UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KASHIYA NWANGUMA, ET AL. **CASE NO.: 3:16-cv-247-DJH**

PLAINTIFFS,

v.

DONALD J. TRUMP, ET AL.

DEFENDANTS.

Filed Electronically

MOTION TO DISMISS

Defendants Donald J. Trump, individually and Donald J. Trump for President, Inc., through counsel, and pursuant to Federal Rule of Civil Procedure 12(b)(6), move this Court to dismiss the Complaint as to Mr. Trump and Donald J. Trump for President, Inc. of the Plaintiffs Kashiya Nwanguma, Molly Shah and Henry Brousseau in its entirety, with prejudice. Attached hereto is a Brief in Support of the Defendants' Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on the 20th day of May, 2016 via CM/ECF.

I further certify that on the 20th day of May, 2016 I served a copy of the foregoing document on the following party of record by U.S. mail.

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BRIEF IN SUPPORT OF MOTION TO DISMISS

Political speech at a political rally lies at the core of the First Amendment. Here, Plaintiffs admit they attended Donald Trump's speech in order to protest the speech and harass the people who had gathered to hear Mr. Trump. And now, despite attending Mr. Trump's gathering for the admitted purpose of heckling Mr. Trump and his supporters, those protestors accuse Mr. Trump of "incit[ing] a riot," causing protesters to be "violently assaulted," and "sanction[ing] the physical abuse" of attendees. Compl. ¶¶ 46, 103, 113. Plaintiffs' allegations threaten fundamental constitutional protections and must be dismissed. They cannot survive the motion-to-dismiss standard because they fall far short of raising "a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Because Plaintiffs have failed "to state [any] claim to relief that is plausible on its face" as to Mr. Trump and Donald J. Trump for President, Inc. ("Campaign"), the claims against Mr. Trump and the Campaign must be dismissed. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570)

STATEMENT OF FACTS

Nearly a year ago, Donald Trump announced his candidacy for President. Since then he has given speeches across the country. While the vast majority of people who attend Mr. Trump's speeches are there to support Mr. Trump, a small minority come to heckle Mr. Trump and his supporters and otherwise cause disruptions.

On March 1, 2016, several thousand people gathered to hear Mr. Trump speak in Louisville, Kentucky. According to Plaintiffs, among the thousands of attendees were three individuals who came with the express purpose of protesting Mr. Trump's speech: Ms. Nwanguma, Ms. Shah, and Mr. Brousseau. All three admit they attended the speech to protest. Compl. ¶ 37 ("Nwanguma attended the Rally with the intention of peacefully protesting Trump"); *id.* ¶¶ 51, 61. And protest they did. Several times during the speech, these protesters, intent on shutting Mr. Trump down, caused disturbances in the crowd. As a letter quoted by Plaintiffs' Complaint revealed, when Mr. Trump took the stage, "[p]rotestors in the crowd became vocal and began pushing and shoving their way toward the stage." Letter from A. Bamberger to L. Kinard (Mar. 8, 2016).[1] Mr. Bamberger, who allegedly pushed a protester, continued, "At one point I was physically knocked down and fell to the ground, losing my jacket (which was eventually returned to me). The protestors were holding up signs, chanting 'black lives matter' and pushing and shoving Trump supporters." *Id.* Ms. Nwanguma admits she held a poster of Mr. Trump's face transposed on the body of a pig. Compl. ¶ 44.

The disruptions were loud enough to distract Mr. Trump from his position on the dais. Upon noticing the protesters attempting to disrupt his speech, Mr. Trump said, "Get them out of

[1] Because Plaintiffs have relied on that letter in their Complaint, it is proper for this Court to look to the whole letter. A copy is available at http://eaglecountryonline.com/local-article/203434/.

here." Plaintiffs state without factual support that this directive was issued to the crowd writ large, but it is more plausible that Mr. Trump was simply instructing security to remove those individuals who were making it impossible for others to hear his speech.

Plaintiffs claim that after Mr. Trump said, "Get them out of here," members of the crowd hurled insults, pushed them, and even punched them. Whatever the accuracy of those claims, Plaintiffs identify only three people responsible for the alleged physical assaults—Matthew Heimbach, Alvin Bamberger, and an unknown defendant. It is clear from Plaintiffs' own Complaint that these individuals, who have no connection whatsoever to Mr. Trump or the Campaign, acted on their own. According to Plaintiffs, Mr. Heimbach showed up to the speech in a Traditionalist Worker Party t-shirt—signaling his allegiance to the white supremacist group—"in hopes of recruiting more members from among Trump's supporters." Compl. ¶¶ 66–67. Mr. Bamberger was there because "[o]ne of my favorite things to do is attend political rallies particularly Presidential rallies." Letter from A. Bamberger to L. Kinard (Mar. 8, 2016). And Mr. Bamberger admits that "my emotions got the best of me," after he was pushed to the ground. *Id.* As to the third person who supposedly assaulted the protesters, Plaintiffs have failed to identify that person, but claim that he, too, is associated with the Traditionalist Worker Party. Compl. ¶ 57. These portions of the Complaint confirm that the individuals who engaged in the alleged physical altercations were not acting for or at the direction of Mr. Trump or the Campaign, but were instead acting on their own initiative and for their own purposes.

Plaintiffs have sought to paint a shocking scene, but they allege no actual injury. As to Ms. Nwanguma, the Complaint says she was subjected to "shoving" and "striking," but does not allege she suffered any actual damage from these acts. *Id.* ¶ 50. The Complaint claims Ms. Shah experienced "pain and difficulty sleeping for several days." *Id.* ¶ 60. But it does not identify

what sort of pain she suffered, whether she was ever treated for the pain, or how her lack of sleep had any effect on her job or caused any other physical or financial damage. And Mr. Brousseau allegedly experienced "anxiety and nightmares" after Mr. Trump's speech, but he has evidently yet to seek professional help; nor has Mr. Brousseau alleged that these lingering effects caused him any physical or financial damage. *Id.* ¶ 65.

STANDARD OF REVIEW

Mr. Trump and the Campaign move to dismiss Plaintiffs' Complaint against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The standard under Rule 12(b)(6) is well-known. A complaint must be dismissed when it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A claim should be dismissed if it asserts a legal theory that is not cognizable as a matter of law, or if it fails to state sufficient facts to establish a legally recognized claim. *See Kreipke v. Wayne State Univ.*, 807 F.3d 768, 774 (6th Cir. 2015). While the court should accept all well-pleaded factual allegations as true, *Gunasekera v. Irwin*, 551 F.3d 461, 467 (6th Cir. 2009), "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Thus, a complaint must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

ARGUMENT

Plaintiffs have brought numerous claims against Mr. Trump and the Campaign, but none have merit. Neither Mr. Trump nor the Campaign condoned or incited violence of any kind at the Louisville speech. To hold either liable for the actions of a few alleged bad apples would set a dangerous precedent that would chill core political speech by empowering hecklers to provoke violence at a political rally and then file suit against the candidate they dislike for the results of their provocation. It is inconceivable that a politician would be held responsible for the actions

of everyone who attends his speeches. Moreover, even setting aside the merits of Plaintiffs' accusations, their allegations fall short of the 12(b)(6) standard. For all these reasons, Plaintiffs' claims should be dismissed.

I. PLAINTIFFS HAVE NOT PLAUSIBLY ALLEGED THAT MR. TRUMP OR THE CAMPAIGN INCITED A RIOT

At bottom, Plaintiffs claim Mr. Trump's statement "Get them out of here" incited others to harm Plaintiffs. That claim fails for numerous reasons: (1) it is not plausible that Mr. Trump's statement was directed at the crowd or condoned violence; (2) plaintiffs have not alleged there was a riot at all (because no riot occurred); and (3) the alleged statement is protected by the First Amendment.

A. Plaintiffs' Incitement Claim Is Not Plausible.

"[O]nly a complaint that states a *plausible* claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (emphasis added). Plaintiffs' allegation of incitement is implausible for at least two reasons. First, it is illogical that Mr. Trump directed his statement to civilians who were attending his rally. For Plaintiffs' claim to survive, the Court would have to accept the claim that Mr. Trump was deputizing the entire audience to perform security for his event. Far more plausible is the "obvious alternative explanation" that Mr. Trump was calling on the Secret Service, event security, and local law enforcement to enforce the law and remove hecklers who were ruining the event for others. *Id.* at 682. And "given [this] more likely explanatio[n]," Plaintiffs' allegations "do not plausibly establish" a claim for incitement. *Id.* at 681.

Second, Mr. Trump's alleged statement "Get them our of here" makes no suggestion whatsoever that anyone should use physical force. And that is the only statement by Mr. Trump that Plaintiffs allege led to violence. Compl. ¶¶ 32, 33, 34, 45, 56, 63, 76, 81, 82, 112, 115, 121. The statement merely says to "Get them out of [the convention center]." It no more calls for

violence than did President Obama's campaign statement "If they bring a knife to the fight, we bring a gun."[2] Indeed, as Plaintiffs' Complaint admits, Mr. Trump *explicitly said*, "Don't hurt them." Compl. ¶ 34. Thus, even if some causal link could be inferred between Mr. Trump's call to have the protesters removed and the actions of three people in the crowd, Mr. Trump's directive not to harm anyone severed the connection.

In sum, it is mistaken to convert Mr. Trump's statement to remove those who were trying to disrupt his speech—directed at professional security personnel to do their job—into a general call for members of the crowd to harm the protesters. And given the implausibility of this claim, it must be dismissed. *Iqbal*, 556 U.S. at 681.

B. Plaintiffs Have Failed To Allege There Was A Riot.

Plaintiffs have also failed to allege that Mr. Trump actually incited a riot. And indeed, there was no riot. Kentucky law makes it a crime to "incit[e] or urg[e] five (5) or more persons to create or engage in a riot." KRS 525.040. Kentucky defines "riot" to mean "a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function." KRS 525.010. Plaintiffs fail to allege two key elements of that offense.

First, Plaintiffs identify only three persons that allegedly engaged in violence: Mr. Bamberger, Mr. Heimbach, and an "unknown defendant." Three does not make five. For that reason alone, defendants have not plead a viable claim. Though they allege at various places in their Complaint that they were assaulted by a "group," Compl. ¶ 57, or pushed by "multiple"

[2] *Obama: 'If They Bring A Knife To The Fight, We Bring A Gun*, THE WALL STREET JOURNAL BLOG (Jun 14, 2008), *available at* http://blogs.wsj.com/washwire/2008/06/14/obama-if-they-bring-a-knife-to-the-fight-we-bring-a-gun/#:v4VizqN-P9BD8A.

crowd members, *id.* ¶ 59, nowhere do they specify a number of individuals. Plaintiffs have thus failed to make factual allegations sufficient to satisfy this five-person element.

Second, to constitute a "riot" there must be "tumultuous and violent conduct" that "creates grave danger of damage or injury to property or persons." KRS 525.010. Nowhere in their Complaint do Plaintiffs allege there was "tumultuous and violent" conduct or "*grave* danger." "Tumultuous" means "marked by tumult: full of commotion and uproar." *Webster's Third International Dictionary* 2462. But Plaintiffs do not allege the rally reached that extreme level of disturbance.

Third, Plaintiffs fail to allege that Mr. Trump intended for any tumultuous and violent conduct to occur. Thus, their claim for inciting a riot should be dismissed.

Against these pleading deficiencies, Plaintiffs cannot seek refuge in their formulaic recitation of the elements of a riot under Kentucky law. *See* Compl. ¶ 104. "A pleading must go beyond 'labels and conclusions' or a mere 'formulaic recitation of the elements of a cause of action.'" *SFS Check, LLC v. First Bank of Delaware*, 774 F.3d 351, 355 (6th Cir. 2014) (quoting *Twombly*, 550 U.S. at 555. Plaintiffs' "'naked assertions devoid of further factual enhancement' contribute nothing to the sufficiency of the complaint." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 506 (6th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678). Plaintiffs' failure to allege *facts* giving rise to a plausible allegation that Mr. Trump intended his statement to incite a riot (tumultuous and violent acts by five or more), means the claim must be dismissed.

C. Mr. Trump's Alleged Statements Are Protected By The First Amendment.

But even assuming Plaintiffs' claim that Mr. Trump's statement contributed to the physical altercations were plausible, the First Amendment provides complete protection for Mr. Trump and the Campaign. The right to freedom of speech means the state cannot "proscribe

advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1989) (*per curiam*). If the law were otherwise, political speech would be chilled.

In *Brandenburg*, the Supreme Court erected an incredibly high bar to proving incitement. *See James v. Meow Media, Inc.*, 300 F.3d 683, 698 (6th Cir. 2002) (*en banc*). That test requires proof that "(1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech." *Bible Believers v. Wayne Cty., Mich.*, 805 F.3d 228, 246 (6th Cir. 2015). The problem with Plaintiffs' allegations is that "[a]dvocacy for the use of force or lawless behavior, intent, and imminence, are all absent." *Id.* at 244. Thus, "[t]he doctrine of incitement has absolutely no application" to this case. *Id.*

1. First, as already discussed, Mr. Trump's statement did not advocate—or even mention—the use of any force whatsoever. Because "[t]he mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it," *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002), it is all the more true that a statement that "fails to specifically advocate" for the crowd "to take 'any action' cannot constitute incitement." *Bible Believers*, 805 F.3d at 244 (quoting *Hess v. Indiana*, 414 U.S. 105, 109 (1973)). Because Mr. Trump's statement was most plausibly directed at professional security personnel, there was no cause for the crowd to take any action at all. And even if some in the crowd mistakenly understood his statement to be directed at them (which is irrelevant), his statement does not call for any physical

contact whatsoever. Indeed, he quickly followed his statement with a specific admonition not to harm the protesters. Compl. ¶ 34.

Mr. Trump's request to remove some protesters falls short of the type of speech that may be punished as incitement. As the Sixth Circuit has already recognized, "[i]t is not an easy task to find that speech rises to such a dangerous level that it can be deemed incitement to riot." *Id.* And unsurprisingly, "[t]here will rarely be enough evidence to create a jury question on whether a speaker was intending to incite imminent crime." Eugene Volokh, *Crime–Facilitating Speech*, 57 STAN. L. REV. 1095, 1190 (2005). Take *Hess v. Indiana*, where a protester yelled, "We'll take the fucking street again," to a crowd that was already agitated and resisting police. 414 U.S. at 107. The Court held that speech could not be punished. *Id.* Or take *NAACP v. Claiborne Hardware Co.*, where a speaker told a crowd that anyone who failed to boycott businesses would be "disciplined," and said, "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." 458 U.S. 886, 902 (1982). The Court held that this speech was not incitement. *Id.* at 928–29. If these incendiary statements do not rise to the level of incitement then surely Mr. Trump's request (again, to professional security) to remove unruly protesters from a private speech is not incitement.

2. Even if Mr. Trump's statement could be understood as a call for members of the crowd to remove the hecklers, that statement is still constitutionally protected speech. In order for a speaker to be liable for incitement, his call to use force must be a call for "imminent *lawless* action." *Brandenburg*, 395 U.S. at 447 (emphasis added). There is nothing illegal about removing trespassers from a private event, even if physical force must be used. Under Kentucky law, "a landowner or possessor may use that degree of force necessary, or that appears to him to be reasonably necessary under the circumstances to eject an unwelcome trespasser from his

premises." *McCoy v. Taylor Tire Co.*, 254 S.W.2d 923, 924 (Ky. 1953); *accord Feld v. Feld*, 688 F.3d 779, 783 (D.C. Cir. 2012) ("[T]he right to exclude another from one's property includes the right to use reasonable force."). Indeed, that venerable rule comes from the common law. *See Feld*, 688 F.3d at 783; *see also* 13 D. LEIBSON, *Defense of Property*, KY. PRAC. TORT LAW § 9:7 (2015).

It is indisputable that the protesters were trespassing and Mr. Trump and the Campaign had the right to remove them (by force if necessary). First, Plaintiffs admit in their Complaint that Mr. Trump and the Campaign were possessors of the property (the Kentucky International Convention Center) at the time. Compl. ¶ 29. Thus, Mr. Trump and the campaign had the right to exclude the unwelcome trespassers from the center. Second, though the protesters may have "entered the area in question by lawful permission," once they began their protests "[t]hey knew then that they were in a place they had no right to be." *O'Leary v. Com.*, 441 S.W.2d 150, 157 (Ky. 1969). And "a refusal to leave the property, though lawfully and peacefully entered in the first instance, invites the owner to eject the intruder by force." *Id.* at 157.

In *O'Leary*, students protested the presence of government recruiters at the University of Kentucky. Though they initially gained approval from the school, when the protest became too large, the dean ordered everyone to leave. All but four students complied, and those four students were physically removed from the building and eventually convicted of breaching the peace. The court recognized that those students were trespassers once they refused to leave, even though they had permission to enter the premises, and the college had the right to physically remove them. *Id.*

The same is true here. The protesters may have been permitted to enter the convention center, but once they began their protests they were trespassing, and, indeed, committing a crime

by breaching the peace. That gave Mr. Trump and the Campaign the legal right to remove the protesters by force. Of course, neither Mr. Trump nor the Campaign had the opportunity to actually remove the protestors because members of the crowd took matters into their own hands. But the point is that even if Mr. Trump's statement "Get them out of here" was directed at the crowd (and it was not), it was not advocating *illegal* activity. Instead, it was advocating *legal* activity: the peaceable removal of trespassers from private property. The claim of incitement therefore must be dismissed.

3. Finally, Plaintiffs' incitement claim fails to allege that the likely result of Mr. Trump's statement was imminent physical violence. *See Brandenburg*, 395 U.S. at 447. At worst the statement advocates the removal of trespassers from private property. There was no reason to suspect that violence would follow from that statement. And Plaintiffs' suggestion that Mr. Trump's other statements about protesters served to somehow inspire violence misses the mark. First, Plaintiffs only point to three prior speeches where Mr. Trump supposedly "incite[d]" and "endorse[d]" "violence." Compl., at p. 12. Any statements *after* the Louisville speech are irrelevant. But even viewing Mr. Trump's statements at other rallies in the most negative light, they were, at most, only an abstract discussion of physical force. "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." *Noto v. United States*, 367 U.S. 290, 298 (1961). And specifically as to Mr. Trump's statements about the Birmingham, Alabama rally, Plaintiffs leave out the key fact that after Mr. Trump said to have the protester removed, it was Mr. Trump's security team who removed the protester.[3] That

[3] J. Johnson & M. Jordan, *Trump on Rally Protester*, WASHINGTON POST (Nov. 22, 2015).

deeply undercuts Plaintiffs' claim that Mr. Trump's statement in Louisville was directed at the members of the crowd.

As to the other two speeches where Plaintiffs claim Mr. Trump discussed using physical force against protesters, Plaintiffs fail to identify any violence or even physical altercations that occurred. Thus, even if Mr. Trump discussed violence in the abstract, "there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality." *United States v. Williams*, 553 U.S. 285, 298–99 (2008).

There was thus no reason to expect that Mr. Trump's statement at the Louisville speech to "get [the protesters] out" would lead to any injury to the protesters. Moreover, even if one could posit that the likely response to that statement would have been "imminent lawless action," *Brandenburg*, 395 U.S. at 447, Mr. Trump corrected any such misunderstanding by immediately saying (by Plaintiffs' own admission) "Don't hurt them." Compl. ¶ 34.

Finally, the subject matter of this lawsuit favors dismissal. The protesters were attempting to silence Mr. Trump's political speech. Now, having failed to thwart Mr. Trump's attempt to speak to his supporters, Plaintiffs seek to tie him up in prolonged litigation. If the First Amendment protects anything, it protects statements by political candidates for the highest office in the land to the voters who wish to hear them in the face of attempts by political opponents to silence that speech.

II. PLAINTIFFS FAILED TO PLAUSIBLY ALLEGE MR. TRUMP OR THE CAMPAIGN ARE VICARIOUSLY LIABLE FOR THE ACTIONS OF INDIVIDUALS IN THE CROWD

Plaintiffs also fail to plausibly allege that Mr. Trump or the Campaign are vicariously liable for the injuries Plaintiffs supposedly suffered. Plaintiffs' first theory of vicarious liability is that Messrs. Heimbach, Bamberger, and the "unknown defendant" were "acting as agents of Defendant Trump and/or the Trump Campaign." Compl. ¶ 108. Such a "bald" allegation of

agency "is by itself a mere legal conclusion and is therefore insufficient to withstand a motion to dismiss." *Prochaska & Associates, Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 798 F.Supp. 1427, 1433 (D. Neb. 1992). "A complaint relying on agency must plead facts which, if proved, could establish the existence of an agency relationship. It is insufficient to merely plead the legal conclusion of agency." *Bird v. Delacruz*, 2005 WL 1625303, at *4 (S.D. Ohio July 6, 2005); *see also Nuevo Mundo Holdings v. PriceWaterhouseCoopers LLP*, 2004 WL 112948, at *6 (S.D.N.Y. 2004).

Under Kentucky law, agency "is the fiduciary relation which results from the manifestation of consent by one person [the principal] to another [the agent] that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Phelps v. Louisville Water Company*, 103 S.W.3d 46, 50 (Ky. 2003); *see also Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44, 51–52 (Ky. 2008); RESTATEMENT (THIRD) OF AGENCY § 707. And "the right to control is considered the most critical element in determining whether an agency relationship exists." *CSX Transportation, Inc. v. First National Bank of Grayson*, 14 S.W.3d 563, 567 (Ky. App. 1999) (quotation marks omitted). In other words, "[t]here is no agency relationship where the alleged principal has no right of control over the alleged agent." *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 657 F.Supp. 1475, 1481 n.2 (S.D.N.Y. 1987).

Plaintiffs fail to allege any facts that would suggest Mr. Trump had the right to control the individuals who supposedly harmed Plaintiffs. If anything, their allegations compel the opposite conclusion—despite Mr. Trump's admonition not to hurt any of the protesters, certain members of the crowd allegedly did so anyway. *Compare* Compl. ¶ 34 *with id.* ¶ 97. Plaintiffs have pointed to no preexisting relationship between Mr. Trump and the alleged perpetrators (because there is none). Nor have they identified an agreement between Mr. Trump and the

alleged perpetrators (because there is none). There is simply no connection between Mr. Trump and these Defendants and nothing Plaintiffs allege shows otherwise.

Beyond a vague reference to agency (which Plaintiffs fail to plead any facts to support), Plaintiffs exhume the phrase *respondeat superior*. But that doctrine is confined to *employment*. *See Patterson v. Blair*, 172 S.W.3d 361, 364 (Ky. 2005) (quoting *Osborne v. Payne*, 31 S.W.3d 911, 915 (Ky. 2000) ("The critical analysis is whether the employee or agent was acting within the scope of his *employment* at the time of his tortious act."). As Kentucky's Supreme Court has written, "[u]nder the doctrine of respondeat superior, an *employer* can be held vicariously liable for an *employee's* tortious actions if committed in the scope of his or her *employment*." *Papa John's*, 244 S.W.3d at 56 (emphasis added). There is not (and cannot be) any contention that Mr. Trump or the Campaign employed the other defendants.

In any event, even if this doctrine had some relevance to this case, it is inapplicable "unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment." *Osborne*, 31 S.W.3d at 915. Since the men who carried out the alleged attacks on Plaintiffs were not employees, it is nearly impossible to say what the hypothetical scope of the employment was. But even if the men were somehow tasked with removing Plaintiffs from the convention center, they committed intentional torts, which means liability turns on "the *purpose or motive of the employee* in determining whether he or she was acting within the scope of employment." *Papa John's*, 244 S.W.3d at 56; *O'Bryan v. Holy See*, 556 F.3d 361, 383 (6th Cir. 2009). The other defendants purposes vary but they were definitely not trying to help Mr. Trump.

Based on the allegations in the Complaint, it might be inferred that Mr. Heimbach was punching Ms. Nwanguma (assuming he was) out of racial animus, given he is alleged to be a

white supremacist. Compl. ¶ 67. That is confirmed by the epithets he and others in his group are alleged to have shouted at her (before Mr. Trump ever spoke). *Id.* ¶¶ 40–49. And Mr. Bamberger has admitted that his emotions got the best of him after he was pushed to the ground. *See* Letter from A. Bamberger to L. Kinard (Mar. 8, 2016). Thus, any actions on his part were emotional retaliation for those acts rather than an attempt to help Mr. Trump. Plaintiffs' claims as to vicarious liability must therefore be dismissed.

III. PLAINTIFFS HAVE NOT PLAUSIBLY ALLEGED THAT MR. TRUMP OR THE CAMPAIGN ARE LIABLE UNDER EVEN A NEGLIGENCE STANDARD

Plaintiffs' final attempt to hold Mr. Trump and the Campaign liable for the actions of unaffiliated third parties is a claim that Mr. Trump and the Campaign failed to "provide adequate security in order to ensure the safety" of those attending the speech. Compl. ¶ 117. That claim likewise fails. Plaintiffs allege no facts about what type or what amount of security was present. Nor have they alleged what sort of security should have been provided or what the cost of such security would have been. And Plaintiffs certainly have provided no indication that any amount of security would have prevented an alleged, avowed white supremacist from punching an African-American protestor. It is simply not plausible that more security (in addition to local police, event security, and Secret Service agents) would have prevented Mr. Heimbach from engaging in the violence he is alleged to have engaged in. After all, Plaintiffs' Complaint alleges that Heimbach was there not to support Mr. Trump but to recruit people to the Traditionalist Workers Party. *Id.* ¶ 67.

But Plaintiffs' claim fails for even more basic reasons. It is black-letter law that, to succeed on a claim of negligence, a plaintiff must "establish: (1) a duty on the part of the defendant; (2) a breach of that duty; and (3) consequent injury." *Murphy v. Second St. Corp.*, 48 S.W.3d 571, 573–74 (Ky. Ct. App. 2001). Plaintiffs' claims fail at each step.

First, neither Mr. Trump nor the Campaign owed Plaintiffs a duty. Under Kentucky law, "[a] proprietor is not the insurer of the safety of its guests." *Id.* at 574. So even assuming Mr. Trump and the Campaign were proprietors (which they were not—the actual owners of the convention center were), Mr. Trump and the Campaign are not liable because they were not responsible for insuring the safety of attendees.

But even if there were a duty owed to Plaintiffs, that duty was only to exercise "ordinary care." *Grisham v. Wal-Mart Stores, Inc.*, 929 F.Supp. 1054, 1056 (E.D. Ky. 1995), *aff'd sub nom.*, 89 F.3d 833 (6th Cir. 1996). Here, that means that if defendants knew "of activities or conduct of other patrons or third persons which would lead a reasonably prudent person to believe or anticipate that injury to a patron might be caused, it is the proprietor's duty to stop such conduct, if he reasonably can." *Id.* at 1057 (quoting *Napper v. Kenwood Drive-In Theatre Co.*, 310 S.W.2d 270, 271–72 (Ky. 1958)). Of course, "what constitutes ordinary care or reasonable foreseeability varies with the particular circumstances. It is proportionate to the danger to be apprehended." *Napper*, 310 S.W.2d at 271. But "[t]he mere fact that some of the patrons are boisterous does not alone warrant the belief that they may likely physically attack other patrons." *Id.*; *see also Sidebottom v. Aubrey*, 101 S.W.2d 212, 213–14 (Ky. App. 1937).

Plaintiffs point to only one incident of alleged violence at a speech by Mr. Trump prior to his speech in Louisville. Kentucky law is clear that "neither a single incident nor sporadic incidents are sufficient to establish foreseeability." *Grisham*, 929 F.Supp. at 1058. Take *Napper*, 310 S.W. 2d 270. There the court found that merely because a group of boys had been "smarting off" earlier, it was not foreseeable that they would assault a particular patron. *Id.* at 271. And in *Grisham*, even though there had been four robberies in the area, it was not reasonably foreseeable that a shopper would be shot in Wal-Mart's parking lot. 929 F.Supp. at

1057. One of the few cases where a Kentucky court concluded criminal conduct was reasonably foreseeable was *Waldon v. Housing Authority of Paducah*, 854 S.W.2d 777 (Ky. App. 1991). There the court held that a landlord could be liable for failing to take action to protect a tenant who had been shot and killed. The court noted the landowner was aware the decedent repeatedly threatened to kill the victim, the assailant was living at the apartment complex, and the defendant took *no* steps to evict him from the premises. *Id.* at 779.

This case is much more similar to *Napper* and *Grisham*. Plaintiffs can only point to one prior incident of alleged violence at a speech by Mr. Trump. Compl. ¶ 85. But as *Grisham* held, "neither a single incident nor sporadic incidents are sufficient to establish foreseeability." 929 F.Supp. at 1058. This case is a far cry from the sort of prolonged, specific threats that rendered the landowner in *Waldon* potentially liable. In *Waldon*, the landlord was aware that the assailant had repeatedly threatened to kill the victim. 854 S.W.2d at 779. But here, Plaintiffs do not even allege any history between the alleged assailants and the Plaintiffs, much less history that Mr. Trump or the Campaign knew about. Instead, it is undisputed that Mr. Trump and the Campaign were unaware that members of a white supremacist group would be present at the speech. Thus, Mr. Trump and the Campaign could not possibly have known more security might be needed.

In sum, neither Mr. Trump nor the Campaign owed any duty to Plaintiffs. It was not reasonably foreseeable that an alleged, avowed white supremacist would attend the rally with the express purpose of recruiting members for his cause. It was equally unforeseeable that Mr. Bamberger would "let [his] emotions [get] the best of [him]" after being pushed to the ground. And since none of these acts were foreseeable, there was no duty to breach.

Further, even if these events were somehow foreseeable, neither Mr. Trump nor the Campaign breached their duty because they provided adequate security. If security is necessary,

it needs only be "proportionate to the danger to be apprehended." *Napper*, 310 S.W.2d at 271. Even the events that allegedly transpired would not warrant massive security. Sometimes people in crowds become disorderly and no reasonable amount of security can categorically prevent that. Indeed, Plaintiffs have not even made allegations regarding what sort of security they believe was needed, or about whether adding police officers would have prevented the incidents they allege took place.

That deficiency leads to another reason why Plaintiffs' negligence claim about lack of security fails. Plaintiffs fail to plausibly allege proximate cause, a necessary element of any negligence claim. *See Spivey v Sheeler*, 514 S.W.2d 667, 671 (Ky. App. 1974). The actions of individuals in the crowd were independent of anything Mr. Trump said on the stage, and were most likely occurring before Mr. Trump said, "Get them out of here." There is thus no causal link in the Complaint from the statement to the acts. Moreover, Mr. Trump's statement was likely not directed at the crowd, despite Plaintiffs unsubstantiated claims to the contrary. The more likely scenario—which is the proper test on a motion-to-dismiss—is that Mr. Trump was asking security to remove the protesters. Thus, his statement could not have been the proximate cause of any violence.

More to the point, even if Mr. Trump's statement were directed at members of the crowd, "Get them out of here" is not a call to violence. Mr. Trump had a right under Kentucky law to have protesters removed from his private event. Nothing about invoking that right is a signal that individuals should engage in violence against the trespassers. And, again, any causal connection that might be drawn from Mr. Trump's statement to the acts carried out by the crowd was severed by Mr. Trump's clear instruction that nobody was to hurt any of the protesters.

Finally, if Plaintiffs are correct that it was foreseeable that violence could occur at the speech, then Plaintiffs are barred from recovering from Mr. Trump or the Campaign by the doctrine of assumption of the risk. *See Dean v. Martz*, 329 S.W.2d 371, 374 (Ky. 1959). For example, "a spectator at a baseball game who chooses to sit in an unscreened grandstand or area, assumes the risk of being hit by a thrown or foul ball, for he voluntarily subjected himself to the hazards attendant upon and usually incident to and inherent in the game." *Id.* Plaintiffs admit they went to Mr. Trump's speech to cause trouble; they likely hoped that some form of violence would break out as way to publicize their protest of Mr. Trump's message and to publicize their counter-message. By coming to the speech with the express purpose of protesting, they assumed the risk of provoking others. If it is true that Mr. Trump and the Campaign knew—based on past isolated incidents—that violence was possible (and they did not), then the protesters who held up signs depicting Mr. Trump as a pig with the admitted purpose of protesting his speech knew there was a possibility of violence. They thus cannot recover. *Hibbs v. Brown Hotel Co.*, 302 S.W.2d 127, 128 (Ky. 1957); *Kelly v. Forester*, 311 S.W.2d 547, 549–50 (Ky. 1958).

CONCLUSION

The Court should dismiss Plaintiffs' Complaint as to Mr. Trump and the Campaign for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KASHIYA NWANGUMA, ET AL. **CASE NO.: 3:16-cv-247-DJH**

PLAINTIFFS,

v.

DONALD J. TRUMP, ET AL.

DEFENDANTS.

Filed Electronically

PROPOSED ORDER

This matter having come before the Court on the Motion of Defendants Donald J. Trump, individually and Donald J. Trump for President, Inc. to dismiss the Complaint filed by Plaintiffs Kashiya Nwanguma, Molly Shah, and Henry Brousseau as to these Defendants on March 31, 2016, and the Court being otherwise sufficiently advised,

IT IS HEREBY ORDERED that the Complaint dated March 31, 2016 is hereby DISMISSED as to Mr. Trump and Donald Trump for President, Inc. with prejudice.