

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

FRED LESHER, JR. and	:	
ROMONA LESHER, h/w,	:	CIVIL ACTION
Plaintiffs,	:	
	:	
v.	:	NO. 02-CV-1333
	:	
COLWYN BOROUGH,	:	
DARBY BOROUGH,	:	
POLICE OFFICER SCOTT MAHONEY,	:	
POLICE OFFICER JOSEPH O'DONNELL,:	:	
POLICE OFFICER MARK DELVECCHIO,:	:	
and POLICE OFFICER JOHN DOE,	:	
Defendants.	:	

**MEMORANDUM**

**GREEN, S.J.**

**September \_\_\_\_\_, 2002**

Presently before the Court are: (1) Defendant Colwyn Borough's Motion to Dismiss and Plaintiffs' Response thereto; and (2) Defendants Darby Borough, Police Officer Joseph O'Donnell and Police Officer Mark Delvecchio's Motion to Dismiss and Plaintiffs' Response thereto. For the following reasons, Defendants' motions will be denied in part, and granted in part.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

According to the Complaint, on March 26, 2000, at approximately 9:00 p.m., Police Officers Scott Mahoney, Joseph O'Donnell and Mark Delvecchio, while on patrol, encountered Plaintiff Fred Leshner ("Plaintiff") at his home.<sup>1</sup> Plaintiff, who was lawfully at his residence, claims that sometime thereafter, the Defendant officers brutally beat him. Plaintiff further alleges that he suffered said beating even though he committed no legal offense, did not attempt

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<sup>1</sup>Police Officers Scott Mahoney, Joseph O'Donnell and Mark Delvecchio will be referred to as the "Defendant officers" unless otherwise indicated.

to strike the Defendant officers, nor engaged in any conduct that would justify the acts of the Defendant officers. It is unclear whether Plaintiff was arrested, detained, or prosecuted for any crime.

Thereafter, on April 1, 2002, Plaintiff and his wife, Romona Leshner, filed a nine (9) count Complaint against Colwyn Borough, and its Police Officer Scott Mahoney, and Darby Borough, and its Police Officers Joseph O'Donnell, Mark Delvecchio and John Doe.<sup>2</sup> In Count I, Plaintiff brought an action under 42 U.S.C. §§ 1983 and 1988 against the Defendant officers involved in the incident, alleging that they had used excessive force in violation of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments. In Counts II and III, Plaintiff brought an action under 42 U.S.C. §§ 1983 and 1988 against Defendants Colwyn Borough and Darby Borough, respectively, claiming that these municipalities, as a custom, policy and practice, failed to properly train and discipline their police officers, resulting in a violation of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments. Plaintiff also charged Defendants Colwyn Borough and Darby Borough with negligence (Counts V and VI, respectively) and alleged state law claims of assault and battery (Count IV) and intentional and/or negligent infliction of emotional distress (Count VII) against all Defendants. In Count VIII, Plaintiff requested punitive damages from all Defendants. Finally, Plaintiff's wife charged all Defendants with loss of consortium (Count IX).

Defendants have moved to dismiss Plaintiffs' Complaint and Plaintiffs have responded thereto. Pursuant to 28 U.S.C. § 1331, jurisdiction is premised on original jurisdiction, and

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<sup>2</sup>Initially, Plaintiffs' Complaint alleged claims against "Darby Township." The Complaint was subsequently amended to substitute "Darby Borough" for Darby Township.

pursuant to 28 U.S.C. § 1367(a), the Court will exercise supplemental jurisdiction over Plaintiffs' state law claims because they are "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

## **II. LEGAL STANDARD**

The "notice pleading" approach governs the standard of specificity regarding motions to dismiss civil rights claims pursuant to 42 U.S.C. § 1983. As a unanimous Supreme Court in Swierliewicz v. Sorema, 122 S. Ct. 992 (2002), stated,

[g]iven the Federal Rules' simplified standard for pleading, a court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. If the pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus on the merits of a claim.

Id. at 998-99 (internal citations omitted).

Therefore, in evaluating a motion to dismiss, a court must accept as true all well pleaded allegations of the complaint. See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). Nevertheless, "a court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997) (citations omitted). However, because granting such a motion results in a determination on the merits at an early stage of the plaintiff's case, the district court must "construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v.

Upper Darby Township, 838 F.2d 663, 665-66 (3d Cir. 1988), *cert. denied*, 489 U.S. 1065 (1989) (citations omitted).

### III. DISCUSSION

#### A. Count I- Excessive Force

In Count I of his Complaint, Plaintiff asserts that the excessive force used by the Defendant officers gives rise to a cause of action under 42 U.S.C. §§ 1983 and 1988.<sup>3</sup> Section 1983 “is not itself a source of substantive rights”; rather, it provides “a method for vindicating federal rights elsewhere conferred.” Baker v. McCollan, 443 U.S. 137, 144, n. 3 (1979). Section 1983 provides a cause of action to a plaintiff who has been deprived of any right, privilege or immunity secured by the United States Constitution or the laws of the United States. See 42 U.S.C. § 1983.<sup>4</sup> To properly state a claim under § 1983, a plaintiff must allege that (1) he was deprived of a federally protected right and (2) the deprivation was committed by a state actor. Here, there is no dispute that the Defendant officers were acting under color of state law during the alleged beating of Plaintiff. There is a dispute, however, as to the particular federal rights violated.

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<sup>3</sup>Upon review of the Complaint, it is not clear how Plaintiff wishes to proceed under 42 U.S.C. § 1988. However, Plaintiff alleges claims under 42 U.S.C. § 1983, and to the extent that he is a prevailing party under that statute, he may seek attorney’s fees under § 1988.

<sup>4</sup>42 U.S.C. § 1983 states in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

1. Fourth, Fifth and Fourteenth Amendments

The first step in addressing an excessive force claim brought under § 1983 is identifying the specific constitutional right allegedly infringed. See Baker 443 U.S. at 140. Plaintiff asserts that the excessive force used by the Defendant officers during the alleged beating deprived him of his rights under the Fourth, Fifth, Eighth, and Fourteenth Amendments. In their motion, Defendant Police Officers O'Donnell, and Delvecchio cite Graham v. Connor, 490 U.S. 386 (1989), arguing that the appropriate constitutional source of an excessive force claim is the Fourth Amendment, not the substantive due process rights derived from the Fifth and Fourteenth Amendments. Defendants also challenge Plaintiff's Eighth Amendment claim.

In Graham, the Supreme Court unequivocally decided that the Fourth Amendment governs claims that law enforcement officials used excessive force in the course of an arrest, investigatory stop, or other "seizure" of a person. See id. at 395. The Court determined that the Fourth Amendment and its "reasonableness standard," rather than the substantive due process provisions of the Fifth and Fourteenth Amendments, was the most appropriate ground for claims of excessive force, reasoning 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.

In later opinions, the Supreme Court explained that Graham,

does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, Graham simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (quoting United States v. Lanier, 520 U.S. 259, 272, n. 7 (1997)).

The Fourth Amendment provides that “the right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated . . . .” The Fourth Amendment, therefore, covers “searches and seizures.” A “seizure” occurs within the meaning of the Fourth Amendment only when a government actor, “by means of physical force or show of authority, . . . in some way restrain[s] the liberty of a citizen.” Terry v. Ohio, 392 U.S. 1, 19, n. 16 (1968). A show of authority exists when the words and actions of the government actor convey the message to a reasonable person that he was not free to disregard the government actor and “go about his business.” Florida v. Bostick, 501 U.S. 429, 437 (1991) (quotation omitted).

Here, Plaintiff’s excessive force claim arises in the context of an alleged police beating. Specifically, Plaintiff alleges that the Defendant officers encountered him at his home and brutally assaulted him without provocation. Although Plaintiff provides few details concerning the incident, in construing the Complaint in the light most favorable to Plaintiff, it appears that Plaintiff was “seized” within the meaning of the Fourth Amendment. As such, Plaintiff’s excessive force claim against the Defendant officers must be analyzed under the “reasonableness standard” of the Fourth Amendment, not the substantive due process standard of the Fifth and Fourteenth Amendments. Although Defendant Darby Borough and Police Officers O’Donnell and Delvecchio argue that Plaintiff did not plead a violation of the Fourth Amendment in the Complaint, Plaintiff clearly referenced the Fourth Amendment throughout Count I. Accordingly, Plaintiff’s claims under the Fourth Amendment will survive Defendants’ motion to dismiss, but

Plaintiff's substantive due process claims under the Fifth and Fourteenth Amendments will be dismissed.

2. Eighth Amendment

The language of the Eighth Amendment, that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” . . . “suggests an intention to limit the power of those entrusted with the criminal law function of government” and is “designed to protect those convicted of crimes.” Ingraham v. Wright, 430 U.S. 651, 664 (1977). Consequently, the Eighth Amendment applies “only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.” Id. at 671, n. 40 (citation omitted). Accordingly, because Plaintiff does not allege that he was a prisoner who had been convicted of a crime at the time of the alleged beating, Plaintiff's Eighth Amendment claim in Count I of the Complaint is not properly pled and will be dismissed.

B. Counts II and III- Municipal Liability

In Counts II and III of the Complaint, Plaintiff seeks to impose liability on Defendants Colwyn Borough and Darby Borough, respectively, under 42 U.S.C. §§ 1983 and 1988<sup>5</sup> based upon their alleged custom, policy and practice of failing to properly discipline and train their police officers in violation of his rights under the Fourth, Fifth, Eighth and Fourteenth Amendments. However, as an initial matter, the Court will analyze Plaintiff's § 1983 claims under the Fourteenth Amendment as it incorporates the Fourth Amendments' prohibition against unreasonable searches and seizures.

In determining whether a government entity may be held liable under § 1983, the

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<sup>5</sup>See supra, note 3, at 4.

Supreme Court made clear in Monell v. New York Dep't of Social Servs., 436 U.S. 658 (1978), that liability may not be founded under the doctrine of *respondeat superior*, but rather only upon evidence that the governmental unit itself supported a violation of constitutional rights. Id. at 690-95. Thus, municipal liability attaches only when “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury.” Id. at 694.

The inadequacy of police training in the use of force may serve as the basis for § 1983 liability. See City of Canton v. Harris, 489 U.S. 378, 390, n. 10 (1989). However, an allegation of failing to train or supervise police officers can only be the basis for municipal liability under § 1983 if a plaintiff shows that the alleged inadequate training represents city policy and that the failure to train amounts to deliberate indifference to the constitutional rights of the victim. See id. at 388-92.

Defendants Colwyn Borough and Darby Borough contend that Plaintiff’s Monell claim against them must fail because Plaintiff has not pled that the alleged constitutional violations were a result of a policy or custom of the two Defendant municipalities. Defendants also contend that Plaintiff’s Monell claim is insufficient to establish municipal liability because it is broad and conclusory and describes only one incident.

Upon review of the pleadings, Defendants’ challenges to the sufficiency of Plaintiff’s factual pleadings are grounded in cases where courts employed a heightened specificity requirements for civil rights complaints under 42 U.S.C. § 1983. This heightened specificity requirement is contrary to the decision in Leatherman v. Tarrant County Narcotics and Intelligence & Coordination Unit, 507 U.S. 163 (1993), where the Supreme Court held that

plaintiffs alleging municipal liability under § 1983 may not be held to a heightened pleading standard. Id. at 164-67. Rather, complaints alleging municipal liability under § 1983 for failure to train are to be judged by the liberal, notice pleading standard of Rule 8. See id. at 168. In Leatherman, the Court stated that

[t]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a ‘short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the ground upon which it rests.

Id. (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957) (footnote omitted)).

Based upon the Court’s holding in Leatherman, I can only conclude that Plaintiff’s allegations of failure to discipline and train the Defendant officers and his allegation of an instance of an official use of excessive force provide Defendants with notice of what Plaintiff’s claim is and upon which ground it rests, and thus is sufficient to state a claim for municipal liability under § 1983. This conclusion is supported by the D.C. Circuit’s decision in Atchinson v. District of Columbia, 73 F.3d 418 (1996), which held that “it is possible for a section 1983 plaintiff to satisfy Rule 8 by alleging both a failure to train and an unusually serious instance of misconduct that, on its face, raises doubts about a municipality’s training policies.” Id. at 422-23. That court also held that pleading “deliberate indifference” without providing any factual basis for that allegation is sufficient. See id. at 423.

Here, Plaintiff alleges a failure to train and “deliberate indifference,” and in construing the Complaint in the light most favorable to Plaintiff, Plaintiff has alleged a serious instance of misconduct that, on its face, raises doubts about the municipalities’ training policies. Moreover, Plaintiff’s recitation of only one incident is sufficient to withstand Defendants’ motions to

dismiss. As stated in Atchinson, “a multiple-incident pleading requirement would be inconsistent with Leatherman’s premise.” Id.

[Rather], [a] complaint describing a single instance of official misconduct and alleging a failure to train may put a municipality on notice of the nature and basis of a plaintiff’s claim. Alleging an additional instance of misconduct would not necessarily improve the notice. Such a requirement would simply shift to the pleadings a burden that Leatherman reserves for a later stage of litigation.

Id. Therefore, Defendants’ arguments are unavailing and their motions to dismiss Plaintiff’s claims of municipal liability under § 1983 in Counts II and III will be denied.

C. Counts IV, V, VI, VII, and IX - State Law Claims

Defendants Colwyn Borough and Darby Borough move to dismiss Plaintiffs’ alleged state law claims. The state law claims asserted against them are assault and battery, negligence, intentional and/or negligent infliction of emotional distress<sup>6</sup>, and loss of consortium. These claims, however, will be dismissed against Defendants Colwyn Borough and Darby Borough pursuant to the Political Subdivision Tort Claims Act (“Tort Claims Act” or the “Act”), which, *inter alia*, shields municipalities from liability for state law tort claims. See 42 Pa. Cons. Stat § 8541.<sup>7</sup> Under the Act, injured parties may recover from a municipality only if: (1) damages

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<sup>6</sup>Although Defendants argue that the tort of intentional infliction of emotional distress has not been recognized in Pennsylvania as a cause of action, for purposes of this motion, there is no need to explicitly address this issue. Nevertheless, the Pennsylvania Supreme Court has referenced the tort of intentional infliction of emotional distress. See, e.g., Taylor v. Albert Einstein Med. Ctr., 754 A.2d 650 (Pa. 2000) (stating that “[a]lthough we have never expressly recognized a cause of action for intentional infliction of emotional distress, . . . we have cited the section as setting forth the minimum elements necessary to sustain such a cause of action.” Id. at 652).

<sup>7</sup>Section 8541 of the Act provides that “[e]xcept as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.”

would otherwise be recoverable under common law or statute; (2) the injury was caused by the negligent act of the local agency or employee acting within the scope of his official duties; and (3) the negligent act falls within one of the eight enumerated categories. See 42 Pa. Cons. Stat. § 8542. The eight (8) exceptions to the grant of general immunity are the following: (1) vehicle liability; (2) the care, custody and control of personal property; (3) the care, custody and control of real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) the care, custody and control of animals. See 42 Pa. Cons. Stat. § 8542(b). These exceptions must be construed strictly because of the clear legislative intent to insulate government from exposure to tort liability. See Lockwood v. City of Pittsburgh, 751 A.2d 1136, 1139 (Pa. 2000).

Even viewing the Complaint in the light most favorable to Plaintiffs, none of Plaintiffs' state law claims falls under any of the eight (8) exceptions to governmental immunity enumerated in Section 8542(b) of the Act. Pursuant to section 8550 of the Act, the allegations against the Defendant officers for assault and battery, intentional and/or negligent infliction of emotional distress, and loss of consortium will survive the instant motions to dismiss because § 8550 denies immunity to any governmental employee whose actions cause an injury and which constitute a "crime, actual fraud, actual malice or willful misconduct . . . ." 42 Pa. Cons. Stat. § 8550. However, because "it is only the immunity of the governmental employee that caused the injury which is eliminated under [section 8550]," the immunity of Defendants Colwyn Borough and Darby Borough remains intact. Lumumba v. Philadelphia Dep't of Human Servs., 1999 U.S. Dist. LEXIS 7904, No. 98-5195, at \* 13-14 (E.D. Pa. May 21, 1999). Accordingly, Plaintiffs' claims of assault and battery (Count IV), negligence (Counts V and VI), intentional and/or

negligent infliction of emotional distress (Count VII), and loss of consortium (Count IX) against Defendants Colwyn Borough and Darby Borough only will be dismissed.

D. Count VIII- Punitive Damages

A municipality cannot be held liable for punitive damages brought under § 1983. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). As such, Plaintiff is precluded from seeking punitive damages from Defendants Colwyn Borough and Darby Borough. Accordingly, Plaintiff's claim for punitive damages against the Defendant Boroughs will be dismissed.

Plaintiff also seeks punitive damages against the Defendant officers in their official and individual capacities. Yet, because claims against defendants in their official capacities represent actions against the municipality, Plaintiff's claims against the Defendant officers in their official capacities will be dismissed. See Brandon v. Holt, 469 U.S. 464, 471-72 (1985). However, Plaintiff's claim for punitive damages against the Defendant officers in their individual capacities will survive the instant motions to dismiss.

An appropriate order follows.

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v.	:	NO. 02-CV-1333
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COLWYN BOROUGH,	:	
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POLICE OFFICER SCOTT MAHONEY,	:	
POLICE OFFICER JOSEPH O'DONNELL,:	:	
POLICE OFFICER MARK DELVECCHIO,:	:	
and POLICE OFFICER JOHN DOE,	:	
Defendants.	:	

**ORDER**

**AND NOW**, this \_\_\_\_\_ day of September, 2002, upon consideration of Defendant Colwyn Borough's Motion to Dismiss and Plaintiffs' Response thereto and Defendants Darby Borough, Police Officer Joseph O'Donnell, and Police Officer Mark Delvecchio's Motion to Dismiss and Plaintiffs' Response thereto, **IT IS HEREBY ORDERED** that:

1. Plaintiff's excessive force claims in Count I against Defendant Police Officers Scott Mahoney, Joseph O'Donnell, Mark Delvecchio, and John Doe based on alleged violations of the Fifth Amendment, Eighth Amendment and Fourteenth Amendment are **DISMISSED**;
2. Plaintiff's 42 U.S.C. § 1983 claims in Count II against Defendant Colwyn Borough based on alleged violations of the Fifth Amendment and Eighth Amendment are **DISMISSED**;
3. Plaintiff's 42 U.S.C. § 1983 claims in Count III against Defendant Darby Borough based on alleged violations of the Fifth Amendment and Eighth

Amendment are **DISMISSED**;

4. Plaintiff's state law claims in Counts IV, V, VII and IX against Defendant Colwyn Borough are **DISMISSED**;
5. Plaintiff's state law claims in Counts IV, VI, VII and IX against Defendant Darby Borough are **DISMISSED**;
6. Plaintiff's claim for punitive damages in Count VIII against Defendants Colwyn Borough, Darby Borough, and Defendant Police Officers Scott Mahoney, Joseph O'Donnell, Mark Delvecchio, and John Doe in their official capacities is **DISMISSED**; and
7. Defendants' motions are **DENIED** in all other respects.

BY THE COURT:

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CLIFFORD SCOTT GREEN, S.J.