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. **December 12, 2006**

I. INTRODUCTION

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. The Defendants are 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.

By Order of September 12, 2006, the Court granted a motion by the City, Herncane, Miller, Smith, Orchulli, Beitler, Marraccini, Remaley, and Casterline for summary judgement at to Count I (violation of the Americans with Disabilities Act), Count IV (unreasonable search and seizure), and

Count VI (substantive due process), and with respect to the portions of Count V alleging excessive force in the shooting of Mr. Hogan. We denied these Defendants' Motion in all other respects. We also granted a motion for summary judgment by Captain Mazzeo as to Counts IV and VI, and as to aspects of Count V alleging excessive force by constraining Mr. Hogan's movements in his own home. We denied Mazzeo's motion in all other respects.

Presently before the court are a second round of motions for summary judgment filed by the City of Easton, Mayor Goldsmith and Police Chief Palmer (hereinafter "the City Defendants") and a separate motion for summary judgment by Defendant Mazzeo. For the reasons that follow, the City Defendants' Motion will be granted in part. Mazzeo's motion will be denied.

The two pending motions are addressed to some of the claims remaining in the case after the first round of motions practice. The claims still pending in the case are:

1. Mr. and Mrs. Hogan's claim in Count II against the City of Easton alleging a policy or custom of deliberate indifference to the use of excessive force and violation of the constitutional rights of persons within the City through inadequate supervision and training;
2. Mr. and Mrs. Hogan's claim in Count III against Mayor Goldsmith, Chief Palmer, Capt. John Mazzeo[1], 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
3. Mr. Hogan's claims in Count V against Lt. Orchulli, Capt. Mazzeo, and

[1]Chief Palmer was eventually replaced as EPD Chief by Stephen Mazzeo, Captain John Mazzeo's cousin. To distinguish between the two, we refer to them by their ranks.

Officers Beitler, Marraccini, Remaley, and Casterline, alleging:

(A) that Lt. Orchulli, Capt. Mazzeo, and Officers Beitler, Marraccini, Remaley, and Casterline used excessive force by shooting him; and

(B) that Capt. Mazzeo used excessive force by stepping on his wrist while handcuffing him.

Capt. Mazzeo moves for summary judgment on the excessive force claims and on the supervisor liability claim. The City, the Mayor, and the Chief move for summary judgment on the policy and custom and supervisor liability claims.

The defendants argue that the City, the Mayor and the Chief cannot be derivatively liable as a matter of law on a policy or custom claim of condoning excessive force, or on a failure to train or supervise theory, because the Hogans have produced no evidence of a pattern of prior similar shooting incidents involving the EPD Special Weapons And Tactics ("SWAT") Team. Having reviewed the extensive record and the parties' papers, we find that the City Defendants' summary judgment motion must be granted in part as to:

1. All derivative claims against the City, the Mayor and the Chief based on claims to which we previously granted summary judgment; and
2. The derivative claim against the Mayor and the Chief based on a policy / custom of deliberate indifference to the need to adequately supervise police officers.

The motion must be denied in part as to:

1. The derivative claim based on a policy / custom of the City tolerating excessive force; and

2. The derivative claim based on a policy / custom of deliberate indifference to the need to adequately train police officers.

We find that Captain Mazzeo's motion must be denied in its entirety, i.e. as to:

1. The direct claim against Captain Mazzeo alleging excessive force;
2. Captain Mazzeo's claim of qualified immunity related thereto;
3. The derivative claim against Mazzeo as the direct supervisor of the operation; and
4. The derivative claim against Mazzeo based on a policy / custom of deliberate indifference to the need to adequately train police officers.

II. THE SUMMARY JUDGMENT RECORD.

This case involves a shooting following a standoff between Mr. Hogan and the EPD SWAT Team. The Court reviewed the record in detail in the Opinion of September 12, 2006. We review the record of the shooting incident here only insofar as is necessary to address the pending motions, and review the additional record submitted with the pending motions.

A. The Shooting Incident

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.) 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. (Pl. Ex. Vol. I at 115-122.) Hogan's anger escalated, leading to Mrs. Hogan calling 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.)

Officer Herncane was first to arrive at the Hogan home, pulling up with his lights and sirens on. (Herncane Dep. at 57-58.) Officer Miller arrived just after Officer Herncane. (Miller Dep. at 84, 86.) Both Officers called out for Mr. Hogan. (Def.'s SMF ¶¶ 50, 52.) Mr. Hogan had retreated to his basement by this time to avoid contact with the police. (Michael Hogan Dep. (Vol. I) at 153-54.) 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.) The resulting stand-off between Mr. Hogan and EPD Officers lasted one and one-half hours. 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. (Id. 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, to make them aware of the incident. (Orchulli Dep. at 226-27.)

Other officers, including the SWAT Team, arrived. (See, e.g., Orchulli Dep. at 173-74.) Capt. Mazzeo, the commander of the SWAT Team, 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 but not all of the patrol officers inside the front of the house. (Id. at 120-21; Def.'s Ex. W at 150.) Officer Casterline was armed with a "less lethal" Sage SL6 weapon that fires a high-impact baton round. (Def.'s SMF ¶ 104 n.15.) 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.)

After the SWAT Team was deployed, Officer Miller believed that Mr. Hogan was ready to surrender. (Miller Dep. at 134-36.) He told Mr. Hogan to leave the gun "there," that is, at the top of the basement steps on the floor. (Id. at 136.) He instructed Hogan 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.)

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. (Id. at 225-26, 228.).[2] He then felt a shot in his wrist. (Id. at 227-

---

[2]Although Plaintiffs' expert concludes that the physical evidence is consistent with Mr. Hogan's testimony (Pl.'s Ex. A, Ross Report at 8), Defendants' version of the facts differs. Officer Casterline, who was positioned at the front of the house, testified that Mr. Hogan immediately turned

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.[3] There is also a factual dispute regarding which Officer fired the first shot; some of the testimony indicates that the shot came from the back of the house, probably from Orchulli.[4] (Smith Dep. at 208; Miller Dep. at 149). Officer Casterline fired one round from the Sage. (Casterline Dep. at 127.) The next shots may have come from Officers Marraccini and Remaley, who were situated

---

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.)

[3]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.)

[4]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.)

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.) 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.)

The officers stopped shooting when they noticed that Mr. Hogan had fallen. (Marraccini Dep. at 280; Remaley Dep. at 174.) 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. (Id. at 232.)

B. The Chiefs of Police Evaluation

The Hogans submit an Evaluation of the EPD prepared by the Pennsylvania Chiefs of Police, which was published on June 3, 2005. The Hogans argue that the purpose of the Evaluation was to determine "the level of compliance currently in place within the Easton Police Department with recommendations for improvement in policy and practice where compliance with the standard has not be established within the agency." (Pl. Ex. Vol III at 4273.) The City asserts the Evaluation was for the purpose of "voluntary accreditation." City Defendants' Reply Brief at 7. Nothing, however, in the text of the Evaluation confirms the City's assertion. The Evaluation identified numerous deficiencies within the Department, including:

- no policy on from where police authority is derived (Pl. Ex. Vol III at 4285);

- no policy on constitutional rights (Pl. Ex. Vol III at 4285);
- no policy regarding officer discretion (Pl. Ex. Vol III at 4285);
- no administrative review standard for, and no annual analysis of, the use of force incidents (Pl. Ex. Vol III at 4287);
- no clearly established lines of authority, with rank structure having little to do with command responsibility (Pl. Ex. Vol III at 4288);
- the Department's Policy Manual was unorganized with no consistent indication of who in the agency issued specific policies and under what authority (Pl. Ex. Vol III at 4291);
- the Policy Manual was commonly known to not be a useful tool in identifying policies and procedures to be used, resulting in vague or non-existent expectations by officers (Pl. Ex. Vol III at 4291);
- the lack of a current written directive system left decision making wide open to arbitrary and capricious management, creating inconsistent professional agency practices (Pl. Ex. Vol III at 4295);
- the Department had no Code of Conduct, allowing for a wide range of unchecked behaviors from its membership, no consistent discipline, and mutual distrust between management and members (Pl. Ex. Vol III at 4301);
- once members passed their probationary periods, no performance evaluations were completed unless the member was up for promotion (Pl. Ex. Vol III at 4309);
- the Department had no "early warning system" to identify problem members (Pl. Ex. Vol III at 4309);
- while the Department had a policy on its response to Hostage / Barricaded Persons situations,

the policy had to be enhanced regarding, inter alia:

- avoidance of confrontation in favor of control and containment until the arrival of trained tactical and negotiation personnel,
- interaction between tactical and negotiation personnel and the responsibilities of each,
- establishment of perimeters,
- establishment of an appropriate chain of command,
- authorization for use of force and chemical agents, and
- use of trained negotiators (Pl. Ex. Vol III at 4318-19);

- internal affairs record keeping for citizen complaints was inconsistent with no audit trail system to show accountability for handling claims, and no annual report containing statistics on complaints (Pl. Ex. Vol III at 4325);

The Evaluation recommended, inter alia, the development of a comprehensive Personnel Early Warning System to identify problem officers (Pl. Ex. Vol III at 4395), and a comprehensive written Action Plan for becoming compliant with professional standards. (Pl. Ex. Vol III at 4397.) It concluded that the EPD was essentially devoid of established formal policy and procedures in almost all functional areas, that officers performed based upon unwritten rules or verbal orders from supervisors that often derived from bases that were inconsistent with the agency's, community's, or employee's best interests, resulting in arbitrary decision-making. (Pl. Ex. Vol III at 4398.)

C. The Keystone Study

The Keystone Early Intervention Consortium completed a separate management evaluation of the EPD on November 9, 2005. The purpose of the Study was to determine whether it was fiscally viable to maintain the EPD SWAT Team or, instead, to rely on the Pennsylvania State Police to provide the service. It noted a serious lack of civilian control over the Department and recommended the City reassert effective command and control responsibilities, including discipline and accountability. (Pl. Ex. Vol III at 4467.) It also noted that the Justice Department was conducting an investigation into whether there has been a pattern and practice of civil rights violations or use of excessive force by the EPD. (Pl. Ex. Vol III at 4467.)

The Keystone Study noted that the City had accepted its earlier recommendation that the EPD SWAT team be disbanded due to its burdensome operations, financial and risk management issues, (Pl. Ex. Vol III at 4471), and recommended that all SWAT team equipment be sold and training stopped. (Pl. Ex. Vol III at 4472). It recommended that the resources used to train SWAT members be redirected to train patrol officers and supervisors. (Pl. Ex. Vol III at 4476.) The Study also noted a serious lack of documentation of officer activities during a shift (Pl. Ex. Vol III at 4483), recommended regular performance evaluations (Pl. Ex. Vol III at 44840), and noted the need for significant restructuring to meet generally accepted professional standards and restore confidence in officers, elected officials and city residents. (Pl. Ex. Vol III at 4489.)

D. The Grand Jury Report

Statewide Investigating Grand Jury #22, empaneled to investigate the death of EPD Officer and SWAT Team member Jesse Sollman inside a gun cleaning room at the EPD headquarters, issued a report on March 15, 2006, addressing not only the officer's death, but also the command, culture,

and training of the EPD. (Pl. Ex. Vol III at 4804.) The Report found, inter alia:

- little effort to establish or enforce safety standards or standards of conduct for EPD officers (Pl. Ex. Vol III at 4810);
- since 2002 the City paid in excess of $4.4 million in civil settlements on account of police misconduct (Pl. Ex. Vol III at 4810);
- an individual named John Cuvo was targeted by a written directive of Capt. John Mazzeo, despite the fact that he had not committed a crime, leading to his being stopped, arrested and beaten, resulting in a $2.5 million settlement, with no disciplinary action taken against any officer involved in the incident (Pl. Ex. Vol III at 4810-11);
- SWAT members viewed their membership as elite, distrusted any member of the command structure that had not been a SWAT member, had an improper unit culture that included tattooing of the unit's wolf head symbol, use of the German words Eine fur Alles ("one for all"), wearing unit symbols on uniforms, even though prohibited from doing so by Chief Stephen Mazzeo (Pl. Ex. Vol III at 4811);
- SWAT members and non-SWAT members had animosity toward Chief Stephen Mazzeo and his attempts to reform the EPD, seeing them as a threat to their independence and the status quo (Pl. Ex. Vol III at 4811);
- the Grand Jury discerned little recognition by officers of their duties as public servants and episodes of police misconduct appeared to have caused no recognition by them of a need for reform (Pl. Ex. Vol III at 4811);
- the absence of an enforced code of conduct, written safety rules, and recognized manual of policies (Pl. Ex. Vol III at 4823);

- the command structure failed to identify and remedy obvious safety deficiencies and establish and enforce a code of conduct (Pl. Ex. Vol III at 4823).

The Grand Jury recommended that a code of conduct be established, that the City hire an independent Chief of Police without prior affiliation to the EPD to shake up the command of the force, and that the City establish an internal affairs unit under the Chief's direct supervision. (Pl. Ex. Vol III at 4825-26.)

E. The Clark Report

Roger Clark was retained by the Hogans as an expert on police procedures, tactics, and use of force. He opined on several failures in police procedures.[5] First, he opined that the failure of the SWAT Team to take total command of the incident and reassign non-SWAT officers to other duties outside the house was a key failure. (Ex. E at 16.) According to Clark it is a fundamental requirement during a SWAT deployment not to commingle the team with other officers. Second, he opined that ordering Mr. Hogan to bring his rifle with him up the stairs and lay it on the landing as part of his surrender could never be endorsed as a correct instruction and was grossly incompetent. (Id. at 17.) He opined that the fact that Hogan was holding the rifle when appeared at the top of the stairs was the reason the shooting officers gave for firing. Third, the EPD lacked policies and training regarding mentally ill individuals, which Clark opines is a basic aspect of police work. (Id. at 17-18.) Fourth, Clark found that the EPD's SWAT policies were non-existent at the time Hogan was shot, reflecting a reckless disregard for safety and a foreseeable result of serious injury or death. (Id. at 18-19.) Fifth, he opined the officers failed to determine Hogan's mental condition and

[5]Although we cite to and rely upon the Clark report in determining the motions for summary judgment, Clark's opinions remain subject to a Daubert hearing before they may come into evidence at trial.

implement proper police procedures regarding mentally ill suspects. (Id. at 19-20. Six, he opined that the EPD overreacted to the incident, caused by an apparent lack of effective command and control, incompetent tactical decisions, and co-mingled personnel. (Id. at 21.) After he reviewed the Chiefs of Police Evaluation and the Grand Jury Report, Clark supplemented his report adding that the studies depicted a department without a moral and ethical compass and in a state of crisis. (Ex. F. at 4.) He opined that reasonable and prudent police administrators would have fixed the identified problems long before the Hogan incident. (Id.)

III. SUMMARY JUDGMENT 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)).

IV. THE CITY DEFENDANTS' MOTION

A. Subsequent Remedial Measures

As a threshold matter, the City Defendants argue that the Hogans' attempt to rely on the Chiefs of Police Evaluation and the Keystone Study to defeat summary judgment is improper.[6] The incident involving Mr. Hogan occurred on February 25, 2002. The Chiefs' Evaluation is dated June 3, 2005. The Keystone Study was completed on November 9, 2005. The City Defendants argue that these self-evaluative efforts are inadmissible under Fed. R. Evid. 407.[7]

The Federal Rules of Evidence expressly preclude the introduction of evidence of subsequent remedial measures to prove a party's negligence or culpable conduct. Fed. R. Evid. 407. The Rule provides that when measures are taken after an event, which would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence at the event. We find that the reports are excludable.

---

[6]The City Defendants do not specifically contend that the Grand Jury Report is legally inadmissible to support the Hogans' summary judgment burden.

[7]Fed. R. Evid. 407 provides:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The public policy underlying Rule 407 was articulated by the Third Circuit Court of Appeals in Petree v. Victor Fluid Power, Inc., 831 F.2d 1191 (3d Cir. 1987). Rule 407 is supported by "the social policy of encouraging people to take or at least not discourage them from taking, steps in furtherance of added safety." Petree, 831 F.2d at 1198 (citing Notes on Advisory Committee on Proposed Rules). Rule 407 rests on the strong public policy of encouraging defendants to take action to prevent further injuries to others. See Kelly v. Crown Equip. Co., 970 F.2d 1273, 1276 (3d Cir. 1992) (holding that the rule encourages manufacturers to "make improvements for greater safety"). Like a manufacturer who would be discouraged from making improvements for the greater safety of its products if such changes can be introduced as evidence that the previous designs were defective, id., so too would police officials be chilled in their efforts to reform their departments if such changes could be evidence that the previous procedures were constitutionally questionable. Courts "routinely exclude evidence of [subsequent remedial measures] to encourage people to take such measures whether or not they are at fault." Petree, 831 F.2d at 1198. See also Grazier ex rel. White v. City of Philadelphia, No. 98-CV-6063, 2001 WL 1168093 at *3 (E.D. Pa. July 26, 2001) (holding that plaintiff's evidence of post-incident changes in police directives were inadmissible to show that: (1) police department had knowledge of lack of training, (2) prior disciplinary practices did not properly address the excessive force, and (3) deficiencies in training were closely related to the ultimate injuries suffered, because they were all examples of proof of negligent or knowingly culpable conduct in connection with the event at issue, and precisely the type of evidence which is excluded by Rule 407).

Under the subsequent remedial measures doctrine of Rule 407, the Chiefs' Evaluation and Keystone Study are not admissible to prove knowingly culpable conduct in connection with the event

at issue.[8] The studies were undertaken three years after the Hogan incident, were conducted for the purpose of self-evaluation, and are offered by the Hogans to demonstrate that the City was culpable because it had not implemented the post-hoc suggestions before the Hogan incident occurred.

---

[8]Similarly, the so called self critical analysis privilege, or self evaluative privilege, has been recognized in cases in which the privilege is "essential to the free flow of information and . . . the free flow of information is essential to promote recognized public interests." Harding v. Dana Trans., Inc., 914 F.Supp. 1084 (D. N.J. 1996) (citing Note, The Privilege of Self-Critical Analysis, 96 Harv.L.Rev. 1083, 1087 (1983)). The privilege was created to foster self-evaluation and the benefits derived therefrom. Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 250 (D.D.C. 1970). The "[c]andid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care . . .," and "constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit." Id. "The value of self critical evaluations would be destroyed if not shielded from the discovery process." Brunt v. Hunterdon County., 183 F.R.D. 181, 185 (D. N.J. 1998) (citing Bredice, 50 F.R.D. at 250).

The "policies underlying the self critical analysis doctrine are based upon the need to promote candid and forthright self-evaluation." Granger v. National R.R. Passenger Corp., 116 F.R.D. 507, 509 (E.D. Pa. 1987). "The privilege protects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting the violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability." Reichhold Chem., Inc. v. Textron, Inc., 157 F.R.D. 522, 524 (N.D. Fl. 1994).

The self-critical analysis privilege is employed by the courts to protect certain information from discovery, particularly in instances where the compelling public interest that individuals and businesses comply with the law outweighs the needs of litigants and the judicial system for access to information relevant to the litigation. 6 Moore's Federal Practice ¶ 26.48[2]; Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431 (E.D. Pa. 1978). The doctrine is designed to encourage candid evaluation of compliance with regulatory and legal requirements without creating evidence that may be used against the party in future litigation. 6 Moore's Federal Practice ¶ 26.48[2]; FTC v. T.R.W., Inc., 628 F.2d 207, 210 (D.C. Cir. 1980); Granger, 116 F.R.D. 507 (stating that policies underlying the critical self-analysis doctrine are based upon the need to promote candid and forthright self-evaluation; doctrine should be applied to protect those portions of investigation report clearly encompassing opinions and recommendations for future, but not portions on cause of accident and factors contributing to accident). We find that the Evaluation and the Study constitute self-critical analyses to which the privilege applies, in addition to our finding that they constitute subsequent remedial measures.

B. Policy or Custom Evidence

The City Defendants' primary argument is that, given the Court's prior grant of summary judgment on most of the Hogans' direct claims, the only derivative claim remaining against them depend upon whether the Hogans can show a pattern of prior similar shooting incidents, of which they were aware, and to which they were deliberately indifferent. (City Defendants' Motion at 2.) By framing the issue in this manner, the City Defendants attempt to demonstrate that there is a failure of evidence to go forward to the jury on whether a pattern of deliberate indifference, limited to prior shooting incidents, can establish derivative liability. Not surprisingly, the City Defendants argue that there were no such prior, similar complaints, as to any of the defendant officers. They assert that the issue must be framed in this narrow manner because, as the only direct claims that remain are focused on the excessive force allegations surrounding the shooting, only similar shooting incidents can be used to show deliberate indifference. (Id. at 3.)

To the extent that the City Defendants argue that there can be no derivative claims based on the claims to which we previously granted summary judgment, the Hogans make no counter argument. They appear to concede that there can be no derivative claims where the substantive claims were found not to have violated their civil rights. Accordingly, the motion is granted to that extent as unopposed.[9] However, to the extent that the City seeks to shape the argument as one involving "prior shooting incidents," rather than prior excessive force incidents generally, we find that the argument is fallacious. Count II of the Complaint clearly states that the City had a policy,

[9]We also find that the motion must be granted on its merits. There is nothing in the summary judgment record to support a finding that the City Defendants had a policy or custom of deliberate indifferent to claims under the Americans with Disabilities Act, unlawful entry into and search of citizens' homes, constraining the freedom of movement of citizens within their homes, or denying medical care to persons involved in police shootings.

practice or custom to "use excessive force," which in the Hogans' case was the use of firearms. The Hogans' custom or policy claim cannot, however, be limited to only prior shootings.

1. Policy or Custom Evidence on Excessive Force

In Monell v. Dept. of Soc. Services, 436 U.S. 658, 691 (1978), the Supreme Court established that municipal liability under 42 U.S.C. § 1983 may not be proven under the respondeat superior doctrine, but must be founded upon evidence that the government unit itself supported a violation of constitutional rights. 436 U.S. at 691-95. Thus, municipal liability attaches only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." Id. at 694. "Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (quoting Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986)). Custom, on the other hand, can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law. Andrews, 895 F.2d at 1480; see also Fletcher v. O'Donnell, 867 F.2d 791, 793-94 (3d Cir. 1989) ("Custom may be established by proof of knowledge and acquiescence.").

To show either a policy or a custom, a plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom. Andrews, 895 F.2d at 1480. In order to identify who has policymaking responsibility, "a court must determine which official has final, unreviewable discretion to make a decision or take an action." Andrews, 895 F.2d at 1481. "Under § 1983, only the conduct of those officials whose decisions constrain the discretion of subordinates constitutes the acts of the

municipality." Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990). Practices "'so permanent and well settled' as to have 'the force of law' [are] ascribable to municipal decisionmakers." Anela v. City of Wildwood, 790 F.2d 1063, 1067 (3d Cir. 1986) (quoting Monell, 436 U.S. at 691).

A plaintiff bears the additional burden of proving that the municipal practice was the proximate cause of the injuries suffered. Bielevicz at 850 (citing Losch v. Borough of Parkesburg, 736 F.2d 903, 910 (3d Cir. 1984)). To establish causation, a plaintiff must demonstrate a "plausible nexus" or "affirmative link" between the municipality's custom and the specific deprivation of constitutional rights at issue. Bielevicz at 850 (citing Estate of Bailey by Oare v. County of York, 768 F.2d 503, 507 (3d Cir.1985)). Plaintiffs, however, need not demonstrate that their injuries were the direct result of formal departmental procedures or encouragement in order to satisfy the nexus requirement. Bielevicz at 850. Therefore, the fact that the City of Easton did not have an express policy authorizing officers to use unnecessary force does not relieve the City of liability. Instead, to sustain a § 1983 action against the City, the Hogans must simply establish "a municipal custom coupled with causation, i.e., that policymakers were aware of similar unlawful conduct in the past, but failed to take precautions against future violations, and that this failure, at least in part, led to their injury." Bielevicz at 851. "If the City is shown to have tolerated known misconduct by police officers, the issue whether the City's inaction contributed to the individual officers' decision [to use excessive force] in this instance is a question of fact for the jury." Id.

The City argues that the Hogans have presented absolutely no evidence of a pattern of similar prior violations, which, as stated, they seek to limit to "complaints or lawsuits in the prior ten years in which an EPD officer unjustifiably fired his weapon and/or was permitted to do so by EPD

officials," (City Defendants' Brief at 8)[10] so as to support a policy or custom. Citing several decisions applying Eleventh Circuit law, they contend that the law requires evidence be "of a specific nature and of prior incidents of similar alleged misconduct" to support the finding of a policy or custom. Id. at 7 (citing Mercado v. City of Orlando, 407 F.3d 1152, 1162 (11th Cir. 2005) (holding that where prior excessive force cases did not involve substantially similar factual situations, plaintiff could not make out policy or custom); Thomas v. City of Pensacola, No. 03CV586, 2005 WL 1876175 at *10 (N.D. Fla. Aug. 1, 2005) (holding that single isolated situation could not establish policy or custom); Gold v. City of Miami, 151 F.3d 1346, 1351 (11th Cir. 1998) (holding that where there was no evidence of prior excessive force in handcuffing claims, plaintiff could not make out Monell claim).

There is no basis in our own Circuit law to limit the "similar alle ged conduct" in this case to only shooting incidents, when the Hogans' complaint alleges a more general policy and custom claim on the use of excessive force. It is clear that when a plaintiff alleges that an officer violated his constitutional rights by using excessive force, municipal liability may be imposed under § 1983 if that same officer has a history of excessive force conduct. See Beck v. City of Pittsburgh, 89 F.3d 966, 973 (3d Cir. 1996) (stating that, because of prior complaints involving slapping an arrestee, improperly handcuffing an arrestee, billy clubbing and verbally abusing an arrestee, and taunting and punching another arrestee, a reasonable jury could have inferred that municipality had knowledge of police officer's propensity for violence when effecting an arrest, so as to support a claim involving

[10]They assert that the only incident in which it was determined that an EPD officer unjustifiably fired his weapon led to the termination of that officer, and that in the subsequent lawsuit over said incident, the plaintiff's counsel conceded there was no viable Monell claim. (City Defendants' Brief at 9 (citing Estate of Rapp v. Cameron, No. 00-1376 (E.D. Pa. 2000))).

pushing his gun into arrestee's face, cursing at and striking arrestee in the face with the end of his gun). To establish deliberate indifference on the part of supervisors and the municipality, a plaintiff also may point to evidence of deficient treatment of prior, similar complaints against that officer. See id., 89 F.3d at 973-74 (holding that written complaints were sufficient for a reasonable jury to infer that the Chief of Police and department knew, or should have known, of officer's violent behavior in arresting citizens; complaints came in a narrow period of time and were of similar nature); Martin v. City of Philadelphia, No. 99-CV-543, 2000 WL 1052150 (E.D. Pa. July 24, 2000) (finding that a monitoring report, noting that the City received 221 civilian complaints about physical abuse by various police officers, 43 complaints regarding false arrest or illegal detention, and that the City initiated 50 investigations regarding officers' use of force and physical abuse without civilian prompting, raised a genuine issue of material fact as to City's knowledge of a prior pattern of similar incidents); Greco v. National R.R. Passenger Corp., No. 02-CV-6862, 2005 WL 1320147 (E.D. Pa. June 1, 2005) (holding that officer's history of excessive force complaints, comments from instructors on his failures to follow procedures and lack of self-control under pressure, was sufficient evidence from which a jury could conclude that Amtrak exhibited deliberate indifference through its failure to train, discipline, or control officer). Because these cases make clear that the *type* of excessive force need not be identical in all prior incidents to find a policy or custom condoning an officer's use of excessive force, the City Defendants' attempt to limit the scope of prior incidents to only shootings would not be appropriate.

Even without consideration of the Chiefs' Evaluation and the Keystone Study, the Hogans have come forward with sufficient evidence that, if believed, would establish a claim of deliberate indifference by the City Defendants to the use of excessive force by the officers involved in the

Hogan shooting. They have shown that Defendant Beitler was involved in three excessive force incidents before the Hogan standoff, but was appointed to the SWAT Team and later to the Criminal Investigation Division. Defendant Marraccini was involved in two excessive force incidents before the Hogan standoff, but was appointed to the SWAT Team, and was involved in other incidents thereafter. Captain Mazzeo allegedly has an extensive record of excessive force complaints filed against him during his career, resulting in substantial monetary settlements. The Hogans have identified at least 12 incidents of excessive force involving Mazzeo, 22 incidents of excessive force involving defendant Michael Orchulli, 6 incidents involving defendant Lawrence Palmer, and 2 involving defendant John Remaley. Combined with the Grand Jury Report – which found that, at the time of the Hogan incident, the City had no Code of Conduct, written safety rules, or recognized manual of policies, and that the command stucture failed to identify and remedy obvious safety deficiencies – and the report of plaintiffs' expert Clark – who opined that the use of force here was excessive – the Hogans have satisfied their summary judgment burden of comig forward with sufficient evidence to establish the existence of a policy or custom of deliberate indifference to the use of excessive force by EPD members.[11]

2. Policy or Custom Evidence on Failure to Train the SWAT Team

The City Defendants's motion also argues that the failure train and/or supervise claim cannot

---

[11]We note that the City Defendants vigorously deny that the other incidents cited by the Hogans of excessive force alleged against the police officer defendants are valid claims. Clearly, these are genuine issues of material fact in dispute, precluding summary judgment. It remains for the Court, along with the parties, to fashion an efficient means by which a jury can be presented with the evidence of prior incidents without creating mini-trials on each incident within the trial of the Hogans' claims.

go forward because the firearms training provided to the defendant officers was in full compliance with, and actually exceeded, the firearms training required by Pennsylvania law. On a failure to train claim, the Third Circuit has held that a plaintiff must identify a municipal policy or custom that amounts to deliberate indifference, which typically requires proof of a pattern of underlying constitutional violations, and must also demonstrate that the inadequate training caused a constitutional violation. Carswell v. Borough of Homestead, 381 F.3d 235, 244 (3d Cir. 2004). To survive summary judgment on a failure to train theory, the Third Circuit has held that plaintiffs must present evidence that the need for more or different training was so obvious that the policymaker's failure to respond amounts to deliberate indifference. Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001).

In Carswell, the Court held that the plaintiff had not met his burden because the record failed to establish deliberate indifference or causation. At trial, the municipal police chief testified that his officers attended annual in-service courses, where they studied, among other subjects, relevant court opinions.[12] The officer alleged to have used excessive force testified that he attended these sessions. In addition, the record reflected that the municipal police manual on use of force had been regularly updated, and the officers were directed to become familiar with the updated policy manual. Id. at 245.

This evidence, the Court determined, could not establih a lack of training on the use of deadly force that amounted to a deliberate indifference, nor did it demonstrate a pattern of underlying constitutional violations that should have alerted the municipality to an inadequate training program.

---

[12]Although the district court had denied summary judgment, it granted the municipal defendant judgment as a matter of law under Fed. R. Civ. P. 50 at the close of the plaintiff's case. Carswell, 381 F.3d at 237.

The Court concluded that the record did not "meet the high burden of proving deliberate indifference, nor [did] it show that [the municipality]'s actions caused a constitutional violation. We conclude that the plaintiff failed to present evidence from which a reasonable jury could find municipal liability." Id.

In Brown, the Third Circuit held that the scope of failure to train liability is a "narrow one." Id. (citing City of Canton v. Harris, 489 U.S. 378, 388 (1989) stating that, in light of the duties assigned to specific officers or employees, the need for more or different training may be so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need)). The plaintiffs alleged excessive force by a police officer against their pet dog. The plaintiffs were unable to demonstrate an excessive force claim because the record demonstrated no official policy endorsing the police officer's conduct, the municipality's policy manual spelled out a progressive use of force policy against animals that was inconsistent with the officer's conduct, and there was no pattern or custom condoning a practice of employing excessive force in handling dogs. The Third Circuit rejected the Browns' failure to train claim as follows:

> To survive summary judgment on a failure to train theory, the Browns must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference. City of Canton, 489 U.S. at 390, 109 S.Ct. 1197. While it is true that Muhlenberg police officers received no formal training specifically directed to handling dogs, they did have the guidance of the policy manual, and we believe a reasonable trier of fact could not conclude that the need for further guidance was so obvious as to indicate deliberate indifference on the part of the Board to the Browns' constitutional rights.

Brown, 269 F.3d at 216.

The City Defendants argue that they are entitled to summary judgment on the failure to train

claim because the summary judgment record establishes that all EPD members involved in the Hogan incident received the required firearms and deadly force training required by the Pennsylvania Municipal Police Officers Education and Training Commission, 53 Pa.C.S.A. § 2161, et seq ("PMOETC"). They argue that "numerous" courts have held that where a State imposes training standards, evidence showing adherence to those standards bars any finding that a police department had a custom or policy of delberately indifference to the need for additional training. City Defendants' Brief at 10 (citing Tapia v. City of Greenwood, 965 F.2d 336, 339, 340 (7th Cir. 1992) (holding that where plaintiff offered no evidence to indicate that the City failed to adhere to the minimum state standards for training police officers under state law, SWAT Team's unconstitutional entry into plaintiff's apartment could not be said to have been pursuant to an "official policy" of the City because proof of a single incident of unconstitutional activity is not sufficient to impose liability unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy); Ross v. Town of Austin, No. 01-CV-15, 2002 WL 31160139 (S.D. Ind. Sept. 23, 2002) (holding that, under binding authority of Tapia, compliance by a municipality with state minimum training standards defeats any possibility that a reasonable jury could uphold a charge of deliberate indifference); Johnson v. City of Milwaukee, 41 F. Supp. 2d 917, 931 (E.D. Wis. 1999) (same); Williams v. Musser, No. 94-CV-4140, 1997 WL 403509 (N.D. Ill. July 16, 1997) (same)).[13]

The Hogans respond that they have sufficiently demonstrated their failure to train claim based

[13]The City Defendants' "numerous" court decisions, as can be seen, are essentially one decision from the Seventh Circuit, Tapia, and the cases citing it for its proposition. In addition to the citations provided, the decision was also cited for the same proposition in Czajkowski v. City of Chicago, 810 F.Supp. 1428, 1439 (N.D. Ill. 1992); Franklin v. Manek, No. 02-CV-1083, 2004 WL 1629544 (S.D. Ind. June 08, 2004); and Palmquist v. Selvik, No. 91-CV-973, 1992 WL 296372 (N.D. Ill. Oct. 14, 1992). It has never been cited by a non-Seventh Circuit tribunal.

upon their evidence that: (1) the SWAT Team was operating without any written standards; (2) the non-SWAT officers who were the initial responders to the Hogan home had no training in barricaded persons situations, surrender plans or on the use of the SAGE weapon; (3) non-SWAT Team officers participated in the incident even though they did not train with the SWAT Team; and (4) the incident commander, Chief Palmer, had not trained with the SWAT Team. They argue that the lack of SWAT training caused a breakdown in command and control, leading to confusion, particularly when the SWAT Team fired the SAGE weapon, thereby leading other non-SWAT officers still in the house to believe that Hogan had fired his weapon.

We find that the City Defendants reliance on the officers' PMOETC certifications to defeat the failure to train claim is misplaced. The City Defendants do not cite – and the Court has not located – any authority from the Third Circuit to the effect that compliance with firearms training absolutely bars any finding of a policy or custom of deliberate indifference to the need for training on SWAT Team tactics in barricade situations.[14] Moreover, the City Defendants again read the Hogans' claim too narrowly. The Hogans do not claim that the officers did not receive firearms and deadly force training. Rather, their complaint pled generally that the City had a policy or custom to

---

[14]The PMOETC regulations require that new police officers receive training in Pennsylvania criminal law, rules of criminal procedure, and the use of firearms, among other subjects. 37 Pa. Code § 203.51. The regulations also provide for mandatory in-service training for existing police officers, including

> Annual qualification on a police firearms course with any firearms, shotguns, or rifles authorized for use, including personal weapons carried in lieu of issued weapons or as a second weapon. A weapon may not be carried on duty for which an officer is not qualified.

37 Pa. Code § 203.52.

The regulations also provide for certain non-mandatory training courses, with the proviso that "The Commission will not approve nonmandatory in-service training grant requests for the following: . . . (ii) Special Weapons and Tactics (SWAT type training)." 37 Pa. Code § 203.53(b)(4)(ii).

inadequately train officers, and the Hogans argue in their response to the summary judgment motion, that the City Defendants had a policy or custom of indifference to the need to adequately train the SWAT team on how to respond to an incident requiring that a distraught man be subdued without the use of deadly force. (Mem. In Opposition to Motion at 36.)

The Hogans have met their burden of proof of a pattern of underlying constitutional violations and the existence of an issue of material fact as to whether the need for more or different training was so obvious that the policymaker's failure to respond amounted to deliberate indifference. The evidence they adduced on the failure to train issue includes their expert's report that the EPD lacked adequate policies and training regarding mentally ill individuals, that the SWAT Team was operating without any written standards, and that permitting non-SWAT officers who had not trained with the SWAT Team to participate in the situation proximately caused the use of excessive force when the SAGE weapon was deployed. As the Hogans have identified these specific failures in the training practices that the City Defendants failed to remedy, they have satisfied their burden of showing evidence that, if believed, would show that the need for more or different training was so obvious that the policymaker's failure to respond amounted to deliberate indifference. Thus, they have created a jury issue on whether the policymaker's failure to respond amounts to deliberate indifference to the EPD SWAT Team's lack of adequate training.

3. Policy or Custom Evidence on Failure to Supervise

In Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989), the Third Circuit stated that, in order to survive summary judgment on a failure to supervise claim, the plaintiff must (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the

existing custom and practice without the identified, absent custom or procedure created an unreasonable risk of the ultimate injury, (3) the supervisor was aware that this unreasonable risk existed, (4) the supervisor was indifferent to the risk; and (5) the underling's violation resulted from the supervisor's failure to employ that supervisory practice or procedure. See also Bonenberger v. Plymouth Twp., 132 F.3d 20, 25 (3d Cir.1997) (quoting Colburn v. Upper Darby Twp., 838 F.2d 663, 673 (3d Cir.1988) (holding that a plaintiff asserting a failure to supervise claim must not only identify a specific supervisory practice that the defendant failed to employ, he or she must also allege "both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval.")). Sample emphasized that "it is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did." Sample, 885 F.2d at 1118. Rather, the plaintiff must identify specific acts or omissions of the supervisor that evince deliberate indifference and persuade the court that there is a "relationship between the 'identified deficiency' and the 'ultimate injury.'" Id.

Mayor Goldsmith and Chief Palmer argue that, other then the generalized allegation that they were responsible for the implementation of policies, the Hogans' complaint contains no specific allegations of actions or inactions by them, and that the Hogans have thus failed to show evidence of their involvement in the SWAT operation inside the Hogan house. Significantly, the Hogans make no specific argument regarding the failure to supervise claim.

The record appears to provide only that the Mayor, and the Chief failed in their general administrative and supervisory duties, and not with respect to any specific supervisory practice or procedure that they failed to employ. The grand jury report identifies only a failure by the command

structure to identify and remedy obvious safety deficiencies and establish and enforce a code of conduct. There is no specific practice identified in the Hogan incident. As the plaintiffs do not address the failure to supervise argument, we find this evidence insufficient to meet their summary judgment burden. Thus, the motion is granted in this respect.

V. Captain Mazzeo's Motion

Captain Mazzeo argues that the Hogans have failed to identify any policy of deliberate indifference to constitutional violations, or any history of such violations by Mazzeo's subordinates that would subject him to supervisor liability under Monell. He also argues the Hogans have failed to adduce evidence that he possessed policy-making authority, such that his own actions would amount to a violation under Monell. He too rests his failure to train argument on the fact that EPD members received firearms training and were fully compliant with Pennsylvania's certification requirements. Finally, he asserts he is entitled to qualified immunity on the direct claim of excessive force.

It is undisputed that Captain Mazzeo was the commander of the SWAT Team and there is evidence that he had operational control over the situation at the Hogans' house. We previously determined in the first round summary judgment opinion that, under the holding of Estate of Smith v. Marasco, 430 F.3d 140 (3d Cir. 2005), those who have operational control over a police operation and who approve the plan are personally involved in the allegedly unconstitutional conduct. We also held in the first round opinion that there were genuine issues of fact concerning whether Capt. Mazzeo directed Officer Casterline to shoot when and if Mr. Hogan appeared at the top of the stairs. Additionally, we found there was evidence that Capt. Mazzeo was personally in charge of the other SWAT Team Officers who shot Mr. Hogan. As discussed earlier, the Hogans have satisfied their

burden of demonstrating a policy or custom of excessive force, and have created a genuine issue of factual dispute regarding whether there is a history of excessive force violations by Mazzeo's subordinates. Thus, as the commanding officer of the EPD SWAT Team and direct supervisor of the operation at the Hogan home, we find that Mazzeo is subject to derivative liability.

Mazzeo's arguments regarding the direct claim of excessive force, and his entitlement to qualified immunity, although raised in the pending motion, were adjudicated in the Court's first round summary judgment opinion. We determined that there were genuine issues of material fact as to whether he was personally involved in the use of force, both as regards the shooting and the stepping on Mr. Hogan's wrist. (Opinion at 30, 34.) We also found that he was not entitled to qualified immunity on the wrist claim because there was a genuine issue of fact regarding whether the use of force on a wounded and subdued suspect is clearly excessive. (Opinion at 35.) In discussing the claims of qualified immunity made by the other officers involved in the actual shooting, we determined that summary judgment was not appropriate against the defendants who used force, as well as Captain Mazzeo. (Opinion at 32.) As all of Mazzeo's non-Monell arguments were adjudicated in the first round Opinion, that portion of the instant motion is summarily denied.

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

ORDER

AND NOW, this 12th day of December, 2006, upon consideration of the Motion for Summary Judgment filed by the City of Easton, Mayor Goldsmith and Chief of Police Palmer (Docket Entry 86) and the Motion for Summary Judgment of John Mazzeo (Docket Entry 85), 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 Motion of the City of Easton, Mayor Goldsmith and Chief Palmer is **GRANTED** as to:
    a. all derivative claims asserted against them that are based on underlying claims as to which summary judgment was previously granted;
    b. the derivative claim asserted against them based a policy or custom of failure to supervise the members of the Easton Police Department.
2. The Motion of the City of Easton, Mayor Goldsmith and Chief Palmer is **DENIED**

in all other respects.

3. The Motion of John Mazzeo is **DENIED**.[15]

BY THE COURT:

____

John R. Padova, J.

---

[15]Accordingly, the claim proceeding to trial are as follows:

1. Mr. and Mrs. Hogan's claim in Count II against the City of Easton alleging a policy or custom of deliberate indifference to the use of excessive force and violation of the constitutional rights of persons within the City through inadequate training;
2. Mr. and Mrs. Hogan's claim in Count III against Mayor Goldsmith, Chief Palmer, Capt. John Mazzeo, and Lt. Orchulli, alleging deliberate indifference to the constitutional rights of persons within the City through a failure to adequately train the City's Officers;
3. The claim in Count III against Capt. John Mazzeo alleging deliberate indifference to the constitutional rights of persons within the City through a failure to adequately supervise the SWAT Team;
3. Mr. Hogan's claims in Count V against Lt. Orchulli, Capt. Mazzeo, and Officers Beitler, Marraccini, Remaley, and Casterline, alleging:
   (A) that Lt. Orchulli, Capt. Mazzeo, and Officers Beitler, Marraccini, Remaley, and Casterline used excessive force by shooting him; and
   (B) that Capt. Mazzeo used excessive force by stepping on his wrist while handcuffing him.