

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

SCARLETT BLACK,)
as Administratrix of the Estate)
of Cordell Lamar Black, Deceased,) Civil Action
) No. 04-CV-05007
Plaintiff)
)
vs.)
)
CITY OF READING and)
PHILLIP N. BENTZ, Sgt.,)
)
Defendants)

* * *

APPEARANCES:

ANTHONY D. JACKSON, ESQUIRE
On behalf of Plaintiff

JANELLE E. FULTON, ESQUIRE
On behalf of Defendants

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER
United States District Judge

This matter is before the court on Defendants' Motion for Summary Judgment filed on January 31, 2006, which motion is unopposed.

For the reasons expressed below, we grant defendants' motion for summary judgment and dismiss the remaining counts in plaintiff's Amended Complaint, Counts I, II, III and V.¹

¹ On February 17, 2005 by Order of the undersigned, Counts IV and VI of plaintiff's Amended Complaint were dismissed because plaintiff did not oppose defendants' motion to dismiss those claims.

JURISDICTION

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. Specifically, Counts I and II of plaintiff's Amended Complaint allege violations of 42 U.S.C. § 1983, which give rise to federal question jurisdiction. The court has supplemental jurisdiction over plaintiff's pendent state-law claims. See 28 U.S.C. § 1367. As discussed below, plaintiff's state-law claims are tort claims.

VENUE

Venue is proper in the United States District Court for the Eastern District of Pennsylvania because the events and omissions giving rise plaintiff's claims allegedly occurred in Reading, Berks County, Pennsylvania, which is located within this judicial district. See 28 U.S.C. §§ 118, 1391(b).

FACTS

Based upon the pleadings, record papers, depositions, defendants' motion and brief and the exhibits submitted by defendant, which are uncontroverted and taken in the light most favorable to the plaintiff, the pertinent facts are as follows.

At approximately 3:15 a.m. on October 25, 2002, Reading Police Officer Andrew Winters was on patrol in the 400 Block of Penn Street in Reading, Pennsylvania. At that time, three men flagged down Officer Winters and reported to him that a black

male had just fired two shots at them and then ran north on 4th Street. Officer Winters transmitted a brief description of the suspect over the police radio. After Officer Winters transmitted this information, the three men spoke to Officer Winters and alleged that the unidentified black male had attempted to rob them.²

Defendant Sergeant Philip Bentz was one of several police officers who responded to Officer Winters's radio transmission and who assisted Officer Winters in the search for the suspect. At the time of the transmission, Sergeant Bentz was traveling westbound on Washington Street in his police vehicle. There was another patrol car a block or two ahead of him, and, so rather than following the other officer, Sergeant Bentz turned right at the next intersection. After his right-hand turn, Sergeant Bentz traveled northbound on 5th Street.

Shortly thereafter, Sergeant Bentz saw a black male running from the area of the robbery. The man was later identified as plaintiff's decedent Cordell Black.

Sergeant Bentz attempted to follow Mr. Black in his marked police cruiser. As Sergeant Bentz attempted to follow Mr. Black, Sergeant Bentz radioed for a more specific description

² It is unclear from the record whether the unidentified male was successful in the alleged robbery attempt. Nevertheless, whether the robbery attempt was successful is immaterial. Specifically, as discussed below, the issue before the court is whether defendants violated Mr. Black's rights under the United States Constitution and whether defendants are liable for Mr. Black's death.

of the shooting suspect. The description of the suspect that Sergeant Bentz received was consistent with the appearance of Cordell Black.

Sergeant Bentz then tried to stop Mr. Black by calling to him from the police cruiser. While doing so, Sergeant Bentz saw that Mr. Black was holding a concealed object in his pants. Instead of stopping, Mr. Black fled, and Sergeant Bentz gave chase in his police cruiser.

After briefly losing sight of Mr. Black, Sergeant Bentz located Mr. Black lying on his stomach in the ambulance bay of St. Joseph Medical Center, which is at Reed and Walnut Streets, in Reading. Sergeant Bentz saw that Mr. Black had a large blued-steel gun in his hand.

Sergeant Bentz exited his cruiser. He drew his service weapon and yelled at Mr. Black not to move. Instead of remaining still, Mr. Black got up and ran across Walnut Street into a parking lot. Again, Sergeant Bentz gave chase, this time on foot.

During the foot chase, Sergeant Bentz called for Mr. Black to stop. Instead of stopping, Mr. Black, with his revolver in hand, looked back over his shoulder, reached his arm back and pointed the revolver at Sergeant Bentz. In response, Sergeant Bentz fired two shots at Mr. Black.

Mr. Black fell to the ground with his hands underneath him. His revolver fell out of his hand and to the right of him. The revolver was still within Mr. Black's reach.

Concerned for his safety, Sergeant Bentz took cover behind a guard booth a short distance from Mr. Black. From this position, Sergeant Bentz ordered Mr. Black to show his hands. After repeating the order several times, Mr. Black complied and showed his hands.

Sergeant Bentz then ordered Mr. Black to place his hands behind his back, and Mr. Black complied. Sergeant Bentz then kicked Mr. Black's revolver out of the reach of Mr. Black and handcuffed him.

At this point, Sergeant Bentz could not see any wounds or blood on Mr. Black, and Sergeant Bentz did not know whether any of the shots that he fired had hit Mr. Black. Additionally, Mr. Black was breathing, speaking and had a pulse. Mr. Black then stated repeatedly "you got me", but did not tell Sergeant Bentz where he was injured.

Sergeant Bentz quickly checked Mr. Black for wounds and asked him where he was hit. Sergeant Bentz then called for an ambulance. Sergeant Bentz called for an ambulance within 20 seconds after Mr. Black said "you got me".

An ambulance responded within minutes and Mr. Black was transported to Reading Hospital, where he was later pronounced

dead.³ The officers of the Reading Police Department do not have control over either the length of time it takes for an ambulance to respond or the hospital to which the ambulance takes an injured person.

PLAINTIFF'S AMENDED COMPLAINT

On November 12, 2004, plaintiff filed her six-count Amended Complaint. On January 24, 2005 defendants moved to dismiss Counts IV and VI of plaintiff's Amended Complaint. On February 17, 2005 by Order of the undersigned, Counts IV and VI of plaintiff's Amended Complaint were dismissed because plaintiff did not oppose defendants' motion. Further, plaintiff was given until on or before March 4, 2005 in which to file a second Amended Complaint implementing the February 17, 2005 Order. Plaintiff never filed a second Amended Complaint. Accordingly, we review defendants' motion to dismiss the remaining counts of plaintiff's Amended Complaint.

The remaining counts in plaintiff's Amended Complaint are as follows: Count I is a cause of action against Sergeant Phillip Bentz pursuant to 42 U.S.C. § 1983 for violating Mr. Black's Fourth and Fourteenth Amendment rights under the United States Constitution. Count II is a cause of action against the

³ Mr. Black died of a gunshot wound to the back. The bullet caused massive internal hemorrhage. The bullet entered at the left lower back in the lumbar area. It traveled from back to front and left to right in Mr. Black's abdominal cavity.

City of Reading pursuant to 42 U.S.C. § 1983 for violating Mr. Black's Fourth and Fourteenth Amendments rights under the United States Constitution.

Count III is a state-law cause of action against Sergeant Bentz pursuant to 42 Pa.C.S.A. § 8301 for the wrongful death of Mr. Black. Count V is a state-law survival action against Sergeant Bentz pursuant to 42 Pa.C.S.A. § 8302, which permits a cause of action to survive the death of a party to the action.

STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202, 211 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 443 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in her pleadings, but rather must present competent evidence from which a jury could reasonably find in her favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D.Pa. 1995).

DISCUSSION

Defendants' motion for summary judgment seeks to dismiss all four counts remaining in plaintiff's Amended Complaint. Defendants' argue that defendant Bentz lawfully fired upon Mr. Black and, thus, did not deprive Mr. Black of his life in violation of the United States Constitution or Pennsylvania tort law. Defendants further argue that, because Sergeant Bentz's act of firing upon Mr. Black was lawful and not in violation of Mr. Black's rights under the United States Constitution, defendant City of Reading did not violate Mr. Black's constitutional rights.

As of the date of the within Memorandum and Order, Plaintiff has not responded to defendants' motion for summary

judgment.

We do not grant defendants' motion as unopposed, and we take the facts alleged in the light most favorable to plaintiffs. Nevertheless, we do consider the facts alleged by defendants as undisputed.⁴ For the reasons articulated below, we find that there are no genuine issues of material fact that preclude the entry of summary judgment in favor of defendants on all of the counts remaining in plaintiff's Amended Complaint. Accordingly, we grant defendants' motion and enter summary judgment in favor of defendants on Counts I, II, III and V of plaintiff's Amended Complaint.

Plaintiff's Federal Claims

Plaintiff's federal claims are contained within Counts I and II of plaintiff's Amended Complaint. Both Counts are brought under 42 U.S.C. § 1983.

In pertinent part, Section 1983 states that

⁴ The standard of review for summary judgment requires us to examine whether this case contains genuine issues of material fact that would preclude the entry of summary judgment in favor of defendants. Anderson, supra. Further, a plaintiff cannot rest on her pleadings or upon mere speculation. Ridgewood Board of Education, supra.

Additionally, by Rule 16 Status Conference Order of the undersigned dated July 12, 2005 and filed July 25, 2005, the parties were ordered to respond to a party's statement of material facts on an opposing party's motion for summary judgment. Further stated in the July 12, 2005 Order, if a non-moving party does not respond to the statement of material facts "[a]ll factual assertions set forth in the moving party's statement shall be deemed admitted...." Here, plaintiff, the non-moving party, has not responded to either defendants' motion for summary judgment or defendants' statement of material facts. Accordingly, we deem defendants' statement of material facts admitted by plaintiff.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State..., 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 any action at law....

42 U.S.C. § 1983.

Further, Section 1983 does not create any substantive rights. Rather, it provides a remedy "for any person who has been deprived of the rights secured by the Constitution or laws of the United States by a person acting under color of law." Curley v. Klem, 298 F.3d 271, 277 (3d Cir. 2002).

Use of Force

Count I is a claim against Sergeant Bentz under 42 U.S.C. § 1983 for violating Mr. Black's rights under the Fourth and Fourteenth Amendments of the United States Constitution. Specifically, plaintiff claims that Mr. Black's rights were violated because Sergeant Bentz used "unreasonable, unnecessary, and excessive force" in violation of the Fourth Amendment of the United States Constitution when Sergeant Bentz shot and killed Mr. Black. Additionally, plaintiff claims that Sergeant Bentz deliberately, maliciously or recklessly deprived Mr. Black of proper medical attention, in violation of Mr. Black's Fourteenth Amendment rights, after he had been shot.

Defendants argue that Sergeant Bentz is entitled to the protection afforded by the doctrine of qualified immunity. In addition, defendants argue that, in order for plaintiff to assert a claim for excessive force under the Fourth Amendment, plaintiff must establish that there was a seizure and that the use of force was unreasonable.

Defendants acknowledge that a seizure occurred, that is, Mr. Black's life ended. Nevertheless, defendants assert that under both federal law and state law, the seizure of Mr. Black's life was constitutionally reasonable.

Likewise, defendants argue that, in order for plaintiff to state a claim that Mr. Black was denied medical attention in violation of his Fourteenth Amendment Constitutional rights, plaintiff must show that Mr. Black had a serious medical need and that Sergeant Bentz was deliberately indifferent to his serious medical need.

Defendants concede that Mr. Black had a serious medical need, that is, he was shot. Nevertheless, defendants assert that Sergeant Bentz was not deliberately indifferent to that need because he immediately requested medical assistance upon learning that Mr. Black had, indeed, been shot.

In order to assert a 42 U.S.C. § 1983 claim for excessive force in violation of the Fourth Amendment, a plaintiff must establish that there was a seizure and that the use of force

was excessive under objective standards of reasonableness. Saucier v. Katz, 533 U.S. 194, 201-202, 121 S.Ct. 2151, 2157, 150 L.Ed.2d 272, 281-282 (2001).

Additionally, the objective standard of reasonableness "must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight". Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443, 455 (1989). This perspective is to make "allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving--about the amount of force that is necessary in a particular situation." Graham, 490 U.S. at 397, 109 S.Ct. at 1872, 104 L.Ed.2d at 456.

Further, the United States Supreme Court has stated that a police officer's use of deadly force does not violate the Fourth Amendment of the United States Constitution when "it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others." Tennessee v. Garner, 471 U.S. 1, 3, 105 S.Ct. 1694, 1697, 85 L.Ed.2d 1, 4 (1984).

Moreover, the Supreme Court has stated that "if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the

infliction or threatened infliction of serious physical harm, deadly force may be used to prevent escape, and if, where feasible, some warning has been given. Garner, 471 U.S. at 11-12, 105 S.Ct. at 1701, 85 L.Ed.2d at 10.

In order to prevail on a claim that Sergeant Bentz deliberately denied Mr. Black medical care in violation of his Fourteenth Amendment right to due process, plaintiff must demonstrate first, that Mr. Black was a pretrial detainee; second, that he had a serious medical need; and third, that Sergeant Bentz was deliberately indifferent to that serious medical need. Natale v. Camden County Correctional Facility, 318 F.3d 575, 581-582 (3d Cir. 2003).

The defense of qualified immunity is a question of law. Siegert v. Gilley, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277, 287 (1991); DeBellis v. Kulp, 166 F.Supp.2d 255, 266 (E.D. Pa. 2001)(Van Antwerpen, J.). Additionally, qualified immunity is immunity from suit, not a defense to liability at trial. Saucier, 533 U.S. at 200-201, 121 S.Ct. at 2156, 150 L.Ed.2d at 281.

Therefore, it is imperative to determine whether the defense is available before trial. Further, "qualified immunity shields state officials performing discretionary functions from suit for damages if 'their conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known.'" DeBellis, supra, (quoting Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 1696, 143 L.Ed.2d 818, 827 (1999)).

The United States Supreme Court has articulated a two-part test to determine whether a state official is entitled to the defense of qualified immunity. In Saucier, supra, the Supreme Court stated that the initial inquiry is "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201, 121 S.Ct. at 2156, 150 L.Ed.2d at 282. If no right would have been violated, then there is no need for the second step.

If a right were violated, then the next question to ask is "whether the right was clearly established." Saucier, supra. In order to determine whether the right was clearly established, the question is whether a reasonable officer would have known that his or her conduct violated the right. DeBellis, supra (citing Harlowe v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d. 396 (1982)). If these requirements are met, then the officer is entitled to qualified immunity.

For the reasons stated below, we conclude that, taken in the light most favorable to plaintiff, the facts alleged and

undisputed,⁵ if proven, would not establish a violation of a constitutional right. Therefore, defendant is entitled to qualified immunity.

Specifically, with regard to plaintiff's claim under 42 U.S.C. § 1983 that Sergeant Bentz unreasonably seized Mr. Black, the alleged facts reveal that when Sergeant Bentz shot and killed Mr. Black, Sergeant Bentz did not violate the Fourth Amendment.⁶

The facts alleged establish that Sergeant Bentz was responding to a report that an unidentified black male fired two shots at three men. Sergeant Bentz spotted Mr. Black and radioed for a more particularized description of the suspect. Mr. Black matched that description.

Sergeant Bentz then ordered Mr. Black to stop. Instead of halting, Mr. Black fled. Sergeant Bentz lost sight of Mr. Black but, after a short while located Mr. Black hiding in an ambulance bay, and Mr. Black had a gun.

⁵ As stated above, plaintiff has not responded to Defendants' Motion for Summary Judgment. We note that in the deposition of plaintiff Scarlett Black, plaintiff believes that Sergeant Bentz acted unlawfully when he fired on Mr. Black because the bullet entered Mr. Black's back and because she believed her son did not have a gun. Nevertheless, plaintiff cannot rely on speculation. Ridgewood Board of Education, supra. Further, as stated above, when plaintiff did not dispute defendants' facts, we accepted defendants' facts as undisputed.

⁶ As stated above, we determine reasonableness of the seizure at the time that the seizure occurred. Graham, supra. Accordingly, we do not consider defendants' submissions of Mr. Black's prior criminal history because defendants have not alleged any facts that would demonstrate that, at the time that Sergeant Bentz was pursuing Mr. Black, Sergeant Bentz was aware of Mr. Black's prior criminal history.

Sergeant Bentz once again ordered Mr. Black to freeze, but Mr. Black again fled. While fleeing Mr. Black turned and pointed his gun at Sergeant Bentz. Sergeant Bentz then fired two shots at Mr. Black. At least one of the shots hit Mr. Black and he fell to the ground.

These alleged facts establish that Sergeant Bentz acted constitutionally. Here, Mr. Black was attempting to escape after being ordered repeatedly not to attempt to escape. Additionally, Sergeant Bentz had probable cause to believe that Mr. Black posed a significant threat of death or serious physical injury to Sergeant Bentz because Mr. Black possessed a gun, a revolver, and pointed the gun at Sergeant Bentz.

Moreover, Sergeant Bentz had probable cause to believe that Mr. Black posed a significant threat of death or serious physical injury to the public because Mr. Black matched the description of a suspect who only minutes ago and a few blocks away fired shots at three individuals.

Thus, based upon these alleged facts, plaintiff has not established that Sergeant Bentz utilized unlawful or excessive force in violation of the Fourth Amendment of the United States Constitution. Because the facts do not establish a violation of the Fourth Amendment of the United States Constitution, we need not address the second step of the qualified immunity analysis,

that is, whether the right allegedly violated was a clearly established right.

Regarding plaintiff's 42 U.S.C. § 1983 claim that Sergeant Bentz was deliberately indifferent to a serious medical need of Mr. Black in violation of Mr. Black's Fourteenth Amendment right under the United States Constitution, the alleged facts do not establish plaintiff's claim.

For plaintiff to sufficiently allege a violation of Mr. Black's Fourteenth Amendment right to pretrial medical treatment, she must allege facts which demonstrate that Mr. Black was a pretrial detainee, that he had a serious medical need and that Sergeant Bentz was deliberately indifferent to that need.

Plaintiff has alleged, and defendants appear to concede, that Mr. Black was a pretrial detainee and that Mr. Black had a serious medical need. Specifically, after being shot Mr. Black was suffering from a serious medical need, a gunshot wound, and was in Sergeant Bentz's custody because he was handcuffed on the ground.

Nevertheless, plaintiff has not alleged any facts based upon competent evidence from which a jury could conclude that Sergeant Bentz was deliberately indifferent to the medical need of Mr. Black. Instead, the uncontested alleged facts, taken in the light most favorable to plaintiff, establish that Sergeant Bentz was attentive to Mr. Black's gunshot wound.

Specifically, after Mr. Black was shot and fell to the ground, Sergeant Bentz ordered Mr. Black to display his hands. Then, after Sergeant Bentz secured the scene to make sure it was safe for Sergeant Bentz to approach Mr. Black, Sergeant Bentz asked Mr. Black where he had been hit by the Sergeant's shot.

Within 20 seconds of learning that Mr. Black had been hit by at least one of the shots, Sergeant Bentz radioed for an ambulance. However, Sergeant Bentz could not control either the response time or the destination of the ambulance. These facts demonstrate that Sergeant Bentz was sufficiently concerned about Mr. Black's medical needs.

Thus, based on the facts as alleged, plaintiff has not established that Sergeant Bentz was deliberately indifferent to a serious medical need of Mr. Black in violation of the Fourteenth Amendment. Because we find that the facts do not establish a Fourteenth Amendment violation, we need not address the second step of the qualified immunity analysis, that is, whether the right allegedly violated was clearly established.

For the reasons expressed above, Sergeant Bentz is entitled to qualified immunity. Further, because plaintiff has not alleged facts based on competent evidence from which a jury could reasonably conclude that defendant Bentz violated Mr. Black's Constitutional rights, there are no genuine issues of material fact that would preclude the entry of summary judgment

in favor of defendant Bentz on Count I of plaintiff's Amended Complaint.

Accordingly, we entry summary judgment in favor of defendant Sergeant Bentz on Count I of plaintiff's Amended Complaint and dismiss that count.

Policies and Customs

Count II is a claim against the City of Reading for violating 42 U.S.C. § 1983 by setting policies and customs which violated Mr. Black's federal constitutional rights. In particular, plaintiff asserts that Mr. Black's life was taken by excessive force and that he was denied the right to proper medical care after he had been shot.

Defendants assert that plaintiff has failed to prove an underlying constitutional violation or that an official policy or custom of the City of Reading encouraged or permitted its police officers to violate the Constitution.

It is unclear whether in her Amended Complaint, plaintiff is alleging that Reading's policies and customs were unconstitutional as they applied to actions of Sergeant Bentz as a member of the Reading police department, or as they applied to the responding ambulance crew. This ambiguity results from the fact that plaintiff does not directly state which, if any, policies were unconstitutional.

Plaintiff must prove three elements in order to establish that the City of Reading is liable under 42 U.S.C. § 1983. They are first, that there was an underlying constitutional violation; second, the identity of the officials or governmental bodies with final policymaking authority; and third, proof that those individuals through their decisions caused the deprivations of rights at issue because their policies affirmatively command, or acquiesce in, a longstanding practice or custom which constitutes the standard operating procedure of the local governmental body. Simmons v. City of Philadelphia, 947 F.2d 1042, 1062 (3d Cir. 1991).

Regardless of which policies and procedures plaintiff is alleging to be unconstitutional, she cannot merely rest on her pleadings. Ridgewood Board of Education, supra. No facts based upon competent evidence have been alleged from which a jury could find any connection between the City of Reading and the responding ambulance crew.⁷

Moreover, plaintiff has not alleged facts that would establish that the City of Reading has the final policy-making authority over the responding ambulance department. Nor are

⁷ Of course, it is possible that the responding ambulance was operated by employees of the City of Reading. However, it is equally possible that the ambulance was operated by the County of Berks or a private entity. Therefore, in the absence of competent evidence, which plaintiff is required to provide under Ridgewood Board of Education, supra, we cannot appropriately conclude, without speculation, that the responding ambulance had any affiliation with the City of Reading.

there facts alleged from which a jury could appropriately conclude that the responding ambulance crew violated Mr. Black's constitutional rights.⁸

Because, there are no material facts that would preclude the entry of summary judgment in favor of defendant City of Reading, we enter summary judgment on Count II of plaintiff's Amended Complaint in favor of defendant City of Reading. Accordingly, we dismiss Count II of plaintiff's Amended Complaint.

Plaintiff's State-Law Claims

Wrongful Death and Survival Actions

Count III of plaintiff's Amended Complaint alleges a wrongful death action against Sergeant Bentz under Pennsylvania law. 42 Pa.C.S.A. § 8301. Under 42 Pa.C.S.A. § 8301 an action may be brought for the death of an individual if that individual's death was caused by the wrongful act, wrongful neglect, unlawful violence or negligence of another and if no recovery for the same damages claimed in the death action was obtained by the injured individual during his lifetime.

⁸ We note that it is possible that the ambulance should have taken Mr. Black to St. Joseph's Medical Center rather than Reading Hospital because St. Joseph's Medical Center was across the street from where Mr. Black was shot. However, it is equally possible that St. Joseph's Medical Center did not have the proper facilities to deal with gunshot wounds, that is, a trauma center, an on-call surgical staff, etc. Therefore, without plaintiff alleging facts based upon competent evidence as she is required to do under Ridgewood Board of Education, supra, we cannot conclude that the ambulance should have taken Mr. Black to St. Joseph's Medical Center.

Count V of plaintiff's Amended Complaint alleges a claim against Sergeant Bentz under Pennsylvania's Survival Act. 42 Pa.C.S.A. § 8302. Under 42 Pa.C.S.A. § 8302 all causes of action survive the death of a party to the litigation.

Pursuant to a federal court's supplemental jurisdiction, we may entertain state-law claims when they are so related to federal claims within the court's original jurisdiction that they form a part of the same case or controversy. 28 U.S.C. § 1367. However, if all federal claims are dismissed before trial, the court should ordinarily dismiss any remaining state-law claims as well. Fortuna's Cab Service v. City of Camden, 269 F.Supp.2d 562, 566 (D.N.J. 2003). Accordingly, we dismiss Counts III and V of plaintiff's Amended Complaint.

Even if we were to retain jurisdiction over plaintiff's pendent state-law claims, we would grant summary judgment on the merits and dismiss Counts III and V from plaintiff's Amended Complaint for the following reasons.

Both wrongful death and survival actions are tort actions which are governed by Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A § 8541-8564 ("Tort Claims Act"). Bornstad v. Honey Brook Township, No. Civ.A. 03-3822, 2005 U.S. Dist. LEXIS 19573 (E.D.Pa. Sept. 9, 2005)(Surrick, J); See Lockwood v. City of Pittsburgh, 561 Pa. 515, 751 A.2d 1136,

1140 (2000).

Under the Tort Claims Act, the general rule is that no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of that local agency or an employee of the agency. 42 Pa.C.S.A. § 8541.

None of the exceptions enumerated in Section 8541 to the general rule apply here. Therefore, we would dismiss the claims against the City of Reading from Counts III and V of plaintiff's Amended Complaint.

Further, under the Torts Claims Act, employees generally possess the same broad immunity as their employing agencies. 42 Pa.C.S.A. § 8545; Bornstead, supra. Additionally, a police officer may claim immunity if his actions were required or authorized by law, or if he in good faith reasonably believed that his actions were authorized by law. 42 Pa.C.S.A. § 8546(2); Bornstead. Therefore, Sergeant Bentz is entitled to immunity because his actions were authorized by law.

Specifically under Pennsylvania law, a police officer may justifiably use deadly force for self-protection or to effect an arrest pursuant to 18 Pa.C.S.A. §§ 505 and 508.

In this regard, Section 508(a) provides in pertinent part that a peace officer is justified in using deadly force to effect an arrest or to protect himself

when he believes that such force is necessary to prevent death or serious bodily injury to himself

or such other person, or when he believes both that: (i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and (ii) the person to be arrested has committed or attempted a forcible felony or is attempting to escape and possesses a deadly weapon....

18 Pa.C.S.A. § 508(a). As reflected in our discussion of the facts, above, all of the component parts of this statute are applicable here.

Accordingly, because we interpret Counts III and V of plaintiff's Amended Complaint to be alleging that Sergeant Bentz acted negligently by shooting at Mr. Black,⁹ then Sergeant Bentz is entitled to immunity under the Tort Claims Act because his actions were within the scope of his employment. Specifically, he was a police officer on duty and in pursuit of an armed and dangerous suspect, Cordell Black.

To the extent that the averments of Counts III and V can be interpreted as alleging an intentional tort (see

⁹ We conclude that Counts III and V of the Amended Complaint aver negligence because paragraph 23 of Count III alleges that "As a direct and proximate result of the negligent acts of the defendant, Plaintiff's decedent was caused to die."; and paragraph 37 of Count V alleges that "As a direct result of the carelessness and negligence of the defendant..., the Plaintiff's decedent, Cordell Lamar Black, suffered great physical pain and suffering prior to his death."

Paragraphs 22 of Count III alleges that the actions of defendant Sergeant Bentz in shooting Cordell Black were "negligent, reckless, careless and were willful and wanton." Paragraph 36 of Count V alleges that Mr. Black died of the injuries he sustained as a result of "the carelessness, gross negligence, wanton and reckless misconduct, and other liability-producing conduct of the Defendant". To the extent that the terms "willful" and "wanton" could be interpreted as connoting intentional conduct, rather than negligence, all of the remaining language of Counts III and V refer to negligence, and not to intentional torts.

Footnote 9, above) that would disqualify Sergeant Bentz from the benefit of qualified immunity. Willful misconduct, which has been defined by the Supreme Court of Pennsylvania as an intentional tort, would bar a police officer from asserting immunity under the Tort Claims Act. Renk v. City of Pittsburgh, 537 Pa. 68, 76, 641 A.2d 289, 293 (1994).

Even without qualified immunity, however, Sergeant Bentz is entitled to summary judgment on any counts alleging intentional torts. This is because under Pennsylvania law, when a police officer attempts to make a lawful arrest, the officer "may use such force as is necessary under the circumstances to effectuate the arrest." It is the reasonableness of the force used in making the arrest that determines whether the officer committed an intentional tort. Renk, 537 Pa. At 76, 641 at 293. For the reasons articulated in the Use of Force subsection, above, Sergeant Bentz is entitled to summary judgment under this standard.

CONCLUSION

For the reasons expressed above, we grant Defendants' Motion for Summary Judgment. Accordingly, we dismiss the remaining counts in plaintiff's Amended Complaint. Specifically, we dismiss Counts I, II, III and V.

IT IS FURTHER ORDERED that plaintiff's Amended
Complaint is dismissed.

IT IS FURTHER ORDERED that the Clerk of Court shall
close this case for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge