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

MICHAEL & ANN HOGAN	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF EASTON et al.	:	No. 04-759

MEMORANDUM

Padova, J. **September 12, 2006**

This action arises out of a standoff between Plaintiff, Michael Hogan ("Mr. Hogan"), and members of the Easton Police Department ("EPD"), which culminated in the shooting of Mr. Hogan. Plaintiffs, Michael and Ann Hogan ("Mrs. Hogan"), who are husband and wife, assert various federal constitutional and statutory claims pursuant to 42 U.S.C. § 1983 and Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134 ("Title II"), for a declaratory judgment and damages against the following Defendants: the City of Easton ("the City"); Thomas Goldsmith, the former mayor of the City; Larry Palmer, the former chief of the EPD; John Mazzeo, Jr., former captain of the EPD, and EPD Officers Brian T. Herncane, Christopher G. Miller, Scheldon M. Smith, Michael Orchulli, David M. Beitler, Dominick W. Marraccini, John D. Remaley, and Eugene Scott Casterline. Before the Court are two Motions for Summary Judgment, one filed by Capt. Mazzeo, the other filed by the City, Herncane, Miller, Smith, Orchulli, Beitler, Marraccini, Remaley, and Casterline (collectively, "the Easton Defendants").[1] Although the Motions are titled "Motions for Summary Judgment," the moving Defendants do not seek judgment on the Plaintiffs' Monell and

[1]Throughout this opinion, we also refer to all individual moving Defendants (Mazzeo, Herncane, Miller, Smith, Orchulli, Beitler, Marraccini, Remaley, and Casterline) as the "EPD Officers."

supervisory liability claims brought pursuant to § 1983.[2] For the reasons that follow, Defendants' Motions for Summary Judgment are granted in part and denied in part.

I. FACTUAL BACKGROUND

A. Mr. Hogan's Mental Health

Mr. Hogan suffered from and received treatment for an anxiety disorder for several years prior to the incident in question. (Def.'s SMF ¶¶ 1-2.) He also suffers from Panic Disorder, Obsessive-Compulsive disorder, Borderline Personality Disorder and Histrionic Personality Disorder. (Pl.'s SMF ¶ 1; Pl.'s Ex. D, Fallon-Kline Report at 285.) He has been hospitalized as a result of panic attacks, which cause him to hyperventilate and cause his extremities to go numb and cramp such that he cannot physically function. (Pl.'s SMF ¶ 6; Michael Hogan Dep. (Vol. II) at 14.) The histrionic component of his personality disorder can cause him to "display dramatic emotional behaviors." (Pl.'s Ex. D, Fallon-Kline Report at 283.) Mr. Hogan has abused alcohol as a form of self-medication in order to release some of his anxiety. (Michael Hogan Dep. (Vol. I) at 137.) Mr. Hogan now recognizes that he used alcohol as a medication and that at times he used it to excess. (Id. (Vol. II) at 111-13.) On February 25, 2002, the date of the incident, Mr. Hogan was unemployed and was collecting disability as a result of his anxiety disorder. (Id. at 49.)

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[2]Pursuant to our Order dated June 16, 2006, dispositive motions relating to the Monell and supervisory liability claims under § 1983 (Counts II and III) may be filed after the Court rules on the instant Motions pertaining to the underlying constitutional violations. We note, additionally, that we previously dismissed Count VII, alleging abuse of process in violation of the Fourteenth Amendment by Lt. Orchulli and Officer Smith, as well as the claims asserted by Mrs. Hogan in Counts I, V, and VI. See Hogan v. City of Easton, Hogan v. City of Easton, No. Civ. A. 04-759, 2004 WL 1836992, at *6, 11, 12 (E.D. Pa. Aug. 17, 2004). By stipulation, Defendant Northampton County was dismissed on February 10, 2006 (Doc. No. 51), and Defendant Stephen J. Parkansky was dismissed on February 28, 2006 (Doc. No. 53).

B. Mrs. Hogan's 911 Call

On February 25, 2002, Mr. Hogan was angry about an accident that had occurred a few weeks earlier, in which his parked car was struck by an uninsured motorist. (Id. (Vol. I) at 115-122.) He went out to lunch and had a few drinks, returning home at approximately 6:30 or 7:00 p.m. (Id. at 122-26.) When Mr. Hogan arrived home, he was upset and worried about telling his wife that the motorist who had struck their car was uninsured and that they would have to pay to repair their car. (Id. at 131-32, 133.) He planned to go to the motorist's house to retrieve the $1600 he needed for the repairs. (Id. at 139-40.) In pursuance of this plan, Mr. Hogan called his cousin, Buddy Shull, and asked him to come over. (Id. at 132.) He also attempted to call his attorney, Theresa Hogan (another cousin). (Id.) When Mrs. Hogan asked him what was going on, he threw the phone at the wall and told her to shut up and not to worry about it. (Id.) At some point, Mr. Hogan went upstairs to retrieve two handguns, a 9 mm and a Colt-380. (Ann Hogan Dep. at 46-47; Def.'s Ex. H (photographs of handguns).) According to his wife, Mr. Hogan was acting "paranoid," at first telling Mrs. Hogan to leave, and then preventing her from leaving when she attempted to take the dog into the yard. (Ann Hogan Dep. at 51-52.) Mrs. Hogan stated that her husband "was a totally different person" to her, that she had seen him drunk before and this was dissimilar to those experiences, and she surmised that he might have been "having a breakdown." (Id. at 50.)

The Hogans' interaction turned somewhat physical, and their next-door neighbors, the Ditmars, arrived at the door after Mrs. Hogan banged on their common wall. (Ann Hogan Dep. at 54-55.). When Mrs. Hogan went to the door, Mr. Hogan followed her, tripping over the coffee table, and losing one of the guns. (Michael Hogan Dep. (Vol. I) at 88.) Mr. Ditmars confronted an angry and upset Mr. Hogan, who was waving the other handgun around; Mr. Ditmars asked him to hand

over the gun, which Mr. Hogan did by tossing it lightly at him. (Michael Hogan Dep. (Vol. I) at 89; John Ditmars Dep. at 23-29.) Mr. Ditmars assumed that the confrontation was over at this point. (Id. at 38.)

At approximately 8:04 p.m., while Mr. Ditmars was speaking with Mr. Hogan, Mrs. Hogan pulled away from her husband, went upstairs, and called 911. (John Ditmars Dep. at 20; Ann Hogan Dep. at 57.) Mrs. Hogan reported to the 911 dispatcher that her husband was "freaking out" and "drunk." (Pl.'s Ex. K, Transcript of 911 Call, at 2.) In response to the dispatcher's query, she answered that he had a handgun, and said "hurry up, please." (Id. at 3.) When asked if she was safe, she responded that she was, "for right now." (Id. at 4.) She then stated that "everything" was "breaking downstairs" and that she had to go; the call was disconnected. (Id. at 5.) Mrs. Hogan later testified that she had heard a noise downstairs and that she did not know whether furniture was breaking or if someone had fallen over. (Ann Hogan Dep. at 67.) Mrs. Hogan passed her husband on the stairs, as he was on his way up to the bathroom; she told him she was leaving and he said "good, get out of here." (Michael Hogan Dep. (Vol. I) at 147-48, 149.) Mr. Hogan then called down to Mr. Ditmars that he would see him on the porch. (Id. at 149.)

C. The Arrival of EPD Officers

The 911 emergency dispatcher employed by the Northampton County Emergency Dispatch Center radioed to EPD Officers that there was a "domestic" involving an individual with a gun at the Hogans' address. (Herncane Dep. at 31.) The emergency dispatcher also called Mrs. Hogan back; Mrs. Hogan reported that she was now out on the front porch with her neighbor, and that her husband was in the house. (Pl.'s Ex. K, Transcript of 911 Call, at 7.) She told the operator that she didn't want her husband to see her on the phone. (Id. at 9.) Officer Herncane was the first to arrive

on the scene at 8:08 p.m. (Def.'s SMF ¶ 45), and Officer Miller arrived shortly thereafter (Miller Dep. at 83, 85); Mrs. Hogan was on the phone for the second time with the emergency dispatcher at this time. There are unidentified male voices on the call, and the dialogue indicates that at least one of those men learned that Mr. Hogan was no longer armed. (Id. at 9-11; Shull Dep. at 22, 28.) Mr. Ditmars was standing on the porch, and Mr. Hogan's cousin, Buddy Shull, arrived just after Officer Herncane. (Shull Dep. at 22, 28.)

Officer Herncane pulled up with his lights and sirens on and double parked in front of the Hogan residence, blocking the street. (Herncane Dep. at 57-58.) Officer Herncane noticed two or three people on the adjacent porch and went to speak to them. (Herncane Dep. at 31-32.) He asked one woman on the porch (Mrs. Hogan) where the armed man was and what his name was. (Id. at 32.) Mrs. Hogan, who was not crying, responded that his name was "Michael" and that he was in the house. (Ann Hogan Dep. at 62; Herncane Dep. at 180-81.) Mr. Shull introduced himself to Officer Herncane and identified himself as a police officer with the Wilson Police Department; Officer Herncane informed Mr. Shull that they were in Easton, not Wilson, and proceeded to walk into the house. (Shull Dep. at 29-30; Herncane Dep. at 31-32.) Officer Herncane asked no other questions of the people on the porch to ascertain what had happened, nor did he ask Mrs. Hogan her own name or her relationship to the man inside the house. (Herncane Dep. at 69-70, 228, 229, 134-36.) Mrs. Hogan did not volunteer any additional information or tell the police not to enter the house. (Ann Hogan Dep. at 62.) Officer Miller, who had arrived just after Officer Herncane, could not hear this discussion but knew that it only lasted 20-30 seconds. (Miller Dep. at 84, 86.)

Officer Herncane entered the home, followed by Officer Miller. Both Officers called out for Mr. Hogan. (Def.'s SMF ¶¶ 50, 52.) Mr. Hogan had retreated to the basement by this time to avoid

contact with the police. (Michael Hogan Dep. (Vol. I) at 153-54.) Mr. Hogan testified that Officers Herncane and Miller were calling his name; there were flashing lights on the police cars; police dogs were barking; and loud boots were stomping across the first floor in what sounded like a "fast-paced motion." (Id. at 153-59.) He felt this behavior was aggressive, so he grabbed and loaded one of the shotguns that he kept in the basement with birdshot "as a defense" because he felt threatened and nervous. (Id. at 158-162.) Officer Herncane called down to Mr. Hogan, identified himself as a police officer, and warned that he was coming down the stairs. (Id. at 163.) Mr. Hogan responded by stating he had a shotgun and telling the officers to "get the fuck out of" his house. (Id.) He stated that he hadn't broken any laws, and Officer Herncane responded that the officers were only there to make sure he was all right. (Id. at 164.) Officer Miller testified that the police had an obligation to stay and investigate the domestic disturbance; he also expressed concern that Mr. Hogan was acting violently. (Miller Dep. at 98.) Herncane acknowledged that, at the time the Officers entered the home, Mr. Hogan was under no legal obligation to leave his basement. (Herncane Dep. at 185.) Mr. Hogan also said that he would shoot their dogs if they brought them down; Officers Herncane and Miller responded that they did not have dogs. (Id. at 168-69.) Mr. Hogan told them they were lying, because he could hear the dogs. (Id. at 169.) Officer Miller told Mr. Hogan that the dogs were outside in the car. (Miller Dep. at 113.)

D. Police Negotiations with Mr. Hogan

The resulting stand-off between Mr. Hogan and EPD Officers lasted one and one-half hours. It proceeded approximately as follows: While Officers Herncane and Miller were talking to Mr. Hogan, Officer Barry Golazeski arrived and looked from the outside through the basement window, observing Mr. Hogan pointing a shotgun in his direction; Officer Golazeski radioed that he had seen

a man with a gun in the basement. (Golazeski Dep. at 77-78, 91.) Mr. Hogan could not see out the windows and did not intentionally point his weapon in Officer Golazeski's direction. (Michael Hogan Dep. (Vol. I) at 173-74.) Lieutenant Orchulli had arrived by this time, about two minutes after Officers Herncane and Miller. (Orchulli Dep. at 142-43.) The parties agree that Officers Smith and Marraccini arrived shortly after Lt. Orchulli.

Officer Herncane let Officer Miller assume the role of negotiator (Herncane Dep. at 34-35; Miller Dep. at 103.) Officer Miller's voice was calm during the initial stages of the negotiations (Michael Hogan Dep. (Vol. I) at 168, 181), although he had to yell and shout to communicate with Mr. Hogan. (Miller Dep. at 131-32, 175-76.) Officer Miller asked Mr. Hogan to come upstairs without any guns; that Mr. Hogan would feel comfortable and that the Officers would be assured that Mr. Hogan was unarmed. (Id. at 114-16.) Lt. Orchulli interjected often, yelling commands to Mr. Hogan to put the gun down and using expletives. (Shull Dep. at 77-78; Michael Hogan Dep. (Vol. I) at 212; see also Orchulli Dep. at 155-57; Maraccini Dep. at 211.)

At times, Mr. Hogan would ask to speak to Mr. Shull. (Orchulli Dep. at 152.) Lt. Orchulli approached Mr. Shull and invited him into the residence to talk to Mr. Hogan. (Id. at 37-38, 40.) Mr. Shull peered down from the top of the stairs and observed Mr. Hogan in a prone position with the rifle in ready position. (Id. at 42.) Mr. Hogan, who seemed very flushed and "panicked" to Mr. Shull, entreated him to come downstairs—but without a vest or firearm. (Id. at 42.) Mr. Shull asked Mr. Hogan to lower the barrel and let him come down the stairs, but Mr. Hogan would not lower the shotgun. (Id.) Lt. Orchulli felt that he could not let Mr. Shull go downstairs under such circumstances. (Orchulli Dep. at 172.) Mr. Hogan then told Mr. Shull to "get the fuck out of his house." (Shull Dep. at 45-46.)

Mr. Hogan was very upset, believing that the police were armed intruders who were falsely imprisoning him, so he threatened to shoot through the basement ceiling. (Michael Hogan Dep. (Vol. I) at 182-84.) When he heard the Officers laugh, he began a countdown and fired his shotgun off at the basement wall at approximately 8:24 p.m. (Id. at 185.) Around the time of the gunshot, the officers began to consider Mr. Hogan a "barricaded gunman." (Miller Dep. at 104.) Also around this same time, Lt. Orchulli directed the County dispatcher to page the Easton SWAT Team (Special Weapons and Tactics), to make them aware of the incident. (Orchulli Dep. at 226-27.) Although it is unclear from the record who subsequently activated the SWAT Team, it is undisputed that the Team, headed by Capt. Mazzeo (as team commander) and Chief Palmer (as incident commander), was activated.

After the shots, Mr. Shull asked Mr. Hogan if he was okay; Mr. Hogan yelled up that he was all right, but that "next time, you know, the shots are not going to be downstairs." (Michael Hogan Dep. at 186-87.) Officer Miller told Mr. Hogan that if he put the gun down and came to the bottom of the steps, he could talk to Mr. Shull. (Id. at 187.) Mr. Hogan thus attempted to unload his gun but was unable to, and instead put the gun down, sliding it across the floor. (Id. at 187.) He stood at the bottom of the basement stairs and waited but could not see anyone at the top; he felt that the police had broken their promise so he picked up a hunting rifle (an "unarmed" 30-30) and stood by the wall. (Id. at 188.) By this time Mr. Hogan was aware that other officers were outside and could see him through the windows. (Id.) He felt like the Officers had tricked him into disarming himself in order to "come and get" him. (Id. at 188-89.) Through the basement window, Officer Marraccini observed Mr. Hogan lay his shotgun down and pick up the rifle; he subsequently radioed this information to the other officers. (Marraccini Dep. at 217 ("I radioed in that he now had a high

powered weapon with a scope."))

During this time, Miller continually requested that Mr. Hogan put the gun down and come upstairs, and Mr. Hogan told him to "go fuck" himself. (Michael Hogan Dep. (Vol. I) at 195.) Mr. Hogan threatened to release gas into the house and walked over to the boiler to release the bleeder valve, which made a loud hissing sound. (Id. at 200.) Capt. Mazzeo observed a fluid dropping onto the floor and radioed that he thought it was only water, not gas. (Mazzeo Dep. at 210.) Mr. Hogan then smashed out the basement lights so that the police could not see what he was doing. (Michael Hogan Dep. (Vol. I) at 201.)

Meanwhile, other officers, including the SWAT team, had arrived. (See, e.g., Orchulli Dep. at 173-74.) Capt. Mazzeo instructed his team that there was a domestic situation, and that the subject was possibly armed with a shotgun and a high-powered rifle and had already fired a shot. (Casterline Dep. at 119-20.) Capt. Mazzeo testified that there was a tactical plan to contain Mr. Hogan in the basement (Mazzeo Dep. at 215), although other team members state that no overall tactical plan was communicated to them. (E.g., Marraccini Dep. at 160; Casterline Dep. at 134, 158.)

SWAT officers replaced some of the patrol officers inside the front of the house. (Id. at 120-21; Def.'s Ex. W, at 150.) The officers were positioned as follows: Officer Miller and Officer Parkansky (a secondary negotiator) were in the front room of the residence on the south side of the basement stairs; Officer Smith, armed with a shotgun, and Officer Casterline, armed with a "less lethal" Sage SL6[3], were nearby, a bit closer to the stairs; outside the front/south window of the house were Officers Remaley and Marraccini, both armed with AR-15s; inside the back of the residence,

[3]The Sage SL6 is a less lethal weapon that fires a high-impact baton round. (Def.'s SMF ¶ 104 n.15.)

to the north of the basement stairs, were Lt. Orchulli (shotgun) and Officer Beitler (MP5); Defendant Herncane was with Buddy Shull just outside the back of the house; finally, Capt. Mazzeo was positioned outside the front of the house. (Def.'s Ex. W, at 150; Casterline Dep. at 98.) Officers Casterline, Marraccini, Remaley, Beitler, and Smith were all members of the SWAT Team. Officer Casterline understood that Capt. Mazzeo had instructed him to shoot with the Sage if Mr. Hogan appeared at the top of the steps with a weapon. (Casterline Dep. at 158-59.) Capt. Mazzeo testified that the plan was for Officer Casterline to shoot Mr. Hogan with the less lethal Sage weapon if Mr. Hogan appeared at the top of the steps without surrendering or was not fully compliant with the Officers' instructions; he did not communicate this plan to the Officers positioned in the back of the house. (Mazzeo Dep. at 215-17, 221.)

Although Officer Miller continued to talk, Mr. Hogan thought all of the Officers had left the house, and he wanted to insure that they had. (Michael Hogan Dep.(Vol. I) at 215.) He went to the stairs, hollered up, stomped up and down on the stairs, and threw his boot up to the landing to test the reaction of the Officers. (Id. at 215-16, 219-20.) Officer Miller believed that Mr. Hogan was ready to give up and surrender, but did not communicate his belief to anyone. (Miller Dep. at 134-36.) He saw the gun and told the officers in his area, "There is the gun, I think I got him." (Miller Dep. at 136.) He told Mr. Hogan to leave the gun "there," that is, at the top of the basement steps on the floor. (Id.) He instructed him to put his hands out of the doorway and parallel to the gun and come up. (Id. at 136-37.) Mr. Hogan then retracted the rifle, and Miller again told him to put his hands through the doorway and come up. (Id. at 137.) Mr. Hogan, who claims that at this point he thought no one was in the house, lowered the lever of the rifle, put the bolt to the rear, and went to the top of the steps with the unarmed rifle. (Michael Hogan Dep. (Vol. I) at 220, 224.)

E. The Shooting

When he arrived at the top of the stairs, Mr. Hogan bent over in one continuous motion to lay the gun down, with the barrel facing the general direction of the front of the house; his hands were holding the rifle from the top, with his right hand on the stock of the pistol grip and the left hand on the fore-end. (Michael Hogan Dep. (Vol. I) at 225-26, 228.).[4] He then felt a shot in his wrist. (Id. at 227-28.) The first shot was almost simultaneous with Mr. Hogan's appearance at the top of the stairs. (Smith Dep. at 159-60; Marraccini Dep. at 246-47.) Multiple additional shots were fired within a second. (Mazzeo Dep. at 232; Marraccini Dep. at 247; Orchulli Dep. at 203-04.)

There is a factual dispute as to whether the Officers warned Mr. Hogan to drop the gun prior to firing.[5] There is also a factual dispute regarding which Officer fired the first shot; some of the

[4]Although Plaintiffs' expert concludes that the physical evidence is consistent with Mr. Hogan's testimony (Pl.'s Ex. A, Ross Report at 8), the Defendants' version of the facts differs. Officer Casterline, who was positioned at the front of the house, testified that Mr. Hogan immediately turned to the front of the house when he appeared at the top of the stairs, and, despite the fact that many Officers were yelling at him to drop the gun, moved the rifle in an upward motion as if raising it to his shoulder. (Casterline Dep. at 126-27.) Lt. Orchulli, who was positioned at the back of the house, testified that the barrel of the rifle was first pointing up toward the ceiling, and then came down to level position once Mr. Hogan was through the landing. (Orchulli Dep. at 200.) He testified that Mr. Hogan was holding the rifle with his right hand around his mid-section, and his left hand above his shoulder, leveling it toward the front, or South, side of the house. (Id. at 200-01; Def.'s Ex. W, at 150.) Mr. Hogan then turned to bring the weapon to bear on Lt. Orchulli and Officer Beitler in the back of the house, although Lt. Orchulli could not tell if Mr. Hogan had already been shot at this point. (Id. at 201.)

[5]Officer Casterline testified that he yelled at Mr. Hogan to drop the gun, and that other Officers were yelling the same thing. (Casterline Dep. at 126.) Some Officers heard this command. (Marraccini Dep. at 244; Miller Dep. at 139.) Other Officers testified that they did not hear anyone say anything prior to the first shots being fired. (Beitler Dep. at 111; Herncane Dep. at 125.) Officer Stephen Parkansky testified to the effect that the commands came almost at the same time as the shots rang out. (Parkansky Dep. at 99, 114-15.)

testimony indicates that the shot came from the back of the house, probably from Orchulli.[6] (Smith Dep. at 208; Miller Dep. at 149). The second shots may have come from Officers Marraccini and Remaley, who were situated just outside the front window. (Marraccini Dep. at 247-48.) Officer Marraccini fired three to five rounds (Id. at 255-56), and Officer Remaley fired three to four rounds. (Remaley Dep. at 114, 213-14.) Officer Casterline fired one round from the Sage. (Casterline Dep. at 127.) From the back of the house, Lt. Orchulli fired one round (perhaps the first shot) and then a second round from his shotgun (Orchulli Dep. at 197-98), and Officer Beitler discharged three rounds from his MP-5, an automatic weapon. (Beitler Dep. at 186-87.) Smoke from the Sage and dust from the brick walls filled the room. (Smith Dep. at 191; Marraccini Dep. at 274.) Mr. Hogan fell to the floor. (Michael Hogan Dep. (Vol. I) at 232.)

F. After the Shooting

The officers stopped shooting when they noticed that Mr. Hogan had fallen. (Marraccini Dep. at 280; Remaley Dep. at 174.) Smoke and debris had filled the room, and the Officers reported that their sight was at least partially obscured during the shooting. (Smith Dep. at 232-34; Remaley Dep. at 220.) Lt. Orchulli yelled at Mr. Hogan to show his hands. (Michael Hogan Dep. (Vol. I) at 232.) Capt. Mazzeo, who had been stationed near the front porch, came in and, while handcuffing Mr. Hogan, stepped on his wrist, causing Mr. Hogan severe pain, after which Mr. Hogan passed out.

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[6]Some Officers believed that the first shot came from Officer Casterline's Sage weapon. (Marraccini Dep. at 247; Casterline Dep. at 127.) Other Officers stated that they could not tell where the first shot came from. (Remaley Dep. at 172; Beitler Dep. at 111-12.) If the first shot did come from the back of the house, it was fired by Lt. Orchulli, who was the first to fire from the back of the house. (Beitler Dep. at 112-15.) Lt. Orchulli contends, however, that he was hit by debris resulting from another shot hitting the brick wall *before* he fired. (Orchulli Dep. at 119.) Lt. Orchulli and Officer Beitler could not tell from their location whether any of the officers in the front of the house were in danger of loss of life or serious injury. (Orchulli Dep. at 189; Beitler Dep. at 233.)

(Id. at 232.) Capt. Mazzeo carried him into the dining room (toward the front of the house) to assess his wounds. (Mazzeo Dep. at 238; Orchulli Dep. at 216.) Capt. Mazzeo called to county control that he had a man with gunshot wounds to his abdomen, and he himself began "plugging the holes" with bandages from his belt, providing direct pressure to some of the wounds in his abdomen, but all the while speaking into the radio (which required the depression of a button with one hand in order to be heard). (Mazzeo Dep. at 244-45.) Capt. Mazzeo did not realize that Mr. Hogan was bleeding from the wrist as well as the abdomen. (Id. at 248.) Mr. Shull, a trained Emergency Medical Technician, asked to enter the residence, and Capt. Mazzeo immediately acquiesced. (Shull Dep. at 63-64.) Mr. Shull testified that, when he entered, Capt. Mazzeo was standing over Mr. Hogan and there were no dressings on Mr. Hogan's wounds. (Id. at 64-66, 85.)

An ambulance was stationed nearby, but not directly in front of the house. (Pls.' Ex. I, Easton Emergency Squad Report at 1.) Mr. Shull testified that the emergency squad did not arrive for three to five more minutes (Shull Dep. at 69); the Easton Emergency Squad reported that they arrived at the residence four minutes after being called. (Pls.' Ex. I, Easton Emergency Squad Report, at 1.) The emergency squad had difficulty accessing the scene due to police vehicles blocking the roadways. (Id.) Mr. Hogan had been struck in his left wrist/hand, three of his right fingers, and his abdomen (Pls.' Ex. A, Ross Report at 7-8.); his condition at the scene was life-threatening. (Pls.' Ex. I, Easton Emergency Squad Report, at 1.) He was transported to the hospital by helicopter, spent eight days in the hospital, and his right ring finger was amputated. (Michael Hogan Dep. (Vol. I) at 86-89.)

G. Police Knowledge of Mr. Hogan's Mental Health Problems

There is some dispute as to the EPD Officers' knowledge of Mr. Hogan's mental health

disorders. Lt. Orchulli inquired of Mr. Shull as to why Mr. Hogan was upset; Mr. Shull responded that Mr. Hogan "apparently had been drinking and also had mental issues, that he had anxiety problems." (Shull Dep. at 39.) Lt. Orchulli said that Mr. Shull told him that Mr. Hogan had "mental health issues," but that he did not specify what those issues were. (Orchulli Dep. at 160.) Officer Herncane reported that Mr. Shull told Lt. Orchulli that Mr. Hogan had been drinking, and that he was taking medication for depression. (Herncane Dep. at 55.) This conversation occurred before Mr. Shull came into the house to talk to Mr. Hogan—and thus before Mr. Hogan fired his shotgun into the wall. (Shull Dep. at 39-40.)

H. Criminal Charges Against Mr. Hogan

Mr. Hogan was subsequently charged with ten counts of aggravated assault; one count of terroristic threats, ten counts of recklessly endangering another person; and one count of crimes committed with firearms. (Pls.' Ex. L, Guilty Plea Tr. at 2-3.) He pled guilty to the one count of terroristic threats and nine counts of recklessly endangering another person. (Id. at 3.) According to the Assistant District Attorney, speaking at the guilty plea proceeding, "[t]he recklessly endangering plea relates to really the first part of this incident . . . ." (Id. at 5-6.) Specifically, the reckless endangerment charges were based on Hogan's firing a round from his shotgun into the basement wall. (Pl.'s Ex. Y, 02/26/02 Police Criminal Complaint, at 248-49.)

II. LEGAL STANDARD

Summary judgment may be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "material" if it may affect the outcome of the matter pursuant to the underlying

law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The moving party bears the initial responsibility of "identifying those portions of [the record] . . . which it believes demonstrate an absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party must go beyond the pleadings and set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. The Court may not itself weigh the evidence and determine the truth of the matter, but must draw all inferences in interpreting the evidence presented by the parties in favor of the nonmoving party. Abraham v. Raso, 183 F.3d 279, 287 (3d Cir. 1999) (citing Anderson, 477 U.S. at 249, and Boyle v. County of Allegheny, 139 F.3d 386, 393 (3d Cir. 1998)).

III. DISCUSSION

The Easton Defendants have moved for summary judgment with respect to the ADA claim against the City (Count I) and the claims brought pursuant to § 1983 against the EPD officers for unlawful entry in violation of the Fourth Amendment (Count IV), excessive force in violation of the Fourth Amendment (Count V), and denial of medical care in violation of the substantive due process component of the Fourteenth Amendment (Count VI). Capt. Mazzeo has also moved for summary judgment with respect to Counts IV, V, and VI.

A. ADA Claim Against the City

In Count I, Mr. Hogan alleges that the City violated Title II of the ADA, asserting that the

City is liable for the EPD Officers' failure to reasonably accommodate his psychological disorders during the course of the incident. Title II, which sets forth the obligations of public entities regarding individuals with disabilities, states, in pertinent part: "[N]o 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. Thus, to succeed on a typical claim brought pursuant to Title II, a plaintiff must establish that (1) he is disabled; (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, exclusion, or denial of benefits was by reason of his disability. Gohier v. Enright, 186 F.3d 1216, 1219 (10th Cir. 1999); Weinreich v. Los Angeles Count Metro. Transp. Auth., 114 F.3d 976, 978 (9th Cir. 1997). The implementing regulations for Title II require that a public entity make "reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the services, program, or activity." 28 C.F.R. § 351.30(b)(7).

In ruling on the Defendants' Motion to Dismiss, we recognized that police services constitute a "service, program, or activity" contemplated by Title II, and that a claim based on a local government's failure to properly train its police officers for encounters with disabled persons is actionable under this provision. Hogan v. City of Easton, No. Civ. A. 04-759, 2004 WL 1836992, at *6-7 (E.D. Pa. Aug. 17, 2004) (relying on Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232 (M.D. Pa. 2003)). We thus held that the City could be liable under Title II's nondiscrimination mandate for failing to train its Officers to treat individuals with emotional disturbances in a manner

consistent with their disability. We also noted that, in the context of police responses to disturbances, Title II may not require reasonable accommodations[7] of disabled persons "'prior to the officer's securing of the scene and ensuring that there is no threat to human life.'" Id. at *7 n.3 (quoting Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000)).

The City cannot, therefore, be liable unless there was some form of underlying discrimination on the basis of Mr. Hogan's disability; that is, the City's alleged failure to train must be causally connected to the EPD Officers' actions in this case. Mr. Hogan alleges that the EPD Officers failed to accommodate his disorders during the course of the arrest by utilizing flashing lights, shouting at him and using expletives, lying to him about the presence of police dogs, failing to use family members or a psychologist to talk to him, and failing to make the appropriate inquiries into his mental health before confronting him. According to Mr. Hogan, this failure to make reasonable accommodations was caused by the City's failure to modify its police services to provide adequate training for dealing with emotionally disturbed or mentally ill persons and to create a written policy or directive as a complement to training.

The facts, viewed in the light most favorable to the Plaintiff, do not demonstrate an underlying failure to treat Mr. Hogan in a manner consistent with his disability during the initial stages of the incident. First, there is no evidence that the Officers knew or should have known that they should not have used their flashing lights or brought their dogs with them. That is, Mrs. Hogan did not inform the 911 dispatcher that her husband had any mental health disorders. The undisputed facts show that Officers Herncane and Miller left their police dogs in the car, and never lied to Mr.

[7]Although Title II uses the term "reasonable modifications" rather than "reasonable accommodations," courts have used these terms interchangeably. See Swenson v. Lincoln County Sch. Dist. No. 2, 260 F. Supp. 2d 1136, 1144 n.10 (D. Wyo. 2003).

Hogan about the dogs' presence. The deposition testimony shows that Officer Miller understood that Mr. Hogan was asking them not to send their dogs down to the basement or he would shoot them; thus, they responded that they did not have their dogs with them. Officer Miller then clarified to Mr. Hogan that the dogs were in the car.

Approximately ten minutes into the incident, Lt. Orchulli learned that Mr. Hogan had been drinking and was taking medications for his mental health. The undisputed facts demonstrate that Lt. Orchulli attempted to help Mr. Hogan by having him talk to family members: namely, his cousin, Mr. Shull. Mr. Shull tried to talk to Mr. Hogan, but Mr. Hogan was pointing his shotgun at the basement doorway and would not put it down. Thus, the Officers' only omission was their failure to call a psychologist. By this time, however, it was clear that Mr. Hogan's actions posed a potential threat to the safety of others. Soon afterward, Mr. Hogan fired his shotgun into the basement wall. Thus, the facts establish that there was a need to secure the scene and the safety of the Officers and others, thus taking this case out of the ambit of the ADA and its requirement of reasonable accommodations to disabled persons. See Hainze, 207 F.3d at 801.

In conclusion, the Officers' actions were not the result of inadequate training with respect to emotionally disturbed individuals, because the first-arriving Officers (Officers Herncane and Miller) did not know that Mr. Hogan was influenced by mental health disorders. Once Orchulli inquired into the situation and realized that Mr. Hogan may have mental health issues, he attempted to allow Mr. Hogan to speak to his family. By this time, exigent circumstances were present, and the Officers needed to ensure the safety of themselves and others. See Thompson v. Williamson County, 219 F.3d 555, 558 (6th Cir. 2000) (holding that the police officer's inability to control the decedent was "not because he was inadequately trained to deal with disabled individuals, but because

the decedent threatened him with a deadly weapon before he could subdue him"). The Court concludes that the City cannot be liable for a violation of the nondiscrimination mandate of Title II of the ADA because the facts do not establish the required causal connection between the City's allegedly inadequate training and the EPD Officers' treatment of Mr. Hogan.[8] The Easton Defendants' Motion is, therefore, granted with respect to Count I.

B. Section 1983 Claims Against the Police Officers

Plaintiffs have asserted claims against the individual EPD Officers pursuant to 42 U.S.C. § 1983 based on the Officers' allegedly unlawful entry into and search of their house, use of excessive force against Mr. Hogan, and denial of medical care for Mr. Hogan's wounds. Section 1983

[8]Although Mr. Hogan alleges that the City failed to properly train its Officers to deal with emotionally disturbed individuals, there is some evidence that the City required training regarding individuals with special needs. Under state law, the EPD Officers must be certified by the Municipal Police Officers' Education and Training Commission (the "MPOETC"), which requires basic training and 12 hours of annual update training. In 2001, each of the Defendant Police Officers attended a course entitled "Law Enforcement and Special Needs Populations," which provided awareness level training to enable police officers to recognize the nature of various disabilities while ensuring the safety of both the public and officers involved. (Pl.'s Ex. S, MPOETC Training Logs.) Each of the EPD Officers had handled numerous calls with persons with suspected or actual mental health problems. (Defs.' SMF ¶ 141.) Capt. Mazzeo, who was the person responsible for training, testified that the Department itself did not provide any training. (Mazzeo Dep. at 37-38.) The Court sees no distinction between intra-departmental training and external training required as part of the MPOETC Program, and Mr. Hogan has not explained why the required course on Special Needs Populations was inadequate to prepare the Officers for dealing with emotionally disturbed or mentally ill individuals.

On the other hand, the EPD Officers uniformly agree that the Department has no written guidelines for dealing with the mentally ill. Plaintiffs' expert on police practices states that this is contrary to required professional standards and that "the absence of a clearly defined policy denies any opportunity for training and results in poor tactical decisions and incorrect acts in the field." (Pls.' Ex. E, Clark Report at 17-18.) The City's failure to have a formal written policy to complement training does not equate to a failure to modify its practices to accommodate emotionally disturbed individuals. Accordingly, there are no genuine issues of material fact as to whether the City made reasonable modifications to its provision of police services to accommodate emotionally disturbed individuals by providing training in this area.

provides a remedy against "any person" who, under the color of state law, deprives another of his constitutional rights. 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. Lake v. Arnold, 112 F.3d 682, 689 (3d Cir. 1997). All Defendants concede that they were acting under color of state law at all times relevant to the claims. Both the Easton Defendants and Capt. Mazzeo have moved for summary judgment on the grounds that there are no genuine issues of material fact with respect to these claims and that, as a matter of law, they did not deprive Mr. Hogan of his constitutional rights. Alternatively, with respect to the excessive force claim, the Defendants argue that they are entitled to qualified immunity.

1. Unlawful Entry/Unreasonable Search (Count IV)

In Count IV of the Complaint, Mr. and Mrs. Hogan allege that the EPD Officers violated their Fourth Amendment rights by entering and searching their home without a warrant. "Absent exigency or consent, warrantless entry into the home is impermissible under the Fourth Amendment." United States v. Shaibu, 920 F.2d 1423, 1425 (9th Cir. 1989) (citing Steagald v. United States, 451 U.S. 204, 211 (1981)); see also Couden v. Duffy, 446 F.3d 483, 496 (3d Cir. 2006) ("A search of a home without a warrant is presumptively unreasonable under the Fourth Amendment." (quoting Payton v. New York, 445 U.S. 573, 586 (1980))). The Easton Defendants argue that both consent and exigent circumstances existed to justify their initial and later entries into the Hogan residence; Capt. Mazzeo argues that exigent circumstances also justified his later entry into the home.

The Easton Defendants contend that the undisputed facts demonstrate that Mrs. Hogan consented to their initial entry and search of the premises by calling 911 and directing Officer

Herncane to Mr. Hogan when he arrived on the scene. The Hogans argue that there are genuine issues of fact as to whether Mrs. Hogan consented because the Officers did not make an express request to enter the home and Mrs. Hogan did not acquiesce to his entry. Consent is "the product of an essentially free and unconstrained choice by its maker," and its voluntariness is determined by "the totality of the circumstances." Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).[9] Although the Court must draw all reasonable inferences from the facts in favor of the Hogans, the undisputed facts leave no room for an inference that Mrs. Hogan did not consent to a search of her home because Mrs. Hogan called 911, requested help dealing with her armed husband, and did not negate her request when the police arrived. While a mere failure to object to officers' entry into a home, absent any affirmative acts indicating consent, would not suffice to establish consent, see United States v. Jaras, 86 F.3d 383, 390 (5th Cir. 1996); Shaibu, 920 F.2d at 1427-28, Mrs. Hogan affirmatively reached out to the police by requesting help in an emergency. Officer Herncane explicitly demonstrated his intent to find Mr. Hogan by asking Mrs. Hogan where the man was and what his name was; Mrs. Hogan cooperated with him by indicating that the man about whom she had called was inside the house and did not indicate to Officer Herncane that he should not enter the house to find her husband. The voluntariness of her cooperation is evident in light of her earlier 911 call. Examining the totality of the circumstances surrounding the police entry, there are no genuine

[9]Plaintiffs contend that Defendants bear the burden of persuasion with respect to exceptions to the warrant requirement. It is true that in criminal cases the burden is on the government to prove consent. Schneckloth, 412 U.S. at 222. The United States Court of Appeals for the Third Circuit has not ruled on the burden of proof in establishing these exceptions in a § 1983 case, but the majority view is that the defendant has the burden of producing evidence of consent, while the "'ultimate risk of nonpersuasion must remain squarely on the plaintiff in accordance with established principles governing civil trials.'" Valance v. Wisel, 110 F.3d 1269, 1278 (7th Cir. 1997) (quoting Ruggiero v. Krzeminski, 928 F.2d 558, 563 (2d Cir. 1991)).

issues of material fact as to whether the entry of the house was made with Mrs. Hogan's voluntary consent.[10] We conclude, therefore, that the facts establish that none of the EPD Officers violated the Fourth Amendment by entering and searching the house without a warrant, and that the Officers are entitled to judgment as a matter of law with respect to this claim. Accordingly, both Motions are granted with respect to Count IV.[11]

2. Unreasonable Seizure/Excessive Force (Count V)

In Count V of the Complaint, Mr. Hogan alleges that the EPD officers deprived him of his Fourth Amendment right to be free from excessive force in the following ways: (1) constraining his freedom of movement in his own home; (2) shooting him; and (3) continuing to shoot him after he was incapacitated. He also asserts that Capt. Mazzeo used unreasonable force in stepping on his left wrist while handcuffing him after he was incapacitated. The Easton Defendants argue that these

[10]Plaintiffs argue that Officer Herncane's deposition testimony demonstrates that he did not have sufficient facts in his possession to reasonably believe that Mrs. Hogan had authority to consent to search, and thus the search of the premises was unreasonable, citing Illinois v. Rodriguez, 497 U.S. 177 (1990). In Rodriguez, the Supreme Court held that police may enter a home without a warrant based on consent if they reasonably believe that the "consenting party had authority over the premises." Id. at 188. This rule renders such an entry unlawful if there is no apparent authority to consent, "*unless* actual authority exists." Id. at 188-89. In this case, although Herncane may have lacked the facts necessary to reasonably conclude that he had permission to enter and failed to engage in further inquiry, the entry was not unlawful because there is no dispute that Mrs. Hogan had actual, if not apparent, authority to consent to the Officers' entry. See United States v. Chaidez, 919 F.2d 1193, 1201-02 (7th Cir. 1990) (holding that apparent authority is "not necessary" if actual authority exists; affirming denial of motion to suppress where defendant had consented to search of premises in which she resided but gave police no reason to believe she had such authority to consent).

[11]Having determined that the undisputed facts establish that Mrs. Hogan voluntarily consented to the police entry, we need not determine whether there are factual issues with respect to the exigent circumstances exception to warrantless entry. We further note that, even if there were no consent, the Hogans do not dispute that exigent circumstances justified the entry of later-arriving Officers Remaley and Casterline and Capt. Mazzeo.

claims fail as a matter of law because the force used was reasonable under the circumstances, and/or the officers are entitled to qualified immunity. They also argue that three of the Officers named in this Count—Smith, Herncane, and Miller—did not shoot at Mr. Hogan and cannot be held liable for excessive force. Capt. Mazzeo argues that he was not involved in the shooting of Mr. Hogan, the force he used in handcuffing Mr. Hogan was reasonable under the circumstances, and he is entitled to qualified immunity.

"All claims that law enforcement officers have used excessive force–deadly or not—in the course of an arrest, investigation stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard." Africa v. City of Philadelphia, 49 F.3d 945, 962 (3d Cir. 1995) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)). A claim for excessive force thus must involve a "seizure" that was unreasonable. Kopec v. Tate, 361 F.3d 772, 776 (3d Cir. 2004). The reasonableness standard "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396 (citing Tennessee v Garner, 471 U.S. 1, 8-9 (1985). "Other factors include 'the duration of the [officer's] action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.'" Couden, 446 F.3d at 496 (quoting Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir.1997)).[12]

"The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene . . . ." Graham, 490 U.S. at 396. The finding should allow "for the

[12]The listed factors are hereinafter referred to as the Graham/Sharrar factors.

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." Id. "Reasonableness under the Fourth Amendment should frequently remain a question for the jury, however, defendants can still win on summary judgment if the district court concludes, after resolving all factual disputes in favor of the Plaintiff, that the officer's use of force was objectively reasonable under the circumstances." Kopec, 361 F.3d at 777 (quoting Abraham, 183 F.3d at 290).

a. Constraining Mr. Hogan's Freedom of Movement in His Own Home

Mr. Hogan argues that the EPD Officers used excessive force by taking a "confrontational stance" and constraining Mr. Hogan's freedom of movement in his own home. According to Mr. Hogan, there was no need for any force and, thus, the force used was constitutionally unreasonable. Although the United States Court of Appeals for the Third Circuit has found force to be excessive in some cases "notwithstanding the absence of extensive physical contact and permanent physical injury," Sharrar v. Felsing, 128 F.3d 810, 821 (3d Cir. 1997), none of the authority cited by Plaintiffs supports the theory that lawful entry into a house, even when aggressively "stomping" on the floor in their boots and leaving their dogs to bark in the patrol cars, constitutes an unreasonable use of force when police are responding to a 911 call regarding a domestic disturbance involving an armed man.[13] The first EPD Officers to arrive on the scene[14] knew that a 911 call had been placed regarding

[13]For example, in Sharrar the Third Circuit discussed its decisions finding an excessive use of force despite the absence of physical touching; those decisions involved the brandishing of a pistol by an individual not known to the plaintiff to be a police officer and the use of handguns as a show of force by police officers who were ordering unknown individuals approaching a house that was the subject of a drug raid to "get down." Sharrar, 128 F.3d at 821-22 (citing Black v. Stephens, 662 F.2d 181 (3d Cir. 1981), and Baker v. Monroe Twp., 50 F.3d 1186, 1193 (3d Cir. 1995)). The additional authority relied upon by Mr. Hogan to show that the instant scenario constitutes excessive force also

Mr. Hogan's behavior and quickly learned that Mr. Hogan had re-armed himself. See Sharrar, 128 F.3d at 822 (naming the possibility that the suspect may be armed and violent or dangerous as a relevant factor in determining the objective reasonableness of the force used). The Officers asked to talk to Mr. Hogan; they did not threaten to shoot him, they said they just wanted to talk to him when he was not armed, and Officer Miller, the designated negotiator, had a "calm" voice, according to Mr. Hogan. Although Lt. Orchulli interjected, yelling at Mr. Hogan to put down his gun and using expletives, this type of conduct does not constitute excessive force as a matter of law in a situation where there is cause to believe the suspect is violent. See id. (holding that foul language, shouting, and "Rambo-type behavior" while handcuffing and securing suspects not unreasonable force as a matter of law where there was probable cause to arrest for domestic dispute involving a gun). The amount of force exhibited was proportionate to the situation. See id. (naming the amount of force applied and whether it caused physical injury as relevant factor in determining the objective reasonableness of force is a relevant consideration in evaluating an excessive force claim). Accordingly, the Court finds that the police conduct prior to activating the SWAT Team was objectively reasonable under the Graham/Sharrar factors, especially given that the amount of force displayed was minimal.

Mr. Hogan also argues that the Officers constrained his movement by the activation and use

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involve much more extreme uses of force. See Alexander v. City and County of San Francisco, 29 F.3d 1355, 1367 (9th Cir. 1994) (involving the storming of decedent's house by a SWAT team for the purpose of executing an inspection warrant); McDonald v. Haskins, 966 F.2d 292, 294 (7th Cir. 1992) (involving holding a gun to nine-year old boy's head and threatening to shoot during search of residence, where boy was not under arrest).

[14]These Officers, according to Plaintiffs, were Lt. Orchulli and Officers Herncane, Miller, Smith, and Marraccini.

of the SWAT Team, and that this use of force was excessive. In Estate of Smith v. Marasco, 318 F.3d 497 (3d Cir. 2003) (Smith I), the Third Circuit held that there were genuine issues of material fact as to whether the decision to activate a sudden emergency response team to confront an emotionally unstable and physically fragile man whom police did not know to be violent in response to a neighbor's complaint constituted an unreasonable use of force. Id. at 515-18. In this case, the EPD Officers did not activate the SWAT Team until after Mr. Hogan had explicitly threatened the officers and placed them in danger by shooting into the basement wall, which he admitted to doing when he pled guilty to the charges of reckless endangerment. Thus, unlike in Smith I, the SWAT Team was not activated until after it was clear that Mr. Hogan was acting violently. See id. at 517 (noting that "there was no indication that Smith had been using a gun recently or that Smith ever [had] used a gun in a violent manner"). Before the SWAT Team was called, Mr. Hogan demonstrated an intent to defy the Officers' wish to talk peacefully and was threatening harm to the Officers. These factors outweigh other Graham/Sharrar factors (that is, that the Officers outnumbered Mr. Hogan, and that Mr. Hogan was affected by his psychological disorders at the time).[15] The Court finds that there are no genuine issues of material fact and that the EPD's decision to have a special weapons team present was objectively reasonable as a matter of law based on the undisputed facts that, at that time, Mr. Hogan was armed and had fired a shotgun into the basement

[15]Plaintiff argues that there are disputed issues of fact as to whether the police knew or should have known that Mr. Hogan was emotionally disturbed, and the reasonableness of the force should be evaluated with this in mind. See Smith I, 318 F.3d at 517 (recognizing that the decedent's status as an emotionally disturbed person is relevant to the reasonableness of force used); Deorle v. Rutherford, 272 F.3d 1272, 1283 (9th Cir. 2001) ("[W]here it is or should be apparent to the officers that the individual involved is emotionally disturbed, that is a factor that must be considered in determining, under Graham, the reasonableness of the force employed."). We conclude that, in light of the other factors supporting the force used, any factual disputes are immaterial.

wall, continued to resist the EPD Officers, and threatened the safety of the Officers and others. See, e.g., Estate of Fortunato v. Handler, 969 F. Supp. 963, 973 (W.D. Pa. 1996) (holding that the activation of sudden emergency response team to execute arrest was objectively reasonable where arrestee was charged with threatening the district attorney and had allegedly reported that he would shoot anyone who tried to arrest him); see also Mellott v. Heemer, 161 F.3d 117, 122-24 (3d Cir. 1998) (holding that U.S. Marshals acted reasonably as a matter of law in barking orders and pointing guns at former property owners and guests when executing a court order to remove former owners from the property because there was evidence that they had been violent and threatening to federal officers in the past). In sum, the Court finds that the force displayed by the EPD Officers by entering Mr. Hogan's house, stomping, yelling, using expletives, and calling the SWAT Team, all of which caused Mr. Hogan to feel contained to his basement, was reasonable as a matter of law.

b. Shooting Mr. Hogan

Mr. Hogan also argues that the police used excessive force by shooting him and continuing to shoot at him after he was incapacitated. According to Mr. Hogan, he arrived at the top of the stairs with the rifle, but the rifle was unloaded and his hands were not positioned to fire. (Michael Hogan Dep. (Vol. I.) at 225-26.) Officer Miller had just told him to put the gun down at the top of the stairs. (Miller Dep. at 136.) When Mr. Hogan arrived near the top, he bent down in one continuous motion to put the rifle on the floor. (Michael Hogan Dep. (Vol. I) at 228.) Mr. Hogan admits that he had previously threatened the Officers' safety by shooting birdshot into the wall. The parties agree that the Mr. Hogan was shot almost immediately after appearing at the top of the stairs.

As with all claims of excessive force by law enforcement officers, we analyze deadly force claims under the reasonableness standard. Africa, 43 F.3d at 962 (quoting Graham, 490 U.S. at

395).[16] The paramount consideration in a deadly force case is whether the defendants had probable cause to believe that the suspect posed a significant threat of serious physical harm. See Garner, 471 U.S. at 11-12 (1985); Abraham, 183 F.3d at 292-95 (placing emphasis in deadly force case on the significance of the threat posed by suspect). Mr. Hogan contends that, viewing the facts in the light most favorable to him, the EPD Officers could not reasonably have believed that he posed a threat of serious physical harm at the time he was shot because he was visibly surrendering his weapon.

We find that there are genuine issues of material fact as to whether any meaningful warning was given to Mr. Hogan at the time; moreover, the officers had not warned him prior to that time that they might use deadly force, although they did assert throughout the negotiations that they needed him to disarm himself. See Garner, 471 U.S. at 11-12 (noting the importance of warnings before use of deadly force, if feasible). The undisputed facts demonstrate that the shooting began less than a second after Mr. Hogan appeared at the top of the stairs, from which a reasonable juror could infer that the officers did not assess the situation and the threat posed. Furthermore, the Officers outnumbered Mr. Hogan. There are genuine issues of material fact as to whether Mr. Hogan posed a threat of serious physical harm at the time. Although Mr. Hogan had previously resisted arrest by barricading himself in the basement, threatened the Defendants with harm, and fired birdshot at the wall, at the moment of the shooting approximately one hour later (See Def.'s Ex. W, at 101), Mr. Hogan was bent over from the waist, was holding the gun with his hands in a position where he could not fire, was setting the gun down, was indicating no intent to resist arrest or to flee the scene,

[16]In their Motion, the Easton Defendants do not meaningfully distinguish between the use of the less lethal weapon and the use of deadly force.

and was no longer advancing.[17] Whether the Officers that shot at Mr. Hogan had probable cause to believe he posed a significant threat is central to the inquiry of whether the use of force is reasonable. See Abraham, 183 F.3d at 292-96 (reversing grant of summary judgment as to excessive force claim where there were genuine issues as to whether the fleeing shoplifting suspect/decedent had truly posed a threat to the shooting officer's safety, particularly with regard to the speed of the suspect's car when it reversed toward the shooting officer and whether the officer truly had to jump away to avoid being hit). Finally, there is some question as to whether the use of force was excessive because the Officers continued to shoot while their sight was obscured by smoke and debris. Accordingly, we cannot find that the force used by Lt. Orchulli and Officers Remaley, Beitler, Casterline, and Marraccini when they shot Mr. Hogan was reasonable as a matter of law because there are genuine factual disputes as to whether Mr. Hogan posed a significant threat at the time they shot him and whether warnings were feasible, and these factual issues are material to whether they used reasonable force.[18]

There is no dispute that Capt. Mazzeo and Officers Herncane, Miller, and Smith did not actually use force at this stage of the incident, but Mr. Hogan contends that they are nonetheless liable for the actions of the other EPD Officers who shot at him. First, Mr. Hogan argues that Capt.

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[17]Mr. Hogan's testimony that he never intended to surrender to the police does not directly contradict his testimony that he was surrendering his weapon. When he testified that he had no intention of surrendering, it was in response to discussions of earlier stages of the stand-off. (See Michael Hogan Dep. (Vol. I) at 22, 195.)

[18]Having concluded that there are issues of fact as to whether the shooting itself amounted to an unconstitutional use of deadly force, we need not address Mr. Hogan's argument that the officers recklessly provoked the encounter. We note, however, that in Part III.B.2.a, *supra*, we concluded that, up to the point of activating the SWAT Team, the Defendants' use or display of force was reasonable as a matter of law.

Mazzeo, was the person responsible for strategic decisions the night of the incident and is responsible for the shooting, citing Estate of Smith v. Marasco, 430 F.3d 140 (3d Cir. 2005) (Smith II), in which the plaintiffs claimed that the use of an emergency response team to storm the decedent's house constituted an unreasonable use of force. Id. at 152-53. The Smith II Court held that those who had operational control and who approved the plan were personally involved in the allegedly unconstitutional conduct. Id. In this case, although Capt. Mazzeo was not present inside the house and did not fire any shots, there is evidence that he had operational control. There is some dispute as to whether Capt. Mazzeo had directed Officer Casterline to shoot when and if Mr. Hogan appeared at the top of the stairs. Additionally, there is evidence that Capt. Mazzeo was personally in charge of the other SWAT Team Officers who shot Mr. Hogan. Accordingly, there are genuine issues of material fact as to whether Capt. Mazzeo was personally involved in the use of force. See Baker v. Monroe Twp., 50 F.3d 1186, 1190-91 (3d Cir. 1995) (holding that an officer could be liable if he directed others to violate plaintiffs' rights, or, "as the person in charge of the raid, had knowledge of and acquiesced in his subordinates' violations").

There is no evidence that Officers Herncane, Smith, and Miller were either in charge of the raid or that they directed others to use force. Police officers may also be liable for a failure to intervene to prevent the use of excessive force if there is a reasonable opportunity to do so. See Smith v. Mensinger, 293 F.3d 641, 650 (3d Cir. 2002) (holding that a "corrections officer's failure to intervene in a beating can be the basis of liability for an Eighth Amendment violation under § 1983 if the corrections officer had a reasonable opportunity to intervene and simply refused to do so"). There is no dispute that the use of force in this case happened in a matter of seconds, and we conclude that no reasonable juror could find that the non-shooting officers had an opportunity to

intervene. Accordingly, on the basis of the undisputed facts, we find that Herncane, Smith, and Miller did not participate in the claimed use of excessive force.

Defendants also argue that they are entitled to qualified immunity with regard to Mr. Hogan's claim that they used excessive force in shooting Mr. Hogan. In deciding whether a defendant is immune from damages based on his affirmative defense of qualified immunity,

> First, the court must determine whether the facts alleged show that the defendant's conduct violated a constitutional or statutory right. If so, the court must then determine whether the constitutional or statutory right allegedly violated by the defendant was "clearly established." If the court concludes that the defendant's conduct did violate a clearly established constitutional or statutory right, then it must deny the defendant the protection afforded by qualified immunity.

Williams v. Bitner, 455 F.3d 186, 190 (3d Cir. 2006). As the previous discussion demonstrates, viewing the facts in the light most favorable to Mr. Hogan, Mr. Hogan did not pose a significant threat of serious physical harm to others at the time of the shooting. Accordingly, if the factual disputes are resolved in favor of Mr. Hogan, a jury may find that Lt. Orchulli, Capt. Mazzeo, and Officers Remaley, Beitler, Casterline, and Marraccini used excessive force in violation of the Fourth Amendment by shooting, or directing the shooting of, Mr. Hogan when he was ostensibly surrendering and laying down his gun.

We thus examine whether the right to be free from deadly force while surrendering a weapon was clearly established in February 2002, that is, whether "a reasonable officer would have been aware that his conduct violated the victim's constitutional rights." Smith II, 430 F.3d at 148 n.3. The Third Circuit "has adopted a broad view of what constitutes an established right of which a reasonable person would have known." Kopec, 361 F.3d at 778 (quoting Burns v. County of Cambria, 971 F.2d 1015, 1024 (3d Cir. 1992)). The very action in question need not have been held

unlawful, but that, "in light of the preexisting law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 639 (1987). The officers must have had "fair warning" that their conduct was unconstitutional. Hope v. Pelzer, 536 U.S. 730, 740-41 (2002).

Since Tennessee v. Garner, a law enforcement officer's use of deadly force has been restricted by the requirement that the officer have probable cause to believe that the suspect poses a threat of serious harm or that he has committed a violent crime and escape must be prevented. In fact, in Bennett v. Murphy, 274 F.3d 133 (3d Cir. 2002), decided one month before the incident in question, the Third Circuit reiterated that deadly force was constitutionally inappropriate where plaintiff's decedent, who was armed, had stopped advancing toward the state troopers and was not pointing a gun at them, thereby posing no threat. Id. at 136. As we have determined that there are genuine issues of material fact as to whether Mr. Hogan posed a threat at the time Lt. Orchulli Officers Remaley, Beitler, Casterline, and Marraccini, shot at him, we cannot conclude that these Officers are entitled to qualified immunity at this stage of the proceedings because a reasonable officer should have known that deadly force is unconstitutional when used against a surrendering, nonthreatening suspect.[19] We conclude, therefore, that summary judgment is not appropriate with respect to this portion of Mr. Hogan's excessive force claim against the Defendants who used force (Lt. Orchulli and Officers Remaley, Beitler, Casterline, and Marraccini), as well as Capt. Mazzeo.[20]

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[19]The Easton Defendants cite numerous additional cases that they argue mandate a grant of summary judgment based on their qualified immunity defense. Each of these cases is factually distinguishable in that the victim of force posed a significant threat at the time of the shooting, such as by raising a weapon to his shoulder, Fortunato, 969 F. Supp. at 973-74, or advancing at full speed toward a police officer as if to assault him, Carswell v. Borough of Homestead, 381 F.3d 235, 243-44 (3d Cir. 2004).

[20]All moving Defendants also argue that Heck v. Humphrey, 512 U.S. 477 (1994), mandates dismissal of the entire claim, including the shooting of Mr. Hogan. In Heck, the United States

c. Stepping on Mr. Hogan's Wrist

Mr. Hogan also asserts that Capt. Mazzeo used excessive force when he stepped on his wrist. It is undisputed that Mr. Hogan was on the floor, seemingly incapacitated, and that Capt. Mazzeo

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Supreme Court expressed concern that civil suits were being used to collaterally attack criminal convictions. See id. at 484-86. Thus, the Court instructed the district courts 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 . . . .

Id. at 486-87.

Mr. Hogan was convicted of nine counts of Recklessly Endangering Another Person based on the incident that is the subject of this lawsuit. Mr. Hogan, in pleading guilty to the crime, admitted that he "recklessly engage[d] in conduct which place[d] or may [have] place[d] another person in danger of death or serious bodily injury." 18 Pa. Cons. Stat. § 2705. Defendants argue that, in order to find the EPD Officers liable for their use of deadly force in this case, the jury must find that the Officers could not reasonably have believed that they were placed in danger of death or serious bodily injury. See Abraham, 183 F.3d at 289 (in case of fleeing suspect, deadly force is not excessive if it was objectively reasonable to believe that such force was necessary to prevent escape and that the suspect posed a significant threat of death or serious physical injury to the officer or others). According to this logic, a jury verdict in Mr. Hogan's favor as to excessive force would impliedly invalidate Mr. Hogan's conviction.

Defendants' reliance on the Heck doctrine to bar the portion of Mr. Hogan's excessive force claim pertaining to the shooting is misplaced, however. It is undisputed that Mr. Hogan's plea to reckless endangerment was based on his conduct an hour prior to being shot, when he fired his shotgun into the basement wall. Thus, Mr. Hogan admitted to placing the EPD Officers who were present in danger of death or bodily injury by so firing, but not at any other time. If the Court accepted the Defendants' argument that Heck bars a claim for use of deadly force once a considerable amount of time had passed since Mr. Hogan fired a shot, the Court would be holding that *any* subsequent conduct of Mr. Hogan would have been immaterial and the Officers would have been justified in shooting him from that point on. We cannot adopt the Defendants' argument. See Ellis v. Wynalda, 999 F.2d 243, 247 (7th Cir. 1993) ("When an officer faces a situation in which he could justifiably shoot, he does not retain the right to shoot at any time thereafter with impunity."), quoted in Abraham, 183 F.3d at 294. We thus conclude that Mr. Hogan's guilty plea to charges of reckless endangerment is not inconsistent with a verdict against the Defendants on the issue of the use of excessive force in shooting Mr. Hogan.

did not realize that Hogan was bleeding from the wrist. Assuming, *arguendo*, that Capt. Mazzeo intentionally stepped on Mr. Hogan's wrist, which is disputed, Capt. Mazzeo maintains that the use of force was objectively reasonable as a matter of law because he could not see one of Hogan's hands and there was an empty holster in his back pocket, and thus stepping on his wrist while handcuffing him was reasonable to insure the safety of others.

Examining the facts in the light most favorable to Plaintiff, we find that there are genuine issues of material fact pertaining to an evaluation of Capt. Mazzeo's use of force under the Graham/Sharrar factors. First, there is a genuine issue of fact as to whether Mr. Hogan posed any threat to the Officer or was actively resisting arrest at the time. Second, there was only one (incapacitated) suspect and several officers on the scene. Furthermore, handcuffing which causes severe pain can constitute unconstitutional force. Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004). Moreover, the use of force after a suspect has been subdued may be excessive. See Champion v. Outlook Nashville, Inc., 380 F.3d 893, 903 (6th Cir. 2004); Skrtich v. Thornton, 280 F.3d 1295, 1299-1300, 1302 (11th Cir. 2002) (holding that it was unconstitutional to beat the plaintiff *after* the plaintiff had been subdued). Accordingly, we cannot find that Capt. Mazzeo's use of force by stepping on Mr. Hogan's wrist was reasonable as a matter of law.

Capt. Mazzeo argues thathe is entitled to qualified immunity because the right was not clearly established, and that he could not have reasonably known how the legal precedent regarding excessive force would be applied to this situation. Yet courts have refused to grant qualified immunity in similar cases, such as where officers used substantial force after the suspect had been subdued and/or incapacitated. See Champion, 380 F.3d at 903 (6th Cir. 2004) (holding that, with respect to an incident that took place in the year 2000, "it is clearly established that putting pressure

on a suspect's back while that suspect is in a face-down prone position after being subdued and/or incapacitated constitutes excessive force"). The use of force on a wounded and subdued suspect is clearly excessive. As we have determined that there are genuine issues of material fact as to whether Capt. Mazzeo intentionally stepped on Mr. Hogan's wrist and as to whether there was cause for Capt. Mazzeo to believe that Mr. Hogan posed a threat at the time, we cannot conclude that Capt. Mazzeo is entitled to qualified immunity at this stage of the proceedings. We conclude, therefore, that summary judgment is not appropriate as to this portion of Mr. Hogan's excessive force claim.

Both Motions are granted as to the aspects of Count V alleging that the EPD Officers used excessive force by constraining Mr. Hogan's freedom of movement in his own home, and that Officers Herncane, Smith, and Miller were personally involved in the alleged use of excessive force in the shooting of Mr. Hogan. Both Motions are denied as to the portion of Count V which alleges that Lt. Orchulli, Capt. Mazzeo, and Officers Remaley, Beitler, Casterline, and Marraccini used excessive force by shooting or directing others to shoot him. Capt. Mazzeo's Motion is denied as to the portion of Count V which alleges that Capt. Mazzeo used excessive force by stepping on Mr. Hogan's wrist while handcuffing him.

3. Substantive Due Process: Denial of Medical Care (Count VI)

In Count VI of the Complaint, Mr. Hogan alleges that the Defendants denied or delayed medical attention for his serious wounds in violation of the Fourteenth 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)). 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 evidence demonstrates that Mr. Hogan required immediate medical attention. The Easton Defendants and Capt. Mazzeo argue that Mr. Hogan has not adduced any evidence that there was any delay in the provision of medical care: an ambulance was ready a few blocks from the scene when the shooting occurred; Capt. Mazzeo immediately provided medical attention by placing pressure on the wounds; and Mr. Shull, an EMT, was allowed into the residence to provide emergency aid to Mr. Hogan before the ambulance arrived. Mr. Hogan contends that there are at least genuine issues of fact as to whether there was an unconstitutional deprivation of medical care because (1) the ambulance was four or five blocks away, and no tactical EMS was on site; (2) the officers had blocked the Hogans' street, preventing the ambulance from accessing the scene in a timely fashion; (3) Mr. Shull was prevented from immediately entering the scene, and (4) Mr. Shull testified that, when he did enter, it appeared that Capt. Mazzeo had not tended to Mr. Hogan because there were no dressings on his wounds.

Viewing the facts in the light most favorable to Mr. Hogan, there is no evidence that any of the Defendants exhibited deliberate indifference by delaying medical treatment. First, Mr. Shull's testimony demonstrates that he was granted access to the residence with little difficulty and within

a minute of the shooting, as Capt. Mazzeo quickly ordered the Officers to let Mr. Shull into the house. (Shull Dep. at 68.) Moreover, although the ambulance had difficulty accessing the scene, it arrived within five minutes of the shooting. The facts of record demonstrate, at most, a very slight delay in the provision of medical treatment (from three to four minutes) that does not rise to the level from which a jury could infer deliberate indifference. Finally, even if Capt. Mazzeo failed to tend to Mr. Hogan's wounds, such failure is immaterial because he immediately called for the ambulance and did not prevent Mr. Shull from providing treatment. See City of Revere v. Mass. General Hospital, 463 U.S. 239, 244 (1983) (holding that, regardless of what standard is used to define the government's obligation to provide medical care to arrestees under the Due Process Clause, there was no violation where the city's police officers promptly called for an ambulance). Mr. Hogan has not met his burden of pointing to genuine issues of material fact regarding whether there was any meaningful delay in treatment or reckless disregard of the need for medical care on the part of any of the Defendants.[21] Accordingly, both Motions are granted as to Count VI.

4. Punitive Damages

Defendants also argue thatPlaintiffs' claim for punitive damages under § 1983 should be dismissed, as there is no basis for finding willful, malicious, and outrageous behavior. In § 1983 cases, "[a] jury may award punitive damages when it finds reckless, callous, intentional or malicious

[21]Plaintiffs argue that the Court is bound by its Opinion on the Motion to Dismiss, which allowed this claim to go forward based on the allegations in the Complaint, see Hogan, 2004 WL 1836992, at *11, because each of the allegations are supported by facts of record. The Complaint averred that the EPD 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." Id. However, the undisputed facts show that an ambulance was available and arrived within five minutes of the shooting, and that the Defendants allowed Mr. Shull to attend to Mr. Hogan's wounds with little hesitation.

conduct." Springer v. Henry, 435 F.3d 268, 281 (3d Cir. 2006) (citing Alexander v. Riga, 208 F.3d 419, 430-31 (3d Cir.2000), and Smith v. Wade, 461 U.S. 30, 54-56 (1983)). "'[T]he defendant's conduct must be, at a minimum, reckless or callous. Punitive damages might also be allowed if the conduct is intentional or motivated by evil motive, but the defendant's action need not necessarily meet this higher standard.'" Id. (quoting Savarese v. Agriss, 883 F.2d 1194, 1204 (3d Cir.1989)). Whether the officers' conduct rises to that level is for the jury to determine. See Woolfolk v. Duncan, 872 F. Supp. 1381, 1392 (E.D. Pa. 1995). Accordingly, the Court declines to dismiss Plaintiffs' request for punitive damages.

V. CONCLUSION

We grant the Easton Defendants' Motion as to Counts I, IV and VI, and with respect to the portions of Count V alleging excessive force by constraining Mr. Hogan's movement in his home and alleging that Herncane, Smith, and Miller participated in the use of excessive force in the shooting of Mr. Hogan. We deny the Easton Defendants' Motion in all other respects. We grant Capt. Mazzeo's Motion as to Counts IV and VI, and as to the aspects of Count V alleging excessive force by constraining Mr. Hogan's movement in his own home. We deny Mazzeo's Motion in all other respects.[22]

[22]Thus, the following claims remain in this case: Mr. and Mrs. Hogan's claim in Count II against the City of Easton alleging a policy or custom of deliberate indifference to the constitutional rights of persons within the City through inadequate investigation, supervision, and training; Mr. and Mrs. Hogan's claim in Count III against Mayor Goldsmith, Chief Palmer, Capt. Mazzeo, and Lt. Orchulli, alleging deliberate indifference to the constitutional rights of persons within the City through a failure to adequately supervise and train the City's Officers; and Mr. Hogan's claims in Count V against Lt. Orchulli, Capt. Mazzeo, and Officers Beitler, Marraccini, Remaley, and Casterline, alleging (1) that Lt. Orchulli, Capt. Mazzeo, and Officers Beitler, Marraccini, Remaley, and Casterline used excessive force by shooting him; and (2) that Capt. Mazzeo used excessive force by stepping on his wrist while handcuffing him.

An appropriate order follows.

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

MICHAEL & ANN HOGAN	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
CITY OF EASTON et al.	:	No. 04-759

O R D E R

AND NOW, this 12th day of September, 2006, upon consideration of the Motions for Summary Judgment filed by Defendant John Mazzeo (Doc. No. 54) and Defendants the City of Easton, Brian Herncane, Christopher Miller, Scheldon Smith, Dominick Marraccini, John Remaley, and Eugene Scott Casterline ("the Easton Defendants") (Doc. No. 61), Plaintiffs' response thereto, and Defendants' replies, **IT IS HEREBY ORDERED** that said Motions are **GRANTED in part and DENIED in part** as follows:

1. The Easton Defendants' Motion is **GRANTED** as to Counts I, IV, and VI, and Count V insofar as it pertains to allegations of the use of excessive force by constraining Michael Hogan's freedom of movement in his home. The Motion is **DENIED** in all other respects.

2. Mazzeo's Motion is **GRANTED** as to Counts IV and VI, and Count V insofar as it pertains to allegations of the use of excessive force by constraining Mr. Hogan's freedom of movement in his home. The Motion is **DENIED** in all other respects.

3. Defendants Brian Herncane, Christopher Miller, and Scheldon M. Smith are **DISMISSED** as defendants in this action.

4. Dispositive Motions pertaining to the Monell and supervisory liability claims (Counts

II and III of the Complaint) may be filed within 20 days of the date of this Order.

BY THE COURT:

s/ John R. Padova
John R. Padova, J.