

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

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KEITH ROSENBERG,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO. 01-2514
	:	
MICHAEL JOHN VANGELO, DOUGLAS D.	:	
SCHLEGEL, LAWRENCE R. PALMER,	:	
THOMAS F. GOLDSMITH and THE CITY	:	
OF EASTON,	:	
	:	
Defendants.	:	

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**MEMORANDUM**

ROBERT F. KELLY, Sr. J.

APRIL 18, 2002

Presently before this Court is the Defendants’ Motion for Partial Summary Judgment on: (1) Count I of the Plaintiff Keith Rosenberg’s (“Rosenberg”) Complaint, alleging violations of 42 U.S.C. § 1983 against the Defendants Douglas D. Schlegel (“Schlegel”), a Captain of the Easton Police Department; Lawrence R. Palmer (“Palmer”), the Chief of the Easton Police; and Thomas F. Goldsmith (“Goldsmith”), the Mayor of Easton (together, the “Supervisor Defendants”); (2) Count II, alleging intentional infliction of emotional distress against all of the Defendants; and (3) Count IV, alleging negligent infliction of emotional distress against all of the Defendants. Rosenberg’s claims arise out of an incident where he alleges that the Defendant Officer Michael John Vangelo (“Vangelo”) allowed his police canine, Bere, to bite Rosenberg’s face and shoulder. For the reasons that follow, the Motion will be granted in part and denied in part.

## **I. FACTS**

In his Complaint, Rosenberg alleges that in the City of Easton, Pennsylvania, on March 6, 1999, he was a passenger in a stolen vehicle which was being pursued by the police. Rosenberg further alleges that he fled from the vehicle when it stopped at an intersection, ran from the police, and was subdued on the ground by police officers. Lastly, Rosenberg alleges that while he was completely subdued on the ground, Vangelo allowed Bere to repeatedly bite Rosenberg, seriously injuring him. Rosenberg filed a complaint with the Court of Common Pleas for Northampton County on April 24, 2001, which was removed to this Court on May 18, 2001. The Defendants filed the present Partial Motion for Summary Judgment on March 14, 2002.

## **II. STANDARD**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper “if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). Essentially, the inquiry is “whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-252 (1986). The moving party has the initial burden of informing the court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson, 477 U.S. at 249. A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248.

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present “specific facts showing that there is a genuine issue for trial.” FED. R. CIV. P. 56(e). Similarly, the non-moving party cannot rely on unsupported assertions, conclusory allegations, or mere suspicions in attempting to survive a summary judgment motion. Williams v. Borough of W. Chester, 891 F.2d 458, 460 (3d Cir. 1989)(citing Celotex, 477 U.S. at 325 (1986)). Further, the non-moving party has the burden of producing evidence to establish prima facie each element of its claim. Celotex, 477 U.S. at 322-23. If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Id. at 322;Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

### **III. DISCUSSION**

#### **A. Supervisory Liability Under 42 U.S.C. § 1983**

Taking the facts in the light most favorable to the Plaintiff, as we must on summary judgment, genuine issues of material fact remain regarding whether the Supervisor Defendants are liable as supervisors for Vangelo’s actions. Rosenberg claims that Schlegel, Palmer and Goldsmith are liable as supervisors for Vangelo’s allegedly unconstitutional acts involving the canine attack upon him. If Rosenberg can establish supervisory liability, the Supervisor Defendants may escape liability only if they establish that they are entitled to qualified immunity. See Beers-Capitol v. Whetzel, 256 F.3d 120, 135 (3d Cir. 2001)(stating that the defendants bear the burden of proving that they enjoy qualified immunity). However, while the Supervisor Defendants couch their argument in terms of qualified immunity, in reality, they simply dispute whether Rosenberg has established a *prima facie* case of supervisory liability. In

fact, the Supervisor Defendants do not analyze the factors involved in the qualified immunity test at all, but only allege that they are not liable because they were not “directly and actively” involved in Vangelo’s conduct.<sup>1</sup> The Supervisor Defendants may not collapse the analyses of both the supervisory liability and the qualified immunity; both of these issues are separate and distinct. See Carter v. City of Phila., 181 F.3d 339, 357 n.1 (3d Cir. 1999)(stating that before determining whether an immunity defense is available, it is proper to determine whether there has been a constitutional violation).

As stated, Rosenberg must establish supervisory liability. Rosenberg may not simply establish *respondeat superior*. See Monell v. Dept. of Soc. Servs. of City of N.Y., 436 U.S. 658, 691-92 (1978). The Third Circuit, in Brown v. Muhlenberg Township, 269 F.3d 205 (3d Cir. 2001), recently stated that:

In Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989), this court identified the elements of a supervisory liability claim. The plaintiff must (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the existing custom and practice without the identified, absent custom or procedure created an unreasonable risk of the ultimate injury, (3) the supervisor was aware that this unreasonable risk

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<sup>1</sup> The Supervisor Defendants do acknowledge that “[t]he defense of qualified immunity shields governmental officials performing discretionary acts from civil liability as long as their conduct ‘does not violate a clearly established statutory or constitutional right of which a reasonable person would have known.’ Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).” However, they do not analyze: (1) whether under the proper standard, Rosenberg has alleged a violation of a constitutional right; (2) whether the right was clearly established at the time of the acts; or (3) whether a reasonable person in the official’s position would have known that his conduct would violate that right. See Amaro v. Taylor, 170 F. Supp.2d 460, 465 (D. Del. 2001). Instead, the Supervisor Defendants simply argue that there is no causal connection between the alleged injury and their actions or inactions because they were not “directly and actively” involved in Vangelo’s actions or Rosenberg’s subsequent arrest. This argument addresses whether there was supervisory liability, not whether the Supervisor Defendants enjoy qualified immunity.

existed, (4) the supervisor was indifferent to the risk; and (5) the underling's violation resulted from the supervisor's failure to employ that supervisory practice or procedure. We emphasized that "it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did." Sample, 885 F.2d at 1118. Rather, the plaintiff must identify specific acts or omissions of the supervisor that evidence deliberate indifference and persuade the court that there is a "relationship between the 'identified deficiency' and the 'ultimate injury.'" Id.

Brown v. Muhlenberg Tp., 269 F.3d at 216. Furthermore, a supervisor may be liable for failing to properly train, discipline or control a subordinate if the supervisor knew of a prior pattern of similar incidents or circumstances and acted in a manner that reasonably could be found to communicate a message of approval to the subordinate. Brown v. Byrd, No. 00-3118, 2000 WL 1780234, at \*6 (E.D. Pa. Dec. 1, 2000)(citing Montgomery v. De Simone, 159 F.3d 120, 126-27 (3d Cir. 1998); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997)).

Here, Rosenberg alleges that Schlegel, Palmer, and Goldsmith failed to properly train or discipline Vangelo and other officers after several similar incidents involving dog attacks and excessive force perpetrated by the Easton Police, including other incidents which involved Vangelo. Rosenberg also alleges that instead of disciplining the officers involved, the Supervisor Defendants unjustly exonerated and actually promoted some of the offending officers. Furthermore, Rosenberg alleges that the Supervisor Defendants have never addressed or responded to the pattern of excessive force, or devised methods or procedures for handling the issue. As a result of the Supervisor Defendants' knowledge of the past pattern of conduct, and their failure to correct the problem or implement effective safeguards, Rosenberg alleges that he

was seriously injured.<sup>2</sup>

The Supervisor Defendants do not dispute Rosenberg’s allegations of “deliberate indifference” which are detailed above. In fact, the Supervisor Defendants assume for the purposes of their argument that Rosenberg’s allegations of misconduct are true. Rather, the Supervisor Defendants only argue that in order to avoid supervisory liability, they simply need to show that they did not have “direct and active” involvement in the allegedly unconstitutional activities. Specifically, the Supervisor Defendants, relying on Brown v. Grabowski, 922 F.2d 1097 (3d Cir. 1990), argue that a supervisor must be “directly and actively” involved in the subordinate's unconstitutional conduct in order to be held liable as a supervisor. Brown v. Grabowski, 922 F.2d at 1119-20. In support of the argument that they were not “directly and actively” involved in the allegedly unconstitutional acts, the Supervisor Defendants assert that they did not have contact with Rosenberg on the day of his arrest, they did not give direction or instruction with respect to his pursuit or arrest, they were not present at his post-arrest processing, and they were not aware of his arrest until after it had occurred. However, since Brown v. Grabowski was decided, the Third Circuit and the United States Supreme Court has repeatedly stated that supervisory liability may be found where the supervisor was merely “indifferent” to a known risk. City of Canton v. Harris, 489 U.S. 378, 390 (1989); Beers-Capitol, 256 F.3d at 134; Brown v. Muhlenberg Tp., 269 F.3d at 216; Carter, 181 F.3d at 357; Baker v. Monroe Tp., 50 F.3d 1186, 191 n.3 (3rd Cir. 1995); Sample, 885 F.2d at 1118.

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<sup>2</sup> We will not comment upon whether Rosenberg’s allegations of supervisory liability are alleged with the required specificity as to each of the Supervisor Defendants, as the Supervisor Defendants have not raised this issue and thus Rosenberg has not had the opportunity to respond to it. Brown v. Muhlenberg Tp., 269 F.3d at 216.

Therefore, the Supervisor Defendants cannot succeed simply by showing that they were not “directly and actively” involved in the alleged activities when faced with evidence showing that they were “indifferent” to a known risk.

To summarize, contrary to the Defendant’s argument, a plaintiff may make out a claim for supervisory liability based upon the supervisor’s deliberate indifference to a known risk and the supervisor’s failure to respond appropriately to a known pattern of similar previous injuries. Id. Furthermore, neither of the parties has actually briefed the issue of qualified immunity, and therefore, it is inappropriate for us to rule on the issue at this time. Lastly, because Rosenberg has alleged sufficient facts to establish supervisory liability at this stage of the litigation, which have not been adequately disputed by the Supervisor Defendants, and because the Supervisor Defendants have not properly addressed the issue of qualified immunity, summary judgment cannot be granted in their favor.

**B. Intentional Infliction of Emotional Distress**

To recover for intentional infliction of emotional distress in Pennsylvania, Rosenberg must support his claim with competent medical evidence, in the form of expert medical evidence. Bolden v. S.E. Pa. Transp. Auth., 21 F.3d 29, 35 (3d Cir. 1994); DeBellis v. Kulp, 166 F. Supp.2d 255, 281(E.D. Pa. 2001)(citing Hackney v. Woodring, 652 A.2d 291, 292 (Pa. 1994)(per curium)). The deadline for expert reports has passed, and Rosenberg has failed to produce a medical expert report confirming his emotional distress. Therefore, because Rosenberg cannot establish a *prima facie* case of intentional infliction of emotional distress, summary judgment must be granted on this claim.

### C. Negligent Infliction of Emotional Distress

In order to prove a cause of negligent infliction of emotional distress, Rosenberg must prove, *inter alia*, that he suffered physical injuries as a result of the emotional distress. Sonlin ex rel. Sonlin v. Abington Mem'l Hosp., 748 A.2d 213, 217 (Pa. Super. 2000)(citing Mazzagatti v. Everingham by Everingham, 516 A.2d 672, 677 (Pa. 1986)). The Defendants argue that summary judgment is warranted on this claim because Rosenberg has failed to produce expert medical evidence of his physical injuries. However, contrary to the Defendant's argument, in Pennsylvania, expert medical evidence is not required to support a claim for negligent infliction of emotional distress. Tuman v. Genesis Associates, 935 F. Supp. 1375, 1386 (E.D. Pa. 1996)(stating that "Pennsylvania does not require medical evidence of physical injury to establish a negligent infliction of emotional distress claim"); Krysmalski by Krysmalski v. Tarasovich, 622 A.2d 298, 305 (Pa. Super. 1993)(stating that expert medical evidence is not required for a claim of negligent infliction of emotional distress, and that "the medical proof requirement was intended to buttress the requirement of proof of outrageous conduct in the context of intentional infliction of emotional distress claims").<sup>3</sup> Therefore, because expert medical evidence is not required to prove negligent infliction of emotional distress, summary judgment on this claim is not appropriate.

An appropriate Order follows.

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<sup>3</sup> It does appear, however, that all of the Defendants may be immune from suit for negligent infliction of emotional distress under the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S.A. § 8541, *et seq.* See Webb v. City of Phila., No. 98-2261, 1999 WL 793466, at \*9 (E.D. Pa. Oct. 6, 1999); Moser v. Bascelli, 865 F. Supp. 249 (E.D. Pa. 1994). However, the Defendants do not raise this argument in their Motion and thus Rosenberg has not had an opportunity to address the argument. Thus, we will not rule on this argument at this time.

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SCHLEGEL, LAWRENCE R. PALMER,  
THOMAS F. GOLDSMITH and THE CITY  
OF EASTON,

Defendants.

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CIVIL ACTION

NO. 01-2514

**ORDER**

AND NOW, this 18th day of April, 2002, upon consideration of the Defendants' Motion for Partial Summary Judgment (Dkt. No. 18), and any Responses and Replies thereto, it is hereby ORDERED that the Motion is GRANTED in part and DENIED in part. It is hereby further ORDERED that:

1. Summary Judgment is DENIED on Count I, alleging violations of 42 U.S.C. § 1983;
2. Summary Judgment is GRANTED on Count II, alleging Intentional Infliction of Emotional Distress; and
3. Summary Judgment is DENIED on Count IV, alleging Negligent Infliction of Emotional Distress.

BY THE COURT:

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Robert F. Kelly,

Sr. J.