant: (1) instituted, procured or participated in the criminal proceeding against plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of plaintiff").

"[P]robable cause is not a high bar." District of Columbia v. Wesby, 138 S. Ct. 577, 586 (2018); United States v. Humphries, 372 F.3d 653, 660 (4th Cir. 2004) ("the probable-cause standard does not require that the officer's belief be more likely true than false"). "[F]or probable cause to exist, there need only be enough evidence to warrant the belief of a reasonable officer that an offense has been or is being committed; evidence sufficient to convict is not required." Durham v. Horner, 690 F.3d 183, 189 (4th Cir. 2012) (citation omitted). "'The existence or nonexistence of probable cause is a mixed question of law and fact.'" Mead v. Gaston County, No. 3:12cv132-GCM, 2013 WL 5925893, at *7

(W.D.N.C. Nov. 1, 2013) (quoting Glenn–Robinson v. Acker, 140 N.C.App. 606, 619 (2000) (quoting Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 87 (1978)). However, "[i]f the facts are admitted or established, it is a question of law for the court." Id.

Here, the allegations set out in the Amended Complaint indicate that when Deputy Joyner on October 19 told Plaintiff, at the jail, that she was being arrested, he knew (or thought) the following: that Zoe had previously attempted to obtain an ex parte domestic violence protection order in Buncombe County; that Deputy Joyner believed such an order had been issued; that he had told Plaintiff she would be arrested if he saw Plaintiff with Zoe; that a call had been placed to 911 earlier on October 19; that he had responded to that call and when he arrived on the scene saw Plaintiff and Zoe; that Deputy Denton reported she had observed redness on Zoe's chest; that Deputy Joyner subsequently questioned Zoe at the Sheriff's Department (though the Amended Complaint does not relate what Zoe reported) and that Zoe was in tears afterward; and that Plaintiff did not provide other or conflicting information regarding the events that took place prior to the placement of 911 call (because she informed him she was "going to plead the 5th").

Even taking these allegations in the light most favorable to Plaintiff, Plaintiff has failed to allege adequately a lack of probable cause for her arrest on October 19. See also N.C.G.S. § 15A-401(b)(2)(d) (allowing an officer to make

a warrantless arrest when the officer has probable cause to believe that a person has committed a simple assault upon a victim with whom the person has a "personal relationship," even if the offense allegedly occurred outside of the officer's presence).[17]

For the same reasons, with respect to Plaintiff's "malicious prosecution" claims, the undersigned is persuaded that there was probable cause to charge Plaintiff with simple assault. See Durham v. Horner, 690 F.3d 183, 190 (4th Cir. 2012). Magistrate Goddard found that there was probable cause to believe that Plaintiff had, on October 19, assaulted Zoe by:

> Slapping and choking [Zoe] about the neck and chest area and using a bladed hand to jab into the crotch area causing redness and scratches to the neck and chest area.
>
> Doc. 18-2 at 3.

Plaintiff contends that "Magistrate Goddard's statement of charge is nonsensical and physically impossible" because there was no "identification of a witness to the alleged events," because Deputy Denton had no evidence of what caused the redness of Zoe's chest (since she did not witness the altercation between Plaintiff and Zoe), and because there is "no evidence of what the statement was that [Zoe] gave, merely an allegation by Plaintiff that

[17] For purposes of the statute, "personal relationship is defined to include a parent/child relationship. N.C.G.S. § 50B-1(b)(3).

such a statement was given without the presence of a parent or a guardian." Doc. 23 at 13.

Generally, however, "[o]nce a pretrial seizure has been rendered reasonable by virtue of a probable cause determination by a neutral and detached magistrate, the continuing pretrial seizure of a criminal defendant…is reasonable." Brooks, 85 F.3d at 184.

Here, Plaintiff does not allege that Deputy Joyner intentionally, or with a reckless disregard for the truth, either made false statements to Magistrate Goddard or omitted facts from his presentation. See Evans v. Chalmers, 703 F.3d 636, 650 (4th Cir. 2012) ("plaintiffs must allege that defendants 'knowingly and intentionally or with a reckless disregard for the truth' either made false statements in their affidavits or omitted facts from those affidavits, thus rendering the affidavits misleading") (citation omitted); see also Darling v. Falls, 236 F.Supp.3d 914, 924 (M.D.N.C. 2017) (finding sufficient probable cause for arrest where plaintiff argued the arrest warrant was "based on an uncorroborated one-sided story without any further evidence.").

Finally, to the extent Plaintiff relies on the fact that the simple assault charge was later dismissed by the State of North Carolina to establish a lack of probable cause, see Doc. 23 at 12, the Dismissal Plaintiff has attached to her Amended Complaint indicates that the charge was dismissed "at the request

of the named victim," not because the State had concluded that there was insufficient evidence to support prosecution. See Doc. 18-2 at 1.

3. Interference with Parent/Child Relationship

The Moving Defendants also seek dismissal of Plaintiff's claim for "Interference with Parental/Child Relationship."

The undersigned reads the Amended Complaint as asserting a claim pursuant to Section 1983 for violation of Plaintiff's Fourteenth Amendment rights. Hodge v. Jones, 31 F.3d 157, 163 (4th Cir. 1994) ("[T]he sanctity of the family unit is a fundamental precept firmly ensconced in the Constitution and shielded by the Due Process Clause of the Fourteenth Amendment").

In the Amended Complaint, Plaintiff alleges that Deputy Joyner violated Plaintiff's due process rights by "not granting her" a "constitutional presumption" that Plaintiff was acting in Zoe's best interest; by "improperly injecting himself" into the "private realm of family" and by improperly detaining and arresting Plaintiff. Doc. 18 at ¶¶ 75-76.

"The Supreme Court has recognized that the 'interest of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized.'" Hogan v. Cherokee County, 519 F.Supp.3d 263, 280 (W.D.N.C. 2021) (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)). see also Santosky v. Kramer, 455 U.S. 745, 753 (1982); Jordan by Jordan v. Jackson, 15 F.3d 333, 343 (4th Cir. 1994) ("The bonds between parent

and child are, in a word, sacrosanct, and the relationship between parent and child inviolable except for the most compelling reasons"). Accordingly, Plaintiff has a recognized liberty interest in "maintaining the integrity of" her family unit. Hogan, 519 F.Supp.3d at 280 (citing Weller v. Dep't of Social Servs. for City of Baltimore, 901 F.2d 387, 395 (4th Cir. 1990) ("It is clear that the private, fundamental liberty interest in retaining the custody of one's child and the integrity of one's family is of the greatest importance")).

Only behavior that shocks the conscience, though, is sufficient to support a claim for violation of substantive due process. See Hogan, 519 F.Supp.3d at 280 ("[W]hen the government removes a child from a parent's custody for the child's protection, only an 'abuse of power which 'shocks the conscience' creates a substantive due process violation'") (quoting Wolf v. Fauquier Cty. Bd. of Supervisors, 555 F.3d 311, 322 (4th Cir. 2009) (citing Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).

Here, Plaintiff's allegations with regard to the actions of the Moving Defendants does not rise to this level.

As discussed above, there was probable cause to arrest and charge Plaintiff with simple assault. Additionally, Plaintiff has alleged that she signed a waiver form allowing Zoe to be placed with "a family-known individual." Id. at ¶ 45.

Therefore, the undersigned will recommend this claim be dismissed.

IV. The Motion for Preliminary Injunction

The County, Sheriff Harwood, and the Sheriff's Department have not asserted that the Motion for Preliminary Injunction should be denied as moot based on the filing of Plaintiff's Amended Complaint.[18] The undersigned nonetheless notes that it may be denied on this basis. See Garcia v. Mid-Atlantic Military Family Communities LLC, No. 2:20cv308, 2021 WL 1429474, at *3 (E.D.Va. March 4, 2021) ("An amended complaint supersedes a prior complaint and renders it of no legal effect. Because the Court grants Plaintiff leave to file an Amended Complaint, Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction—which seek relief based on Plaintiff's initial Complaint—are DISMISSED as moot") (internal citation omitted); Osrx Inc. v. Anderson, 6:22-cv-1737-TMC, 2023 WL 2472417, at *2 (D.S.C. Feb. 7, 2023) ("the motions pending at the time Plaintiffs filed their Amended Complaint which relied on and were directed at the original complaint…including Plaintiffs' original motion for a preliminary injunction, were mooted by the Amended Complaint and the court denied them as such") (internal citations omitted).

The undersigned has also considered the merits of Plaintiff's request for injunctive relief. El v. United States Department of Commerce, No.2:18cv190,

[18] The Moving Defendants filed their response in opposition to the Motion for Preliminary Injunction before Plaintiff filed the Amended Complaint.

2021 WL 1540467, at *4 n. 2 (E.D. Va. March 25, 2021) ("even if the Court were to consider the factual allegations of Plaintiff's Amended Complaint as the basis for Plaintiff's Third Motion for Preliminary Injunction, the Court would nevertheless deny Plaintiff's motion"). Specifically, Plaintiff seeks a preliminary injunction prohibiting the Sheriff's Department from strip searching individuals upon intake who "(1) are detained in solitary confinement and not placed in general population upon intake; (2) have not been informed they are under arrest; and (3) … are detained under suspicion of a non-drug misdemeanor." Doc. 6 at 1-2.

"In order to obtain a preliminary injunction, a plaintiff must establish all four of the following elements: (1) that he is likely to succeed on the merits; (2) that he is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of the equities tips in plaintiff's favor; and (4) that an injunction is in the public interest." Moore v. Corpening, No. 1:18-CV-00146-FDW, 2018 WL 4110547, at *13 (W.D.N.C. Aug. 29, 2018) (citing Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008)).

Here, even assuming, for the purpose of this Memorandum only, that elements one, three, and four favor Plaintiff, the undersigned will recommend that Plaintiff's Motion for Preliminary Injunction be denied because Plaintiff has not demonstrated that she will suffer irreparable harm if the injunctive relief is not granted.

In that regard, Plaintiff asserts that because she owns a home in Madison County and pays property taxes there, and because she is a licensed driver who regularly drives in the County, "she is presently at risk for detainment at the Madison County Jail" due to the potential that she might violate state law including, "by speeding 1 mile over the speed limit…." Doc. 6 at 2.

Plaintiff does not allege, however, that there is a real and immediate threat that she will be subject to another strip search. For example, Plaintiff does not include factual allegations indicating that she has been told, or otherwise believes based on specific factual allegations, that she will be arrested and strip searched for committing any minor infraction occurring in the County. Plaintiff's speculative injury is not enough to establish that she will suffer irreparable harm if injunctive relief is not granted. Winter, 555 U.S. at 22 ("Our frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.") (internal citations omitted) (emphasis in original); O'Shea v. Littleton, 414 U.S. 488, 496 (1974) (denying preliminary injunction because the "prospect of future injury rested 'on the likelihood that [plaintiffs] [would] again be arrested for and charged with violations'" and be subjected to proceedings; thus, the "threat to the plaintiff was not sufficiently real and immediate to show an existing controversy simply because they anticipate" the

same injury occurring in the future); Marchetta v. City of Bayonne, No. 2:12–cv–02696 (WJM), 2014 WL 2435820, at *3 (D.N.J. May 30, 2014) ("Plaintiff has not shown immediate irreparable harm. His assertion that he might be arrested "at whim for any fabricated reason" is highly speculative, and is not sufficient to justify injunctive relief); Hodges v. Abraham, 253 F.Supp.2d 846, 864 (D.S.C. 2002) ("The rule barring consideration of remote or speculative injury for purposes of a preliminary injunction applies despite the degree of injurious consequences").

V. The Remaining Claims and Outstanding Service Issues

In the event the undersigned's recommendations are adopted, only Plaintiff's claim for "Unconstitutional Strip Search" would remain against the Moving Defendants.

Additionally, Plaintiff's claims against Deputy Joyner, John Doe Corporation, and Jane Doe Corporation would remain.

There is no service information in the record regarding the John and Jane Doe Corporations.

Plaintiff is responsible for effectuating service on each named defendant within the time frame set forth in Fed. R. Civ. P. 4(m), and failure to do so renders the action subject to dismissal. Under Rule 4(m):

> If a defendant is not served within 90 days after the complaint is filed, the court---on motion or on its own motion after notice to the plaintiff---must dismiss the

> action without prejudice against the defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.
>
> Fed. R. Civ. P. 4(m).

With respect to Deputy Joyner, Plaintiff has filed a "Notice of Service by Publication on Defendant Daniel Joyner Pursuant to N.C.R. Civ. P. 4(j1)." (Doc. 21). This rule, though, provides for service by publication "on a party that cannot otherwise be served." N.C.G.S. § 1A-1, Rule 4(j1).

As noted, Plaintiff was previously granted an extension, through and including March 17, 2023, to complete service of process on Deputy Joyner, John Doe Corporation, and Jane Doe Corporation.

The undersigned will additionally recommend that Plaintiff be ordered to show cause why service of process on Deputy Joyner should be deemed effective, and why Plaintiff's claims against the Doe defendants should not be dismissed for Plaintiff's failure to serve the Doe Defendants.

VI. Recommendation

For the reasons set forth herein, the undersigned respectfully **RECOMMENDS**:

(1) That the Partial Motion to Dismiss (Doc. 19), filed by the Madison County Sheriff's Department, Madison County Sheriff James Harwood, and Madison County be **GRANTED**, and that Plaintiff's

claims of "Malicious Prosecution," "Unreasonable Arrest," and "Interference with Parental/Child Relationship" against the Madison County Sheriff's Department, Sheriff Harwood, and the County be **DISMISSED.**

(2) That Plaintiff's Motion for Preliminary Injunction (Doc. 6) be **DENIED**.

(3) That Plaintiff be ordered to **SHOW CAUSE** why service of process on Deputy Joyner should be deemed effective, and why Plaintiff's claims against the Doe defendants should not be dismissed for Plaintiff's failure to serve the Doe Defendants.

Signed: August 7, 2023

W. Carleton Metcalf
United States Magistrate Judge

Time for Objections

The parties are hereby advised that, pursuant to Title 28, United States Code, Section 636, and Federal Rule of Civil Procedure 72(b)(2), written objections to the findings of fact, conclusions of law, and recommendation contained herein must be filed within **fourteen (14)** days of service of same. **Responses to the objections must be filed within fourteen (14) days of service of the objections.** Failure to file objections to this Memorandum and Recommendation with the presiding District Judge will preclude the parties from raising such objections on appeal. See Thomas v. Arn, 474 U.S. 140, 140 (1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).