UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES LEE SALTMARSHALL,

Plaintiff,

v.

Case Number 18-10887
Honorable David M. Lawson
Magistrate Judge R. Steven Whalen

PRIME HEALTHCARE SERVICES - GARDEN CITY, LLC, SHAWNA WRIGHT, M.D., VHS CHILDREN'S HOSPITAL OF MICHIGAN, INC., SCOTT LANGENBERG, M.D., CHRISTIAN BAUERFELD, M.D., JONATHAN MUNSON, JEFFREY TWARDZIK, JEFFREY SMITH and the CITY OF INKSTER,

Defendants.
_____/

OPINION AND ORDER GRANTING MOTIONS FOR SUMMARY JUDGMENT BY DEFENDANTS PRIME HEALTHCARE SERVICES – GARDEN CITY, LLC, SHAWNA WRIGHT, CHRISTIAN BAUERFELD, JONATHAN MUNSON, JEFFREY TWARDZIK, JEFFREY SMITH AND THE CITY OF INKSTER, AND GRANTING IN PART AND DENYNG IN PART MOTION FOR SUMMARY JUDGMENT BY DEFENDANTS VHS CHILDREN'S HOSPITAL OF MICHIGAN, INC., AND SCOTT LANGENBERG

Plaintiff James Lee Saltmarshall was wrongfully accused of sexually assaulting and murdering his infant daughter. Extensive publicity attended his arrest and accusation, but not so much after the state prosecutors realized it had no case and the charges were dropped. Saltmarshall alleges in a complaint filed under 42 U.S.C. § 1983 and state law that the criminal accusations were the result of a doctor at Children's Hospital spewing false information about the cause of the child's mortal injuries, over-aggressive police practices, and other misinformation disseminated by medical personnel. He also contends that the City of Inkster and its police personnel, in league with the doctors, conspired to deprive him of his civil rights on the basis of his race (African American). The three groups of defendants each have filed motions for summary judgment, which the Court heard on January 30, 2019. Based on the record before the Court, no reasonable jury

could find that the police proceeded without probable cause or that the officers acted in bad faith. The same cannot be said for one of the doctors, but there are insufficient facts to conclude that they can be considered state actors, and some of them are immune under Michigan's Child Protection Law. The Court therefore will dismiss the federal claims and some of the state law claims with prejudice.

I. Facts

Saltmarshall was charged with felony murder, child abuse, and criminal sexual conduct following the death of his infant daughter in April 2017. Treating physicians at primary and tertiary care hospitals had observed injuries to the infant's bottom and head that they speculated were inconsistent with the plaintiff's account of what happened on the day in question. The charges were dropped after the preliminary autopsy findings deemed the death an accidental asphyxiation, but not before the story had made headlines locally and around the world. The plaintiff has sued three groups of defendants: the City of Inkster and its police officers involved in his arrest and subsequent prosecution (the Inkster defendants); Garden City Hospital and Shawna Wright, a doctor attending the emergency room which the child was brought in (the GCH defendants); and Children's Hospital of Michigan and two doctors who worked there, Scott Langenberg and Christian Bauerfeld (the CH defendants).

A. Initial Police Contacts

The record developed during discovery indicates that on April 20, 2017 at approximately 4:23 p.m., Saltmarshall called 911 after finding his eight-month-old daughter, Janiyah, unresponsive in Room 34 of the Alpine Motel in Inkster, Michigan. Saltmarshall, who had sole legal custody of Janiyah, had been staying at the motel with his girlfriend and the baby's mother, Zuleika Moreno, that week. Emergency medical service (EMS) and Inkster police department

officers, including defendants Jeffrey Smith and Jeffrey Twardzik, arrived within minutes of his call. The plaintiff had attempted CPR in the interim following the dispatcher's instruction. The run sheet from that day indicates that the baby, who was face down on the bed, had no palpable pulse, was not breathing, and her body was limp. After intubating the baby, EMS performed CPR while they carried her to the ambulance and during their ride to Garden City Hospital. The plaintiff rode with Lt. Twardzik in his squad car.

B. Events at Garden City Hospital

The ambulance arrived at the hospital at 4:40 p.m. where Janiyah presented in cardiac arrest. Defendant Shawna Wright, a private physician, was the attending physician in the emergency room that day. Dr. Wright initially pronounced Janiyah dead after continued CPR and resuscitation efforts failed. However, a nurse obtained a pulse at 5:02 p.m., at which time Dr. Wright and resident physician Meagan Thomas stabilized Janiyah and performed a standard physical exam, including listening to heart sounds, lung sounds, and checking the baby's eyes. When the nurse pulled down Janiyah's diaper to try a rectal thermometer, Dr. Wright observed a large rectal tear that was bleeding. Dr. Wright's documentary note from that date indicates that Janiyah had bloody feces coming out of her rectum. Dr. Wright also noted that Janiyah's nose was bloody, and she had been without a pulse for approximately 40 minutes.

The triage note indicates that neither of Janiyah's parents were present on arrival to obtain her medical history. However, at some point during Dr. Wright's examination, Wright spoke to the plaintiff, who indicated that Moreno had an uncomplicated pregnancy and delivered at full-term. Janiyah had not been diagnosed with any ailments and her immunizations were up to date. Dr. Wright testified that when she asked the plaintiff for Janiyah's medical history, he did not mention constipation and there were no signs of constipation upon visual exam. Dr. Wright did

not conduct a rectal exam, but she testified that the wound looked larger than an anal fissure — a break or tear in the skin of the anal canal. An abdominal and chest x-ray was obtained, which showed, among other things, gas-filled loops of her bowels. The radiologist's note indicates that the loops "may be secondary to resuscitation efforts." Dr. Wright explained that when patients are bagged or intubated, gas may enter their gastrointestinal tract, which can push bowels out of the body or cause vomiting. Dr. Wright testified that she did not think resuscitation efforts such as CPR and intubation could have caused the rectal tears. Dr. Wright maintained that because of Janiyah's critical condition, she did not have time to contact Janiyah's family doctor.

Dr. Wright recalled speaking with the plaintiff (whom she had never met before) in the trauma bay about Janiyah's injuries and asking him what happened before he called 911 and began resuscitation efforts. According to Dr. Thomas's note, the plaintiff informed them that he was holding Janiyah, set her down to go to the bathroom and returned to find her not breathing. Dr. Wright's note indicates that the plaintiff had told EMS and the police officers who were at the motel the same story. Dr. Wright testified that at the time she did not know that the plaintiff had been sharing a bed with his daughter. She recalled asking him if he had ever seen his daughter like that before, to which he responded that he had not. She testified that she did not accuse the plaintiff of any wrongdoing. Dr. Wright testified that she believed the plaintiff's account of what happened was inconsistent with her physical examination findings.

After discovering the tears and blood in Janiyah's diaper, Dr. Wright stepped into the hallway of the emergency room, where Lt. Smith and Officer Shawn Vargo, who also had responded to the 911 call, were waiting. Officer Vargo testified that he heard Dr. Wright tell Lt. Smith that there were signs of trauma and tearing to Janiyah's rectum. Both Lt. Smith and Officer Vargo testified that they heard Dr. Wright say that the only way an injury like that would occur

was if something was inserted into the baby's rectum. Officer Vargo's report from that day mentions that "Dr. Wright stated that the nature of injury to the child's rectum could have only been caused by something being inserted into the child's rectum." Officer Vargo testified that Dr. Wright did not say anything that caused him to believe that the plaintiff was responsible for the injury.

Dr. Wright testified that she does not remember telling anyone that the "only way" the injury to Janiyah's bottom could have been caused was by something being inserted into her rectal area. She testified that she does not usually speak in absolutes, but it is a possibility that insertion is what caused Janiyah's rectal injury. She said she did not speak to EMS or the police about what they suspected had happened to Janiyah at the motel and that she only asked if CPR was started and if Janiyah had a pulse.

Dr. Wright admitted that she told the police officers that her observations were consistent with suspected child abuse. Dr. Wright and Dr. Thomas subsequently filled out a "Form 3200," required paperwork for those mandated by state law to report known or suspected child abuse or neglect. In the section asking to "describe injury or conditions and reason for suspicion of abuse or neglect," Drs. Wright and Thomas wrote, "Large rectal tears with loss of pulses and respiratory distress." Dr. Wright's emergency department (ED) Provider Note indicates that she also called Children's Protective Services (CPS), although she testified that she first spoke to the social worker who works in the ED throughout the day, who contacted CPS. Dr. Wright's note indicates that CPS informed her that there already was a case on Janiyah open in Oakland County due to suspected abuse by her mother.

C. Arrest of the Plaintiff

After speaking with Dr. Wright and Janiyah's mother, Lt. Smith ordered Officer Vargo to place the plaintiff under arrest for criminal sexual conduct with a person under thirteen. Officer Vargo's report indicates that he interviewed Moreno, who was present at the hospital after responding to the plaintiff's frantic call, shortly before placing the plaintiff under arrest. Officer Vargo testified that Moreno had told him that she was at the motel that morning and had not returned to the motel that day. Officer Vargo testified that he advised the plaintiff that he was under arrest for criminal sexual conduct, handcuffed him, and walked him outside. The plaintiff then was taken to the Inkster Police Department. Moreno also was taken into custody based on outstanding warrants.

Lt. Smith testified that although he was aware that the plaintiff also had outstanding warrants, he made the decision to arrest the plaintiff based on his conversation with Dr. Wright. He testified that she relayed to him that there was extensive injury to Janiyah's anus and that in her opinion, something was inserted. He said that he believed those factors, along with the fact that the plaintiff was with Janiyah before he called 911, gave him probable cause to arrest the plaintiff. He admitted that while at the motel, he did not observe any blood and had no reason to think that the plaintiff, whom he had never met, had anything to do with Janiyah's condition. He nevertheless asserted that the plaintiff's sole custody of Janiyah tied him to her injuries, which he believed in his experience as an officer was sufficient to create probable cause. Lt. Smith testified that he did not recall whether Dr. Wright offered an opinion about what was inserted or if it was sexual in nature. He believed his investigation lasted not longer than 30 minutes.

That evening, a state judge issued a search warrant for Room 34 of the Alpine Motel. Lt. Smith, defendant Scott Munson, an Inkster detective, and Inkster detective Brian Shafer performed

the search, which yielded nothing remarkable (three bags of trash, a Samsung cell phone, bedding, a box and bag of nail care products, clothing, a backpack with baby clothing, a box of documents and miscellaneous items, a laundry basket, a bag of miscellaneous items, a toilet plunger handle, a laundry bag with clothing, and a box of baby items, such as used diapers, washcloths, baby clothes, baby bottles, and contents of purses).

D. Events at Children's Hospital

At the same time the search was under way, Janiyah was transferred to Children's Hospital of Michigan in Detroit, where all services were waiting for her. Upon arrival at approximately 7:27 p.m., Dr. Helene Tigchelaar performed a physical examination of Janiyah in the emergency department. Her documentary note indicates that there were no observable lumps, bumps, or bruises on Janiyah's head, but her eyes were not reactive and there was blood crusted in the nares of her nose and at the opening of her mouth. She also noted that Janiyah had an approximately five-millimeter tear of the perineal body and some gaping of the anal opening. She observed that Janiyah was unresponsive to pain and scored at "3" on the Glasgow Coma Scale, the lowest end of the scale, indicating a total lack of brain function. A CT scan of her head was immediately performed after leaving the emergency department, which showed "diffuse loss of supratentorial gray and white matter differentiation suggestive of hypoxic injury." Dr. Tigchelaar noted that "no fracture was visualized."

Dr. Tigchelaar admitted Janiyah to the surgical service critical care placement, describing Janiyah's condition as an "apparent non-survivable injury." Her final diagnosis read: "Severe head injury secondary to nonaccidental trauma, genital trauma, suspected sexual assault. Hypothermia." Dr. Tigchelaar contacted a Wayne County Sexual Assault Forensic Examiner (SAFE) worker to perform a sexual assault assessment of Janiyah. The worker apparently stated that she needed the

signature of one of Janiyah's parents before proceeding. Dr. Tigchelaar filled out a Form 3200 and consulted a social worker at Children's Hospital, noting that the same precautions were taken at Garden City Hospital. The form described Janiyah's injuries as "perineal laceration, unconscious, severe head trauma, in shock, no other external injury." Under "x-ray," Dr. Tigchelaar wrote, apparently inaccurately, "CT scan brain hemorrhage/fracture skull."

Defendant Scott Langenberg, who was present when resuscitation efforts initially were performed, was the doctor responsible for Janiyah's care while on the surgical service. The note prepared by his resident, Dr. Kurt Ammerman, indicates that Janiyah appeared well nourished and well developed. Dr. Ammerman observed an anterior perineal tear measuring approximately five millimeters. Under "Impression and Plan," Dr. Ammerman noted, without basis, a "nondisplaced comminuted left temporal bone fracture" under his neurological findings. He mentioned consulting SAFE nurses for sexual assault/rape evaluation in connection with Janiyah's perineal laceration.

Other services were consulted at the same time. Imaging completed by a neurosurgery consultant revealed loss of gray white differentiation and diffuse cerebral edema consistent with hypoxic ischemic injury, or lack of oxygen to the brain. The writer, who noted in the "history of present illness" section of the chart that the patient was transferred to Children's after suspected non-accidental trauma, opined that Janiyah suffered non-accidental trauma "with extended asystole" (loss of heartbeat). The pediatric intensive care unit (PICU) consultant similarly observed a five-millimeter laceration of Janiyah's perineum to the anus around the 4 o'clock position with some tearing, as well as lacerations at the 12 o'clock and 6 o'clock positions. The PICU consultant who read the CT scan observed no evidence of depressed calvarial fracture, skull base fracture, or acute intracranial hemorrhage. Among the PICU's impressions were "diffuse

global hypoxic brain injury," "perineal trauma with lacerations suspicious for sexual abuse," and "findings highly suspicious for nonaccidental trauma." The PICU attending physician noted that it was very likely that Janiyah would have another cardiac arrest. The ophthalmology consultant noted "multiple scattered hemorrhages throughout different retinal layers."

Lt. Twardzik, who had responded to the plaintiff's emergency call and was present at the motel room with EMS, followed Janiyah to Children's Hospital. He testified that at the time he was unaware that the plaintiff had been taken into custody. While at Children's Hospital, Lt. Twardzik met Dr. Langenberg, with whom he spoke briefly about Janiyah's condition in the hallway adjacent to the intensive care unit. Langenberg, a board certified pediatric general and thoracic surgeon, told Lt. Twardzik that things looked "grave" and that he was concerned about Janiyah's well-being. Lt. Twardzik gave Dr. Langenberg his business card, advising him to call if he needed anything. He testified that it is part of his routine to follow a patient and alleged victim to see how she is doing and to get information from the care provider. Langenberg testified that he regularly uses texts to communicate with patients and family members.

Later that night Dr. Langenberg sent Lt. Twardzik the following false information in a text message:

> Baby has skull fractures, brain swelling on CT (likely will meet brain death criteria). Lung bruising, anterior anal laceration. We have some other studies pending.
>
> This is non-accidental trauma. The perpetrator murdered this child.
>
> Nice meeting you. Scott
>
> Scott Langenberg, M.D. Children's Hospital of Michigan

PageID.3741, 4158. Lt. Twardzik thanked Langenberg for the information and immediately forwarded Langenberg's text message to Detective Munson, who was in charge of the plaintiff's

child abuse case and included the communication in his police report. Other than his communication with Dr. Langenberg, Lt. Twardzik was not involved in gathering any additional information in the subsequent days, and he did not prepare any police reports.

During his deposition Dr. Langenberg, who has been on faculty at Children's Hospital for 20 years, described the extent of his involvement in Janiyah's care. He testified that he was brought onto Janiyah's case because he was informed that she potentially had a head injury as well as a perineal laceration. He stated that when Janiyah was brought into the emergency department, he performed a physical examination and ordered a series of studies. He did not perform a digital exam of her rectum, but he recalled that the tear was "pretty significant." He stated that because the tear was anterior on the anal canal, as opposed to a posterior tear which usually forms after something passes out, there was concern that something was inserted or stretched the external portion of the canal. He testified that the tear did not appear like a standard anal fissure, which are usually posteriorly located if caused by constipation or forceful defecation.

As to his statement that Janiyah had suffered skull fractures, Dr. Langenberg averred that he had texted Lt. Twardzik before the official CT report was prepared, but he knew at the time that there was head injury based on her Glasgow Coma Scale score and lack of brain activity. He characterized his conclusion as a "preliminary finding," attributing the x-ray interpretation to a resident who may have thought the suture lines in the brain was a fracture. He apparently never read any imaging before he shared his conclusion with the police. Langenberg admitted that no fractures were ever confirmed based on the final x-ray reading, which he reviewed after he texted Lt. Twardzik and after Janiyah was turned over to the PICU. He did not let Lt. Twardzik know that the final finding revealed no fractures.

Dr. Langenberg believed that Janiyah had suffered non-accidental trauma based on certain "red-flags." He stated that the conflicting stories they were told about how Janiyah's injuries came to be, which he admitted they learned second-hand from Garden City Hospital personnel and the police officers, gave them reason to be suspicious. He also emphasized that a healthy eight-month-old child who presents *in extremis* with a severe neurological injury, coupled with an extensive anal laceration that does not appear consistent with being a healthy baby, gives doctors reason to worry about non-accidental trauma. When asked why he thought Janiyah was murdered, Langenberg testified that he used the word in a "medical" sense, in that whoever injured Janiyah did so to a "lethal degree" based on his assessment that she was not going to make it.

That night, a sexual assault examination was conducted by Erin Ivaniszyn of Wayne County SAFE/SANE. The report, which apparently was not released to the police until April 22 or 23, included the following findings: "laceration measuring approximately .5 cm at 12 o'clock to anus with redness, actively bleeding; gaping laceration starting at 12 o'clock extending through 6 o'clock measuring approximately 1.5 cm through anal opening, actively oozing reddish brown mucus; multiple thin linear abrasions measuring approximately .5 cm x .3 cm from 2 to 4 o'clock perianal; red linear abrasion measuring approximately .3 cm x .1 cm at 4 o'clock perianal; and red linear abrasion measuring approximately .3 cm x .2 cm at 8 o'clock perianal." The examining nurse also took photographs of Janiyah's bottom, which show a severe, gaping wound around her anus.

The following morning Dr. Langenberg sent another text to Lt. Twardzik, this time asking if Janiyah's mom and dad were in custody. He testified that he sent that message before rounding that morning, hoping to get more information about her injuries. He stated that shortly thereafter Janiyah was taken off the surgical service and transferred to the PICU. He was of the opinion that

there was nothing that could be done to make Janiyah better. Langenberg sent one more text to Lt. Twardzik later that morning, stating that Janiyah had no signs of brain activity. He did not have any further discussions with police officers from the Inkster Police Department or the prosecutor's office.

Defendant Dr. Christian Bauerfeld, a pediatric critical care specialist, oversaw Janiyah's treatment while in the PICU. He noted that there was no skull fracture found on the CT scan, but the diffuse loss of supratentorial gray-white matter differentiation indicated global hypoxic injury. Dr. Bauerfeld wrote that Janiyah presented with acute hypoxic/hypercarbic respiratory failure, cardiogenic shock, and multi-organ failure after prolonged cardiac arrest. He indicated that Janiyah's progress was "grave," stating that she "most likely will develop brain death." Dr. Bauerfeld discussed Janiyah's prognosis with the plaintiff's mother, who signaled her understanding of her granddaughter's condition, and a "Do Not Resuscitate" order was placed in the chart. Dr. Bauerfeld indicated that the PICU would follow up with the social worker.

Detective Munson met with Dr. Bauerfeld at Children's Hospital on April 21 to discuss Janiyah's condition. Detective Munson noted in his police report that Dr. Bauerfeld stated that Janiyah had bilateral retinal hemorrhaging, indicative of shaken baby syndrome, and anal laceration. Dr. Bauerfeld was unable to confirm the existence of skull fractures or obvious external trauma to the head, and he did not believe that the injuries could have been caused by a fall from the bed. Dr. Bauerfeld, who never met the plaintiff or spoke with Dr. Wright about Janiyah, further ruled out the possibility that the anal laceration could have been caused by constipation or some other internal condition. Detective Munson recalled that Dr. Bauerfeld was "understandably and typically guarded in how he talked about the case."

During his deposition, Dr. Bauerfeld admitted that he did not perform a digital exam because Janiyah was too unstable, but upon visual inspection he observed tears. He testified that based on Janiyah's limited medical history, the fact that she appeared to be an otherwise healthy baby, and the battery of tests and imaging studies, he had concerns about non-accidental trauma where they were dealing with a "really not-well explained presentation." Dr. Bauerfeld maintained that based on his training and knowledge, the injury to Janiyah's bottom was not consistent with anal fissure from constipation.

E. Interrogation of the Plaintiff

While Janiyah was under observation, Detective Munson, who testified that he has investigated hundreds of child sexual abuse cases, twice interrogated Saltmarshall, after he waived his rights, at the Inkster jail where he was being held. The first interview took place on April 21. The plaintiff initially explained that Janiyah was a "little fussy" the previous day, so he patted her until she fell asleep. He eventually fell asleep, too, and when he woke up, Janiyah had moved a little bit underneath him. He said that he picked her up and held her because he did not want her to fall off the bed, which he denied had happened. The plaintiff later acknowledged that Janiyah fell off the bed onto the floor while he was trying to perform CPR. He explained that he tried to catch her but her head hit the ground "a little bit," but not "too hard." The plaintiff did not know at the time that skull fractures had been reported. As for Janiyah's rectal injury, the plaintiff vehemently denied knowing anything about it, stating that the police would not find his DNA in that area.

The second interview took place on April 22. The plaintiff explained that at some point after Moreno had left that morning, he noticed that Janiyah's diaper was coming off, and after checking that it was dry, he placed it back on. The plaintiff noted that Janiyah was sleeping on

him, close enough that her face might have been in his clothing, maybe even covering her mouth and nose. When he returned from the bathroom, the plaintiff noticed Janiyah's head was tilted in an "unusual way," and that she looked a little purple. He stated that he shook her a little bit to wake her up and to see if she was alive. He again denied knowing anything about her "butt injuries," stating that he would take a polygraph. As the interview concluded, Detective Munson pressed him one more time for an explanation:

> Q: So before God, and considering you know what I know, and what the medical personnel are going to say happened, and what they know happened, before God —
>
> A: Uh—huh.
>
> Q: — what happened to your daughter?
>
> A: What happened to my daughter?
>
> Q: Because what I'm talking about here is there is evidence of — medical evidence, not my kind of evidence, medical evidence — what the doctors are telling me, what the nurses are telling me, the specialist, there is evidence that you shook your baby hard enough to damage her brain. I know you said she had fallen on the floor, and I get that, but there is more too [sic] it then [sic] that.
>
> A: Okay.
>
> Q: And you're saying you suffocated her. Is that what you're going to tell God when you get there?
>
> A: I want to tell God exactly what happened. I did not shake my dead baby like this to give her brain damage or to break her neck. Why would I do that?
>
> Q: Her neck is not broken, as far as I know.
>
> A: It looked broke to me when it went back like this. That's what made me call the cops because my daughter's neck don't go back that far when she's alive.
>
> Q: Okay.
>
> A: Okay. Marmar, Marmar — her neck goes back the second time I shook her. I ran outside already crying and I called 911.

Q: Do you think that she fell to the floor with such violence that she caused symptoms of shaken baby syndrome? Is that what you think?

A: No. I'm responsible for her suffocating, yes. I'm responsible for that. That is trauma enough for me to wake up and see my dead daughter. Okay.

The brain trauma and the lacerations, or something being stuck in my daughter would have had to happen when I was sleep, because I did not stick anything up her.

Q: Was the door locked?

A: It was shut.

Q: Was it locked?

A: I just know that you can't open it from the outside, from what I know.

Q: So what you're telling me now is that —

A: What I have been telling you. When [the food delivery guy] left I shut the door.

Q: James, what you're telling me now is that while you were sleeping someone —

A: What I'm telling you is —

Q: — came in the room, stuck something up your daughter's ass, while she was cradled in your arms, basically —

A: That's what I'm trying to get you to understand. If it wasn't me and no one else can get into this room —

. . .

Q: You know, honestly, I have to submit this to a prosecutor. This is your last chance to be straight. Tell me if you know anything. Tell me if anything happened. Be straight with me, or I'm just going to turn it over to them and they're going to make a decision.

A: (Crying) That's not fair. This is so unfair. What did I do? Oh, my God. Oh, my God.

Q: Get right with it now and just tell me what happened.

A: (Crying) I'm trying to.

Q: Just tell me what happened and that way you can look like you're at least a responsible, honest person.

A: (Crying) I told you I'm responsible for suffocating her. Okay. I held her too close. I just didn't want her to fall off the bed, man. (Inaudible) I don't do that shit, man. It's not me. Okay.

Q: Did somebody else do it?

A: (Crying) I don't know. I was asleep. Okay. I woke up and my daughter was not breathing and I call the cops. Okay. The cops came and got her and they took me to jail. That's all I know. I promise to God that's all I know. I'm not lying to you, man. I wouldn't sit in this cell for four days if I could tell you, hey, I did this shit and you're like okay.

No, I'm not that person. I don't know nothing about who stuck shit up my daughter's ass. I was sleeping. I don't go up her ass. barely touch her ass. Okay. I'm getting frustrated because I have called the cops to come help me with my daughter that's not breathing. She gets to the hospital and something is wrong with her ass, and it's all her dad's fault. How? Oh, yeah, because I'm the only one in the room. Okay. Do they have cameras at the motel? Do they have that? That's all I want to know. Do they have cameras — want to know that. If there is a way that they could see inside the room, and you'll be amazed — how the hell is something got stuck up her ass. That's the only way I would think — that the paramedics — but they said they went through the ear. Okay. Now back to dad. Why would I stick anything up my daughter's ass. (Inaudible) She's dead, okay, from me holding her too close. I do not want to go to jail and die over an assumption because you guys think because I'm the only one in there — I'm telling you the truth. If there's a way that I could pull somebody else in I would do that, but I'm not. I'm telling you exactly what I know. My daughter was fine. We went to sleep. I wake up and she is dead because I suffocated her too much in the middle of my sleep.

Officer Munson: Okay. Come on.

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F. Investigation of Zuleika Moreno (the Baby's Mother)

Detective Munson also interviewed Moreno on April 21 while in custody. She informed him that she had left work the previous day around 8:30 a.m. and that Janiyah was fine when she left. She was at work all day until she received a call from the plaintiff that Janiyah was

unresponsive. She indicated that she did not believe that the plaintiff would hurt the child. Moreno admitted that she was not supposed to be with Janiyah because of the pending CPS case, but that she and the plaintiff had been "forced by circumstances" to stay together in the motel with the baby since April 17.

Although apparently not known to Detective Munson at the time, the plaintiff and Moreno were wrapped up in an ongoing CPS investigation. Because of a previous history of child abuse concerning her five other children, including physical abuse and neglect and improper supervision, Moreno, who is eight years older than the plaintiff, was immediately stripped of custody when Janiyah was born, and Janiyah was placed in foster care until custody was eventually awarded to the plaintiff. Under the terms of the court order, Moreno was allowed only supervised visits with Janiyah at the Department of Health and Human Services (DHHS) office or the Ennis Center for Children. Despite these restrictions, the plaintiff allowed Moreno to have unsupervised visits and contact with Janiyah on at least three occasions. On February 22, 2017, CPS noted an incident of physical abuse, identifying the plaintiff as the perpetrator and noting signs of bruising around Janiyah's back, bottom, and shoulder area, as well as a large bump over her left eyebrow.

As recently as April 17, CPS had received a complaint of alleged maltreatment, including improper supervision and physical abuse. The complaint was called in by the plaintiff's mother, Aisha Saltmarshall, who notified CPS and the police on April 17 after her son came to pick up Janiyah from her house and she noticed Moreno in the car. Ms. Saltmarshall informed Dr. Bauerfeld at the hospital that she had called CPS twice that week to let them know that her son was staying in the Embassy Motel with Moreno and allowing unsupervised visits. She later testified that she initially refused to give Janiyah to her son that day, but was forced by the responding police officer, who allowed the plaintiff to take the baby because he had legal custody.

A receipt from the Embassy Motel indicates that the plaintiff and Moreno had stayed there sometime between April 11 and 14. CPS subsequently contacted the plaintiff on April 17, at which time he denied staying at the motel with Moreno. CPS also conducted an unannounced home visit at the plaintiff's father's house, where Janiyah was observed to be neat, clean, and dressed appropriately. However, the social worker noted that Janiyah was sleeping in a "pack and play," which was not sleep appropriate.

A CPS note entered on April 18 indicates that an active foster care worker from the Ennis Center was concerned because the plaintiff had not shown up for the last three scheduled visits with Moreno, nor had he called to reschedule. The writer noted that Moreno also did not seem concerned. CPS then requested a case transfer to Wayne County, filing for termination of Moreno's rights.

On April 19, the plaintiff had a face-to-face meeting at a Michigan DHHS office. He again denied allowing Moreno to visit Janiyah, but admitted that the two were in a relationship. He insisted that he lived at his father's home. The social worker provided the plaintiff a copy of the "Safe Sleep" pamphlet and read him the "Safe Sleep Pledge," which he signed. Janiyah appeared clean and neat.

G. Warrant Request

On the evening of April 20, CPS learned from a social worker at Children's Hospital that Janiyah was in critical condition and that her parents had been arrested. CPS attempted to make contact with the Inkster Police Department several times that night, eventually speaking with Detective Shafer, who indicated that the investigation was not completed. The next morning CPS told Detective Shafer that Janiyah appeared clean and neat earlier that week, and that they did not

observe signs of abuse or neglect. On April 21, CPS emailed the Wayne County Prosecutor a law enforcement complaint alleging child abuse and neglect.

On April 22, Detective Munson prepared a "request for warrant," which summarized the details of his investigation to that point. He included the above-mentioned opinions formed by Drs. Wright, Langenberg, and Bauerfeld as to Janiyah's condition, as well as his interviews of the plaintiff and Moreno. He also included certain exculpatory evidence, such as Moreno's statement that she did not believe the plaintiff would harm Janiyah and the plaintiff's statement that he did not touch Janiyah or put anything into her anus. At the time of his writing, he had not received the SAFE report or the evidence collection kit. Wayne County Prosecutor Jennifer Tink received Detective Munson's "warrant package" the next day, and decided to charge the plaintiff with felony murder, Mich. Comp. Laws § 750.316, first-degree child abuse, Mich. Comp. Laws § 750.136, and first-degree criminal sexual conduct, Mich. Comp. Laws § 750.520. The warrant package included medical records from both hospitals and the SAFE report and photographs. Prosecutor Tink testified that she filled out the charging form after consulting with her boss, Karen Goldfarb, who was the head of the Wayne County Child Abuse Unit. She testified that Detective Munson did not recommend or suggest any of the charges.

On April 23, after two confirmatory exams showing no brain function, Janiyah was declared brain dead at 7:36 a.m. Prosecutor Tink filed a felony complaint against the plaintiff on April 24, a decision she testified that she made the previous day. That same day at 1:06 p.m., the plaintiff was arraigned and pleaded not guilty to the charges. His bond was set at $2 million, and he was transferred to Wayne County. Lt. Smith testified to the factual basis for the charges, which tracked Detective Munson's outline of the investigation in the warrant request. Detective Munson was not present at the arraignment because of a scheduling conflict. In summarizing the facts, Lt.

Smith testified that Janiyah had passed away the previous day. The plaintiff asserts that this was the first time that he learned of his daughter's passing.

H. Autopsy Results

On April 24, medical examiner Dr. Francisco Diaz performed an autopsy of Janiyah. At some point that day prosecutor Goldfarb contacted Dr. Diaz via text message and asked if he could fill her in on the findings regarding "baby James Saltmarshall." Dr. Diaz responded at 6:24 p.m., stating "What we saw today doesn't correlate with the vast clinical findings. We dissected the spine and eyes and we r [sic] going to examined [sic] them microscopically later as well as the brain[.] But there were no major findings in Terms of brain bleed and so on." PageID.3131. Prosecutor Tink testified that Goldfarb informed her that the medical examiner was not finding injuries consistent with what the doctors had reported. She stated that once they received word that there was an inconsistency, she immediately requested that the plaintiff be put on a personal bond with a GPS tether. She recalls contacting the plaintiff's attorney and indicating that the State no longer wanted him in custody. On April 27 at the probable cause conference, the plaintiff's bond was lowered to a personal bond with a tether. The plaintiff was released; he was in custody for eight days.

On June 12, 2017, Dr. Diaz released his post mortem report, in which he opined that Janiyah's death was caused by asphyxia. He noted that she had a medical history of chronic constipation and the autopsy examination did not reveal any injuries on her body. He found a "minute perianal fissure/laceration of unknown etiology with histologic evidence of scarring." PageID.1772. "Histologic examination of brain showed changes of hypoxic-ischemic injury, consistent with the history of languishing in the hospital for several days before death." *Ibid.* He concluded that none of those findings contributed to Janiyah's death. In classifying her death as

an accident, Dr. Diaz noted "[u]nsafe sleep environments, including co-sleeping with an adult, are a known risk factor for asphyxia related deaths in children under the age of one." *Ibid.*

Dr. Langenberg testified that although he did not disagree with the medical examiner's findings, he was surprised to see that there was no evidence of retinal hemorrhages based on the retina exam performed by the ophthalmologists. Dr. Langenberg agreed that in the absence of the anal laceration and varying stories, an unsafe sleep environment was a plausible cause of the asphyxia in light of the fact that her brain injury was due to lack of blood flow and oxygen. Dr. Bauerfeld testified that based on his review of relevant medical literature, it is possible for evidence of retinal hemorrhaging to fade away in the days following a clinical examination. He noted that as clinicians, they have limited options in terms of what kind of imaging can be done when the child presents acutely ill and alive, whereas the medical examiner has the advantage of opening up the body.

I. Dismissal of Charges

In the days following Janiyah's death, the plaintiff's criminal case received significant media attention. *See e.g.*, Elisha Anderson, *Father accused in death, sexual assault of Inkster infant*, DETROIT FREE PRESS (Apr. 24, 2017, 12:30 p.m.) (https://www.freep.com/story/news/local/michigan/wayne/2017/04/24/death-sex-assault-infant-inkster/100842474/); Crimesider Staff, *Detroit father accused of sexually assaulting, killing infant*, CBS NEWS (Apr. 25, 2017, 4:38 p.m.) (https://www.cbsnews.com/news/detroit-father-accused-of-sexually-assaulting-killing-infant/).

The charges against the plaintiff were dismissed without prejudice on June 29, 2017. After this litigation commenced, Dr. Diaz stated in an affidavit, without further elaboration, "I can attest that I now believe, to a reasonable degree of medical certainty, that the cause of death is undetermined." Diaz Aff, ECF No. 43-17, PageID.1781.

J. The Plaintiff's Version

The plaintiff remembers the story differently. The plaintiff testified that he had spent the previous night with Moreno at the Alpine Motel, explaining that he was trying to help Moreno after she had been evicted from her home. He remembered bringing Janiyah to the motel on either April 17 or 18, although he had checked in on April 13. The plaintiff testified that after Moreno left for work that morning, he changed Janiyah's diaper (and did not notice any bleeding or cuts) and gave her a warm bottle. He recalled Janiyah being cranky and that she was dealing with some constipation. The plaintiff stated that he held her under his right arm as they watched TV on the bed. After waking up from a nap, the plaintiff did not notice anything unusual about Janiyah. He testified that after he returned from the restroom, he thought her head placement looked "very odd." He stated that when he picked Janiyah up, her head titled back and "there was no life." PageID.3588. The plaintiff rocked her to try to wake her, but she was unresponsive. He said he then ran outside screaming and called 911 from his cell phone. The dispatcher instructed him to start CPR.

The plaintiff recalled EMS and the police arriving within minutes of his call. The plaintiff testified that Lt. Twardzik asked him repeatedly what happened and where Janiyah's mother was at the time. He recalled that Janiyah smelled like she had a bowel movement before EMS took her away. When they reached Garden City Hospital, Janiyah already was in the emergency room and intubated. The plaintiff testified that the first thing he remembers Dr. Wright asking him was something like "what did you to do her butt." PageID.3572. He did not recall Dr. Wright asking him anything else, including Janiyah's medical history. The plaintiff testified that no one told him how grave Janiyah's condition was or that she was transferred to Children's. At some point before the plaintiff was transferred to Wayne County, the plaintiff remembered Detective Munson, in

response to the plaintiff's question about what was going to happen when the DNA came back and showed that he was innocent, said "Well, you might want to ask your lawyer because I'm the guy that's trying to f--- you." PageID.3579.

K. Procedural History

The plaintiff filed his original complaint in Wayne County, Michigan circuit court on October 12, 2017. The Inkster defendants removed the case to this Court. Thereafter, the plaintiff filed an amended complaint (styled incorrectly as a "second" amended complaint) alleging claims of civil conspiracy asserted via 42 U.S.C. §§ 1983 and 1985 (Count I), "defamation per se" (Count II), malicious prosecution (Count III), false arrest and imprisonment (Count IV), intentional infliction of emotional distress (Count V), and gross negligence (Count VI) against all defendants.

All three groups of defendants filed motions for summary judgment. The Inkster defendants contend that its individual officers had probable cause to arrest the plaintiff and present their case to the prosecutor, they did not discriminate against the plaintiff on the basis of his race, there is no evidence of liability on the part of the City under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), the individual defendants are entitled to various forms of immunity, and the alleged defamatory statements made in connection with criminal proceedings are privileged. The GCH defendants argue that they are not state actors, and Dr. Wright is entitled to immunity under Michigan's Child Protection Law for her statements. And the CH defendants repeat those same arguments, adding that there is no evidence that they conspired with anyone to deprive the plaintiff of his civil rights.

Responding to all three motions, and necessarily repeating some of his arguments, the plaintiff contends that (1) the Inkster defendants fumbled the investigation because of their racial bias and the City's failure to train them adequately in implicit bias; (2) the defendants collectively failed to follow the State's "model protocol" on reporting and investigating child abuse, which

resulted in false diagnoses and baseless findings of probable cause; (3) the "contradictory" findings of the medical examiner and the medical defendants can only be explained by a conspiracy to deprive the plaintiff of his rights; (4) the defendants are not entitled to immunity under the Child Protection Law or Michigan's governmental immunity statute because they did not act in good-faith; (5) the defendants' conduct and baseless prosecution amounts to extreme and outrageous conduct; and (6) the defendants knowingly communicated defamatory, false statements, which were picked up by the media.

II. Discussion

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing the motion record, "[t]he court must view the evidence and draw all reasonable inferences in favor of the non-moving party, and determine 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" *Alexander v. CareSource*, 576 F.3d 551, 557-58 (6th Cir. 2009) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986)). "The court need consider only the cited materials, but it may consider other materials in the record." Fed. R. Civ. P. 56(c)(3).

"The party bringing the summary judgment motion has the initial burden of informing the district court of the basis for its motion and identifying portions of the record that demonstrate the absence of a genuine dispute over material facts." *Id.* at 558. (citing *Mt. Lebanon Personal Care Home, Inc. v. Hoover Universal, Inc.*, 276 F.3d 845, 848 (6th Cir. 2002)). "Once that occurs, the party opposing the motion then may not 'rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact' but must make an affirmative showing with proper evidence in

order to defeat the motion." *Ibid*. (quoting *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479 (6th Cir. 1989)).

"[T]he party opposing the summary judgment motion must do more than simply show that there is some 'metaphysical doubt as to the material facts.'" *Highland Capital, Inc. v. Franklin Nat'l Bank*, 350 F.3d 558, 564 (6th Cir. 2003) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)) (internal quotation marks omitted). A party opposing a motion for summary judgment must designate specific facts in affidavits, depositions, or other factual material showing "evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S. at 252. If the non-moving party, after sufficient opportunity for discovery, is unable to meet her burden of proof, summary judgment is clearly proper. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Irrelevant or unnecessary factual disputes do not create genuine issues of material fact. *St. Francis Health Care Centre v. Shalala*, 205 F.3d 937, 943 (6th Cir. 2000). A fact is "material" if its resolution affects the outcome of the lawsuit. *Lenning v. Commercial Union Ins. Co.*, 260 F.3d 574, 581 (6th Cir. 2001). "Materiality" is determined by the substantive law claim. *Boyd v. Baeppler*, 215 F.3d 594, 599 (6th Cir. 2000). An issue is "genuine" if a "reasonable jury could return a verdict for the nonmoving party." *Henson v. Nat'l Aeronautics & Space Admin.*, 14 F.3d 1143, 1148 (6th Cir. 1994) (quoting 477 U.S. at 248).

The defendants' motions assert some overlapping issues, which will be addressed together. However, some of the defendants are uniquely situated, requiring individual treatment.

A. Federal Claims Against Inkster Defendants

The plaintiff brings his main federal claims against the City of Inkster and its police officers under 42 U.S.C. § 1983. That statute imposes civil liability upon persons acting under color of

state law who deprive a citizen of rights guaranteed by the Constitution and federal laws. To survive a summary judgment challenge, a plaintiff must offer evidence establishing "(1) the deprivation of a right secured by the Constitution or laws of the United States; (2) caused by a person acting under the color of state law." *Baynes v. Cleland*, 799 F.3d 600, 607 (6th Cir. 2015) (citing *Sigley v. City of Parma Heights*, 437 F.3d 527, 533 (6th Cir. 2006)).

1. False Arrest

The plaintiff alleges that "but for the collusion and contrived testimony," charges would not have been levied against him because there was no probable cause for his arrest and subsequent detention. The only defendant acting under color of law that played a role in the arrest that took place on April 20, 2017 was Lt. Jeffrey Smith, who instructed Officer Shawn Vargo to arrest Saltmarshall at the Garden City Hospital. Lt. Jeffrey Twardzik also was present at the scene, but there are no allegations that he engaged in any conduct leading to the plaintiff's arrest. The plaintiff has not made any specific federally-based claims against the other defendants under this theory, and therefore they are entitled to summary judgment on this count. *See Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.").

The Fourth Amendment guarantees that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated," and it mandates that "no Warrants shall issue, but upon probable cause . . . ." U.S. Const. amend. IV. The Sixth Circuit has defined probable cause as "reasonable grounds for belief, supported by less than *prima facie* proof but more than mere suspicion." *Hoover v. Walsh*, 682 F.3d 481, 499 (6th Cir. 2012) (citation omitted).

"'A false arrest claim under federal law requires a plaintiff to prove that the arresting officer lacked probable cause to arrest the plaintiff.'" *Wesley v. Campbell*, 864 F.3d 433, 438 (6th Cir. 2017) (quoting *Sykes v. Anderson*, 625 F.3d 294, 305 (6th Cir. 2010)). "An officer has probable cause to make an arrest when the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent person in believing that the [plaintiff] had committed or was committing an offense." *Id.* at 439 (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)) (internal marks and alterations omitted). Because officers must consider both inculpatory and exculpatory evidence in determining whether probable cause exists, they "cannot simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone." *Ahlers v. Schebil*, 188 F.3d 365, 372 (6th Cir. 1999).

Here, the undisputed facts show that Lt. Smith was aware of facts that would lead a reasonable person to conclude that the plaintiff had committed a felony, even though further investigation demonstrated that he didn't. Smith first encountered the case when, upon arrival at the Alpine Motel on April 20, 2018, he found an eight-month-old infant unresponsive. The plaintiff, her father, was the only person with her. EMS personnel performed CPR as she was taken to Garden City Hospital.

At the hospital, Dr. Wright told Smith that she found extensive injury to the child's anus, and that in her opinion, something was inserted in the anus. Smith did not recall whether Dr. Wright offered an opinion about what was inserted or if it was sexual in nature, but Officer Vargo testified that he heard Dr. Wright tell Smith that there were signs of trauma to the baby's rectum and tearing, and that the only way that would occur was if something was inserted into the child's rectum. Dr. Wright testified that she did not remember telling anyone that the "only" explanation

for Janiyah's injury was something being inserted into her rectal area. But she acknowledged the possibility that insertion is what caused Janiyah's injury.

In Michigan, "[a] person is guilty of criminal sexual conduct in the first degree if he or she engaged in sexual penetration with another person [who is] under 13 years of age." Mich. Comp. Laws § 750.520b(1)(a). Lt. Smith testified that he believed his conversation with Dr. Wright, as well as the undisputed fact that the plaintiff was the only person with Janiyah at the motel when he called for help, furnished probable cause to arrest the plaintiff for criminal sexual conduct. Officer Vargo's written report from that day indicates that before Vargo arrested the plaintiff, he spoke with Janiyah's mother who stated that she had not returned to the motel room since leaving for work that morning around 9:00 a.m. Smith testified that he spoke with the plaintiff on the scene at the motel, and that the plaintiff told him that he was sleeping in the bed with his daughter and upon returning from the bathroom the plaintiff realized that Janiyah was not breathing. Smith acknowledged that while he was at the motel he did not have reason to think the plaintiff was responsible for Janiyah's lack of consciousness. But he learned more information; he stated that he believed that the plaintiff's custody of Janiyah tied him to the rectal injuries observed by Dr. Wright.

"In general, the existence of probable cause in a § 1983 action presents a jury question, unless there is only one reasonable determination possible." *Parsons v. City of Pontiac*, 533 F.3d 492, 501 (6th Cir. 2008) (citation omitted). The plaintiff argues that Lt. Smith's brief investigation and Dr. Wright's after-the-fact hedging of her diagnosis creates a fact dispute that precludes summary judgment, citing without elaboration *Crocket v. Cumberland College*, 316 F.3d 571 (6th Cir. 2003) and *Gardenhire v. Schubert*, 205 F.3d 303 (6th Cir. 2000). *Crocket* does not help the plaintiff, as the Sixth Circuit, in finding that the officer-defendant had probable cause to arrest the

plaintiffs for complicity to commit rape, noted that "[o]nce probable cause is established, as it was here, an officer 'is under no duty to investigate further or to look for additional evidence which may exculpate the accused.'" *Crocket*, 316 F.3d at 583. And although the court in *Gardenhire* concluded that a reasonable jury could find that the defendant did not have probable cause to arrest the plaintiffs, that outcome does little to bolster the plaintiff's position. The plaintiffs in that case were owners of a retail clothing store and were accused of stealing merchandise from the neighboring thrift store with which they shared a common interior doorway. In determining whether probable cause existed to arrest the plaintiffs, the court noted that several factors made it unreasonable for the defendant to believe the plaintiffs committed any crime, including the peculiar placement of the allegedly stolen goods in the window of the plaintiffs' own-store front and the plaintiffs' explanation that they were actually victims of theft. *Id.* at 315. The facts in that case in no way resemble those here.

Nor did Smith engage in any misconduct or fabrication of information when he arrested the plaintiff at the hospital or when he requested a formal arrest warrant. Compare the case of *Richardson v. Nasser*, 421 F. App'x 611 (6th Cir. 2011), which recites facts eerily similar to those here, but with some major differences. The plaintiff in that case was arrested following the death of his nine-day-old daughter on charges of felony murder, first-degree child abuse, and first-degree criminal sexual abuse. After the plaintiff and the baby's mother observed bleeding from the baby's nose and mouth, they took her to Wyandotte Henry Ford Hospital, where upon admission, medical personnel observed an injury to the rectum and contacted the Lincoln Park Police Department to report a suspicion of criminal sexual conduct. *Id.* at 612. The infant then was transferred to Children's Hospital for specialized care, where she died two days later. The autopsy deemed the

baby's death a homicide caused by an extensive penetrating trauma to the anus, and the medical examiner also documented injuries to her head, wrists, and ankles. *Ibid.*

The plaintiff was arrested on a warrant some days later after the defendant, a city detective, was advised by a doctor that there was evidence of sexual assault, and he conducted multiple interviews of the plaintiff and subjected him to a polygraph examination. *Id.*at 613-14. At the probable cause hearing before a state-court judge, the defendant, armed with a complaint and warrant prepared by the prosecutor assigned to the case, testified that the plaintiff made admissions that he stuck his finger in the baby's rectum. *Id.* at 614. The judge did not independently review the evidence at the time, and relying exclusively on the defendant's testimony, concluded that probable cause existed. *Ibid.*

Following the plaintiff's arrest, the judge conducted a preliminary examination hearing, at which time he took testimony from various witnesses and reviewed, for the first time, the recorded interviews and polygraph examination. *Ibid.* Although the judge was satisfied that the manner of death was a homicide, he concluded that probable cause did not exist to believe that the plaintiff committed the charged crimes. *Ibid.* The judge stated on the record that he understood the defendant's testimony at the probable cause hearing to be that the plaintiff acknowledged digital penetration of the anal cavity, when in fact the evidence merely showed that the plaintiff acknowledged the possibility of some incidental scratching or slight penetration with his fingernail while wiping the baby's bottom with a diaper wipe. *Ibid.* Critically, the judge noted that he would have never signed the complaint and warrant had the defendant fairly characterized the plaintiff's purported admission. *Ibid.* In affirming the district court's denial of summary judgment on the federal claim of false arrest, the Sixth Circuit found that the plaintiff put forth sufficient evidence

that the defendant made reckless misrepresentations to the state court judge that were material to the finding of probable cause. *Id.* at 617.

Here, the plaintiff does not stand to benefit from similar inferences being drawn in his favor. Lt. Smith did not act in reckless disregard for the truth when he instructed Officer Vargo to arrest the plaintiff. It is uncontroverted that the plaintiff not only had custody of Janiyah, but also was the only one with her at the motel when he realized that she was unresponsive. It similarly is undisputed that Janiyah had anal lacerations that could not be explained by the plaintiff's account of what happened. Despite Dr. Wright not recalling whether she used the word "only" when describing Janiyah's injury or her general reluctance to speak in absolutes, she filed a Form 3200 on April 20, noting "large rectal tears with loss of pulses and respiratory distress" as the description of the injury and reason for suspicion of abuse or neglect. Although the summary judgment standard requires the Court to view the facts in the light most favorable to the nonmoving party, it "'does not allow, much less require, that [the Court] draw strained and *unreasonable* inferences in favor of the nonmovant.'" *Audi AG v. D'Amato*, 469 F.3d 534, 545 (6th Cir. 2006) (quoting *Willis v. Roche Biomedical Laboratories, Inc.*, 21 F.3d 1368, 1380 (5th Cir. 1994) (emphasis in original)). Based on the evidence known to Lt. Smith at the time of the plaintiff's arrest, no reasonable jury could conclude that he lacked probable cause to believe that the plaintiff had sexually abused his daughter.

Furthermore, "under § 1983, 'an arresting agent is entitled to qualified immunity if he or she could reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent.'" *Parsons*, 533 F.3d at 501 (quoting *Harris v. Bornhorst*, 513 F.3d 503, 511 (6th Cir. 2008)). It was clearly established generally in 2017 that an arrest without probable cause violates the Constitution, but

"[i]t is important to emphasize that the inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004) (internal quotes and citation omitted). On these facts, it was objectively reasonable for Lt. Smith to conclude, based on his belief at the time, that something had been inserted in Janiyah's bottom. That inference, coupled with the fact that the plaintiff was the only one with the baby at the motel, allows Smith to claim qualified immunity, a defense that insulates state actors from liability in close-call situations. *See Saucier v. Katz*, 533 U.S. 194, 206 (2001) (explaining that the defense is intended to protect state actors who must operate along the "hazy border" that divides acceptable from unreasonable conduct).

Lt. Smith is entitled to summary judgment on the plaintiff's federal claim of false arrest.

2. Malicious Prosecution

The plaintiff's claims for malicious prosecution in the amended complaint are leveled "against all defendants," but once again, there are no specific allegations against individual actors. The plaintiff's arguments focus primarily on Inkster defendant Munson, who took over the case and made the presentation to the state prosecutor.

To succeed on a malicious prosecution claim under section 1983, a plaintiff must show: "(1) that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute; (2) that there was a lack of probable cause for the criminal prosecution; (3) that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty . . . apart from the initial seizure; and (4) that the criminal proceeding must have been resolved in the plaintiff's favor." *Mills v. Barnard*, 869 F.3d 473, 480 (6th Cir. 2017) (quoting *Sykes v. Anderson*, 625 F.3d 294, 308-09 (6th Cir. 2010) (internal marks and alterations omitted).

The Sixth Circuit has recognized that "malicious prosecution" is a misnomer: "the constitutional tort of malicious prosecution that is actionable in our circuit as a Fourth Amendment violation under § 1983 does not require a showing of malice at all, and might more aptly be called 'unreasonable prosecutorial seizure.'" *King v. Harwood*, 852 F.3d 568, 580 (6th Cir. 2017) (quoting *Sykes*, 625 F.3d at 310). "The prototypical case of malicious prosecution involves an official who fabricates evidence that leads to the wrongful arrest or indictment of an innocent person." *Mills*, 869 F.3d at 480. "But the § 1983 version of 'malicious prosecution' is not limited to the institution of proceedings; it can also support a claim for 'continued detention without probable cause.'" *Ibid.* (citing *Sanders v. Jones*, 845 F.3d 721, 728 n.4 (6th Cir. 2017)).

The Inkster defendants contend that the Court ought to summarily dismiss this claim because none of the police officers made the decision to prosecute the plaintiff. Although the Sixth Circuit has held that "a police officer may not be held liable for malicious prosecution when he did not make the decision to prosecute," *McKinley v. City of Mansfield*, 404 F.3d 418, 444 (6th Cir. 2005) (citing *Skousen v. Brighton High Sch.*, 305 F.3d 520 (6th Cir. 2002)), there is evidence that Detective Munson, in preparing the warrant package for Prosecutor Tink, participated in the decision to prosecute the plaintiff, even if he did not recommend the specific charges and had no say in the prosecution after submitting his report. The same cannot be said for Lts. Smith or Twardzik, whose involvement in the investigation was negligible after Detective Munson took the reins.

The plaintiff argues that in determining whether Detective Munson had probable cause in preparing his warrant request, the Court ought not to consider his subjective state of mind, "whether good faith or ill will." Citing *Sykes v. Anderson*, 625 F.3d 294, 309 (6th Cir. 2010), the plaintiff argues that the reasonableness of the seizure instead should be analyzed from an objective

perspective. In saying so, the *Sykes* court merely was clarifying that, despite its name, malice is not an element of a § 1983 suit for malicious prosecution." *Id.* at 310. The court explained that "[i]n the context of malicious prosecution, the Fourth Amendment violation that generates a § 1983 cause of action obviates the need for demonstrating malice." *Ibid.* "'For instance, if the harm alleged is a seizure lacking probable cause, it is unclear why a plaintiff would have to show that the police acted with malice.'" *Id.* (quoting *Gallo v. City of Philadelphia*, 161 F.3d 217, 222 n.6 (3d Cir. 1998)).

The plaintiff cites no other authority on this point, resting on the fact that the charges were eventually dropped as the evidence of an absence of probable cause at the time the prosecution was instituted. However, "not every failed criminal prosecution will sustain a subsequent malicious-prosecution suit." *Harris v. United* States, 422 F.3d 322, 327 (6th Cir. 2005) (citation omitted). Moreover, "the investigation was not as deficient as the plaintiff[] suggest[s]." *Garner v. Harrod*, 656 F. App'x 755, 760 (6th Cir. 2016). Detective Munson had no reason to question the truthfulness of the medical defendants' statements regarding Janiyah's injuries, and there is no evidence that he "knowingly or recklessly" made false statements in his investigation report that were material to Prosecutor Tink's decision. *King*, 853 F.3d at 583. The medical examiner's findings were not consistent with the treating doctors' conclusions, which in retrospect were speculative and precipitous. But that does not make Munson's reliance on them unreasonable or undercut his probable cause determination. Moreover, the summary of his investigation presented to the prosecutor included exculpatory evidence, which Prosecutor Tink reviewed when she made her charging decision. Drawing all reasonable inferences in the plaintiff's favor, no reasonable jury could find that Detective Munson, to the extent he can be implicated in the plaintiff's malicious prosecution claim, lacked probable cause when he prepared his investigative report.

Detective Munson and the other Inkster defendants are entitled to summary judgment on this count.

3. *Monell* Liability

It is well established that "a municipality cannot be held liable under § 1983 simply because one of its employees violated the plaintiff's constitutional rights." *Smith v. City of Troy, Ohio*, 874 F.3d 938, 946 (6th Cir. 2017)). "In order to impose § 1983 liability on a municipality, the plaintiff must prove that the constitutional deprivation occurred as a result of an official custom or policy of the municipality." *Ibid.* (citing *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978)). A city also may be liable if its "failure to train employees amounts to deliberate indifference to constitutional rights." *Bailey v. City of Ann Arbor*, 860 F.3d 382, 388 (6th Cir. 2017) (citation omitted).

The plaintiff alleges in the amended complaint that the "Inkster defendants by custom and practice, routinely discriminate against African-American suspects by turning the presumption of innocence on its head." Amend. Compl. ¶ 12. That allegation apparently was based on, at least in part, a highly publicized incident in 2015 involving an Inkster police officer using excessive force during a traffic stop. Apparently anticipating a more robust argument at this stage of the proceedings, the City of Inkster devoted several pages of its briefing to summarizing the history of race relations in Inkster, with a particular emphasis on the role of its current African-American chief of police and the corrective action that took place after the 2015 incident, and vigorously denying the existence of a policy or custom of race-based prosecutions.

The plaintiff's response greatly expands on the sole allegation of municipal liability in the amended complaint, arguing that the City failed to train its police officers and familiarize them with the "model protocol" adopted by the State of Michigan (and apparently abandoning the claim

that the City has a policy of racial discrimination). In argument spanning 12 pages, the plaintiff asserts that this failure is the result of the City's deliberate indifference, and if the officer-defendants had been properly trained in the protocol's recommended practices, the "appalling comedy of errors leading to Plaintiff's constitutional violations" could have been avoided.

Failure-to-train certainly is a recognized theory of *Monell* liability. But "the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). To prevail on a failure to train theory, the plaintiff must demonstrate either (1) "a pattern of similar constitutional violations by untrained employees and [the defendant municipality's] continued adherence to an approach that it knows or should know has failed to prevent tortious conduct by employees, thus establishing the conscious disregard for the consequences of its action . . . necessary to trigger municipal liability," or (2) "a single violation of federal rights, accompanied by a showing that [the defendant] has failed to train its employees to handle recurring situations presenting an obvious potential for a constitutional violation." *Shadrick v. Hopkins Cty., Kentucky*, 805 F.3d 724, 738-39 (6th Cir. 2015) (citations, quotations, and alterations omitted). The plaintiff here has not offered evidence of either.

Moreover, "[t]here must be a constitutional violation for a § 1983 claim against a municipality to succeed — if the plaintiff has suffered no constitutional injury, his *Monell* claim fails." *North v. Cuyahoga County*, 754 F. App'x 380, 389 (6th Cir. 2018) (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986)). Although the Sixth Circuit in *Winkler v. Madison County*, 893 F.3d 877 (6th Cir. 2018), recently considered "[w]hether and under what circumstances a municipality can be liable when the plaintiff suffered a constitutional violation

but cannot attribute it to any individual defendant's unconstitutional conduct," *North*, 754 F. App'x at 389, that inquiry is inapplicable here where there is no evidence of a Fourth Amendment violation or some other deprivation of rights recognized under the Constitution. *See Green v. City of Southfield*, 925 F.3d 281, 286 (6th Cir. 2019).

It appears that the plaintiff's theory of *Monell* liability is premised on the idea that the City and its police officers did not comply with the Child Protection Law's requirement that "the department [of health and human services] and law enforcement officials shall conduct investigations in compliance with the protocols adopted and implemented . . . using as a model the protocols developed by the governor's task force on children's justice." Mich. Comp. Laws § 722.628(4), (6). But even if the Inkster defendants were unfamiliar with the City's child abuse protocol or did not follow it by the book, that alone cannot furnish a basis for municipal liability under section 1983 where there was no underlying constitutional violation. *Cf. Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 698 (6th Cir. 2018) ("We fail to see how serving civil orders in violation of th[e] purported internal policy [barring Detroit Police Officers from doing so] amounts to a constitutional violation, and thus the City's failure to enforce this policy adequately (assuming it exists) does not create liability under *Monell*.").

The City is entitled to summary judgment on all of the claims brought under section 1983.

B. Federal Claims Against Garden City and Children's Hospital Defendants

As noted above, claims under 42 U.S.C. § 1983 may be brought only against individuals acting under color of law. There is no question that the individual Inkster defendants qualify as state actors. However, Prime Healthcare – Garden City Hospital, Dr. Wright, Children's Hospital of Michigan, Dr. Langenberg, and Dr. Bauerfeld are private actors. They are not organs of the State, and they do not work for the State. "Private action, it is true, may still count as state action

under discrete circumstances, such as when the State exercises 'coercive power' over the private entity, the State provides 'significant encouragement, either overt or covert' to the private entity, or the private actor operates as a 'willful participant in joint activity with the State or its agents.'" *Thomas v. Nationwide Children's Hospital*, 882 F.3d 608, 612 (6th Cir. 2018) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 296 (2001)). "[T]he Supreme Court has made clear that all of [the Sixth Circuit's] various 'criteria' boil down to a core question: whether there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brent*, 901 F.3d at 676 (quoting *Brentwood Acad.*, 531 U.S. at 295) (quotation marks omitted). "But the frequent reality that the State regulates private entities or cooperates with them does not transform private behavior into state behavior." *Thomas*, 882 F.3d at 612. (citations omitted).

The plaintiff argues that Michigan's Child Protection Law, which imposes on certain professionals (including physicians) a mandatory duty to report instances of suspected child abuse and neglect, establishes a close nexus between the State and the medical defendants' behavior. The plaintiff asserts that by cloaking mandatory reporters with immunity for good-faith reporting, the State has "exercised significant coercive power over or severe encouragement of private medical personnel and institutions." The Sixth Circuit recently rejected a similar theory of state action in *Thomas v. Nationwide Children's Hospital*, in which the plaintiffs filed a section 1983 claim against medical personnel, who acting on suspicion of child abuse, ordered x-rays, CT scans, and blood testing to identify additional injuries. *Id.* at 610. The plaintiffs argued that the defendants' conduct violated their children's right to be free from unreasonable searches and their own right to familial association. *Ibid.* In asserting that the defendants qualified as state actors under section 1983, the plaintiffs attempted to link the defendants to the State by emphasizing,

among other things, that Ohio law requires health care professionals to report suspicion of child abuse to the State. *Id.* at 613. The Sixth Circuit quickly disposed of that argument, noting that the mandatory "duty to report does not make Nationwide and its doctors state actors any more than it makes private school teachers, private attorneys, and private day-care facilities state actors." *Ibid.*

Citing no authority, the plaintiff also asserts that the "Model Child Abuse and Neglect Protocol" developed by the Governor's Task Force on Child Abuse and Neglect and published by Michigan's DHHS, creates a question of fact as to whether the medical defendants fairly may be considered state actors. Section 722.628(6) of the CPL directs prosecuting attorneys to "adopt and implement standard child abuse and neglect investigation and interview protocols using as a model the protocols developed by the governor's task force on children's justice." But the model framework, apart from its incorporation of mandatory requirements under the CPL, offers only recommended practices "to provide for better coordination of prosecutor, law enforcement, children's protective service workers, child advocacy center staff, as well as the medical, mental health, school and friend of the court staff who deal with child abuse and neglect cases." Plf.'s Resp., ECF No. 69-41, PageID.4540. These guidelines cannot save the plaintiff where the CPL itself fails to establish the required link between private decisions and the State.

What's more, although "[p]rivate persons may be held liable under § 1983 if they willfully participate in joint action with state agents," *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 397 (6th Cir. 2016), "the mere furnishing of information to police officers who take action thereon does not constitute joint action under color of state law which renders a private actor liable under § 1983," *Lee v. Town of Estes Park*, 820 F.2d 1112, 1115 (10th Cir. 1987)).

There is no evidence that the actions taken by the medical professionals and their affiliates amounted to state action under section 1983. Dr. Wright, Garden City Hospital, Dr. Langenberg,

Dr. Bauerfeld, and Children's Hospital therefore are entitled to summary judgment on the plaintiff's federal claims against them.

C. Civil Conspiracy Claims

In a single count in his amended complaint, the plaintiff attempts to state claims against all the defendants for civil conspiracy under both section 1983 and section 1985 of Title 42, United State Code.

1. Section 1983

To show a civil conspiracy under 42 U.S.C. § 1983, a plaintiff must demonstrate that (1) the defendants entered into an agreement to violate the plaintiff's civil rights; (2) the defendants shared a general objective to deprive the plaintiff of his rights; and (3) an overt act was committed in furtherance of the conspiracy to deprive the plaintiff of his civil rights that caused injury to the plaintiff. *Spadafore v. Gardner*, 330 F.3d 849, 854 (6th Cir. 2003). "In opposing a motion for summary judgment, plaintiffs are entitled to 'rely on circumstantial evidence to establish an agreement among the conspirators.'" *Robertson v. Lucas*, 753 F.3d 606, 622 (6th Cir. 2014) (quoting *Hensley v. Gassman*, 693 F.3d 681, 695 (6th Cir. 2012)).

The plaintiff does not state the elements of civil conspiracy under section 1983 in his briefing. Instead, he boldly asserts that it is "implausible that three medical doctors, from two different institutions, each formed medical opinions that were contradicted by the medical findings of the medical examiner, absent conspiracy or a bad epidemic outbreak of negligent diagnosis." He points to no evidence in the record from which a factfinder could infer concert of action. Instead, the plaintiff posits that the only explanation for the inconsistencies between the treating physicians' findings and the medical examiner's report is the white defendants' racial bias. Citing statistics about the racial makeup in the City of Inkster and condemning the police department for

inadequate implicit bias training in the wake of a controversial excessive force incident in 2015, the plaintiff contends — without reference to any record evidence — that "the pretrial record in this case demonstrates sufficient evidence of private meetings with medical defendants and IPD to create a genuine issue of dispute for a jury." But there is nothing in the record that remotely suggests that the defendants had secret meetings where they came to an agreement to conspire based on racial bias, as the plaintiff contends.

There is no evidence that any of the defendant medical personnel ever met the plaintiff. The most damning piece of evidence in the record is Dr. Langenberg's text message to Lt. Twardzik stating that "this child was murdered." That statement, although false and defamatory, even when viewed in the light most favorable to the plaintiff, does not amount to an agreement to falsify evidence to support criminal charges. Although the plaintiff is allowed to rely on circumstantial evidence, he must point to facts from which reasonable inferences can be drawn. Instead, the plaintiff merely cites "the optics and demographics of this investigation" to establish that the individual defendants entered into an agreement to violate the plaintiff's rights. That is not enough for a jury to find the elements of a conspiracy under section 1983.

Finally, according to the plaintiff, the conspiratorial objective among the individual defendants would have been to violate his Fourth Amendment rights by arresting and maliciously prosecuting him without probable cause. However, as discussed above, there was no constitutional violation associated with the plaintiff's arrest and brief prosecution. *See Hill v. Shobe*, 93 F.3d 418, 422 (7th Cir. 1996) ("For liability under § 1983 to attach to a conspiracy claim, defendants must conspire to deny plaintiffs their constitutional rights: there is no constitutional violation in conspiring to cover up an action which does not itself violate the constitution.").

Because there are no facts that support a reasonable inference of civil conspiracy under section 1983, the defendants are entitled to summary judgment on this count.

2. Section 1985

Count I of the amended complaint also alleges civil conspiracy under 42 U.S.C. § 1985. To show a conspiracy to deprive an individual of the equal protection of the laws under 42 U.S.C. § 1985(3), a plaintiff must prove: "(1) a conspiracy involving two or more persons (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws and (3) an act in furtherance of the conspiracy (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States." *Peters v. Fair*, 427 F.3d 1035, 1038 (6th Cir. 2005) (citing *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 839 (6th Cir. 1994)). "A plaintiff also must show that the conspiracy was motivated by racial or other class-based invidiously discriminatory animus." *Ibid.*

The plaintiff does not distinguish between his conspiracy claims under section 1983 and section 1985, and does not recite the elements of either claim. Because evidence of an agreement is a necessary component of any conspiracy, the plaintiff's underdeveloped claim of conspiracy under section 1985 fails for the same reasons discussed above.

D. State Law Claims

In addition to his federal claims, the plaintiff alleges state law claims of malicious prosecution, false arrest, defamation, intentional infliction of emotional distress, and gross negligence. Michigan's Child Protection Law presents a formidable obstacle to recovery on many of these claims against the Garden City and Children's Hospital defendants. That statute grants mandatory reporters immunity from suit, as long as they acted in good faith. Because the Inkster

defendants are state governmental actors, they enjoy immunity from intentional and certain negligent torts under Michigan Governmental Tort Liability Act.

1. Immunity Statutes

a. Child Protection Law

Michigan's Child Protection Law requires "a physician . . . who has reasonable cause to suspect child abuse or child neglect [to] make an immediate report . . . of the suspected child abuse or child neglect." Mich. Comp. Laws § 722.623(1)(a). "In addition to those persons required to report child abuse or neglect under section [722.623(1)] any person, including a child, who has reasonable cause to suspect child abuse or neglect may report the matter to the department or a law enforcement agency." *Id.* § 722.624.

Under the CPL, "[a] person acting in good faith who makes a report, cooperates in an investigation, or assists in any other requirement of this act is immune from civil or criminal liability that might otherwise be incurred by that action." Mich. Comp. Laws § 722.625. "A person making a report or assisting in any other requirement of this act is presumed to have acted in good faith." *Ibid.* "This immunity from civil or criminal liability extends only to acts done according to this act and does not extend to a negligent act that causes personal injury or death or to the malpractice of a physician that results in personal injury or death." *Ibid.*

The Michigan Court of Appeals has held that "a person who has 'reasonable cause to suspect child abuse' is by definition 'acting in good faith" when reporting the suspicions.'" *Warner v. Mitts*, 211 Mich. App. 557, 559, 536 N.W.2d 564, 566 (1995). "Thus, immunity extends to reports of 'suspected' child abuse regardless of the outcome of a subsequent investigation." *Ibid.* And "the Michigan courts have held that where a physician files a report that is based on an 'allegedly negligent diagnosis,' the plaintiff cannot avoid the statute's grant of immunity as a matter of law." *Sanders v. Stanley*, 794 F. Supp. 2d 755, 763 (E.D. Mich. 2011) (quoting

Awkerman by Awkerman v. Tri-Cty. Orthopedic Group, P.C., 143 Mich. App. 722, 726-27, 373 N.W.2d 204, 206 (1985)).

The plaintiff has failed to overcome the statutory presumption that Dr. Wright and Dr. Bauerfeld were acting in good faith when they filed child abuse reports and cooperated in the investigation following the plaintiff's arrest. Once again, the plaintiff's argument rests in large part on whether the doctors followed the "Model Protocol" adopted by Michigan's Department of Health and Human Services, citing no authority as to its applicability in this context. The plaintiff further asserts, without any expert testimony of his own, that the doctors acted recklessly in failing to perform a rectal exam or obtain Janiyah's complete medical history before suspecting child abuse and reporting it to the Inkster defendants. The plaintiff argues that if these doctors had been more thorough, they would have realized that Janiyah's injuries were the result of an unsafe sleeping environment, not sexual abuse. But Dr. Wright was confronted with an infant who was near death, whose injuries displayed hallmarks of foul play. The unexplained rectal injury had nothing to do with an unsafe sleeping environment. Dr. Bauerfeld had more to work with, but his conclusions of possible shaken baby syndrome and his belief that the rectal tears were not the result of constipation did not betray bad faith. In fact, the undisputed evidence was that Bauerfeld was "understandably and typically guarded in how he talked about the case" to the police. PageID.3797.

Dr. Scott Langenberg presents a different picture. His conduct transcended cooperation with a police child abuse investigation. A jury could conclude that he took an active role in encouraging prosecution, despite his lack of accurate evidence, medical or otherwise. He offered an opinion to the police that the child suffered "non-accidental trauma," falsely asserted that the infant had skull fractures when he had not even seen any imaging studies, and declared that the

plaintiff "murdered this child," when she had not even been pronounced dead. He later acknowledged that no fractures were confirmed, based on a final x-ray reading, but he never informed Lt. Twardzik of that correct information. And when asked at his deposition why he thought Janiyah was murdered, Dr. Langenberg testified that he used the word in a "medical" sense, when there in fact is not any "medical sense" of that legal and colloquially inflammatory term. Finally, he took it upon himself the following morning to send another text to Lt. Twardzik, this time asking if Janiyah's mom and dad were in custody. There is enough evidence in the record at this stage of the proceedings to rebut the presumption that defendant Landenberg was acting in good faith when he interacted with the police in this case.

Certainly, the "public policy behind the statute was to 'encourage reporting of suspected child abuse.'" *Lavey v. Mills*, 248 Mich. App. 244, 253-54, 639 N.W.2d 261, 266 (2001) (quoting *Awkerman*, 143 Mich. App. at 728, 373 N.W.2d at 207). But disseminating false or exaggerated accounts of a tragic event in no way serves that policy. The plaintiff's state-law claims against Drs. Wright and Bauerfeld cannot proceed as a matter of law because the plaintiff has not offered evidence to rebut the presumption of good faith. And their affiliated hospitals, Garden City and Children's, also are entitled to summary judgment on the claims based on their conduct, as they cannot be found vicariously liable. *See Al-Shimmari v. Detroit Medical Ctr.*, 477 Mich. 280, 296, 731 N.W.2d 29, 37 (2007).

b. Governmental Immunity

Michigan's governmental tort liability act (GTLA), Mich. Comp. Laws § 691.1407, grants immunity to lower-ranking governmental officials from negligent and intentional tort liability. The Michigan Supreme Court in *Odom v. Wayne County*, 482 Mich. 459, 479-80, 760 N.W.2d 217, 228 (2008), explained that if such a defendant is accused of a negligent tort, he or she is

entitled to immunity if that defendant acted within the scope of employment and did not commit gross negligence. And if accused of an intentional tort, immunity applies if the act occurred within the scope of employment, it was undertaken in good faith, and it was discretionary and not ministerial.

The plaintiff contends that the Inkster defendants are not entitled to immunity from suit for the intentional torts of malicious prosecution and false arrest because they did not act in good faith. The *Odom* court explained that a governmental employee does not act in "good faith" if the employee acts "maliciously or with a wanton or reckless disregard of the rights of another." *Id.* at 474, 760 N.W.2d at 225 (citation and emphasis omitted). And "'willful and wanton misconduct is made out only if the conduct alleged shows an intent to harm or, if not that, such indifference to whether harm will result as to be the equivalent of a willingness that it does.'" *Id.* at 475, 760 N.W.2d 217 (quoting *Burnett v. City of Adrian*, 414 Mich. 448, 455, 326 N.W.2d 810 (1982)).

"Under Michigan law, 'to prevail on a claim of false arrest or false imprisonment, a plaintiff must show that the arrest was not legal, i.e., the arrest was not based on probable cause.'" *Hoover v. Walsh*, 682 F.3d 481, 501 (6th Cir. 2012) (quoting *Peterson Novelties, Inc. v. City of Berkley*, 259 Mich. App. 1, 18, 672 N.W.2d 351, 362 (2003)) (alterations omitted). As discussed above, there is no evidence to support the contention that Lt. Smith lacked a good-faith belief that he was acting properly when he arrested the plaintiff. *See Odom*, 482 Mich. at 481, 760 N.W.2d at 229 (A police officer has acted in good faith where he "honestly believed that he had probable cause to arrest, even if he later learned that he was mistaken."). Relatedly, there is no evidence that the Inkster defendants lacked probable cause or acted with malice when they assisted in his prosecution. *See Newman v. Township of Hamburg*, 773 F.3d 769, 773 (6th Cir. 2014) ("Under Michigan law, [the plaintiff] must show an absence of probable cause, and he must show

'malice.'") (citing *Matthews v. Blue Cross & Blue Shield of Mich.*, 456 Mich. 365, 572 N.W.2d 603, 609-10 (1998)). There is no evidence that Detective Munson did not honestly believe the facts supporting probable cause when he prepared the warrant package for Prosecutor Tink. Nor is there evidence that he knowingly swore to false facts regarding Janiyah's injuries.

Therefore, the Inkster defendants are entitled to immunity under the GTLA as to the plaintiff's claims of false arrest and malicious prosecution.

The plaintiff argues that he "can demonstrate that Defendants Munson, Twardzik and Smith, as lower ranking employees[,] were grossly negligent for many of the same reasons that Defendants have liability under the Civil rights claim." But the Sixth Circuit in *Brent v. Wayne County Department of Human Services* faced a similar claim of gross negligence premised on the defendants' alleged commission of intentional torts. There the plaintiffs argued that the defendants' failure to abide by the Detroit Police Department's internal policy against executing civil removal orders amounted to gross negligence, which they contended was a claim independent of the alleged forced entry and assault. 901 F.3d at 701-02. In declining to credit the plaintiffs' argument, the Sixth Circuit noted that the GTLA does not "provide an independent cause of action for 'gross negligence,' and plaintiffs may not bypass the immunity statute by 'transforming intentional excessive force or battery claims into negligence claims." *Ibid.*

The plaintiff here likewise has attempted to reframe his false arrest and malicious prosecution claims against the Inkster defendants as a claim for gross negligence. The argument that the Inkster defendants' failure to follow the Model Protocol or certain procedural requirements of the CPL amounts to gross negligence cannot transform his ostensible intentional tort claims into an act of gross negligence. But all of that goes back to the plaintiff's position that had the officers followed through with all of those steps, they would have realized that there was no probable cause.

But as the *Brent* court explained, "a plaintiff seeking to raise a common-law negligence claim must show that the defendant owed him a duty of care." *Brent*, 901 F.3d at 701. The plaintiff has not done so here. *See Brent*, 901 F.3d at 701 ("[H]ere, plaintiffs have identified no statute, contractual relationship, or common-law principle that imposes a duty running from Detroit police officers to private citizens requiring the officers to abide by internal departmental polices regarding the execution of child removal orders.").

The Inkster defendants, therefore, are entitled to summary judgment on the state law claims of false arrest, malicious prosecution, and gross negligence. *See State Farm Fire & Cas. Co. v. Corby Energy Servs., Inc.*, 217 Mich. App. 480, 483 722 N.W.2d 906, 909 (Under section 691.1407(1) of the GTLA, "absent the applicability of a statutory exception, [a city] is immune from tort liability if the tort claim arises from the City's exercise of a governmental function.").

2. Defamation

The plaintiff alleges defamation *per se* against "all defendants" in his amended complaint, but the allegations single out only defendants Wright, Langenberg, and Bauerfeld. The Inkster defendants point out in their brief that defamation must be pleaded specifically. *See Gonyea v. Motor Parts Fed. Credit Union*, 192 Mich. App. 74, 77, 480 N.W.2d 297, 299 (1991) (holding that all the "elements [of a defamation claim] must be specifically pleaded, including the allegations with respect to the defamatory words, the connection between the plaintiff and the defamatory words, and the publication of the alleged defamatory words") (citing *Ledl v. Quik Pik Food Stores, Inc.,* 133 Mich. App. 583, 589, 349 N.W.2d 529, 532 (1984)). Those are state court pleading rules, which do not govern here. *See* Fed. R. Civ. P. 8, 9(c); *see also Bowlers' Alley, Inc. v. Cincinnati Ins. Co.*, 32 F. Supp. 3d 817, 823 (E.D. Mich. 2014) (holding that "[t]he Federal Rules of Civil Procedure govern the pleading requirements in federal court") (citing *Shady Grove Orthopedic*

Associates, P.A. v. Allstate Ins. Co., 559 U.S. 393, 410 (2010) (plurality) (holding that if a Federal Rule "regulates procedure," "it is authorized by [the Rules Enabling Act, 28 U.S.C.] § 2072 and is valid in all jurisdictions, with respect to all claims, regardless of its incidental effect upon state-created rights")). But the federal pleading rules required that a plaintiff state at least enough facts to show a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556, 570 (2007). The plaintiff's amended complaint contains *no* allegations against *any* of the Inkster defendants relating to their own defamatory statements. The only allegations are that they repeated information conveyed to them by the physicians, and those statements found their way into the press.

But the summary judgment record contains only references to statements made by Lt. Smith at the plaintiff's arraignment in court. The plaintiff attached several news articles to his response brief in support of his defamation claim. The Inkster defendants indicate that only one of these articles quotes Lt. Smith and that there are no articles that attribute statements to Lt. Twardzik or Detective Munson. That single article from the Detroit Free Press on April 24, 2017 includes a summary of Lt. Smith's testimony at the plaintiff's arraignment. *See* Free Press Article, ECF No. 47-29, Page ID.2159. Those statements are not actionable because of the judicial-proceedings privilege. *See Bedford v. Witte*, 318 Mich. App. 60, 65, 896 N.W.2d 69, 72 (2016) ("'Statements made by judges, attorneys, and witnesses during the course of judicial proceedings are absolutely privileged if they are relevant, material, or pertinent to the issue being tried.'") (quoting *Oesterle v. Wallace*, 272 Mich. App. 260, 264, 724 N.W.2d 470 (2006)). The article also includes two comments attributed to Lt. Smith that do not track his arraignment testimony:

> Police said Saltmarshall denied any knowledge of criminal sexual conduct. At one point, he alluded that somebody may have come in the room while the pair was sleeping and done something, an explanation Smith called "preposterous."

. . .

"This case is unfortunate . . . obviously, it's a tragedy," Smith said.

Free Press Article, ECF No. 47-29, PageID.2160. Even if Smith made those statements, neither amounts to assertions of fact. Rather, they are opinions, which are not actionable. *See Ireland v. Edwards*, 230 Mich. App. 607, 614, 584 N.W.2d 632, 636 (1998) (noting that "some expressions of opinion are protected"). These Inkster defendants are entitled to summary judgment on that count.

To make a claim of defamation against defendants Wright, Langenberg, and Bauerfeld, the plaintiff must offer evidence showing "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Edwards v. Detroit News, Inc.*, 322 Mich. App. 1, 13, 910 N.W.2d 394 (2017) (citations omitted). Under Michigan law, "defamation of a private figure requires only a showing of negligence, not actual malice." *J&J Const. Co. v. Bricklayers & Allied Craftsmen, Local 1*, 468 Mich. 722, 732, 664 N.W.2d 728, 734 (2003) (quoting Mich. Comp. Laws § 600.2911(7)). The burden of proving that the statement was not false rests with the defendant where the alleged defamation "concerns both a private figure and a matter of private concern." *American Univ. of Antigua College of Medicine v. Woodward*, 837 F. Supp. 2d 686, 695 (E.D. Mich. 2011) (citation omitted).

The statements attributed to Dr. Wright are that she told the police that the medical staff found tearing of the tissue around the infant's anus, and that she asked the plaintiff, "Why did you do that to her?". Amend. Compl. ¶¶ 102, 103. The record plainly shows that Dr. Wright believed she found an injury to the infant's anus and that she expressed her opinion to the police that it was

intentionally caused. But the parties have not pointed to any record evidence showing that Dr. Wright accused the plaintiff of causing the injury. The plaintiff's testimony was that Dr. Wright asked him, "What did you do to her butt?". Dr. Wright's question was not an accusation of wrongdoing. It was made in the context of gathering a medical history. Her other statements concerned the child, not the plaintiff. And although the evidence supports a claim that she believed that the injury was caused intentionally, that does not translate into an accusation of criminal activity against the plaintiff. In fact, Officer Vargo testified that Dr. Wright did not say anything that caused him to believe that the plaintiff was responsible for the injury. Any other statements attributed to Dr. Wright are contained in the Form 3200, which was filed under the Child Protection Law. As discussed above, immunity protects her from suit based on those statements.

Dr. Wright is entitled to summary judgment on the defamation claim.

The same reasoning applies to the statements attributed to Dr. Bauerfeld. According to the amended complaint, Dr. Bauerfeld told the police that the infant displayed the physical signs of shaken baby syndrome, and that the anal laceration could not have been caused by constipation. Some of that information turned out to be wrong, but there is no allegation that Dr. Bauerfeld made any accusation against the plaintiff attributing criminal activity to him. As noted earlier, Dr. Bauerfeld was "guarded in how he talked about the case" to the police.

Dr. Bauerfeld also is entitled to summary judgment on the defamation claim.

Dr. Langenberg accused the plaintiff — "the perpetrator" — of murder. That statement was communicated to Lt. Twardzik in a series of text messages. The defendant argues that the CPL immunizes him from that conduct, but as discussed above, it doesn't. He does not attempt to argue in his summary judgment motion that the defamation count against him should be dismissed for any other reason.

3. Intentional Infliction of Emotional Distress (IIED)

The plaintiff asserts that the "pretrial record in this matter has established a prima facie claim of [IIED] as a result of defendant's conduct in reversing a tragic private matter into a public abasement of his character." He argues that the disclosure to him of his daughter's death at his arraignment and the ensuing public humiliation amounted to "extremely outrageous" conduct on behalf of the defendants. Additionally, the plaintiff contends that Dr. Wright's conversations with him at the hospital were extreme and outrageous.

"To set forth a claim for IIED under Michigan law, a plaintiff must show (1) extreme and outrageous conduct, (2) intent or recklessness, (3) causation, and (4) severe emotional distress." *Graham v. Ford*, 237 Mich. App. 670, 674, 604 N.W.2d 713, 716 (1999); *see also Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 678 (6th Cir. 2018) (citing *Jones v. Muskegon Cty.*, 625 F.3d 935, 948 (6th Cir. 2010)). "Such conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community." *Jones*, 625 F.3d at 948 (quoting *Graham v. Ford*, 237 Mich.App. 670, 604 N.W.2d 713, 716 (1999)).

The plaintiff's underdeveloped claim falls far short of what is required to survive summary judgment. The plaintiff cites no authority that establishes that the public disclosure of a family member's death amounts to "extreme and outrageous conduct." To the contrary, "[a]s a matter of law, truthful statements cannot be outrageous." *Salser v. Dyncorp Int'l Inc.*, 170 F. Supp. 3d 999, 1009 (E.D. Mich. 2016) (citing *Andrews v. Prudential Sec., Inc.*, 160 F.3d 304, 309-10 (6th Cir. 1998)).

Where conduct is more akin to "mere insults, indignities, threats, annoyances, pretty oppressions, or other trivialities," such as Dr. Wright's alleged accusatory comment to the plaintiff,

a defendant will not be found liable. *Lucas v. Awaad*, 299 Mich. App. 345, 359, 830 N.W.2d 141, 150 (2013) (citation omitted). The case on which the plaintiff exclusively relies (without elaboration), *Moore v. City of Detroit*, 252 Mich. App. 384, 389, 652 N.W.2d 688, 691 (2002), does not substantiate his claim against Dr. Wright. In that case, the court of appeals concluded that summary judgment could not be granted on whether the defendants committed "outrageous conduct" where it could be determined as a matter of law that "[the defendant] saw plaintiff in this [injured] position and understood that he had experienced a serious physical injury." *Ibid.* If that were true, "the factfinder could conclude that [the defendant's] leaving plaintiff behind or his locking the facility in a manner that would prevent others, including medical personnel, from assisting plaintiff was extreme and outrageous conduct." *Ibid.* Even if Dr. Wright accused the plaintiff of injuring Janiyah's bottom, which she denies that she did, her remark is in no way comparable to the conduct in *Moore*.

The defendants are entitled to summary judgment on the IIED claim.

III. Conclusion

For the reasons discussed above, the plaintiff has not established a genuine factual dispute that requires a trial on any of his federal claims, and the defendants are entitled to a judgment in their favor as a matter of law. The plaintiff has not offered sufficient facts to overcome the immunity from suit for his state law claims under the Michigan Child Protection Law and the Governmental Tort Liability Law, except for the claim of defamation against defendant Scott Langenberg and, insofar as it is vicariously liable for his conduct, defendant Children's Hospital of Michigan.

Accordingly, it is **ORDERED** that the motion for summary judgment by the Inkster defendants (ECF No. 47) is **GRANTED**.

It is further **ORDERED** that the motion for summary judgment by the Garden City Hospital defendants (ECF No. 43) is **GRANTED**.

It is further **ORDERED** that the motion for summary judgment by the Children's Hospital defendants (ECF No. 67) is **GRANTED IN PART AND DENIED IN PART**.

It is further **ORDERED** that the amended complaint is **DISMISSED WITH PREJUDICE** as to defendants Prime Healthcare Services – Garden City, LLC, Shawna Wright, Christian Bauerfeld, Jonathan Munson, Jeffrey Twardzik, Jeffrey Smith and the City of Inkster, **ONLY**.

It is further **ORDERED** that Counts I, III, IV, V, and VI of the amended complaint is **DISMISSED WITH PREJUDICE** as to defendants VHS Children's Hospital of Michigan, Inc. and Scott Langenberg. The motion for summary judgment by these defendants is **DENIED** in all other respects.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Date: July 11, 2019

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means or first-class U.S. mail on July 11, 2019.

s/Susan K. Pinkowski
SUSAN K. PINKOWSKI