IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

JERRY HART and ANDRE DYER — PLAINTIFFS

v. CASE NO. 4-02 CV 00576 JMM

CITY OF LITTLE ROCK — DEFENDANT

PLAINTIFFS' RESPONSE TO DEFENDANT'S
MOTION FOR JUDGMENT AS A MATTER OF LAW
AND INCORPORATED MEMORANDUM OF LAW

I. Preliminary Statement.

For reasons stated herein Officers Jerry Hart and Andre Dyer respectfully submit that there is no basis for a Judgment As A Matter Of Law in this case. More than sufficient evidence has been submitted establishing that the Defendant's release of Officers Hart's and Dyer's personnel files was an intentional act. Further, substantial testimony has been submitted as to the emotional distress suffered by Officers Hart and Dyer.

Plaintiffs respectfully submit that Defendant's arguments are based upon factual issues which were resolved against them by the jury verdict. As such, a Judgment As A Matter Of Law is not appropriate.

II. Standard of Review.

The Court must be "extremely guarded in granting judgments as a matter of law after a jury verdict." Equal Employment Opportunity Comm'n v. Kohler Co., 335 F.3d 766, 772 (8th Cir. 2003). The standard to be applied when deciding a motion for a judgment as a matter of law is as follows:

> [T]he district court must (1) consider the evidence in the light most favorable to the prevailing party, (2) assume that all conflicts in the

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> evidence were resolved in favor of the prevailing party, (3) assume as proved all facts that the prevailing party's evidence tended to prove, and (4) give the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts proved. That done, the court must then deny the motion if reasonable persons could differ as to the conclusions to be drawn from the evidence.

Id. (*citing* Haynes v. Bee-Line Trucking Co., 80 F.3d 1235, 1238 (8th Cir. 1996) (citations omitted)).

A judgment as a matter of law should only be granted if "'there is no legally sufficient evidentiary basis for a reasonable jury to find for' the nonmoving party." Kohler Co., 335 F.3d at 772. When the evidence is viewed according to this standard, there is overwhelming support for the jury's verdict, and this Motion For Judgment As A Matter Of Law should be denied.

III. The Evidence More Than Supports The Jury's Verdict In This Case.

(a) The Sixth Circuit Has Already Decided This Issue In Plaintiffs' Favor.

In Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998) ("Kallstrom I"), three undercover police officers brought a § 1983 action against the City of Columbus for compensatory damages and injunctive relief. The City had disclosed the officers' personnel records, which included family members' addresses, the officers' social security numbers, banking account information, home addresses and phone numbers, to the defense counsel of a known violent drug dealer, whom the police officers had arrested and were testifying against. Id. at 1059. During the course of the trial, the officers' personnel records ended up in the hands of the defendant drug dealer. Id. The police officers alleged that disclosure of their personnel files violated their Constitutional right to privacy under the Fourteenth Amendment, or "the right not to have your family subject to harm merely because of your career." Id. at 1061. The District Court granted the City's Motion for Summary Judgment. Id. at 1060. The Sixth Circuit Court of Appeals reversed.

Relying on Whalen v. Roe, 429 U.S. 589, 97 S. Ct. 869 (1977) and Nixon v. Adm'r. of Gen. Services, 433 U.S. 425, 97 S. Ct. 2777 (1977), the Sixth Circuit first held that "the officers' privacy interests do indeed implicate a fundamental liberty interest, specifically their interest in preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity." Id. at 1062. The Court then held that, in light of the defendant drug dealer's "propensity for violence and intimidation. . . . We see no reason to doubt that where disclosure of this personal information may fall into the hands of persons likely to seek revenge upon the officers for their involvement [in the case], the City created a very real threat to the officer's and their family members' personal security and bodily integrity, and possibly their lives." Id. at 1063 (emphasis added). The Court also stated, "where the release of private information places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat, the magnitude of the liberty deprivation . . . strips the very essence of personhood. Under these circumstances, the governmental act 'reaches a level of significance sufficient to invoke strict scrutiny as an invasion of personhood.'" Id. at 1064 (*quoting* Laurence H. Tribe, American Constitutional Law, 1333 (2d ed. 1988)). The Court further held that the police officers' "fundamental constitutional interest in preventing the release of personal information contained in their personal files where such disclosure creates a substantial risk of serious bodily harm" outweighed the City's interest in allowing the officer's records to be open to the public. Id.

The Court then addressed the issue of whether the defendant drug dealer's potential acts of revenge towards the police officers or their family members could be attributed to the City. Id. at 1066. The Court applied the "state-created-danger theory" to the facts of the case and found the City's action placed the officers' and their family members in "special danger." Id. at 1067; see

DeShaney v. Winnebago County Dept. of Soc. Services, 489 U.S. 189, 201, 109 S. Ct. 998, 1006 (1989) (recognizing the possibility that the state may be liable for private acts which violate constitutionally protected rights despite the absence of a special relationship); see also Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (stating that if the state "has taken affirmative action which increases the individual's danger of, or vulnerability to, such violence beyond the level it would have been at absent state action," a "constitutional duty to protect an individual may exist"). Specifically, the Court in Kallstrom held:

> Applying the state-created-danger theory to the facts of this case, we hold that the City's actions placed the officers and their family members in "special danger" by substantially increasing the likelihood that a private actor would deprive them of their liberty interest in personal security. Anonymity is essential to the safety of undercover officers investigating a gang-related drug conspiracy, especially where the gang has demonstrated a propensity for violence. In affirmatively releasing private information from the officers' personnel files to defense counsel in the Russell case, the City's actions placed the personal safety of the officers and their family members, as distinguished from the public at large, in serious jeopardy. The City either knew or clearly should have known that releasing the officers' addresses, phone numbers, and driver's licenses and the officers' families' names, addresses, and phone numbers to defense counsel in the *Russell* case substantially increased the officers' and their families' vulnerability to private acts of vengeance. We therefore hold that the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances creates a constitutionally cognizable "special danger," giving rise to liability under § 1983.

Kallstrom at 1067.

In reversing the granting of summary judgment and remanding the case, the Court concluded by holding

> [T]hat because disclosure of the officers' addresses, phone numbers, and driver's licenses, as well as the names, addresses, and phone numbers of their family members, placed the officers and their

> families at substantial risk of serious bodily harm, the prior release of this information encroached upon their fundamental rights to privacy and personal security under the Due Process Clause of the Fourteenth Amendment. Because the City has not shown that its prior actions narrowly served a compelling state interest, its release of this personal information to defense counsel in the *Russell* case unconstitutionally denied the officers a fundamental liberty interest. Having deprived the officers of a constitutional right, the City is liable to them under § 1983 for any damages incurred. Moreover, because the City's decision to continue releasing this information potentially places the officers and their families at risk of irreparable harm that cannot be adequately remedied at law, the officers are entitled to injunctive relief prohibiting the City from again disclosing this information without first providing the officers meaningful notice. Accordingly, we REVERSE the lower court order denying the officers' request for a preliminary and permanent injunction and dismissing their claims. We REMAND for further proceedings consistent with this opinion.

Id. at 1069-1070.

(b) Defendant's Reliance Upon The Remanded District Court Kallstrom Decision Is Misguided.

Defendant has relied heavily on the remanded district court opinion, Kallstrom v. City of Columbus, 165 F. Supp. 2d 686 (S.D. Ohio 2001) ("Kallstrom II") in its Motion For Judgment As A Matter Of Law. Because Defendant's motion is substantially based on Kallstrom II, it is important to understand the history of that decision. As discussed extensively above, the Sixth Circuit found in Kallstrom I that the plaintiffs had a cause of action pursuant to § 1983 for "freely releasing" private information from the undercover police officer's personnel files. Id. at 1067. However, Defendant has relied on the District Court's written opinion granting summary judgment upon remand, in its Motion For Judgment As A Matter Of Law.

In its Motion For Judgment As A Matter Of Law, Defendant failed to point out that the facts and the participating parties changed significantly from Kallstrom I to Kallstrom II. Most noticeably, while on remand, the media intervened in the case and requested portions of the undercover officer's

personnel records pursuant to Ohio public record laws. Kallstrom II, 165 F. Supp. 2d at 690-91. A large portion of the Kallstrom II decision focused on the media's subsequent entitlement to the requested documents, including First Amendment and free press issues. Indeed, the opinion begins with a quote from Thomas Jefferson on First Amendment rights. Neither the First Amendment and free press issues nor the state law public records requests are relevant to this case.[1]

In addition, the district court was clearly hostile towards the Sixth Circuit's decision and would have reversed the decision had it been within the court's authority. The district court did not attempt to hide its displeasure with the Sixth Circuit's decision. See e.g., Kallstrom II, 165 F. Supp. 2d at 690 (stating "[t]he Court based its decision on a clear and unbroken line of Sixth Circuit decisions that steadfastly refused to recognize a general constitutionally protected right to privacy that would prevent the government from releasing personal information about an individual"). The district court went so far as to state that the Sixth Circuit Court of Appeals "strikingly" changed the law of the Sixth Circuit while citing as support for this conclusion Smith v. City of Dayton, Ohio, 68 F. Supp. 2d 911, 917 (S.D. Ohio 1999),which is a district court opinion written by a United States Magistrate.[2] Kallstrom II, 165 F. Supp. 2d at 690.

Further, it is obvious that the plaintiff's problem in Kallstrom II, was a failure of proof. See e.g., Kallstrom II, 165 F. Supp. 2d at 695 (stating "Plaintiffs have failed to provide any potentially admissible evidence to suggest that the release of any information contained in the three personnel files may place any of the plaintiffs at any risk of serious bodily harm"). In fact, the district court

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[1] Plaintiffs are aware that Defendant has raised the Arkansas Freedom of Information Act in its motion. However, as set forth more fully below, the evidence at trial shows that the Freedom of Information Act is not a factor in this case.

[2]Apparently, the district court was of the opinion that the Magistrate's opinion on summary judgment took precedent over the opinion of the Sixth Circuit Court of Appeals.

was very critical of plaintiff's counsel's timeliness for filing pleadings and responding to the court's deadlines. Id. at 691, n. 6. Whether it was plaintiff's counsel's lack of due diligence or otherwise, it is obvious that plaintiff's proof is what failed on remand.

Upon remand, the district court changed its previous findings of fact as submitted to the Sixth Circuit. Kallstrom II, 165 F. Supp. 2d at 700. The facts as submitted to the Sixth Circuit which relied "almost exclusively on plaintiff's affidavits" showed that the documents disclosed by the City contained:

> the Officers' addresses and phone numbers; the names, addresses, and phone numbers of immediate family members; the names and addresses of personal references; the Officers' banking institutions and corresponding account information, including account balances; plaintiff's social security numbers; responses to questions regarding their personal lives asked during the course of polygraph examinations; and copies of their driver's licenses.

Kallstrom II, 165 F. Supp. 2d at 700. However, according to the district court, the evidence upon remand showed that most of this information had been redacted from the personnel files before it was released. Id. The redacted information included: addresses, phone numbers, driver's license number and other information. Therefore, the facts relied upon by the Sixth Circuit Court of Appeals were decisively different than those before the district court on remand in Kallstrom II. Id. at 699 ("the record has changed significantly since the Sixth Circuit issued its opinion").[3]

The facts in this case are distinctly different from the facts of Kallstrom II and closely resemble the facts of Kallstrom I as submitted to the Sixth Circuit. In Kallstrom II, the City redacted addresses, phone numbers, and driver's license information before releasing the records. Id. at 700.

[3]According to the district court, "the fact that neither party discovered nor accurately reported the contents of the documents disclosed by the City . . . has no impact on the authority of the Sixth Circuit decision." Kallstrom II, 165 F. Supp. 2d at 699.

Unlike the City of Columbus, the City of Little Rock chose to freely turn over the personnel documents in this case without redacting any sensitive or highly personal information. In comparison, the court in Kallstrom II found that "the city appear[ed] to have gone to great efforts to redact addresses and phone numbers on more than 30 pages of plaintiffs' personnel files before disclosing them." Id. at 703.

In addition, the plaintiffs in Kallstrom II failed to identify any harm resulting from the city's release of the personal information. Id. at 702 (stating "plaintiffs struggle to identify any harm that resulted from the City's release of their personal information"). Again, whether caused by lack of competency of counsel or lack of proof, the city prevailed because of a failure of proof on the plaintiffs' part. Plaintiffs in this case have shown substantial harm in the way of emotional distress and substantial risk to the lives of Officers Hart and Dyer and their family members.

IV. Factual Discussion.

(a) The Confidential Nature Of Plaintiffs' Files.

The factual evidence below was offered by Plaintiffs at trial through direct testimony, cross-examination and exhibits. Under the standards for deciding a motion for judgment as a matter of law, the Court must assume all facts that Plaintiffs' evidence tended to prove. See Equal Employment Opportunity Comm'n v. Kohler Co., 335 F.3d 766, 772 (8th Cir. 2003). A personnel file is a depository of records to show basic employment information so that the City of Little Rock has a history of why the person was paid, the way they were paid, and to maintain an employment history on someone. As a condition of employment, the employees of the City of Little Rock are required to provide certain information such as social security number and home address.

The documents produced such as the Application for Employment and Emergency Contact Form contained detailed personal information concerning the Officers. This included their home address, addresses of family members, former addresses, social security information and all sorts of detailed personal information relating to these Officers. All of these records were not given voluntarily by Plaintiffs; the City required these records to be produced as part of their employment. These Officers trusted the City to maintain the confidentiality of these records and not disclose them. Although the City now contends that social security numbers and other personal information such as spouses' work telephone number are not confidential,[4] during the course of Ms. Witherell's deposition the City objected to these identical questions being posed to Ms. Witherell. Indeed, with regard to Ms. Witherell's social security number she was instructed by counsel for the City not to provide that information. Likewise, Ms. Witherell would not agree to allow Plaintiffs' counsel to inspect and copy her own personnel file. Even Ms. Witherell admitted that if her personnel files had been produced in this manner, she would not be happy about it.

All persons who reviewed the personnel files acknowledged the confidential nature of those files. When the files were discovered by Deputy Latorea Bones, she immediately notified her supervisor and an investigation was initiated. Detective Bones became scared when she saw these files in the possession of Michael Bullock, because she knew if he could get that type of information on Plaintiffs that he could get that type of information on her.

Detective Mark Knowles then interviewed Michael Bullock. Knowles had been instructed by his supervisor to seize the personnel files because of their confidential nature. When he saw the

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[4] To the degree that the City claims this information was not confidential because the information was subject to the Freedom of Information Act, as set forth specifically below, the overwhelming evidence is to the contrary.

files he was very concerned about the confidential nature of the files and knew that these files should not have been in the possession of a criminal. Detective Knowles was so concerned about the confidential nature of the files that he destroyed them when his investigation was completed.

Even Michael Bullock acknowledged the confidential nature of the files. His testimony was that when he saw the files he knew it was something he was not supposed to have and that he immediately sealed them up.[5] Michael Bullock made the comment to both Detective Bones and Detective Knowles, "Do you know what I could do with these files if I wanted to?" Bullock also made a comment to another inmate that if anybody wanted to get these Officers he had the information.

Further, Stacey Witherell readily acknowledged the confidential nature of these files. Ms. Witherell agreed that the files contained sensitive data and other highly personal information. She also agreed that this type of data in the hands of a known felon would cause her concern. Ms. Witherell acknowledged that unauthorized dissemination of the information contained in the Officers' personnel files could directly place the lives of not only the Officers, but their families, in jeopardy. Ms. Witherell acknowledged that the fact that the Plaintiffs are officers arresting people and dealing with felons shall cause them to have a greater privacy interest to protect than, for example, herself.

Finally, the City's own attorney recognized the confidential nature of this information in defending Stacey Witherell's deposition. The City's attorney informed Ms. Witherell that she was not required to provide her social security number and instructed her not to provide that information. When her personnel file was requested during her deposition, the City's attorney informed

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[5] Of course, Michael Bullock's credibility as to whether he again reviewed the files is in issue.

Ms. Witherell that she was not required to produce the file. There can be no dispute that these personnel files were confidential in nature.

Unlike the information released in Kallstrom II, the personnel files released by the City of Little Rock contained private and highly sensitive information. Specifically, the personnel files included Officer Dyer's social security number, driver's license number, and although disputed by the City of Little Rock, his grandmother's name and address, as well as his mother's name, his sister's name, and his emergency contact information. In addition, the personnel files included Officer Hart's social security number, driver's license number, the address from which he was forced to move as a result of the personnel file release, and the former address of his ex-wife, where his daughter currently resides.

(b) Jury Instructions.

It appears that many of Defendant's arguments in connection with the Motion For Judgment As A Matter Of Law are contrary to the agreed jury instructions which were given in this case. First, the jury was instructed that in order to find for Plaintiffs in this case, the Plaintiffs had to prove the following elements by a preponderance of the evidence:

> First, that the City of Little Rock intentionally disclosed personal information of one or more facts about [Plaintiffs] that it had in its possession;
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> Second, that before the disclosure by the City of Little Rock, one or more of the personal facts disclosed by the City was indeed private, that is, not known to the public; and
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> Third, that the release of these one or more personal facts did in fact place [Plaintiffs] at a substantial risk of serious bodily harm, and possibly even death, from a perceived likely threat; and
>
> Fourth, the public disclosure of these personal facts caused [Plaintiffs] to sustain damages.

See Jury Instructions No. 6 and 7 attached hereto and incorporated by reference respectively as Exhibits A and B. In addition, the jury was instructed:

> Plaintiffs contend that the City of Little Rock committed a constitutional invasion of privacy when it released their personal records to the Pulaski County Public Defender. It is not enough for [Plaintiffs] merely to identify conduct properly attributable to a municipality to establish liability under section 1983. The plaintiffs must also demonstrate that through its deliberate conduct the City of Little Rock was the moving force behind the injuries alleged by Plaintiffs Jerry Hart and Andre Dyer. A merely negligent or even grossly negligent action is not sufficient to prove a constitutional violation.

See Jury Instruction No. 8 attached hereto and incorporated by reference as Exhibit C. The City of Little Rock did not object to these instructions.

The City of Little Rock did proffer an instruction setting forth the elements of an invasion of privacy claim which was substantially similar to Jury Instructions Numbers 6 and 7. The City's proffered instruction stated in pertinent part:

> One: The City of Little Rock intentionally made a public disclosure of one or more facts about [Plaintiffs] that it had in its possession; and
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> Two: Before the disclosure these one or more facts were private, that is, not known to the public; and
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> Three: These one or more facts were made known to the public by the Defendant City in a manner that constitutes a flagrant breach of the City's duty to [Plaintiffs'] confidentiality; and
>
> Four: The public disclosure of these one or more facts caused [Plaintiffs] to sustain injury, damage, loss or harm.

See City's Proposed Instruction No. E attached hereto and incorporated by reference as Exhibit D.

These instructions are obviously inconsistent with the arguments the City has made in its Motion For Judgment As A Matter Of Law. Even in the instruction proffered by the City, the

requisite intent is the intent to make a public disclosure, not the intent that Officers Hart and Dyer suffer some physical harm. This is the same intent element that was given to the jury during trial.

Finally, the jury was instructed on intent, "you may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." See Jury Instruction No. 9 attached hereto and incorporated by reference as Exhibit E. The City did not object to this instruction or to proffer its own instruction regarding intent. As specifically set forth below, the law is as the jury was instructed.

The fact that the City released the personnel files with the knowledge that they contained highly personal and sensitive information is enough to establish that the City intended the natural and probable harm that resulted to the privacy rights of Officers Hart and Dyer.

V. Legal Discussion.

(a) There is a public policy interest in protecting privacy rights.

The public policy interest in protecting privacy is well-established. See Kallstrom I, 136 F.3d 1060 (*quoting* Roe v. Wade, 410 U.S. 113, 152, 93 S. Ct. 705, 726 (1973)) (stating, "[t]his substantive component of the Due Process Clause includes not only the privileges and rights expressly enumerated by the Bill of Rights but includes the fundamental rights implicit in the concept of liberty and deeply rooted in this Nation's history and traditions") (internal citations and quotations omitted); see also, Paul v. Davis, 424 U.S. 693, 712-13, 96 S. Ct. 1155,1166 (1976) (stating "[w]hile there is no 'right of privacy' found in any specific guarantee of the Constitution, the Court has recognized that 'zones of privacy' may be created by more specific constitutional guarantees and thereby impose limits upon government power") (citations omitted). Cases involving the right to privacy have developed along two separate lines. Kallstrom II, 136 F.3d at 1060. One

line of these cases involves "the individual's interest in decision making in important life-shaping matters." Id. (*citing* Whalen v. Roe, 429 U.S. 589, 598-600, 97 S. Ct. 869, 875-77 (1977)). The other line of cases "recognizes the individual's interest in avoiding disclosure of highly personal matters." Id. This is the zone of privacy the City intentionally violated when it knowingly and intentionally released Officers Hart's and Dyer's personnel files without redacting the sensitive and highly personal information that the City knew was contained in those files.

(b) The City's Actions Were Intentional.

The City's argument that it did not possess the requisite intent is misplaced. As Plaintiffs have always contended, the City satisfied the requisite intent when the City intentionally released Plaintiffs' private personnel records in violation of their privacy rights. Even though the City was aware that these files contained highly personal and sensitive information, the City released the files without redacting any information or providing Plaintiffs an opportunity to object to the release. Therefore, the culpability of the City rises to the requisite level of intent.

There is no doubt that the courts have recognized the possibility that government acts may be actionable under the Fourteenth Amendment when the level of culpability falls in the range between negligent and intentional conduct. County of Sacramento v. Lewis, 523 U.S. 833, 849, 118 S. Ct. 1708, 1718 (1998) (*citing* Daniels v. Williams, 474 U.S. 327, 334, 106 S. Ct. at 662, 665 (1986)). The Eighth Circuit has held that "if the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his or her state of mind, may have committed a constitutional tort." S.S. v. McMullen, 225 F.3d 960, 962 (8th Cir. 2000) (citations omitted).

Despite the City's claim that in order for the City to have the requisite intent, Ms. Witherell must have intended that Plaintiffs' personnel records would have ended up in the hands of a known felon or that Plaintiffs would suffer some type of physical harm, the requisite intent was merely that the City intended to release Plaintiffs' personnel files in violation of their privacy rights. It is well accepted in tort law that the requisite intent for an intentional tort is only the intent to do the act, not the intent to cause the harm that necessarily follows. See e.g., Restatement of Torts Second § 16 (discussing the character of intent necessary for a battery). The Eighth Circuit noticed such a distinction in S.S. v. McMullen, 225 F.3d 960, 964 (8th Cir. 2000), stating that while the injuries sustained by the plaintiff were "utterly indecent and egregious," the focus should not be on the injuries sustained but on the state's action that purportedly led to those injuries. Id.

As the City has pointed out, no cause of action may arise under § 1983 where the state does not commit an affirmative action that caused the harm. See generally, Davis v. Fulton County, Ark., 90 F.3d 1346, 1352 (8th Cir. 1996); see also, Carlton v. Cleburne County, Ark., 93 F.3d 505, 508-09 (8th Cir. 1996). It is also noteworthy that the Eighth Circuit cases the City has relied upon for the intent element of a § 1983 claim were not based on the right to privacy. What the City has failed to grasp is that the City of Little Rock committed such an affirmative act (when it intentionally released Officers Hart's and Dyer's personnel files without redacting the sensitive and highly personal information that the City knew these files contained) in violation of Officers Hart's and Dyer's privacy rights.

When the evidence is viewed in the light most favorable to Plaintiffs, there is no doubt that the City chose to intentionally release the personnel files of Officers Hart and Dyer without reviewing the files or redacting the sensitive and highly personal information that these files

contained. The City's policies and procedures were to release these files without reviewing the information they contained. Unlike the Defendant in Kallstrom II, the City of Little Rock chose not to redact any of the personal information that was contained in Plaintiffs' personnel files when they were released.

By Ms. Witherell's own admission, she was aware that the files contained sensitive data and other highly personal information at the time they were released. In addition, Ms. Witherell acknowledged that the unauthorized dissemination of this information contained in the Plaintiffs' personnel files could jeopardize the lives of the officers and their families. In addition, Ms. Witherell acknowledged that she was aware that the Plaintiffs were police officers arresting people and dealing with felons which would cause the officers to have a greater privacy interest in their personnel records.

Here, the cause of action arose when the City released the personal information. The City did not and could not argue that it was not allowed to redact this personal information or even that it was not allowed to review the file for such personal information. Rather, the evidence shows that it was the City's policy and procedure to release these files without reviewing them or redacting any information. The City's conscious choice not to review the files before they released them and conscious choice not to redact any of the information before the files were released is not negligence. Such a conscious choice is a deliberate act. Conversely, a negligent act would have occurred if the City had, for example, redacted some of the personal information but failed to redact all of the personal information.

As stated in the jury instructions, the jury was allowed to draw the reasonable inference that the City intended the natural and probable consequences of the acts it knowingly committed, i.e. that

highly personal and sensitive information could be released pursuant to the policy and practice of the City refusing to review personnel files that had been subpoenaed and redact the sensitive and highly personal data contained in those files all in violation of the individual's right to privacy. In this case, the City knowingly released personnel files that the City knew contained highly personal and sensitive information without reviewing those files and redacting the personal information. Therefore, it was not unreasonable for the jury to draw the inference that the City intended any natural and probable consequences of its actions, including that such a release would violate the privacy rights of Plaintiffs. According to the verdict, the jury obviously concluded that the City intended to disclose this personal information in violation of Plaintiffs' privacy rights to keep this information private and confidential.

(c) The State Created Danger Claim.

In addition, by releasing these personnel files, the City placed Plaintiffs and their families in a position of danger that they would not have otherwise faced. See S.S. v. McMullem, 225 F.3d 960, 962 (8th Cir. 2000) (stating "if the state acts affirmatively to place someone in a position of danger that he or she would not otherwise have faced, the state actor, depending on his or her state of mind, may have committed a constitutional tort"). "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). However, a plaintiff alleging a constitutional tort under § 1983 is required to show "special danger" if there is no special relationship between the state and the victim or the state and the tort-feasor. Kallstrom I, 136 F.3d at 1066. Such a "special danger"

exists where the state's actions cause the victim to suffer a risk that is different from the risks suffered by the public at large. Id.

Just as in Kallstrom I, the City of Little Rock's actions placed Officers Hart and Dyer and their family members in "special danger." The City acknowledged that because Plaintiffs are police officers arresting individuals and dealing with felons they have a greater privacy interest to protect than the public at large. Indeed, the evidence shows that because the City released Plaintiffs' personnel files, the files wound up in the hands of a known felon which had been arrested by Plaintiffs on two previous occasions. The evidence is undisputed that had the City of Little Rock not released the information in violation of Plaintiffs' privacy rights, the information could not have reached its final destination. Therefore, there is no doubt that the state created a "special danger" for Officers Hart and Dyer.

(d) The Evidence Disclosed Was Private.

According to the standard for reviewing a motion for judgment as a matter of law after the jury has reached a verdict, there can be no doubt that the documents produced contained detailed personal information that the Officers would not have wanted released. Included in this information were their home addresses, addresses of family members, former addresses, social security information and all sorts of other detailed personal information. The City required these records to be produced as part of the Officers' employment, and therefore, these records were not voluntarily given to the City. The Officers trusted the City to maintain confidentiality of these records and not disclose them.

The confidential nature of these files has not been an issue. Even the known felon, Michael Bullock, acknowledged the confidential nature of these files. Further, Stacey Witherell readily

acknowledged the confidential nature of these files and agreed that these files contained sensitive data or other highly personal information. Ms. Witherell acknowledged that this type of data in the hands of a known felon would cause her concern and that the unauthorized dissemination of this information could directly place the lives of the Officers and their families in jeopardy.

Pursuant to the standard for determining a motion for judgment as a matter of law, the evidence clearly shows that the personnel files and the information which was contained in those personnel files was private, not public, information. Despite the City's claim that this information was subject to the Arkansas Freedom of Information Act, there is absolutely no evidence that either of these files was produced according to the Freedom of Information Act. In fact, during cross-examination, Ms. Witherell agreed that Michael Bullock did not obtain Officers Hart's and Dyer's personnel files through a Freedom of Information Act request. In addition, Ms. Witherell admitted that not all of the information that was released would have been produced under a Freedom of Information Act request, including their social security numbers, their home addresses, any family member's addresses, or written reprimands or appraisals. Ms. Witherell agreed on cross-examination that both of the personnel files which were released contained this type of information.

During her cross-examination, Ms. Witherell admitted that had these personnel files been requested through the Freedom of Information Act, the City would have redacted or blacked out all the personal information. In addition, had such a Freedom of Information Act request been made, Officers Hart and Dyer would have been given notice and the opportunity to object to the release of this information. In fact, Ms. Witherell agreed that pursuant to the Freedom of Information Act, the City had a legal obligation to notify both Officers Hart and Dyer of the request. It was the standard

practice of the City for the past 11 years to send a letter giving notice to an individual when a Freedom of Information Act request had been made that affected that individual. This would give those individuals that were affected by the request an opportunity to understand their rights and object to the disclosure. However, the City did not employ this practice when the information was requested via subpoena. Finally, Ms. Witherell admitted that the Freedom of Information Act legislation in Arkansas had nothing to do with this dispute, except to show that the information released by the City was not produced pursuant to the Freedom of Information Act. Unfortunately, the City did not have the same safety features in place for the information that was released through a subpoena, and this private information was released in violation of Officers Hart's and Dyer's right to privacy.

Finally this argument was never presented to the jury. The City failed to submit a jury instruction on the Freedom of Information Act. Therefore, according to the standards for reviewing a motion for judgment as a matter of law, the evidence shows that this information was not subject to the Arkansas Freedom of Information Act. Therefore, the information the City of Little Rock released was not public information.

(e) Plaintiffs Were Subjected To A Substantial Risk Of Serious Bodily Harm, Possibly Even Death, From A Perceived Likely Threat.

According to the standards for reviewing a motion for judgment as a matter of law, the evidence is overwhelming that Plaintiffs were subjected to a substantial risk of serious bodily harm, possibly even death, from a perceived likely threat. Evidence was presented to the jury, and the jury responded affirmatively that such a threat existed.

Evidence was presented to the jury that Shawn Jiminez solicited an undercover police officer and confidential informant to have Plaintiffs killed between May 23, 2000 and August 16, 2000. On

October 27, 2000, a felony information was filed against Shawn Jiminez for solicitation to commit capital felony murder against Officers Jerry Hart and Andre Dyer. Shawn Jiminez was convicted at trial and sentenced to 360 months for solicitation of capital murder, two counts, for 30 years each.

The evidence showed that Shawn Jiminez had contact with Michael Bullock, the felon that wound up in possession of the private information released by the City. In addition, the evidence showed that Michael Bullock lived across the street from Shawn Jiminez.

Officers Hart and Dyer offered testimony that Michael Bullock was known as a bully, and he was clearly known as a violent felon. There was also evidence that he had been seen having conversations with Shawn Jiminez, although Michael Bullock denied such allegations at trial. In addition, the evidence showed that Michael Bullock let it be known that he could release this information if "anybody wanted to get these officers." In addition, he made threatening comments like "Do you know what I could do with these files if I wanted to?"

Finally, there was evidence introduced at trial that Plaintiffs are subjected to violent felons while performing the duties of their job. One such example was on the evening of August 8, 2001, when Officers Hart and Dyer monitored a house for drug traffic. Early in the morning of August 9, 2001, the Officers entered the residence to make an arrest when Joe Bell, an individual in the house, fired at the Officers and the Officers exchanged shots. Mr. Bell was subsequently charged in this incident. He pled guilty for his actions and was sentenced to the Arkansas Department of Corrections.

Because the City has released this private information without reviewing the file for unnecessary disclosure of private information or redacting any highly sensitive or personal information, the City has exposed the home lives of Officers Hart and Dyer and their family

members to the violence they must face every day at work. Although Officers Hart and Dyer volunteered to work in this environment to protect the City and its citizens, the Officers did not volunteer to take this part of their work home with them or to subject their families to these risks. The substantial risk of serious bodily harm, possibly even death has been unfairly cast upon Officers Hart's and Dyer's off-duty lives and their family members. Indeed, Officer Hart's daughter is currently living at one of the addresses that was released and which wound up in the hands of a known felon. This is an unacceptable and substantial risk of serious bodily injury, possibly even death, that the City has placed on Officers Hart and Dyer and their families.

Therefore, the overwhelming evidence is that Plaintiffs were subjected to a substantial risk of serious bodily harm, possibly even death, a perceived likely threat.

V. Conclusion.

For the reasons stated above, Defendant's Motion For Judgment As A Matter Of Law should be denied, and Plaintiffs Jerry Hart and Andrew Dyer should be afforded all just and proper relief.

Respectfully submitted,

SAMUEL A. PERRONI, Ark. Bar #74119
801 West Third Street
Little Rock, AR 72201-2103
Phone: (501) 372-6555
Fax: (501) 372-6333
Attorney for Jerry Hart

PATRICK R. JAMES, Ark. Bar #82084
801 West Third Street
Little Rock, AR 72201-2103
Phone: (501) 372-6555
Fax: (501) 372-6333
Attorney for Andre Dyer

CERTIFICATE OF SERVICE

I, Patrick R. James, hereby certify that a true and correct copy of the foregoing has been served, via U. S. Mail, postage prepaid, on this 3rd day of October, 2003, to:

Thomas M. Carpenter
Little Rock City Attorney's Office
500 West Markham Street, Suite 310
Little Rock, AR 72201

PATRICK R. JAMES

Hart-Dyer\response to motion for judgment.092303

UNITED STATE DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

# *Exhibits Attached to Original Document in Courts's Case File*