IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONITA JONES, et al.	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	CIVIL ACTION NO. 99-455

MEMORANDUM

Before the court is the City of Philadelphia's Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50(b), regarding the judgment entered on June 26, 2001, in the above-captioned matter. For the reasons that follow, the motion is DENIED.

I. BACKGROUND

A jury trial in this matter was held on June 20, 2001, in which plaintiffs Ronita Jones, Rashford Galloway, Rubens Leocal, and United Solutions d/b/a The A to Z Variety Store ("A to Z Variety Store") alleged that defendants City of Philadelphia ("City"), Police Commissioner Richard Neal, in his individual and official capacities, and Police Detective John Coyne, in his individual and official capacities, violated plaintiffs' constitutional rights under 42 U.S.C. § 1983.

Through a business corporation, Galloway was one of the owners of a building located in a high crime neighborhood in the City. A small, recently opened variety store, owned and operated by Galloway, was located in the front of the building, and first and second floor apartments were located in the rear and were leased to individuals. There was no physical access

from the apartments to the store. Based upon police surveillance of the neighborhood surrounding the building, a prior drug-related arrest of an occupant of the upstairs apartment, and statements from a "confidential informant," defendant Coyne applied for and obtained separate search warrants for the building's apartments, the A to Z Variety Store, and other buildings located in the neighborhood which had been identified through surveillance as appearing to be associated with illegal drug activity. There was no police observation or verification of illegal drug activity in the variety store, although persons believed to be engaged in illegal drug activity on a public street corner near the store had been seen entering and leaving the store. The "confidential informer," according to the search warrant affidavit, told Coyne that the building was the core of drug activity, both in and outside the store and the apartments within the building, and that the drug operation was being run by Jamaican males, one of whom, nicknamed "Bongo," always had two bodyguards in his company that carried firearms. At trial, Coyne testified that the "confidential informer" was also the principal seller of narcotics on the street corner as observed through police surveillance and that the police believed that he was the possessor of all the premises to be searched. Coyne also testified that he knew the "confidential informer" through numerous prior drug related arrests and that he was considered unreliable, except as to the information about the building in question. The "confidential informer's" identity and full history were not made known to the judge who issued the search warrants. Through pretrial discovery, immediately before trial, the identity of the "confidential informer" became known to plaintiffs' counsel. He testified at trial, pursuant to subpoena, that he had not given the statements to Coyne about the store and its operator that Coyne attributed to him.

As the investigating detective, Coyne was in charge of executing the warrants obtained, although it was not established that he was in charge of the uniformed police officers assigned to provide protection for the executors of the warrants. Coyne was part of the team of officers that met to coordinate their "assault" upon the premises to be searched on January 28, 1997.

The uniformed police officers were members of the SWAT team and were under the command of superiors who directed their operations. Each was dressed in black clothing with faces covered. Except for one of the group of police that entered the store, each carried a drawn gun, shotgun or police revolver. One carried a ramming device. The police entered for the purpose of securing the building and disabling all occupants so that there could be no interference with the searches. The time selected for the warrants' simultaneous execution was just after the end of the winter daylight hours, but well within the store's regular business hours. The SWAT team entered the store without warning, prepared to physically subdue all its occupants. There was no need to knock the store door down, since the store was open for business. However, the merchant/salesperson was located within a locked space for his own protection. The police banged on this enclosure, demanding immediate entry.

Galloway and Jones, who were the store's merchants, were surprised. Because of crime in the area, they were behind a transparent bulletproof locked enclosure. While there was dispute at trial whether the police identified themselves as police, it was clear that the entry was intended to be loud, disturbing, and distressing so as to discourage any resistance to the police presence. The SWAT team did not have a search warrant with them and could not produce one to Galloway. Galloway testified that he first thought the store was being robbed by armed thugs

and was hesitant to open the door to the bulletproof haven to the demanding men dressed in black. Jones, who was Galloway's fiancé, and had been helping out in the store, had been asleep on a small settee or sofa behind the cash register when the police demanded entry into the secure area. Leocal, a store customer, had been playing a video game when he was surprised by the police SWAT team entry. Galloway, Jones and Leocal were ordered down onto the floor and immediately they were bound by the police with handcuffs. They were kept on the floor face down or in squatting positions until all the premises to be searched had been secured and searched, including premises within the area that were not part of the building in which the store was located. The searches commenced upon the securing of the premises.

Galloway, Jones and Leocal testified that they were held with guns pointed at their heads, were afraid to move for fear of being killed, and remained in "custody" for several hours. The police denied that the "custody" was for that length of time or that guns were pointed at the heads of plaintiffs. The police admitted rapid entry, the immediate take down of the store occupants, handcuffing them and keeping them close to the floor until the searches were completed. In the process of responding to the directions of the officer guarding her, Jones suffered a deep scratch to her back caused by a sharp object. The scratch left a very discernable scar. Coyne entered the store premises after the buildings were secured but after the search of the store had started or was substantially completed. Shortly after his arrival, Leocal was released.

Galloway and the other plaintiffs testified that the store was ransacked, with store goods strewn about by the searchers. Coyne and the police officers testified that the store was left in the same condition as when they found it. Galloway also testified that the apartments of

the building had been greatly damaged. The police justified all their actions as being necessary for their own and the officers' safety.

Following the search, Galloway, with Jones' assistance, filed a grievance with the police department complaining that the store and apartments were damaged and reimbursement was sought. The grievance was denied on the basis that the search was pursuant to a court issued warrant. This lawsuit ensued.

Plaintiffs averred that Coyne and other City police officers, pursuant to a City policy, practice, or custom, in executing a search and seizure warrant for the A to Z Variety store premises, subjected the individual plaintiffs to unconstitutional periods and conditions of detention, and the store to unconstitutional, unreimbursed physical damage. Plaintiffs further alleged that the search was conducted pursuant to an invalid warrant, since the confidential informant upon which the affiant, Officer Coyne, caused the magistrate to rely, was known by Coyne to be unreliable and was, in fact, a target of the warrant. These facts were not disclosed to the issuing judicial officer in the search warrant affidavit. There was no arrest warrant.

At trial, the parties stipulated that plaintiffs themselves were not targets of the search warrant. No drugs were found in the store or its basement. What was described as a wrapper that could have been used to wrap a small amount of illegal drug substance was found in the basement, but it did not suffice for any charges against any plaintiff. During the search, Jones testified, she repeatedly begged to be taken to the restroom so that she could urinate. She was repeatedly denied access. When finally she was escorted to the toilet by a female officer, she wet herself and had to complete her urination in the toilet in plain view of male police officers.

Plaintiffs elicited from police witnesses testimony that City policy required that police order to the ground and place handcuffs on anyone found in a building during a search, regardless of whether they were known suspects or law-abiding citizens, and that those individuals are searched and detained, for safety reasons, during the entirety of the execution of a warrant.[1]

Before the case was submitted to the jury, defendants moved for judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 50(a)(2), which this court granted as to Commissioner Neal, in his individual capacity, and as to the City of Philadelphia regarding the theory of a policy of excessive force. The motion was denied in all other respects.

At the close of all testimony, the court submitted to the jury special interrogatories, which required them to consider the following: (1) whether Officer Coyne knowingly caused a materially false search warrant affidavit to issue regarding the A to Z Variety Store; (2) whether Officer Coyne, in his individual capacity, during the execution of the search warrant, caused one or more plaintiffs to be subjected to unreasonable periods and conditions of detention; (3) whether the City, through its Police Commissioner, knew that the City policy, practice, or custom for the execution of search warrants subjected occupants of the premises not subject to arrest to unreasonable periods and conditions of detention, in violation of their Fourth Amendment rights; and (4) whether one or more plaintiffs sustained physical damage as a result of the execution of the search warrant, in violation of their Fifth Amendment rights. The jury

[1]Leocal, a customer in the store at the time of the warrants' execution, testified that he alone was allowed to leave approximately 45 minutes to one hour after the police SWAT team had entered. He also testified that he spent that time on the floor handcuffed, and with an officer holding a large gun close to his head.

answered questions (1) and (2) in the negative, finding in favor of Coyne, and questions (3) and (4) in the affirmative, finding against the City. It awarded compensatory damages in favor of all plaintiffs and against the City separately as to the Fourth and Fifth Amendment violations. Judgment was entered for plaintiffs, pursuant to the jury's findings.

On July 11, 2001, the City filed in this court a Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50(b).

II. DISCUSSION

A motion for judgment as a matter of law should be granted only if there is insufficient evidence from which a jury reasonably could find for the prevailing party. F.R.C.P. 50(a). When considering such a motion, the evidence in the case must be viewed in the light most favorable to the non-moving party and giving it the advantage of every fair and reasonable inference. Lightning Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993); McDaniels v. Flick, 59 F.3d 446 (3d Cir. 1995). In determining whether the evidence was sufficient, the court may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury's version. Id.

A. Municipal versus Officer Liability

The City argues that because the jury found that Officer Coyne did not violate the plaintiffs' constitutional rights, by extension, the jury could not reasonably have found that the City had done so, solely by virtue of employing him. The City's argument, however, does not contemplate what the jury reasonably did find, that is, that , in executing the search warrants,

Coyne acted pursuant to a City policy or practice and did no more than what he was trained to do, or that the unlawful acts were all attributed to the SWAT team members, who detained the plaintiffs and searched and damaged the premises as they had been trained to do, or were well known to do.

The City cites City of Los Angeles v. Heller, 475 U.S. 796 (1986), for the proposition that municipal liability under Section 1983 first must be accompanied by a finding of a constitutional violation. In Heller, police officers were accused of making an arrest with excessive force and without probable cause. The jury returned verdicts in favor of the officers but against the city. The Supreme Court reversed the verdict against the city because it was inconsistent, stating:

> [N]either Monell . . . nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm. If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

Id. at 799 (emphasis in original).

The third circuit has interpreted Heller as a case of respondeat superior liability. Fagan v. City of Vineland, 22 F.3d 1283 (3d Cir. 1994). In Fagan, the court did not read the Heller language so broadly as to automatically preclude municipal liability absent an individual police officer's liability. Id. at 1291. Rather, the court found that "the [Heller] Court characterized the liability of the City of Los Angeles and its Police Commission as respondeat superior by noting that '[t]hey were sued only because they were thought legally responsible for

[Officer] Bushey's actions.' Id. at 799, 106 S.Ct. at 1073. Thus, the Court did not address any independent section 1983 claims against the City of Los Angeles and its Police Commission." Fagan, 22 F.3d at 1292. Thus, the Fagan court found that Heller could not be applied to a Section 1983 substantive due process/failure to train claim arising out of a police pursuit because an underlying constitutional tort can still exist even if no individual police officer violated the Constitution. Id. See also Simmons v. City of Philadelphia, 947 F.2d 1042 (failure to train officers to handle suicide watches of detainees constituted Section 1983 violation, even if individual officers not found liable); cf. Williams v. Borough of West Chester, Pa., 891 F.2d 458 (3d Cir. 1989) (finding no municipal liability where plaintiff had not alleged or produced evidence that the municipality, through its policies, directly violated decedent's constitutional rights).

Plaintiffs here argued at trial that the City's policy governing the execution of search warrants, under circumstances applicable to the search warrant obtained for the A to Z Variety store, was unconstitutional, in that it was known by the City, through the Police Commissioner, that its police officers, in the execution of warrants, subjected occupants of premises not subject to arrest to unreasonable periods and conditions of detention in violation of the Fourth Amendment. Accordingly, it was not only appropriate, but necessary under Monell v. Dep't of Social Svcs., 436 U.S. 658 (1978), to give the jury a separate instruction on municipal liability under Section 1983, independent from that of an individual police officer. The jury's finding the City liable on the Fourth Amendment claim was not inconsistent with its finding that Officer Coyne was not personally liable for causing plaintiffs to be unreasonably detained. Coyne was not found to have submitted a knowingly false search warrant affidavit and, although

he was the detective responsible for execution of the warrant, he did not come into the store until substantially after the police had allegedly long detained plaintiffs and destroyed property. Under the evidence, the jury reasonably could have found that Coyne was not responsible for the City policy or practice by which the individual plaintiffs were unreasonably detained, but that the SWAT team members, acting for the City, performed only as they had been trained to do and violated constitutional rights following an unconstitutional City policy.

B. Section 1983- Policy, Practice, Custom

Alternatively, the City argues, even if no underlying constitutional violation is necessary to find the City liable, the plaintiffs still failed to prove that a policymaker of the City knew or should have known that warrants were being executed in a manner that violated the Constitution. Under Monell, a municipality can only be liable when the alleged constitutional violation implements or executes a policy, regulation, or decision officially adopted by the governing body or informally adopted by custom. 436 U.S. 658; see also Beck v. City of Pittsburgh, 89 F.3d 966, 973 (3d Cir. 1996) (where defendant police officers had been the subjects of five prior complaints of excessive use of force, there was sufficient evidence of a pattern of violent and inappropriate behavior so as to allow the inference that the Pittsburgh Police Department knew of and tolerated the use of excessive force).

As the City concedes in its brief, the plaintiffs in the instant case presented testimony that City policy required that police put handcuffs on anyone found in a building during a search, regardless of whether they were known suspects or law-abiding citizens, and that those individuals were to be searched and detained, for safety reasons, during the entirety of the

execution of a warrant. (Def. Renewed JMOL at 11.) Indeed, plaintiffs Ronita Jones, Rashford Galloway, and Rubens Leocal all testified that they were told by the City police to "get the **** down" on the floor, and were handcuffed and detained by the police for approximately two hours, even though they were neither suspects nor targets of the executed warrant. Viewing this testimony in the light most favorable to plaintiffs, it was reasonable for a jury to conclude that (1) the policy of the City was to detain and physically restrain citizens not subject to arrest until a building is secured and a warrant is executed; and (2) the execution of the warrant, pursuant to City policy, resulted in deprivation of plaintiffs' constitutional rights. See Jacobs v. Paynter, 727 F. Supp. 1212 (D. Ill. 1989) (plaintiff's allegation that she and five other individuals were confined by police to small two-person room for approximately two hours, even though confinement occurred during search pursuant to valid warrant, sufficed to state Fourth Amendment claim).

C. The Fifth Amendment Charge

Finally, the City argues that the court's jury charge pursuant to the Fifth Amendment was inappropriate, as the Fifth Amendment is not applicable to the plaintiffs' claims that they were seized or detained unlawfully by members of the City's police department. Albright v. Oliver, 510 U.S. 266 (1994); Graham v. Connor, 490 U.S. 386 (1989).

The City did not ask for a jury charge to the effect that any detention of innocent persons during the execution of a search warrant was unconstitutional. Had it done so, a charge under the Fourth Amendment alone would have sufficed.[2]

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[2]At the charge conference, the court gave the City an opportunity to adopt the position that any injury to innocent parties during the execution of a valid search warrant is per se unreasonable under the Fourth Amendment; it declined to do so. Rather, the City argued that "the policy per se is not unreasonable unless in its execution in this particular circumstance that becomes unreasonable." (Attorney Resnick, City Solicitor, Tr. # 46, at 135.) Further, the court asked, "Now, if the police do what's reasonable in executing the search warrant, but in the detention process the person is injured, is there liability on the part of the City?" (Tr. #46, at 143.) The City responded, "It wouldn't be compensable against – against the City because . . . we're not talking about the execution of an officially-adopted policy or custom or practice that people know and are deliberate (sic) indifferent – deliberately indifferent to the ramifications." (Attorney Resnick, Tr. # 46, at 143-44.)

Only after the charge had been administered, and the jury had begun deliberations, did the court, through its own research, determine that no-knock warrants, such as the one executed against the A to Z Variety Store, are illegal under Pennsylvania Law, absent exigent circumstances. Pa.C.S. Crim. Proc. R. 207; Commonwealth v. Rudisill, 622 A.2d 397 (Pa. Super. 1993) (finding that police entry which is unreasonable under Pennsylvania's knock-and-announce rule is also unreasonable under the Fourth Amendment); Commonwealth v. Crompton, 682 A.2d 286 (finding that fact that front door to defendant's home was open and screen door was unlocked did not cure police officers' noncompliance with knock and announce rule); Commonwealth v. Grubb, 595 A.2d 133 (Pa. Super 1991) (finding that the mere fact that the evidence being sought is easily destroyed does not suspend the requirement that police officers executing warrant give notice of their identity and purpose before attempting to enter private premises). Prior to the court's research, the City had taken the position that "[t]he property that we're talking about in this case was a business that was open for business at the time. . . [S]ince it was open to the public, the police did not have to knock to come in." (Attorney Resnick, Tr. # 48, at 24.) Although Pennsylvania case law supports this proposition with respect to commercial property that is open to the general public, Commonwealth v. Curtin, 628 A.2d. 1132 (Pa. Super 1993), it does not cure noncompliance with respect to the seizure of innocent parties. Commonwealth v. Days, 718 A.2d 797 (Pa. Super. 1998) (finding that purpose of knock and announce rule is to alert the occupant to the presence of a person at the door and inform the occupant of that person's identity and purpose, thus allowing the opportunity for peaceful surrender of the premises without danger to officers and occupants or damage to the property). In other words, occupants Jones, Galloway, and Leocal should have been given the opportunity to surrender the premises, i.e., evacuate the store, through a knock-and-announce procedure, instead of being seized, pursuant to the police department's no-knock execution, in a humiliating manner and length of detention. If the law had been argued appropriately by plaintiffs or defendants, the court would have found as a matter of law that the execution of the no-knock

Ultimately, in charging the jury, the court accepted the City's argument that the City's policy and practice by which it executed search warrants could be found to have been reasonable. Having done so, the question necessarily arose as to when the detention of innocent persons could cease being reasonable and become unreasonable, and whether the City could be held responsible for any damages to innocent persons and property occurring during the time that the detention procedures were reasonable.

Although the City does not raise this argument in its brief, it is worth noting that, as required by the Supreme Court in Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), plaintiffs exhausted state administrative remedies when they filed a claim pursuant to the police department's internal grievance procedure, which was denied. As Williamson notes, "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." Id. at 195. Under Pennsylvania law, however, plaintiffs are barred by the Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8541 et. seq. ("PSTCA"), which provides immunity for municipalities and their employees, absent intentional misconduct. 42 Pa.C.S.A. §§ 8541, 8545; Force v. Watkins, 544 A.2d 114 (Pa. 1987) (finding cause of action against borough and chief of police based on their failure to instruct and supervise police officers is barred under this section; exceptions to immunity under 42 Pa.C.S.A. § 8542 not applicable); Simmons v. Township of Moon, 601 A.2d 425 (Pa. Cmwlth 1991) (county detectives immune from liability under PSTCA

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warrant was per se unreasonable viz. plaintiffs Jones, Galloway, and Leocal, under the Fourth Amendment, and would have instructed the jury to quantify those plaintiffs' personal injury damages under that theory, instead of the Fifth Amendment charge.

for false arrest and negligence in arrestee's suicide death, absent allegation of willful misconduct). Because plaintiffs exhausted all available administrative remedies, and no Pennsylvania state remedies were available to them, their Fifth Amendment claims are appropriately before this court.[3]

In Graham, the Court considered the use of excessive force in the course of an arrest, investigatory stop, or other "seizure" of a free citizen, and found that those claims should be analyzed under the Fourth Amendment and its "reasonableness" standard, rather than under a "substantive due process" approach. 490 U.S. at 395 (citing Tennessee v. Garner, 471 U.S. 1 (1985)). Petitioner in Graham was a diabetic who, because of behavior stemming from the onset of an insulin reaction, was subjected to an investigatory stop, during which he sustained multiple injuries. Petitioner sued under Section 1983, alleging that respondent police officers, through use of excessive force, violated his substantive due process rights under the Fourteenth Amendment. The Court held that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Id. at 395. See also County of Sacramento v. Lewis, 523 U.S. 833 (1998) (interpreting the "more-specific-provision" rule of Graham simply to require that if a

[3]At the charge conference, the court suggested that claims for property damage and personal injury should go to the jury as state law claims under pendent jurisdiction. (Tr. # 47, at 53.) The City vehemently opposed that suggestion, arguing convincingly that the City is immune under the Tort Claims Act, and the actions of its officers did not fall into any of the eight recognized exceptions in which a City may be liable. (Attorney Resnick, Tr. # 47, at 53-54.) Accepting the City's position regarding immunity under state law, the court had to turn to the federal Constitution -- the Fifth Amendment. (Tr. # 47, at 56.)

constitutional claim is covered by a specific constitutional provision, the claim must be analyzed under the standard appropriate to that specific provision and not under substantive due process).

Similarly, in Albright, the petitioner claimed in a Section 1983 action that a police detective violated his substantive due process rights under the Fourteenth Amendment, in that the detective violated his right to be free from prosecution without probable cause. Petitioner in Albright, upon learning that Illinois authorities had issued an arrest warrant charging him with the sale of a substance which looked like an illegal drug, surrendered to respondent police officer. At a preliminary hearing, the officer testified that petitioner sold the look-alike substance to a third party, and the court found probable cause to bind petitioner over for trial. However, the court later dismissed the action on the ground that the charge did not state an offense under state law. Petitioner sued under Section 1983, alleging that respondent deprived him of substantive due process under the Fourteenth Amendment, namely, his "liberty interest" to be free from criminal prosecution. Applying the analysis in Graham, the Court concluded that petitioner's claim of malicious prosecution was most clearly related to the textual provisions of the Fourth Amendment, as it had been designed by the Framers to address pretrial deprivations of liberty that go hand in hand with criminal prosecutions.

> We think [the Graham] principle is likewise applicable here. The Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it. The Fourth Amendment provides:
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> > "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation,

> and particularly describing the place to be searched, and the persons or things to be seized."
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> We have in the past noted the Fourth Amendment's relevance to the deprivations of liberty that go hand in hand with criminal prosecutions. See Gerstein v. Pugh, 420 U.S. 103 (1975) (holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to any extended restraint on liberty following an arrest).

510 U.S. at 274. In his concurrence, Justice Souter noted that substantive due process should be reserved for otherwise homeless substantial claims, and should not be relied on when doing so will duplicate protection that a more specific constitutional provision already bestows. Id. at 288-89 (Souter, J., concurring). See also Patel v. Penman, 103 F.3d 868, 874-75 (9th Cir.1996) (holding that Takings Clause of the Fifth Amendment preempts a substantive due process claim).

In both Graham and Albright, petitioners' claims stemmed from the fact that they themselves were targets of the allegedly unconstitutional searches. In contrast, here, not all of the claims submitted by plaintiffs at trial are related to the textual provisions of the Fourth Amendment, because they themselves were not targets of the search warrant in question. Although the jury did find that the City was liable under the Fourth Amendment for subjecting plaintiffs to unreasonable periods and conditions of detention, this claim is separate and distinct from plaintiffs' contention that for a time they had been subject to a taking for public use, without just compensation, in violation of the Fifth Amendment.[4]

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[4]"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just

In contrast to Graham and Albright, the facts in the instant case lend themselves to claims under the textual provisions of not only the Fourth, but also the Fifth Amendment. As discussed, supra, the jury found that plaintiffs Jones, Galloway, and Leocal were all subject to unreasonable periods and conditions of detention, in violation of the Fourth Amendment. The Fourth Amendment, however, does not serve to vindicate all harms claimed to have been suffered by plaintiffs pursuant to the City's search. All plaintiffs were innocent third parties to the search, which was executed for the public good. Further, regardless of whether the police acted reasonably in executing the warrant, the jury found that all plaintiffs suffered damage to their personal - or real, in the case of plaintiff A to Z Variety Store - property. To the extent that the seizure of persons and destruction of property could have been found to have been reasonable, such harm cannot be redressed by the Fourth Amendment.[5]

While this is an issue of first impression in this jurisdiction,[6] other courts have considered the destruction of an innocent party's real property occurring during an otherwise

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compensation." Const. Amend. V.

[5]As the jury made clear by awarding compensatory damages under both the Fourth and Fifth Amendment claims against the City, it found as a factual matter that (1) in violation of the Fourth Amendment, plaintiffs were subjected to unreasonable periods and conditions of detention; and (2) to the extent that the search was reasonable (e.g., reasonable to create damage to the A to Z Variety Store, in order to effectively execute the search warrant), plaintiffs suffered property damage, personal and real, in violation of the Fifth Amendment.

[6]In In re City of Philadelphia Litigation, 1996 WL 102286 (E.D. Pa. 1996), Judge Pollak addressed a motion to amend plaintiff's complaint to add a Fifth Amendment claim against the City of Philadelphia for allegedly taking her property - in the form of dropping an explosive device on her home, in a standoff with the MOVE movement - but dismissed it as untimely filed. This court knows of no case in this circuit in which a court has addressed the constitutionality of property damage to innocent third parties as a result of a validly executed search warrant.

lawful search to constitute a taking under the Fifth Amendment. In Wallace v. City of Atlantic City, 608 A.2d 480 (N.J. Super. 1992), plaintiff, a landlord whose property was destroyed when police executed a no-knock search warrant, sought compensation for his loss under the Fifth Amendment. The court found that plaintiff could not recover damages under a theory of tort,[7] nor was there any allegation of negligence or excessive force used by police in violation of the Fourth Amendment. The court held that the landlord, an innocent third party, should not bear the sole financial burden for the undertaking of police action, since the intended beneficiary of the search was not the landlord, but society as a whole, and the landlord himself had no knowledge that drug-related activities were taking place in the rented premises.

In support of its reasoning, the Wallace court relied on National Board of Y.M.C.A. v. United States, 395 U.S. 85 (1969), in which plaintiffs sought compensation for damages committed by rioters to buildings occupied by United States troops during riots in the Panama Canal Zone in January 1964. The Court of Claims held that the actions of the Army did not constitute a taking within the meaning of the Fifth Amendment. The Supreme Court, in a 6-3 opinion, affirmed, based on the majority's conclusion that the evidence showed the troops were acting primarily in defense of the plaintiffs' buildings, not primarily for the public good. Id. at 92; cf. id. at 99 (Black, J., dissenting) (stating that the Army's actions constituted a taking because "I think it can hardly be said that these private buildings were taken for the good of the owners. Instead, the taking by the Army was for the benefit of the public generally.").

[7]As the court noted, the New Jersey Tort Claims Act, N.J.S.A. 59:3-9, similar to the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8541 et seq., discussed infra, provides that a public employee is not liable for his entry upon any property where such entry is expressly or impliedly authorized by law.

Applying the Y.M.C.A. "intended beneficiary" test, the Wallace court found that plaintiff was entitled to compensation because "[t]he search was conducted for a public purpose: *i.e.*, a search for and seizure of property and concomitant arrests as part of an ongoing criminal investigation." 608 A.2d at 483. The court continued:

> As part of the investigation the police damaged plaintiff's property. As an innocent third party he should not bear the sole financial burden of such an undertaking. Since the damage was incurred for the public good, rather than for the benefit of the private individual, the public should bear the cost. The intended beneficiary of the police action was not the plaintiff, but society as a whole.

Id. See also State v. 1979 Pontiac Trans Am, Color Grey, 487 A.2d 722 (N.J. 1985) (construing N.J. Forfeiture Statute, N.J.S.A. 2C:64-1 to -9, as to exclude innocent owners who did not consent to or know of the illegal use of their property, because to do otherwise would constitute a taking); Commonwealth v. 502-504 Gordon Street in Ninth Ward of City of Allentown, County of Lehigh, 607 A.2d 839 (Pa.Cmwlth.1992) (holding that owners of forfeited property established innocent owner defense by proving that unlawful use of property by others occurred either without their knowledge or without their consent); United States v. Ferlaino, 1991 WL 238128 (E.D. Pa. 1991); United States v. One 1971 Ford Truck, Serial No. F25HRJ82180, 346 F. Supp. 613 (C.D. Cal. 1972) (holding that imposition of forfeiture of truck used in connection with sale of contraband firearm on father who owned truck, forbade son to use truck except to take mother to airport, and was totally unaware of son's use of truck in connection with sale would cause unconstitutional deprivation of personal property without just compensation);.Note, Owen, Everyone Benefits, Everyone Pays: Does the Fifth Amendment Mandate Compensation

when Property is Damaged During the Course of Police Activities?, 9 Wm. & Mary Bill Rts. J. 277 (December, 2000).[8]

Several other state courts have recognized and followed a broad application of the takings clause in such scenarios. In Skeel v. City of Houston, 603 S.W.2d 786 (Tex. 1980), the owner and residents of a house brought suit against the city under the takings clause of the Texas Constitution for property damages suffered as a result of the police setting fire to their house in an effort to recapture escaped convicts hiding in the house. The Texas Supreme Court held that the property owner was entitled to compensation, finding that "[t]he Constitution itself is the authorization for compensation for the destruction of property and is a waiver of governmental immunity for the taking, damaging or destruction of property for public use." Id. at 791. See also Wegner v. Milwaukee Mutual Ins. Co., 479 N.W.2d 38 (Minn. 1991) (recognizing the constitutional mandate for compensation of innocent third parties, even in cases of emergency exercise of the police power, and declining to allow the city to defend on grounds of public necessity); McGovern v. City of Minneapolis, 480 N.W.2d 121 (Minn Ct. App. 1992) (finding that damages inflicted during course of forced entry into private residence suspected of being a crack house was for public purpose within the meaning of the Constitution and thus was compensable taking).

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[8]Placing the financial burden on the coffers of the City rather than on an innocent third party should not impair the police department from effectively doing its job. As Wallace noted, "It is a question of allocation of financial resources which local governments face every day. Just as a local government must decide how many police to hire, whether to purchase new equipment, and similar issues, the decision of how much to allocate for the destruction of property during the execution of search warrants is a question to be determined at budget time, not by the police officer on the street. Constitutional protections should not be dependent upon a line item in a municipal budget." 608 A.2d at 484.

The jury found that the individual plaintiffs here suffered personal injury as a result of those police actions that the City contended were reasonably required under the circumstances for the execution of the search warrant, circumstances not in any way created by the plaintiffs. The jury awarded plaintiffs compensation under the Fourth Amendment for damages caused by conduct that was excessive in terms of time and scope. However, looking at the conduct of the police during the time period when that conduct may have been necessary, and determining that injury was nevertheless caused to innocent persons, the jury found a taking of property without compensation.

In County of Sacramento v. Lewis, 523 U.S. 833 (1998), the Supreme Court addressed the constitutional rights of an innocent party who was the unintended victim of a police pursuit. In Lewis, police officers were responding to a call to break up a fight when they saw a motorcycle approaching at high speed, in which respondents' decedent, Philip Lewis, was a passenger. The officers turned on their rotating lights, yelled for the cycle to stop, and pulled their car closer to attempt to pen in the cycle, but the cycle driver maneuvered between the two cars and sped off. The officers immediately began a high-speed pursuit through a residential neighborhood, which ended after the cycle tipped over, and the police car skidded into Lewis, causing massive injuries and death. The Lewis estate brought a Section 1983 action, alleging deprivation of Lewis' Fourteenth Amendment substantive due process right to life. The district court granted summary judgment for the defendants under the doctrine of qualified immunity. The ninth circuit reversed, holding, inter alia, that the appropriate degree of fault standard for substantive due process liability for high-speed police pursuits is deliberate indifference to, or reckless disregard for, a person's right to life and personal security.

The Supreme Court reversed, holding that the appropriate standard for a Fourteenth Amendment substantive due process analysis is that which shocks the conscience. Id. at 846-47 (citing Rochin v. California, 342 U.S. 165, 172-73 (1952)). Applying that standard, the Court found that, in a police pursuit case, where an innocent party was harmed unintentionally by the police, no substantive due process liability could possibly attach:

> Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment redressible by an action under § 1983.

Id. at 854. Applying this rationale to the facts of Lewis, the Court continued:

> [Officer] Smith was faced with a course of lawless behavior for which the police were not to blame. They had done nothing to cause Willard's high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard's outrageous behavior was practically instantaneous, and so was Smith's instinctive response.

Id. at 855.

Before examining Lewis' claim in this fashion, the Court found that a substantive due process analysis was appropriate, as opposed to a Fourth Amendment inquiry. The Court reasoned that Graham was inapposite, since "substantive due process analysis is . . . inappropriate in this case only if respondents' claim is 'covered by' the Fourth Amendment. It is not. The Fourth Amendment covers only 'searches and seizures,' neither of which took place here. No one suggests that there was a search, and our cases foreclose finding a seizure." Id. at

843-44 (citing California v. Hodari D., 499 U.S. 621 (1991); Brower v. County of Inyo, 489 U.S. 593, 596-97 (1989)).

The fundamental difference between the facts of Lewis and the instant case is that, here, there was a seizure; in the former, neither a search nor a seizure occurred. For the very reason that substantive due process analysis would be inapposite here, Fifth Amendment takings analysis is appropriate. In the cases in which courts have applied Fifth Amendment takings analysis to claims for destruction of property, the plaintiffs therein were all subject to a search and/or seizure. See Wallace, 608 A.2d at 481 ("The novel question presented in this case is whether the destruction of the property of an innocent third party by the police pursuant to a lawfully executed search warrant requires the innocent third party to be compensated for his loss."); In contrast, a long line of Supreme Court and circuit cases stands for the proposition that a police chase does not constitute a search or seizure under the Fourth Amendment. See, e.g., Hodari D., 499 U.S. at 626 (holding that a police pursuit in attempting to seize a person does not amount to a "seizure" within the meaning of the Fourth Amendment); Brower, 489 U.S. at 596-97 (noting that "a Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), . . . but only when there is governmental termination of freedom of movement through means intentionally applied"); Campbell v. White, 916 F.2d 421, 423 (7th Cir. 1990) (following Brower and finding no seizure where police officer accidentally struck and killed fleeing motorcyclist during high-speed chase), cert. denied, 499 U.S. 922 (1991); Evans v. Avery, 100 F.3d 1033, 1036 (1st Cir. 1996) (noting that "outside the context of a seizure, . . . a person injured as a result of police misconduct may prosecute a substantive due process claim under section 1983"); Pleasant v.

Zamieski, 895 F.2d 272, 276 n.2 (6th Cir.) (noting that Graham "preserve[s] Fourteenth Amendment substantive due process analysis for those instances in which a free citizen is denied his or her constitutional right to life through means other than a law enforcement official's arrest, investigatory stop or other seizure"), cert. denied, 498 U.S. 851 (1990). Applying Graham to this latter line of cases, then, as discussed supra, courts have found substantive due process to be the only remedy available to innocent victims of police chases, because - since no search or seizure had occurred - there is no other appropriate constitutional provision for such claims. In Lewis, the Court emphasized that this analysis was appropriate because of the immediacy of the situation, over which the officers had no control:

> [W]hen unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates the "large concerns of the governors and the governed." Daniels v. Williams, 474 U.S., at 332, 106 S. Ct., at 665 [applying the "shocks the conscience" standard to Eighth Amendment prison riot cases]. Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983.

523 U.S. at 853-54.

Moreover, as the language of Lewis suggests, the "shocks the conscience" standard applied in substantive due process analysis for police pursuit cases simply does not fit the facts of the instant case. Rather, the instant case is more closely analogous to those of prison custody cases, where government officials generally have the luxury of deliberating on decisions that impact the welfare of prisoners. "As the very term 'deliberate indifference' implies, the

standard is sensibly employed only when actual deliberation is practical, and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory under a regime that incapacitates a prisoner to exercise ordinary responsibility for his own welfare." Lewis, 523 U.S. at 851. Similarly, the decision to seize innocent parties in the execution of a search warrant, whether reasonable or unreasonable, is quite different from the split-second decision that an officer makes when he decides to pursue a fleeing felon.[9]

While deliberate indifference would be the appropriate standard to apply if the court were to conduct a substantive due process analysis in this case, the Court's holding in Graham precludes such an undertaking in the first place. Supra. Because of Graham's emphasis that substantive due process is a catch-all provision that should only be used as a last resort, absent more applicable textual provisions of the Constitution, see 490 U.S. at 395; Albright, 510 U.S. at 288-89 (Souter, J., concurring); Lewis, 523 U.S. at 842-44, plaintiffs' claim cannot be analyzed under the due process clause of the Fifth Amendment.[10]

The Takings Clause of the Fifth Amendment, however, provides both the textual support as well as Supreme Court precedent for plaintiffs' claim for bodily injury, which is at essence that they should be compensated for their private property damage - i.e., the length and

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[9]The Court also clarified that the meaning of "deliberate" did not depend on the actual amount of time that an officer has in any particular situation, e.g., a decision to refuse medical treatment to a prisoner, or, in this case, the decision to force plaintiffs down to the floor and handcuff them for approximately two hours during the execution of a search warrant, but rather reflected the nature of the custodial situation. Lewis, 523 U.S. at 851 n.1.

[10]Furthermore, it is important to note that here, in contrast to Graham and Lewis, plaintiffs did not bring substantive due process claims. It would be improper for this court to construe claims as such, when Graham warns that claims *actually brought* under substantive due process are only appropriate as a last resort.

humiliating nature of their detention - because, as innocent parties, they should not bear solely the cost of a public benefit, the execution of the search warrant. See Armstrong v. United States, 364 U.S. 40 (1960 ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); Urbanski v. Horn, 1998 WL 661531, at *7 (E.D. Pa. 1998) (quoting Yee v. City of Escondido, 503 U.S. 519, 522 (1992)) ("By its terms, the takings clause comes into play when the government takes private property for 'public use.'").

In the instant case, it is undisputed that innocent plaintiffs were subject to a seizure during the City's execution of the warrant on the A to Z Variety Store, and therefore substantive due process analysis would have been inappropriate, because a claim existed under the Fourth Amendment. See Graham, supra. In order for a taking to have occurred, in the realm of police action for public benefit, this court finds, a seizure in the Fourth Amendment context first had to have occurred. As discussed supra, whether or not that search or seizure violated an innocent party's Fourth Amendment rights tells only part of the story. In such cases, the Fourth Amendment does not always serve to redress all harms suffered by such a plaintiff pursuant to that search and/or seizure. See Wallace, 608 A.2d at 481. And, in such cases, there is no reason under Graham, Lewis, or their respective progenies, why personal injury, a subset of private property, cannot be redressed by the Takings Clause of the Fifth Amendment.

Further, the court finds that a Takings analysis, as opposed to substantive due process or solely a Fourth Amendment inquiry, is most appropriate for the facts of this particular case. This conclusion is supported by the text of the Takings Clause, and that caselaw which has

attempted to define what does or does not constitute a taking. Unlike the Due Process Clause, the Takings Clause is not intended to prevent government action. Rather, it predicates the legitimacy of government action upon adequate compensation. Eastern Enterprises v. Apfel, 524 U.S. 554 (1998) (Bryer, J., dissenting); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 314-15 (1987) (stating that the Takings Clause is "designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"); Armstrong v. United States, 364 U.S. 40, 49 (1960) (stating that the Takings Clause was designed to prevent the government from forcing people to bear the costs that in all fairness should be borne by the public).

In this case, it was never argued that plaintiffs' personal injuries, to the extent that they were the reasonable byproduct of the police execution of a valid warrant, constituted an arbitrary deprivation, without due process of law. See Eastern Enterprises, 524 U.S. at 537 (finding that, in order to establish that the Coal Act, as applied, violated plaintiff's substantive due process rights, plaintiff must demonstrate that its liability under the Act is "arbitrary and irrational."). Rather, as the jury found, the police seized plaintiffs' personal property under the authority of a valid warrant. As innocent third parties, plaintiffs should not bear the taking of their property - that is, the physical damage to their persons - for public use.

Further, the Supreme Court has held that the concept of "property" need not be limited to physical, tangible items, but should more properly be seen as encompassing legal rights and privileges. See United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (describing property as "the group of rights inhering in the citizen's relation to [a] physical thing,

as the right to possess, use and dispose of it"). For purposes of determining whether the government's action has resulted in a taking, three relevant fields of inquiry are (1) whether the government's action entails physical invasion of plaintiff's property, (2) the extent to which it results in diminution in value of that property, and (3) the degree to which it interferes with plaintiff's "investment-backed expectations." Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707, 715 (3d Cir. 1985) aff'd, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

Government action can constitute a physical invasion of a plaintiff's property, even if it is only temporary. Cooper v. United States, 827 F.2d 762, 763-64 (Fed. Cir. 1987); Kimball Laundry Co. v. United States, 338 U.S. 1, 15 (1949) (finding that a temporary invasion can constitute a taking and, in that case, actually effected more damage to plaintiffs than if the res had been taken permanently). Here, the jury could have reasonably found physical loss. For example, plaintiff Jones suffered an injury to her back, and all three individuals suffered some level of temporary physical damage to their wrists from the application of handcuffs, as found by the jury. The special interrogatories submitted to the jury on this issue required the jury to find whether each plaintiff had "proven that [he or she] suffered physical damage as a result of the execution of the search warrant for the A to Z Variety Store, " and, if so, to quantify the amount of that damage. The jury found that all three plaintiffs suffered such damage, and awarded monetary damages accordingly. Finally, there is no question that the plaintiffs here had a reasonable expectation to be free from all physical damage to their person and property during the execution of the warrant. Since the City deliberately chose to execute the warrant in a

manner that subjected plaintiffs, under the rubric of reasonableness, to physical damage, plaintiffs were entitled to compensation for the taking.

III. CONCLUSION

For the foregoing reasons, the City's Renewed Motion for Judgment as a Matter of Law, Pursuant to Rule 50(b), is DENIED.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONITA JONES, et al.	:	
	:	
v.	:	
	:	
CITY OF PHILADELPHIA	:	CIVIL ACTION NO. 99-455

ORDER

AND NOW, this ___ day of October 2001, upon consideration of Defendant City of Philadelphia's Renewed Motion for Judgment as a Matter of Law Pursuant to Rule 50(b), and the arguments of the parties, it is hereby ORDERED that the motion is DENIED.

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BY THE COURT:

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JAMES T. GILES C.J.

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