Short Form Order

Index No. 618287/2020

SUPREME COURT – STATE OF NEW YORK
PART 78 – SUFFOLK COUNTY

**PRESENT:**
**Hon. Maureen T. Liccione**
Justice Supreme Court

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CHRISTOPHER SCHEER and TABATHA SCHEER,

Plaintiffs,

-against-

THE COUNTY OF SUFFOLK and THE COUNTY OF SUFFOLK POLICE DEPARTMENT,

Defendants.

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Mot. Seq. No. 002 – MG/CaseDisp
Mot. Seq. No. 003 – MD
Orig. Return Date: 11/06/2023
Mot. Submit Date: 04/10/2024

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By: Stephanie N. Hill
Assistant County Attorney

Upon the e-filed documents numbered 20 through 47 and upon due deliberation, it is hereby:

**ORDERED** that defendants' County of Suffolk and County of Suffolk Police Department motion (motion sequence no. 002) to dismiss plaintiffs' complaints is granted; and it is further

**ORDERED** that plaintiffs' cross-motion (motion sequence no. 003) for leave to amend the complaints and for other relief is denied in its entirety; and it is further

**ORDERED and ADJUDGED** that plaintiffs' complaints are hereby dismissed with prejudice.

Defendants the County of Suffolk and the County of Suffolk Police Department (collectively County) move to dismiss the complaint[1] as it fails to comply with the pleading requirements of CPLR 3013 and 3014 and pursuant to CPLR 3211 (a) (7) with regards to plaintiffs' Christopher Scheer (Christopher) and Tabatha Sheer's (Tabatha) (collectively plaintiffs) allegations of First, Fourth, Fourteenth Amendment violations, New York State Constitutional violations, intentional infliction of emotional distress, negligent infliction of emotional distress, negligent supervision, negligent hiring and retention, and injunctive relief. Plaintiffs oppose the County's motion and move via cross-motion for an order, requesting that if the County's motion is granted, it be granted leave to amend their complaints pursuant to CPLR5 3025 (b), granting leave to re-plead the complaints pursuant to CPLR 3211 (e); declaring that the amended complaint be deemed served upon the County; allowing it to amend and supplement the summons and complaint to include Police Officer Pav/Pan/Pax and Police Officer DiMartino as additional defendants, directing the County to comply with their discovery demands and other demands issued by plaintiffs, and granting plaintiffs reasonable attorneys' fees, costs and disbursements incurred in the defense of the County's motion. In support of their cross-motion, plaintiffs provided a proposed amended complaint as well as their own affidavits.

By So-Ordered Stipulation to Consolidate Actions dated October 27, 2021 (St. George, A.J.S.C), the following two actions were consolidated for joint trial and discovery under the Index number 618287/2020: *Christopher Scheer v the County of Suffolk and the County of Suffolk Police Department* with the Index No. 618287/2020 (Action No. 1) and *Tabatha Scheer v the County of Suffolk and the County of Suffolk Police Department* with the Index number 612657/2020 (Action No. 2).

The two complaints in Action Nos. 1 and 2 contain very similar language, same facts, and the same causes of action. There are fourteen causes of action in each complaint: First Amendment violation (First and Second Cause of Action), Fourth Amendment violation (Third Cause of Action), Fourteen Amendment violation (Fourth Cause of Action), "New York State

[1] While the County's motion papers seek the dismissal of the "consolidated Summons and Complaint" with prejudice (NYSCEF Doc No. 21), there is no such document in the record. The two actions, *Christopher Scheer v the County of Suffolk and the County of Suffolk Police Department* with Index No. 618287/2020 and *Tabatha Scheer v the County of Suffolk and the County of Suffolk Police Department* with Index Number 612657/2020, were consolidated in October 2021, but no amended complaint was filed for the consolidated actions. The Court also notes that the Memorandum of Law on Behalf of Defendants County of Suffolk and the Suffolk County Police Department refers at times to the complaint in singular and at times in plural. As there are two complaints in this consolidated action, the Court will treat the County's motion as seeking the dismissal of the two complaints in the consolidated action.

Constitutional Tort" (Fifth to Eighth Cause of Action), common law battery (Ninth Cause of Action), intentional infliction of emotional distress (Tenth Cause of Action), negligent infliction of emotional distress (Eleventh[2] Cause of Action), negligent supervision (Twelfth Cause of Action), negligent hiring and retention (Thirteenth Cause of Action), and injunctive relief (Fourteenth Cause of Action). Tabatha alleges that she was the victim of a crime as she was robbed and assaulted by Harley Condrill and Nick Villani, and that when she appeared at the precinct her request to be provided with an order of protection and for the charges to be upgraded was denied. Per the complaints, on November 13, 2019, when Tabatha appeared with her father, Christopher, in First District Court regarding the alleged "crime" under the belief that she was needed to testify. She alleges that both of them were prevented from attending the court hearing, as they were unwillingly and forcibly detained and removed from the court room. Tabatha alleges that since then she has been a "continuing target" of the Suffolk County Police Department and continues to be pulled over and subject to "illegal" searches and seizures (NYSCEF Doc Nos. 22 and 23). Christopher alleges that he was subsequently charged with harassment in second degree and an order of protection was issued against him on behalf of Harley Condrill.

**County's Motion to Dismiss**

As noted above, the County moves to dismiss plaintiffs' complaints pursuant to CPLR 3013 and 3014 for failure to comply with the pleading requirements, and pursuant to 3211 (a) (7) for failure to state a cause of action.

In considering a motion to dismiss for failure to state a cause of action under CPLR 3211 (a) (7), the complaint is to be afforded a liberal construction and the court must "accept the allegations as true and accord the plaintiff[ ] every possible favorable inference" (*Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021], quoting *Chanko v American Broadcasting Cos. Inc.,* 27 NY3d 46, 52 [2016]; *Aristy-Farer v State*, 29 NY3d 501, 509 [2017]). Giving plaintiff the benefit of all favorable inferences, which may be drawn from the pleading, the court determines only whether the alleged facts "fit within any cognizable legal theory" (*Sassi*, 37 NY3d at 239; *Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141 [2017]; *see Recine v Recine*, 201 AD3d 827, 830 [2d Dept 2022]). Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be

[2] The cause of action for negligent infliction of emotional distress was erroneously labeled as also "tenth cause of action" in the complaints, but it is in fact the Eleventh Cause of Action.

drawn from them do not allow for an enforceable right of recovery (*Connaughton*, 29 NY3d at 142; *Pinnacle Cap., LLC v O'Bleanis*, 214 AD3d 913, 915 [2d Dept 2023]). "In opposition to such a motion, a plaintiff may submit affidavits to remedy defects in the complaint and preserve inartfully pleaded, but potentially meritorious claims" (*Garcia v Polsky, Shouldice & Rosen, P.C.*, 161 AD3d 828, 829 [2d Dept 2018], quoting *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]; *25 Bay Terrace Assocs., L.P. v Pub. Serv. Mut. Ins. Co.*, 144 AD3d 665, 667 [2d Dept 2016]). Upon considering such an affidavit, the facts alleged therein must also be assumed to be true (*Janusonis v Carauskas*, 137 AD3d 1218, 1219 [2d Dept 2016]).

For the following reasons, the Court grants the County's motion to dismiss for failure to state a cause of action in accordance with CPLR 3211 (a) and all causes of action against the County in both complaints are dismissed.

**Freedom of Speech – First and Fifth Causes of Action**

Plaintiffs allege deprivation of their rights to free speech in violation of the First Amendment of the United States Constitution and Article I, Section 8 of the New York Constitution (First and Fifth Cause of Action). Plaintiffs allege that the "policies and conduct of the County prevented or inhibited" plaintiffs from speaking out about matters of public concern (NYSCEF Doc Nos. 22 and 23).

The elements of a cause of action alleging deprivation of the right of free speech in a case involving criticism of public officials by private persons are that (1) plaintiff has an interest protected by the First Amendment, (2) defendants' actions were "motivated or substantially caused" by her exercise of that right, and (3) defendants' actions "effectively chilled" the exercise of her First Amendment right (*Sonne v Bd. of Trustees of Vill. of Suffern*, 67 AD3d 192, 205 [2d Dept 2009]; *Curley v Vill. of Suffern*, 268 F 3d 65, 73 [2d Cir 2001]).

In their complaints and affidavits, plaintiffs do not allege how defendants' actions actually chilled the exercise of their right to free speech (*see Feliz v City of New York*, 2022 WL 446043, *9, 2022 US Dist LEXIS 26129, *26 [SD NY, Feb. 14, 2022, No. 19-CV-6305 (AJN)]), or when and how they were prevented from speaking. In fact, in his affidavit, Christopher admits that "[w]e openly made statements to the pubic [sic] regarding their failure to properly prosecute, for which we faced repercussions" and then seemingly in contradiction to his own statement adds that "I was suppressed from speaking out in public about what transpired between the individuals and his [sic] daughter and the subsequent interaction with the police department personnel" without providing

any facts regarding the alleged "suppression" (NYSCEF Doc No. 32). Plaintiffs have not alleged any facts to support a claim that their First Amendment rights were "effectively chilled." Accordingly, the First and Fifth Causes of Action of the two complaints are dismissed.

**First Amendment Retaliation – Second Cause of Action**

Plaintiffs' complaints contain a Second Cause of Action for First Amendment retaliation. It appears (although not very clearly) that plaintiffs allege that the County pulled over Tabatha at traffic stops in retaliation for plaintiffs complaining to the Internal Affairs Bureau, insisting that the charges against Tabatha's alleged assaulters be upgraded, and for serving a notice of claim.

The First Amendment prohibits government officials from retaliating against individuals for engaging in constitutionally protected speech (*Hartman v Moore*, 547 US 250, 256 [2006]). To plead a First Amendment retaliation claim, a plaintiff must show that: (1) she has a right protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by her exercise of that right; and (3) the defendant's actions caused her some injury (*Dorsett v County of Nassau*, 732 F 3d 157, 160 [2d Cir 2013]). The third element can be satisfied by alleging "either that plaintiff's speech has been adversely affected by the government retaliation or that [s]he has suffered some other concrete harm" (*id.*). As to the second element, "[a] plaintiff may establish causation either directly through a showing of retaliatory animus, or indirectly through a showing that the protected activity was followed closely by the adverse action" (*Birch v City of N.Y.*, 675 Fed Appx 43, 45 [2d Cir 2017]). To survive a motion to dismiss for lack of causation, plaintiff's pleading need not clearly establish that the defendant harbored retaliatory intent; it is sufficient to allege facts which could reasonably support an inference to that effect (*Stajic v City of New York*, 214 F Supp 3d 230, 235 [SD NY 2016]).

In the instant case, assuming that plaintiffs' complaint to the Internal Affairs Bureau constituted speech protected by the First Amendment, and further accepting as true plaintiffs' assertions that Tabatha was stopped by the Suffolk County Police, the complaints, even as amplified by plaintiffs' affidavits, do not support the third element requiring that such an adverse action be motivated by plaintiffs' engaging in a protected activity. Accordingly, plaintiffs have failed to plausibly allege any causal connection between their complaint to the Internal Affairs Bureau, the filing of the notice of claim, the request that charges against Tabatha's alleged assaulters be upgraded, and the alleged traffic stops. Plaintiffs failed to provide facts that the retaliatory motive was the "but-for" cause (*Barkai v Mendez*, 2024 WL 811561, *23, 2024 US Dist

LEXIS 35845, *67 [SD NY, Feb. 21, 2024, No. 21-CV-4050 (KMK)]). Plaintiffs' complaints do not allege that there was no probable cause for any of the alleged traffic stops or no lawful explanation for the police encounters, that the police officers involved in the alleged traffic stops were aware of plaintiffs' having filed a notice of claim[3] or a complaint with the Internal Affairs Bureau (*see Richards v City of New York,* 2021 WL 3668088, *3, 2021 US Dist LEXIS 155979, *8 [SD NY, Aug. 18, 2021, No. 20-CV-3348 (RA) (KNF)]; *McKenzie v City of New York*, 2019 WL 3288267, *9, 2019 US Dist LEXIS 121937, *24-25 [SD NY, July 22, 2019, No. 17 CIV 4899 (PAE)]), or that the police officers involved in each of the traffic stops took adverse actions against Tabatha because of any retaliatory animus (*Thomas v Town of Lloyd*, 2024 WL 118939, *7, 2024 US Dist LEXIS 5712, *18-19 [ND NY, Jan. 11, 2024, No. 21-CV-1358]). Thus, the factual allegations in the complaints, supplemented by plaintiffs' affidavits, are insufficient to state a cause of action for First Amendment retaliation and plaintiffs' Second Cause of Action is dismissed.

**Unreasonable Search and Seizure – Third and Eighth Causes of Action**

The Third and Eighth Causes of Action are based upon violations of plaintiffs' rights under the Fourth Amendment and the New York State Constitution to be free from unreasonable searches or seizures. The unartfully drafted affidavits seem to indicate that plaintiffs allege that Tabatha was on a number of occasions pulled over by the police and her vehicle was searched.

"The Fourth Amendment, incorporated against the states by the Fourteenth Amendment, guarantees all individuals the right to be free from unreasonable search and seizure" (*Corley v Vance*, 365 F Supp 3d 407, 443 [SD NY 2019]). "Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning" of the Fourth Amendment" (*Whren v United States*, 517 US 806, 809–10 [1996]). Accordingly, "traffic stops must satisfy the Fourth Amendment's reasonableness limitation, which 'requires that an officer making a traffic stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity" (*United States v Gomez*, 877 F 3d 76, 86 [2d Cir 2017]; *United States v Stewart*, 551 F 3d 187, 191 [2d Cir 2009]). "Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their

[3] In fact, the complaints allege that the notice of claim was filed on May 8, 2020, while the traffic stops occurred prior to that date, "on May 6, 2020, and two weeks prior thereto, as well as in March of 2020, on several dates and times" (NYSCEF Doc Nos. 34 and 35).

privacy—including (where appropriate) damages for physical injury, property damage, [or] injury to reputation," even though they may not recover damages from an arrest that followed a traffic stop so long as the arrest was itself supported by probable cause (*Townes v City of New York*, 176 F 3d 138, 148 [2d Cir 1999]; *Conti v Comito*, 2022 WL 4485155, *3, 2022 US Dist LEXIS 174996, *7 [ED NY, Sept. 27, 2022, No 21-CV-158 (RPK) (AYS)]).

Plaintiffs' unlawful stop and search allegations are insufficient to survive a motion to dismiss. The complaints and the affidavits are devoid of any statements that Tabatha committed no crime and did not violate the law when she was alleged stopped, or that the police had no probable cause or reasonable suspicion to stop her. No facts were provided as to whether Tabatha was arrested during any of these alleged stops or issued any tickets. The complaints do not even specify where these stops occurred, the exact dates, and how many of these stops took place. Christopher's affidavit vaguely states that "the Police started stopping my daughter at any chance they could" and that "on May 6, 2020, and two weeks prior thereto, as well as in March of 2020, on several dates and times, the County of Suffolk and the County of Suffolk Police Department, had engaged in a game of pulling her over when driving her car" (NYSCEF Doc No. 32). Tabatha's affidavit is even broader in the description of the alleged unlawful stops and searches: "That each time I leave my home, and since in or about the date when she demanded that the charges be increased, that the Police Department of the County, have been waiting and pulling me over in my car, conducting an illegal search and seizure of the car that belonged to my dad. It only stopped when she was no longer able to drive due to COVID-19" (NYSCEF Doc No. 31). Accordingly, the Third and Eighth Causes of Action from the two complaints are dismissed. It is noted that the plaintiffs provided no opposition to the dismissal of these causes of actions.

**Equal Protection Clause – Fourth and Seventh Causes of Action**

The complaints allege violations of federal and state equal protection guarantees, specifically that the "policies and intentional conduct of the defendants in furtherance of a political vendetta deprived" the plaintiffs of their right to equal protection (NYSCEF Doc Nos. 22 and 23). The Equal Protection Clause of the Fourteenth Amendment commands that no state shall "deny to any person within its jurisdiction the equal protection of the laws" (US Const. amend. XIV, § 1). The Equal Protection Clause prohibits the disparate treatment of similarly situated individuals (*City of Cleburne v Cleburne Living Ctr.*, 473 US 432, 439 [1985]). There are "several ways for a plaintiff to plead intentional discrimination that violates the Equal Protection Clause" (*Brown v*

*City of Oneonta*, 221 F 3d 329, 337 [2d Cir 2000]). Plaintiffs can assert that "they were treated differently than an identifiable, similarly situated group of individuals for malicious reasons, including but not limited to racial prejudice"—called a "selective enforcement" (*Doe v Vill. of Mamaroneck*, 462 F Supp 2d 520, 543 [SD NY 2006]; *Elliott v City of New York*, 2024 WL 1119275, *7, 2024 US Dist LEXIS 47367, *18 [SD NY, Mar. 14, 2024, No. 23-CIV-352 (AT) (VF)]). A plaintiff can also assert a "class of one" claim: that they "were intentionally treated differently from others similarly situated and that there was no rational basis for this difference in treatment" (*id.*). However, both selective enforcement and class-of-one claims require the plaintiff to "make a showing of different or unequal treatment" (*Thomas v Town of Lloyd*, 2024 WL 118939, *9, 2024 US Dist LEXIS 5712, *22; *Bristol v Town of Camden*, 669 F Supp 3d 135, 154 [ND NY 2023]).

Upon review, plaintiffs have not done so. Tabatha identified herself as "white, middle class female who now became the symbol of society" (NYSCEF Doc No. 22), and did not allege that she was treated differently from a comparable plaintiff. Christopher did not allege that he was a member of an identifiable group. The complaints failed to plausibly allege or even mention a comparator that was similarly situated to the plaintiffs (*see Hu v City of New York*, 927 F 3d 81, 90 [2d Cir 2019]). Accordingly, plaintiffs' Fourth and Seventh Causes of Action to recover damages for violation of their equal protection rights are dismissed (*see e.g., MacPherson v Town of Southampton*, 738 F Supp 2d 353 [ED NY 2010]) [finding plaintiff's equal protection claim deficient as a matter of law because plaintiff's complaint "failed to identify any comparators or similarly situated entities at all"]).

To the extent that a reading of the complaints could indicate that plaintiffs allege that the County failed to properly protect Tabatha from the alleged attack by Harley Condrill and Nick Villani in violation of her equal protection rights, the government generally has no duty under the Fourteenth Amendment to investigate or protect an individual against harm from others (*DeShaney v Winnebago Cnty. Dept. of Soc. Servs.*, 489 US 189, 195-96 [1989]; *Finnegan v New York City Police Dept.*, 2021 WL 3193040, *3, 2021 US Dist LEXIS 140958, *6 [SD NY, July 26, 2021, No. 21-CV-5798 (LTS)]; *Lewis v Gallivan*, 315 F Supp 2d 313, 316-17 [WD NY 2004] [holding that there is "no constitutional right to an investigation by government officials"]). There are two exceptions to this general rule. First, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some

responsibility for his safety and general well-being" (*DeShaney*, 489 US at 199-200), and second, when the government assumes some obligation as it affirmatively creates or increases the danger to the plaintiff (*see Dwares v City of N.Y.*, 985 F 2d 94, 98-99 [2d Cir 1993]). Plaintiffs failed to allege facts suggesting that either of these two exceptions are applicable here.

**New York State Constitutional Tort – Sixth Cause of Action**

Plaintiffs' Sixth Cause of Action alleges that the "policies and conduct of the defendants constituted retaliation of the plaintiff as a result of his petition to redress, in violation of Article I Section 9 of the New York State Constitution" (NYSCEF Doc Nos. 22 and 23). However, Section 9 of Article I of the New York State Constitution pertains to the passing of laws abridging the right to assemble and petition, judicial divorce, and certain gambling games. As Section 9 of Article I of the New York State Constitution is not applicable to this case, plaintiffs' Sixth Cause of Action is dismissed.

**Battery – Ninth Cause of Action**

In the Ninth Cause of Action, plaintiffs sought to recover damages for battery. To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature (*Cotter v Summit Sec. Servs., Inc.*, 14 AD3d 475, 475 [2d Dept 2005]; *Siegell v Herricks Union Free School Dist.*, 7 AD3d 607, 609 [2d Dept 2004]). Here the complaints, as supplemented by the affidavits, do not sufficiently allege facts necessary to validate a cause of action for battery.

In his complaint, Christopher alleges that while appearing in First District Court, he "was forcibly detained by the court, at the direction of the County, was removed from the Courthouse," "the force that was used by the defendants was such that the Plaintiff did not protest and did not resist or use force against any of the officers of the Court that were present" and that "despite Plaintiff's cooperation with the officers, they continued to pull and yank on him, using unnecessary force upon him" (NYSCEF Doc No. 23). The allegations regarding battery are directed at "officers of the Court," who are State employees and are not part of this action. There are no allegations in the complaints or affidavits that County employees were present at the First District Court and made bodily contact with Christopher that was offensive in nature.

As to Tabatha, the affidavit she provided to remedy the complaint, includes allegations that she was "pushed into the car" by a police officer at an unspecified location and on an unspecified date, "on another occasion I was physically pushed again by another police officer and told to get

out of the car when there was no reason to. This continued on and on" and that "on another occasion, Police Officer DiMartino stopped me and called me names and physically touched me for no reason" (NYSCEF Doc No. 31). Tabatha's affidavit lacked specificity as to when and how Tabatha was "pushed," and whether such "pushing" was "offensive in nature" to Tabatha to fit within the cognizable legal theory of battery. Furthermore, in their opposition, plaintiffs allege that the claim for battery stated by Tabatha constitutes the "forceable" removal from the First District Court, and do not allege that the "pushing" by the police officers constituted battery. However, the complaints and affidavits are devoid of any allegations that there was a bodily contact between Tabatha and any County employees (or anyone else as a matter) at the First District Court, made with intent and offensive in nature. In fact, in her complaint and affidavit, Tabatha alleges that the Court Officers "continued to pull and yank on the father, using unnecessary force upon him" and does not allege that the Court Officers "pulled and yanked" at her (NYSCEF Doc Nos. 22 and 31). Accordingly, defendants' motion to dismiss the cause of action for battery is granted.

**Intentional Infliction of Emotional Distress – Tenth Cause of Action**

Plaintiffs' cause of action for intentional infliction of emotional distress is dismissed as "public policy bars claims sounding in intentional infliction of emotional distress against a governmental entity" (*Gottlieb v City of New York*, 129 AD3d 724, 727 [2d Dept 2015]; *Afifi v City of New York*, 104 AD3d 712, 713 [2d Dept 2013]; *Lauer v City of New York*, 240 AD2d 543, 544 [2d Dept 1997]). In their opposition, plaintiffs contend that the United States Court of Appeals, Second Circuit held in *Bender v City of New York*, 78 F 3d 787, 792 [2d Cir 1996], that "claims for intentional infliction of emotional distress may be maintained against governmental entities" (NYSCEF Doc No. 33). However, the court in *Bender* made no such determination, but discussed a challenge to an intentional infliction of emotional distress award against a police officer (not a governmental entity).

**Negligent Infliction of Emotional Distress – Eleventh Cause of Action**

Plaintiffs' complaints include a cause of action for negligent infliction of emotional distress (NIED), which too, fails to state a claim. "A cause of action to recover damages for negligent infliction of emotional distress generally requires a plaintiff to show a breach of a duty owed to him [or her] which unreasonably endangered his [or her] physical safety, or caused him [or her] to fear for his [or her] own safety" (*Chiesa v McGregor*, 209 AD3d 963, 966 [2d Dept 2022], quoting

*Borrerro v Haks Group, Inc.*, 165 AD3d 1216, 1219 [2d Dept 2018]; *see Taggart v Costabile*, 131 AD3d 243, 255–56 [2d Dept 2015]).

"Under New York law, a plaintiff may establish a claim for negligent infliction of emotional distress in one of two ways: (1) the bystander theory; or (2) the direct duty theory" (*Baker v Dorfman*, 239 F 3d 415, 421 [2d Cir 2000]; *Green v City of Mount Vernon*, 96 F Supp 3d 263, 298 [SD NY 2015]). The bystander theory has no application here, where the complaints do not allege the death of or serious bodily injury to one of the family members of Tabatha or Christopher (*see Truman v Brown*, 434 F Supp 3d 100, 123 [SD NY 2020]). Under the direct duty theory, a plaintiff must allege that she suffered an emotional injury from defendant's breach of a duty which unreasonably endangered her own physical safety (*id.*). The duty "must be specific to the plaintiff, and not some amorphous, free-floating duty to society" (*Green*, 96 F Supp 3d at 299 [internal quotation omitted]).

Plaintiffs have failed to allege that the County owed any "direct duty" towards them that could give rise to a special obligation to avoid negligently causing them emotional distress, and therefore failed to state a claim under the "direct duty" theory. Furthermore, plaintiffs have not cited to any case suggesting that police officers have a special duty to people who are alleging to be a victim of a crime (*see Mortise v United States*, 102 F 3d 693, 696–97 [2d Cir 1996] [holding that the National Guard "may have had a generalized duty to prevent unreasonable risks of harm" to people passing by a field training exercise, but "this duty was not specific" to individuals who happened to roam into the area, and rejecting a theory that the plaintiffs were third party beneficiaries of a contract between the county and the federal government]; *Lieberman v City of Rochester*, 2011 WL 13110345, *9, 2011 US Dist LEXIS 46295, *29-30 [WD NY, Apr. 29, 2011, No. 07-CV-6316], *affd*, 558 F Appx 38 [2d Cir 2014] [dismissing NIED claim where plaintiffs failed to allege any special duty owed to them aside from police officers' general duty to the public not to use excessive force when making an arrest]; *Scheuer v City of New York*, 10 AD3d 272 [1st Dept 2004] [holding no special duty for NIED purposes between the police department and a family where the police officers made affirmative representations to the family that they conducted a proper search for a 91–year–old relative]). Therefore, plaintiffs' claim for NIED is dismissed.

**Negligent Supervision, Hiring, and Retention – Twelfth and Thirteenth Causes of Action**

The complaints allege that the County was negligent in training, supervising, and retaining individual police officers, detectives, and other personnel.

To maintain a claim against a municipal employer for negligent hiring, training, and retention of a tortfeasor under New York State law, a plaintiff must show that the employee acted outside the scope of her employment when committing the tort (*Velez v City of New York*, 730 F 3d 128, 136 [2d Cir 2013]). Where, as here, the complaints allege that "these individual police officers, detectives and other personnel acted as the agents and servants of the Defendants and acted within the scope of their employment" (NYSCEF Doc Nos. 34 and 35), a common law cause of action for negligent supervision, retention and training cannot proceed (*see Gray v Schenectady City Sch. Dist.*, 86 AD3d 771, 773–74 [3d Dept 2011] ["The employee also must not be acting within the scope of his or her employment; in that situation the employer could only be liable, if at all, vicariously under the theory of respondent superior, not for negligent supervision or retention."]; *Ashley v City of New York*, 7 AD3d 742, 743 [2d Dept 2004] ["where an employee is acting within the scope of his or her employment, the employer is liable for the employee's negligence under a theory of respondent superior and the plaintiff may not proceed with a cause of action to recover damages for negligent hiring and retention"]).

Accordingly, plaintiffs' causes of action for negligent supervision (Twelfth Cause of Action) and negligent hiring and retention (Thirteenth Cause of Action) are dismissed.

**Injunctive Relief – Fourteenth Cause of Action**

As for the Fourteenth Cause of Action for injunctive relief, plaintiffs allege that the County's policies should be preliminary and permanently enjoyed as they "deprive and/or chill federal constitutional rights, state constitutional rights and state statutory rights of all similarly situated individuals" (NYSCEF Doc Nos. 34 and 35).

To prove entitlement to a preliminary injunction, a plaintiff must establish (1) a likelihood or probability of success on the merits, (2) irreparable harm in the absence of an injunction, and (3) a balance of the equities in favor of granting the injunction (*Emanuel Mizrahi, DDS, P.C. v Angela Andretta, DMD, P.C.*, 170 AD3d 1120, 1123 [2d Dept 2019]; *Soundview Cinemas, Inc. v AC I Soundview, LLC*, 149 AD3d 1121, 1123 [2d Dept 2017]). "To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a 'violation of a right presently occurring, or threatened and imminent,' that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor" (*Hogue v Vill. of Dering Harbor*, 199 AD3d 900 [2d Dept 2021], quoting *Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014]). Applying these principles, plaintiffs

failed to allege that they would suffer irreparable harm absent an injunction or that there was a violation of a right presently occurring or threatened and imminent. Accordingly, plaintiffs' cause of action for injunctive relief is dismissed.

Thus, all causes of actions are dismissed from both complaints. The County's remaining contentions regarding the dismissal of the complaints for failure to comply with CPLR 3013 and 3014 are academic in light of the above determination.

**Plaintiffs' Cross-Motion to Amend the Complaints**

Plaintiffs cross-motion requests that if the County's motion to dismiss were to be granted, it should be granted for leave to amend the complaints pursuant to CPLR5 3025 (b) and re-plead the complaints pursuant to CPLR 3211 (e), amending and supplementing the summons and complaint to include Police Officer Pav/Pan/Pax and Police Officer DiMartino as additional defendants, and for other relief.

Pursuant to CPLR 3025 (b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." "'In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit' " (*Shields v Darpoh*, 207 AD3d 586, 587 [2d Dept 2022], quoting *Onewest Bank, FSB v N & R Family Trust,* 200 AD3d 902, 903 [2d Dept 2021]; *see also* CPLR 3025 [b]). A determination whether to grant such leave is within the trial court's broad discretion, and "the exercise of that discretion will not be lightly disturbed" (*Bank of Smithtown v 219 Sagg Main, LLC*, 107 AD3d 654, 655 [2d Dept 2013] [internal quotation marks omitted]).

Plaintiffs' cross-motion indicates that "plaintiffs seek leave of court to add and supplement Officers Pav and Dimartino as parties in this action" (NYSCEF Doc No. 33). However, a review of the proposed amended complaint shows that plaintiffs are more than adding individual defendants to their proposed pleading, but are in fact also restating some facts, and changing some of the language in the causes of action. No new causes of actions were added, but since the proposed amended complaint includes now both plaintiffs, the causes of actions doubled to twenty-eight to account for each plaintiff.

The Court finds that the proposed amended complaint is patently devoid of merit (*see Nisari v Ramjohn*, 85 AD3d 987, 990 [2d Dept 2011]), as it includes the same allegations and

causes of actions as the initial complaints, albeit at times reiterated in a more verbose but not more artful manner. Furthermore, a motion for leave to amend in response to a motion to dismiss the complaint is "futile" and should be denied where "the defects [in the complaint] are [not] cured by the proposed ... amended complaint" (*Meimeteas v Carter Ledyard & Milburn LLP*, 105 AD3d 643, 643 [1st Dept 2013]). Here, the proposed amended complaint reiterates the same allegations as the original complaints without addressing any of the deficiencies raised by the County in its motion papers. The restated allegations do not remedy the shortcomings of the original complaints, making the amendments "palpably insufficient or patently devoid of merit" (*Shields*, 207 AD3d at 587). Since, as discussed in this Order, the complaints fail to state a cause of action, and the proposed amended complaint includes the same causes of action and very similar allegations as the ones found in the original complaints, the branch of plaintiffs' motion seeking to amend the complaints is denied. Plaintiffs' remaining contentions are dismissed as moot. Accordingly, plaintiffs' motion is denied and the complaints are dismissed with prejudice.

The foregoing constitutes the decision and Order of the Court.

ENTER

DATE: July 11, 2024
Riverhead, NY

HON. MAUREEN T. LICCIONE, J.S.C.

__X__ FINAL DISPOSITION ___ NON-FINAL DISPOSITION