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

MICHAEL and ANN HOGAN	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF EASTON, et al.	:	NO. 04-759

MEMORANDUM

Padova, J. **August , 2004**

Plaintiffs Michael Hogan ("Mr. Hogan") and Ann Hogan ("Mrs. Hogan"), who are husband and wife, have brought this action against the City of Easton ("the City"); Northampton County ("the County"); Thomas Goldsmith, the former mayor of the City; Larry Palmer, the former chief of the City's Police Department ("Police Department"); and the following other members of the City's Police Department: John Mazzeo, Jr., the former captain of the Police Department, and Police Officers Brian T. Herncane, Christopher G. Miller, Steven J. Parkansky, Scheldon M. Smith, Michael Orchulli, David M. Beitler, Dominick W. Marraccini, John D. Remaley, and Eugene Scott Casterline (collectively, the "Police Officers"). Plaintiff alleges federal constitutional and statutory violations pursuant to 42 U.S.C. § 1983 ("Section 1983") and Title II of the Americans with Disabilities Act("ADA"), 42 U.S.C. § 12132 ("Title II"). All Defendants, except for the County, have filed a motion to dismiss all seven counts pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons that follow, the Motion is granted in part and denied in part.

I. BACKGROUND

The Complaint alleges the following facts. Mr. Hogan has an Axis I diagnosis of Generalized Anxiety Disorder, Panic Disorder, and Obsessive Compulsive Disorder as well as an Axis II diagnosis of Borderline Personality Disorder and Histrionic Personality Disorder (Compl. ¶ 25.) The United States Social Security Administration found him disabled in August 2001. (Id. ¶ 24.) He has a history of experiencing panic attacks, during which he loses control over his actions; trembles; becomes nauseated; suffers abdominal distress, tachycardia, parasthesias, elevated blood pressure, and unsteady balance; and becomes debilitated and unable to perform any productive activity. (Id. ¶ 26.) Following panic attacks, Mr. Hogan has experienced depressive episodes with a diminished interest in all activities, a loss of physical energy, and feelings of worthlessness. (Id. ¶ 27.) His borderline personality disorder can cause his thinking to be dichotomous with no flexibility, while the histrionic component of the disorder can cause him to display dramatic emotional behaviors. (Id. ¶ 28-29.)

On the night of February 25, 2002, as a result of his mental health disorder, Mr. Hogan began to experience deterioration in his emotional condition and started to display irrational thinking. (Id. ¶ 30.) Mrs. Hogan attempted to intervene and redirect him. (Id.) She asked John Ditmars, a neighbor and close friend, to go to the Hogan residence to assist her in calming Mr. Hogan, to

redirect him, and to avert further emotional deterioration. (Id. ¶ 31.)

While Ditmars was talking to Mr. Hogan, Mrs. Hogan dialed "911" in an attempt to err on the side of caution in the event additional assistance was necessary. (Id. ¶ 32.) She was connected to the emergency dispatch service operated by the County. (Id.) The dispatch service advised the Police Officers that there was a domestic disturbance and that there was a possibility that a gun was involved. (Id. ¶ 36.)

By the time the Police Officers arrived at the Plaintiffs' home, Mr. Hogan was unarmed and had calmed down considerably, there was no dispute in progress, and there was no need for the police to be there or to remain. (Id. ¶ 37.) Officer Herncane arrived at approximately 8:05 p.m., while Mrs. Hogan was outside on the front porch and Mr. Hogan was inside by himself. (Id. 38.) He asked Mrs. Hogan where Mr. Hogan was and what his name was. (Id. ¶ 39.) Mrs. Hogan advised Officer Herncane that her husband's name was Michael Hogan, that he was inside the residence, and that there was no one else inside. (Id. ¶ 40.) Without further inquiry, notice, or consent, Officer Herncane proceeded immediately into Plaintiffs' residence. (Id.) Officer Herncane did not ask Mrs. Hogan any questions about the reported basis for the call or about Mr. Hogan's mental state, and he made no effort to determine whether there was any actual need or proper basis for the police to enter

into the Plaintiffs' residence. (Id. ¶ 41.) Officer Miller arrived approximately thirty seconds after Officer Herncane, and he immediately followed Officer Herncane into the residence, without speaking to Mrs. Hogan or anyone else. (Id. ¶ 44.)

Before the Police Officers entered the home, upon seeing the flashing lights of the vehicles outside, Mr. Hogan, who did not have his glasses on, went down to the basement in an attempt to avoid any interaction with the police. (Id. ¶ 47.) Officers Herncane and Miller entered the residence and immediately began yelling for Mr. Hogan. (Id. 48.) Mr. Hogan replied from the basement, asking why the Police Officers were there and whether he had done anything wrong. (Id. ¶ 50.) The Police Officers confirmed that Mr. Hogan had not done anything wrong and that he had not committed any crime. (Id. ¶ 50.) Mr. Hogan repeatedly and adamantly told the Police Officers that he did not want them in his house, that they were violating his constitutional rights, and that they should leave, but they did not leave. (Id. ¶ 51-52.)

Officers Orchulli and Smith arrived within approximately ten minutes, immediately entering the residence, and remaining there despite Mr. Hogan's repeated demands that the Police Officers leave. (Id. ¶ 53.) Mr. Hogan's cousin, E. Bruce Shull, who is a police officer in a neighboring municipality, had arrived on the scene earlier, as well as Mr. Hogan's sister, Sara Hogan, who is an attorney. (Id. ¶ 54.) Mr. Hogan's family members promptly advised

the Police Officers that Mr. Hogan was an emotionally disturbed person, that he suffered from anxiety and panic disorders and depression, and that he should be approached in a quiet, calm manner. (Id. ¶ 55.)

Despite accepted police practice standards, which dictate against the presence of K-9 units when responding to a domestic disturbance or dealing with an emotionally disturbed person, the Police Officers brought police dogs to the scene and allowed them to remain there. (Id. ¶ 59.) When Mr. Hogan heard the dogs barking, he commented on their presence, and the officers blatantly lied to him, denying that the dogs were there. (Id. ¶ 60.) When Mr. Hogan demanded why the Police Officers were in his house, Miller stated that they would leave as soon as they checked that Mr. Hogan was all right. (Id. ¶ 61.) Mr. Hogan advised them that he was all right and insisted again that they were violating his constitutional rights and that they should leave, but the Police Officers remained. (Id. ¶ 62.) Officer Orchulli repeatedly cursed at Mr. Hogan and treated him in a demeaning manner. (Id. ¶ 63.)

Mr. Hogan at various times asked to speak to Shull and his lawyer, Theresa Hogan, who is a fifteen-year veteran legal practitioner in the City of Easton, and who was known by the Police Officers. (Id. ¶ 65.) The Police Officers, acting with deliberate indifference, refused to use these peaceful mechanisms for resolving the stand-off, and instead isolated Mr. Hogan from his

private sources of aid. (Id. ¶ 66.) The Police Officers further escalated the situation, contrary to accepted police practices and Plaintiffs' constitutional and federal statutory rights, as Officers Orchulli and Mazzeo activated the City's SWAT team. (Id. 67.) At or about the same time, Officers Mazzeo, Parkansky, Beitler, Marraccini, Remaley, and Casterline, along with other police officers, entered and remained on Plaintiffs' property despite Mr. Hogan's insistence that the Police Officers leave. (Id. ¶ 68.)

Continuing his desperate efforts to avoid a confrontation with police, Mr. Hogan told the Police Officers that he would come upstairs if they could tell him what he did wrong, and if he did not do anything wrong, they should leave. (Id. ¶ 69.) The Police Officers acknowledged that Mr. Hogan had not done anything wrong but stated that they were nonetheless not going to leave the house. (Id. ¶ 70.) Mr. Hogan could hear the officers engaging in loud destructive action above the basement, which turned out to be their removal of the basement door from its hinges and the moving of the furniture. (Id. ¶ 71.)

As a result of the Police Officers' misconduct, including their reckless actions and inactions, Mr. Hogan's emotional state decomposed. (Id. ¶ 72.) Mr. Hogan felt trapped and severely fearful of the Police Officers. (Id. ¶ 73.) He became increasingly despondent about the situation, and the Police

Officers knew and/or reasonably should have known of his deteriorating emotional state. (Id. ¶ 75.) As the Police Officers were well aware, Mr. Hogan had a shotgun in his basement, which he picked up in self-defense. (Id. ¶ 76.) For approximately an hour and a half, Officers Miller and Orchulli communicated with Mr. Hogan, under the supervision of Officer Parkansky. (Id. ¶ 77.) As a result of the despondency and feelings of desperation brought on by the Police Officers' actions and inactions, Mr. Hogan announced that he was going to count down and that if the Police Officers did not leave, something bad would happen. (Id. ¶ 78.) Mr. Hogan counted down, but the police did not leave. (Id.) Frustrated that the Police Officers would not leave his home, and out of continuing fear that he would be harmed, Mr. Hogan counted down again, and this time when he got to zero and the Police Officers had not left, he fired one shot of birdshot into the basement wall. (Id. ¶ 79.) Mr. Hogan neither intended to cause harm nor did he cause harm. (Id.) The Police Officers called out to him to determine whether Mr. Hogan had shot himself. (Id. ¶ 80.)

Mr. Hogan immediately realized that he had erred in firing his weapon, and after a period of silence, he told the police that he was all right and that he had not meant to shoot the gun. (Id. ¶ 81.) At all relevant times, the Police Officers knew and/or should have known that Mr. Hogan was not a viable threat to them, and they made it clear to Mr. Hogan that they did not consider him to be a

viable threat. (Id. ¶ 82.) The Police Officers advised Mr. Hogan that even though they might have been able to leave, they were not going to leave. (Id. ¶ 83.) They said that if Mr. Hogan put the gun down they would let him talk to Shull. (Id. ¶ 84.) Mr. Hogan complied, but the Police Officers refused to let him speak to Shull. (Id. ¶ 85.) Their conduct caused Mr. Hogan's mental state to further decompose. (Id. ¶ 86.) He released water from the steam boiler in the basement and told the Police Officers that he had turned on the gas and that if they shot at him they would cause the house to explode. (Id. ¶ 87.) However, the Police Officers stationed outside the basement windows saw that Mr. Hogan was releasing water, not gas. (Id. ¶ 88.) Mr. Hogan never intended to harm the Police Officers, and he never attempted to harm them. (Id. ¶ 89.) He was exhausted and wanted the confrontation to end. (Id. ¶ 90.)

Miller instructed Mr. Hogan to go to the top of the steps, lay down his weapon on the landing, and surrender. (Id. ¶ 91.) There was a prolonged period during which Mr. Hogan could not hear any noise on the floor above him, and he believed the Police Officers were no longer in the immediate vicinity of the landing and that it was safe to surrender without being harmed. (Id. ¶ 92.) He disarmed his weapon and pulled the bolt back and the lever down in an attempt to demonstrate that it was unloaded and could not be fired. (Id. ¶ 93.) He climbed the steps and arrived at the

landing in a non-threatening manner, intending to fully surrender to the Police Officers. (Id. ¶ 94.) As he bent over to surrender his weapon by placing it on the floor, Officers Orchulli, Remaley, Marraccini, Beitler, and Casterline opened fire on him, without providing any warning, firing at least fourteen shots. (Id. ¶ 95.) Since the Police Officers were positioned at opposite ends of the house, targeting Mr. Hogan in the middle, when some of their shots missed Mr. Hogan they ricocheted in the direction of the Police Officers on the other side of the house. (Id. ¶ 96.)

After at least one of the Police Officers fired live rounds at Mr. Hogan, Officer Casterline fired an allegedly non-lethal weapon that filled the house with smoke, making it impossible for the Police Officers to see that Mr. Hogan had already been hit, and they continued to fire on Mr. Hogan. (Id. ¶ 97-98.) The Police Officers' shots hit Mr. Hogan in his stomach, right hand and left wrist, causing an arterial bleed. (Id. ¶ 99.) While Mr. Hogan was laying on the floor, the Police Officers yelled "don't move" and "show us your hands." (Id. ¶ 100.) Officer Mazzeo came over to Mr. Hogan, who was laying on the floor bleeding, and stepped on his wrist, making an audible crunch, which caused Mr. Hogan to pass out momentarily. (Id. ¶ 101.) Mr. Hogan regained consciousness when the Police Officers handcuffed him and dragged him across the floor to the next room. (Id.) The Police Officers did not attend to his wounds, leaving him to die on the floor. (Id. 102-103.) Shull

entered the residence and attempted to stop Mr. Hogan's bleeding. (Id. ¶ 104.)

Despite activating the SWAT team, the Police Officers did not have an ambulance immediately available, which caused a delay in getting Mr. Hogan the medical attention he required. (Id. ¶ 105.) Ultimately, he had to be evacuated via helicopter to a trauma unit. (Id. ¶ 106.) He spent approximately eight days in the hospital, followed by approximately five months recuperating at home. (Id. ¶ 107.)

At all times, the Police Officers agreed with and assisted each other in performing the various actions described and lent their support and the authority of the office to each other. (Id. ¶ 112.) Each of the Police Officers played a substantial role and provided input which affected the adverse actions against Plaintiffs. (Id. ¶ 114.) Defendants each advised, assisted, ratified, and/or directed the actions taken against Mr. Hogan. (Id. ¶ 113.)

As a direct and proximate result of Defendants' unlawful and discriminatory actions and inactions against Plaintiffs, Plaintiffs have suffered grievously and needlessly. (Id. ¶ 134.) Defendants' actions and inactions have caused permanent disabling and disfiguring injuries to Mr. Hogan and extreme emotional distress to both Mr. Hogan and Mrs. Hogan. (Id. ¶ 135-136.) Plaintiffs have experienced extreme mental and physical pain and suffering, the

loss of liberty, and the loss of their ability to enjoy the pleasures of life. (Id. ¶ 137.) In addition, Mr. Hogan has lost earnings, earning capacity, and the ability to provide services and earnings to his family; Mr. and Mrs. Hogan have suffered damage to their real and personal property and other incidental damage and were forced to incur significant medical expenses; and Mrs. Hogan has suffered a loss of consortium, including a loss of Mr. Hogan's services, contributions, society, comfort, and companionship. (Id. ¶ 138-141.)

The Complaint asserts causes of action against the City and the County for violation of the ADA (Count I); against the City under Section 1983 for developing and maintaining practices and customs of exhibiting deliberate indifference to the constitutional rights of others (Count II); against Goldsmith, Palmer, Mazzeo, Orchulli and Parkansky under Section 1983 for inadequately supervising and training the City's police officers (Count III); against the Police Officers under Section 1983 for unreasonable search and seizure, in violation of the Fourth Amendment (Count IV); against the Police Officers under Section 1983 for excessive use of force, in violation of the Fourth Amendment (Count V); against the Police Officers under Section 1983 for deprivation of substantive due process, in violation of Fourteenth Amendment (Count VI); and against Officers Orchulli and Smith under Section 1983 for abuse of process, in violation of the Fourteenth Amendment

(Count VII).[1]

II. LEGAL STANDARD

When determining a Motion to Dismiss pursuant to Rule 12(b)(6), the Court may look only to the facts alleged in the Complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well pleaded allegations in the Complaint and view them in the light most favorable to the Plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted when a Plaintiff cannot prove any set of facts, consistent with the Complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. DISCUSSION

The moving Defendants argue that Plaintiffs' ADA claim (Count I), Section 1983 claims against the Police Officers (Counts IV, V, VI, VII), and Section 1983 derivative claims (Counts II, III) fail as a matter of law.

A. Mrs. Hogan's Standing

As an initial matter, the Court notes that the claims asserted by Mrs. Hogan in Counts I, V, and VI are based on violations of Mr. Hogan's civil rights. It is well-established, however, that a

[1] With the exception of Count VII, which is asserted only by Mr. Hogan, all counts in the Complaint are asserted by both Mr. and Mrs. Hogan.

spouse has no standing to assert § 1983 claims that are premised on violations of the other spouse's civil rights. Pahle v. Colebrookdale Township, 227 F. Supp. 2d 361, 381 (E.D. Pa. 2002); see also Quitmeyer v. S.E. Pa. Transp., 740 F. Supp. 363, 370 (E.D. Pa. 1990) ("There is no authority to permit spousal recovery for loss of consortium based on violations of the other spouse's civil rights."); Nerosa v. Storecast Merchandising Corp., No. CIV.A. 02-440, 2002 WL 1998181, at *9 (E.D. Pa. 2002) (dismissing loss of consortium claim based on the ADA and other causes of action). Although a spouse is precluded from asserting derivative claims under § 1983, at least one court in this Circuit has concluded that "a husband or wife should be able to claim violations of his or her *own* constitutional rights under § 1983 for unlawfully government-imposed injuries to a spouse that have a devastating impact on their marriage; namely, he or she can allege deprivation of consortium without Due Process of Law." Pahle, 227 F. Supp. 2d at 381 (emphasis in original). However, the Complaint in this case "gives no hint that Mrs. [Hogan] planned to argue that her own constitutional rights were violated - a novel argument - and Defendants could not have had notice of such allegations." Id. at 384. Accordingly, the Motion is granted with respect to the claims asserted by Mrs. Hogan in Counts I, V, and VI.

B. The ADA

The moving Defendants seek dismissal of Count I, which asserts

that the City and the County violated Mr. Hogan's right to be free from discrimination on the basis of his disability under the ADA. Title II of the ADA states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. In order to state a claim for violation of Title II of the ADA, Mr. Hogan must prove the following: (1) he is disabled;[2] (2) he has been excluded from participation in or denied the benefits of services, programs, or activities provided by a public entity, or was otherwise discriminated against by a public entity; and (3) that such discrimination was based on his disability. Adelman v. Dunmire, Civ.A. No. 95-4039, 1997 WL 164240, at *1 (E.D. Pa. Mar. 28, 1997) (citations omitted).

Mr. Hogan alleges that the failure of the City and County to properly train its police officers for peaceful encounters with disabled persons resulted in discrimination against him under the ADA. In response, the moving Defendants assert that Count I should be dismissed because the effecting of an arrest by police officers is not a "service, program, or activity" for which a disabled person is entitled to reasonable accommodation.

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[2] It is undisputed that the Complaint adequately alleges that Mr. Hogan is disabled.

At least one other court in this Circuit has concluded that the failure of a municipality to adequately train its police officers to peacefully respond to persons with disabilities is actionable under Title II of the ADA. In Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232 (M.D. Pa. 2003), police officers shot and killed the decedent, who was mentally ill, while attempting to involuntarily commit him. 243 F. Supp. 2d at 233. In determining that plaintiffs' improper training claim fell within the ambit of the ADA, the Schorr court emphasized the breadth of Title II :

> Although to the lay reader [the language of Title II] may suggest only commonly available and publicly shared accommodations such as parks, playgrounds, and transportation, the Act in no way limits the terms 'services, programs, or activities' and appears to include all core functions of government. Among the most basic of these functions is the lawful exercise of police powers, including the appropriate use of force by government officials acting under the color of law.

Id. at 235. The court also noted that the United States Court of Appeals for the Third Circuit ("Third Circuit") has held that Congress intended the terms "program" and "activity," as used in Title II of the ADA, to be "all-encompassing." Yeskey v. Commonwealth of Pennsylvania Dep't of Corrections, 118 F.3d 168, 170 (3d Cir. 1997), aff'd, 524 U.S. 206 (1998). The court further cited a number of cases in which courts have determined that the ADA was applicable in the context of an arrest. See, e.g., Gorman v. Bartch, 152 F.3d 907 (8th Cir. 1998), rev'd on other grounds, Barnes v. Gorman, 536 U.S. 181 (2002) (finding that local police

department fell within the ADA definition of "public entity" and that a man injured while being transported to the police station after his arrest could pursue a claim under the ADA); Calloway v. Glassboro Dept. Of Police, 89 F. Supp. 2d 543 (D.N.J. 2000) (finding ADA applicable where deaf person was subjected to police investigative questioning without the assistance of a qualified interpreter); Barber v. Guay, 910 F. Supp. 790, 802 (D. Me. 1995) (holding that plaintiff's claim "that he was denied proper police protection and fair treatment due to his psychological and alcohol problems" during investigation and arrest was actionable under ADA); Jackson v. Inhabitants of Town of Sanford, Civ. A. No. 94-12, 1994 WL 589617, at *6 (D. Me. Sept. 23, 1994) (concluding that municipal defendant's contention that the ADA is inapplicable to arrests was "plainly wrong").

Based on Schorr and the authorities cited therein, the Court concludes that the Complaint states a valid claim under the ADA based on the failure of the City and County to properly train its police officers for encounters with disabled persons.[3]

[3] The Court's determination that Mr. Hogan's claim is actionable under the ADA is not inconsistent with Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000), the case on which the moving Defendants principally rely. In Hainze, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") rejected the plaintiff's claim that the county did not reasonably accommodate his disability by failing to adopt a policy that protected the well-being of people with mental illnesses in mental health crisis situations. The court specifically held that "Title II does not apply to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental

Accordingly, the Motion to Dismiss is denied with respect to Count I.

C. Section 1983

Section 1983 provides a remedy against "any person" who, under the color of the law, deprives another of his constitutional rights. 42 U.S.C. § 1983 (1994). To establish a claim under § 1983, a plaintiff must set forth: (1) a deprivation of a federally protected right, and (2) commission of the deprivation by one acting under color of state law.[4] Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997).

The moving Defendants seek dismissal of Count IV, in which Plaintiffs assert that the Police Officers violated their Fourth Amendment right to be free of unreasonable searches and seizures. The Fourth Amendment provides:

> 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 Warrants shall issue, but upon probable cause, supported by Oath or

disabilities, prior to the officer's securing of the scene and ensuring that there is no threat to human life." Id. at 801. However, the court went on to note that "[o]nce the area was secure and there was no threat to human safety, the [defendants] would have been under a duty to reasonably accommodate [plaintiff's] disability in handling and transporting him to a mental health facility." Id. at 802. In this case, the Complaint avers that the situation was under control and no one was in danger upon the arrival of the Police Officers at the Hogan residence. (Compl. ¶ 37.)

[4] It is undisputed that the Complaint adequately alleges that the Defendants acted under the color of state law.

> affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

In order to establish a claim under the Fourth Amendment, Plaintiffs must show that the actions of the Police Officers (1) constituted a "search" or "seizure" within the meaning of the Fourth Amendment; and (2) were unreasonable in light of the surrounding circumstances. Brower v. County of Inyo, 489 U.S. 593, 595-600 (1989). Warrantless entry into a home is a presumptively unreasonable search under the Fourth Amendment. Payton v. New York, 445 U.S. 573, 586 (1980). Courts have recognized, however, an exception to the warrant requirement for police officers' entry into a home when there are exigent circumstances. Pankhurst v. Trapp, 77 F.3d 707, 711 (3d Cir. 1996). Exigent circumstances can justify warrantless entry into a residence when police officers are in hot pursuit of a fleeing felon, when destruction of evidence is imminent, when there is a need to prevent a suspect's escape, or when there is a risk of danger to the police or to other people inside or outside the dwelling. Minnesota v. Olson, 495 U.S. 91, 100 (1990) (citing Welsh v. Wisconsin, 466 U.S. 740 (1984), State v. Olson, 436 N.W.2d 92 (Minn. 1989)). "[T]he state actors making the search must have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat." Good v. Dauphin County Social Services

for Children & Youth, 891 F.2d 1087, 1094 (3d Cir. 1989) (quoting People v. Smith, 7 Cal. 3d 282, 286 (1972)). The court must decide "'whether the officer's determination was objectively reasonable at the time in question, based on the reasonably discoverable information available to the officer the time.'" U.S. v. Sculco, 82 F. Supp. 2d 410, 417 (E.D. Pa. 2000) (quoting United States v. Tibolt, 72 F.3d 965, 969 (1st Cir. 1995)).

The moving Defendants argue that the Police Officers' warrantless entry into Plaintiffs' home was lawful and justified because the Police Officers were dispatched following Mrs. Hogan's "911" call reporting a domestic dispute that involved a gun. They contend that the call constituted "exigent circumstances," allowing the officers to enter the home to investigate. They further argue that entry into the Hogan's residence was necessary to ensure the safety of Mrs. Hogan from the threat of domestic violence.

Accepting the allegations of the Complaint as true and viewing them in the light most favorable to Plaintiffs, the Police Officers entry into Plaintiffs' residence was not justified by exigent circumstances. By the time the Police Officers arrived at Plaintiffs' home, Mr. Hogan had calmed down considerably, he was unarmed, there was no dispute in progress, and there was no need for the police to be there or to remain. (Compl. ¶ 37.) Mrs. Hogan told Officer Herncane that her husband was inside and that there was no one else inside. (Id. ¶ 40.) The Police Officers did not

question Mrs. Hogan about whether there was still a need for police intervention or whether Mr. Hogan was a danger to his wife or anyone else. (Id. ¶ 40-41.) Instead, the Police Officers entered Plaintiffs' residence without consent. (Id. ¶ 43-44.) Accordingly, the Motion to Dismiss is denied with respect to Count IV.

The moving Defendants also seek dismissal of Count V, which alleges that the Police Officers violated Mr. Hogan's Fourth Amendment right to be free from excessive use of force by state actors. In determining whether the force used to affect a particular seizure is constitutional under the Fourth Amendment, the Court examines whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. Graham v. Connor, 490 U.S. 386, 397 (1989).

The moving Defendants contend that Mr. Hogan's excessive force claim is legally barred under Heck v. Humphrey, 512 U.S. 477 (1994). In Heck, the Supreme Court stated as follows:

> [W]hen a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to

the suit.

512 U.S. at 487 (emphasis in original). The moving Defendants note that, in connection with his arrest on February 25, 2002, Mr. Hogan pled guilty in state court to one count of terroristic threats and nine counts of recklessly endangering another person and was sentenced to twelve to forty-eight months imprisonment. Under Pennsylvania law, a person commits the crime of recklessly endangering another person "if he recklessly engages in conduct which *places or may place another person in danger of death or serious bodily injury*." 18 Pa. Cons. Stat. Ann. § 2705 (emphasis added). As the United States Supreme Court has held that a police officer may use deadly force when the officer has reason to believe that a suspect poses a threat of serious physical harm or death to the officers or others, Garner v. Tennessee, 471 U.S. 1, 11-12 (1985), the moving Defendants maintain that a judgment in favor of Plaintiff on his excessive force claim would imply the invalidity of his reckless endangerment conviction.

Courts have held, however, that if "an officer intentionally or recklessly provokes a violent response, and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law." Billington v. Smith, 292 F.3d 1177, 1190-91 (9th Cir. 2002)(emphasis in original); see also Abraham v. Raso, 183 F.3d 279, 292 (3d Cir. 1999)("[A]ll of the

events transpiring during the officers' pursuit of [plaintiff] can be considered in evaluating the reasonableness of [the officer's] shooting [of plaintiff]."). The Complaint alleges that, by the time the Police Officers arrived at Plaintiffs' home, Mr. Hogan was unarmed and had calmed down considerably, there was no dispute in progress, and there was no need for the police to remain at the residence. (Compl. ¶ 37.) Before entering Plaintiffs' residence, the Police Officers did not question Mrs. Hogan about whether was still a need for police intervention or whether Mr. Hogan was a danger to his wife or anyone else. (Id. ¶¶ 40-41.) The Police Officers further escalated the situation by, *inter alia*, falsely informing Mr. Hogan that no police dogs were present at the scene, repeatedly cursing at him and treating him in a demeaning manner, isolating him from private sources of aid, and remaining in the house despite his repeated assurances that he was alright. (Id. ¶¶ 59-63, 65-66.) As a result of the Police Officers' actions, Mr. Hogan's emotional state decomposed. (Id. ¶ 72.) Accepting all of the allegations in the Complaint as true and viewing them in the light most favorable to Mr. Hogan, it is not clear, at this juncture, that the success of his excessive force claim would *necessarily* invalidate his previous conviction for reckless endangerment. Accordingly, the Motion to Dismiss is denied with respect to Count V.

The moving Defendants also seek dismissal of Count VI, which

alleges that the Police Officers violated Mr. Hogan's substantive due process rights under the Fourteenth Amendment by depriving him of liberty and failing to provide for his basic human needs, namely medical care and reasonable safety.

Plaintiffs may assert a separate Fourteenth Amendment substantive due process claim for deprivation of medical care in limited situations. In DeShaney v. Winnebago Co. Dep't of Social Servs., 489 U.S. 189 (1989), the Supreme Court declared that a claim for violation of substantive due process may be brought in circumstances where there is a "special relationship" between the actor and the victim. The Court stated:

> [W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being . . . . The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs – *e.g.*, food, clothing, shelter, medical care, and reasonable safety – it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

489 U.S. at 199-200 (internal citations omitted); see also City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (holding that the Due Process Clause requires medical care to be provided to people who have been injured while being apprehended by the police); Estate of Phillips v. City of Milwaukee, 123 F.3d 586, 595 (7th Cir.

1997) ("[T]he duty to render medical aid is more often thought of as one arising under the Due Process Clause or the Eighth Amendment.").

In order to state a claim for unconstitutional deprivation of medical care under the Fourteenth Amendment, a plaintiff must allege (1) a serious medical need and (2) acts or omissions by the police officers that indicate deliberate indifference to that need. Natale v. Camden County Correctional Facility, 318 F.3d 575, 582 (3d Cir. 2003). A medical need is serious if it is "one that is so obvious that a lay person would easily recognize the necessity for a doctor's attention." Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 347 (3d Cir. 1987) (quoting Pace v. Fauver, 479 F. Supp. 456, 458 (D.N.J. 1979)). The seriousness prong is also met if the effect of denying or delaying care results in the wanton infliction of pain or a life-long handicap or permanent loss. Id. Deliberate indifference is a "subjective standard of liability consistent with recklessness as that term is defined in criminal law." Natale, 318 F.3d at 582 (quoting Nicini v. Morra, 212 F.3d 798, 811 (3d Cir. 2000)(en banc)). The Third Circuit has found deliberate indifference "in situations where 'necessary medical treatment is delayed for non-medical reasons.'" Natale, 318 F.3d at 582 (quoting Lanzaro, 834 F.2d at 347).

The Court concludes that Mr. Hogan has adequately pled a substantive due process claim for deprivation of medical care

against the Police Officers, who had an affirmative duty to assume responsibility for his health and safety. The Complaint avers that after the Police Officers shot Mr. Hogan, the Police Officers left Mr. Hogan "to die on the floor," that they did not attend to his wounds, and that they did not have an ambulance immediately available, which caused a delay in getting Mr. Hogan the immediate medical attention he required. (Compl. ¶ 102-105.) The Complaint further avers that Mr. Hogan spent approximately eight days in the hospital, followed by five months recuperating at home. (Id. ¶ 107.) Accordingly, the Motion to Dismiss is denied with respect to Count VI.

The moving Defendants also seek dismissal of Count VII, which alleges that Officers Orchulli and Smith violated Mr. Hogan's right to be free from abuse of process under the Fourteenth Amendment. Mr. Hogan alleges that Officers Orchulli and Smith instituted civil litigation against him for unlawful purposes, including to harm and intimidate him and to keep him from vindicating his federal civil rights. (Compl. ¶ 177.) As a direct and proximate result of the litigation, Mr. Hogan has suffered added emotional distress and incurred additional legal expenses. (Id. ¶ 180.) Although Mr. Hogan styles his claim in Count VII as "abuse of process," it appears from the allegations in the Complaint that he is instead

attempting to assert a claim for malicious use of civil process.[5] To state a claim for malicious use of civil process under the Fourteenth Amendment, a plaintiff must adequately plead the elements of the common law tort. McArdle v. Tronetti, 961 F.2d 1083, 1088 (3d Cir. 1992). In Pennsylvania, the elements of the common law tort of wrongful use of civil proceedings are:

> (1) [Defendant] act[ed] in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
> (2) The proceedings have terminated in favor of the person against whom they are brought.

Id. (citing 42 Pa. C.S.A. § 8351).

The Complaint does not adequately plead the claim of malicious use of civil process. The Complaint does not allege that the proceedings have terminated in favor of Mr. Hogan, an essential element of a malicious use of civil process claim. See, e.g., Douris v. Dougherty, 192 F. Supp. 2d 358, 367 (E.D. Pa. 2002) (dismissing claim for malicious use of civil process where plaintiff failed to allege that lawsuit initiated by police officers

[5] "Malicious use of civil process has to do with the wrongful initiation of such process, while abuse of civil process is concerned with a perversion of a process after it is issued." Jennings v. Shuman, 567 F.2d 1213, 1218 (3d Cir. 1977)(quotation omitted). Mr. Hogan alleges that Officers Orchulli and Smith violated his rights by initiating a civil action against him for improper purposes, not that the officers abused the legal process only *after* they had initiated an otherwise legitimate civil action against him.

terminated in plaintiff's favor). Accordingly, the Motion to Dismiss is granted with respect to Count VII.

The moving Defendants further seek dismissal of the derivative claims brought against the City in Count II and against Goldsmith, Palmer, Mazzeo, Orchulli and Parkansky in Count III, for municipal and supervisory liability. To state a claim for either municipal or supervisory liability, a plaintiff must adequately allege, *inter alia*, an underlying constitutional violation. Brown v. Commonwealth of Pennsylvania Dep't of Health Emergency Med. Servs., 318 F.3d 473, 482 (3d Cir. 2003) (citing City of Canton v. Harris, 489 U.S. 378, 380 (1989)). The moving Defendants sole argument is that Plaintiffs' claims in Counts II and III should be dismissed because they have failed to establish any underlying constitutional violation. As the Court has determined that Counts IV, V, and VI state valid claims for relief, Plaintiffs have properly alleged an underlying constitutional violation. Accordingly, the Motion to Dismiss is denied with respect to Counts II and III.

IV. CONCLUSION

For the foregoing reasons, the Motion to Dismiss is granted with respect to the claims asserted by Mrs. Hogan in Counts I, V, and VI and the claim asserted by Mr. Hogan in Count VII, and denied in all other respects.

An appropriate Order follows.

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

MICHAEL and ANN HOGAN	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF EASTON, et al.	:	NO. 04-759

O R D E R

AND NOW, this day of August, 2004, upon consideration of Defendants' Motion to Dismiss Plaintiffs' Complaint and supporting Memorandum of Law (Doc. No. 3), Plaintiffs' Response thereto (Doc. No. 4), and all related submissions, **IT IS HEREBY ORDERED** that said Motion is **GRANTED IN PART** and **DENIED IN PART**, as follows:

1. The Motion is **GRANTED** as to the claims asserted by Mrs. Hogan in Counts I, V, and VI, and those claims are **DISMISSED WITHOUT PREJUDICE.**
2. The Motion is **GRANTED** as to the claim asserted by Mr. Hogan in Count VII**,** and that claim is **DISMISSED WITHOUT PREJUDICE.**
3. The Motion is **DENIED** in all other respects.

BY THE COURT:

____
John R. Padova, J.