

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

RICHARD LIEBERMAN, SR. and	:	
RICHARD LIEBERMAN, JR., as	:	
Co-Administrators of the Estate of	:	
Kris Lieberman,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 06-2745
	:	
DAVID MARINO, et al.,	:	
	:	
Defendants	:	

Baylson, J.

March 13, 2007

Plaintiffs, Richard Lieberman Sr., and Richard Lieberman, Jr. (collectively, “Plaintiffs”), as Co-Administrators for and on behalf of the Estate of Decedent, Kris J. Lieberman (“Decedent”), filed a Complaint asserting claims arising out of the circumstances surrounding Kris Lieberman’s death. Presently before the Court are the Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) of Defendants, David Marino, Sean Stuber, Randy Knauss, Stanley Coopersmith and Bushkill Township (collectively, the “Bushkill Defendants”), and Alan Siegfried, Tyson Unangst and Township of Upper Nazareth (collectively, the “Upper Nazareth Defendants”). For the reason set forth below, Defendants’ motions will be granted in part, and denied in part.¹

¹ Taser International, Inc. is a named Defendant in this case; however, it is not a party to the instant motions. Reference to “Defendants” in this Memorandum denotes the Bushkill and Upper Nazareth Defendants, collectively, and does not include Taser International, Inc. The Court notes that Defendant Taser has not yet filed an answer to the Complaint.

I. Background

A. Procedural History

Plaintiffs filed their Complaint on June 23, 2006 (Doc. No. 1). The Bushkill Defendants filed their Motion to Dismiss (Doc. No. 11) on August 14, 2006 to which Plaintiffs responded (Docs. No. 16 & 17) on December 5, 2006. The Upper Nazareth Defendants filed a Motion to Dismiss (Doc. No. 14) on August 26, 2006 to which Plaintiffs responded (Docs. No. 18 & 19) on December 5, 2006.

B. Factual Background

In accordance with the appropriate standard for a motion to dismiss for failure to state a claim, the facts are taken in the light most favorable to the nonmoving party (*i.e.*, Plaintiffs). At the time of his death, Decedent, Kris Lieberman, was 32 years old, and living at a residence on his parent's property. On the evening of June 24, 2004, Decedent, after performing various helpful tasks at home, rode his motorcycle to his brother, Richard Lieberman, Jr.'s home. There, Decedent drove his motorcycle around his brother's pool until Richard Lieberman, Sr. joined the brothers. Decedent took a picture of his family with a disposable camera, and rode away on his motorcycle.

At about 8:46 p.m. that evening, the Northampton County 911 Emergency Center received two telephone calls about a man yelling and screaming, and running around in an open field in Bushkill Township. The first officer to respond to the call was Defendant David Marino, on duty with the Bushkill Police Department, who arrived at about 8:53 p.m. Upon his arrival at the scene, Marino radioed the Emergency Center to request medical personnel for a possible mental health issue; Marino observed Decedent pulling up tufts of grass and throwing them in

the air, and yelling obscenities. Thereafter, Defendant Sean Stuber arrived at the scene, and took control as the ranking officer from Bushkill Township.

Marino unholstered his Taser, and the two Bushkill Township police officers entered the field to approach Decedent. Decedent and Stuber recognized each other, and Decedent called to Stuber by his first name. Apparently misidentifying Marino as one of Decedent's old schoolmates, Decedent called out to him as well, referring to Marino as "Homoki." Marino gave Decedent verbal commands to "calm down," and "relax" while keeping the Taser trained on Decedent, and placing his upper arm on Decedent's upper body. Decedent, apparently oblivious to the officers' commands, continued spinning on the ground and screaming.

Rather than wait for medical personnel, Stuber contacted the emergency center, and requested the medical responders to slow down their approach. At this point, Decedent ceased spinning, and raised himself onto one knee. He ignored further commands from the officers to stay on the ground, and instead charged at Marino. Marino activated his Taser, discharging a jolt of electricity into the upper body of Decedent. Decedent collapsed to the ground, face-first. As Stuber straddled Decedent in an attempt to immobilize and handcuff him, Marino administered a second jolt from his Taser. While Stuber continued to struggle, Defendant Knauss, also a Bushkill police officer, arrived on the scene, but did not join Defendants Stuber and Marino in their efforts to restrain Decedent. Instead, Stuber directed Marino to administer a third, continuous discharge from the Taser. At the time of the third discharge, one of the Taser wires had broken, however use of the Taser continued, and Stuber ordered Marino to insert a fresh cartridge into the Taser. Records downloaded from the Taser itself indicate the Decedent was shocked at least eleven times within less than one minute, beginning at 8:52 p.m.

Plaintiffs assert that Decedent was kept lying prone on his stomach throughout this time with the weight of at least one defendant on his back, even after his hands had been cuffed behind, despite the possibility of asphyxiation for anyone kept in such a position. Decedent went limp while still on the ground; his lips turned blue, his eye rolled back, and he appeared to stop breathing. Stuber radioed the Emergency Center to inform them Decedent was unconscious, and Marino began to attempt CPR. Defendant Unangst, a Nazareth Township police officer, retrieved a defibrillator from his police car,² which Defendant Knauss attempted to use for a period of about 6 minutes beginning at approximately 9:04 p.m. Plaintiffs assert that during this time, the defibrillator indicate “No Shock Advised” on four occasions while Knauss made his attempt. Plaintiffs further assert that no defendant continued CPR following the “CPR Prompt” indication on the defibrillator. It was at this point Defendant Stuber revised his earlier request to slow the arrival of emergency medical personnel, and requested that the EMTs expedite their arrival to the scene. Decedent was transported to Easton Hospital, where he was declared dead.

While the ambulance crew was still on the scene, Defendant Stan Coopersmith, Chief of Police for Bushkill Township, arrived, and took charge of the investigation. After the ambulance left, the police searched the area, and recovered Decedent’s motorcycle and helmet, his cell phone, keys, a cooler containing water and orange juice, a box of donuts, and the disposable camera with which Decedent had earlier photographed his family. Defendant Coopersmith also contacted the State Police in order to begin an investigation regarding the events of that evening.

² The Complaint does not indicate when Defendant Unangst arrived at the scene.

C. Allegations in the Complaint

In addition to the facts related above, Plaintiffs make a series of inferences as to the activities of the individual defendants. Plaintiffs allege that during the several hours between when the incident occurred and the time State Police Investigator, Trooper Paul Hulbert, contacted any of the defendant police officers, all of the Bushkill Township police officers, and possibly Defendant Unangst as well, were able to confer with one another, and harmonize their version of events that evening. Plaintiffs further allege that Defendants took this opportunity to do so. In Plaintiffs' view, the death of Kris Lieberman was due, in part, to the inadequate training the officers received in the appropriate use of a Taser.

The Complaint proceeds under eight counts.³ Count I alleges violations of 42 U.S.C. § 1983 against all Defendants. (Compl. ¶¶ 90-92.) Count II alleges negligence or negligent supervision against all Defendants. (Id. ¶¶ 93-96.) Count III alleges product liability against Taser International, Inc (“Taser”). (Id. ¶¶ 97-99.) Count IV alleges strict liability against Taser. (Id. ¶¶ 100-103.) Count V is a survival action brought on behalf of Decedent's estate essentially repeating the factual allegations of Counts I and II. (Id. ¶¶ 104-108.) Count VI alleges wrongful death against all Defendants. (Id. ¶¶ 109-112.) Count VII alleges intentional infliction of emotional distress against the individual officers and Taser. (Id. ¶¶ 113-115.) Count VIII alleges negligent infliction of emotional distress against all Defendants. (Id. 116-118.) Finally, Plaintiffs demand a jury trial, and the award of legal fees, costs, interest, expenses, delay

³ The Complaint, apparently mistakenly labels the last two counts both as “Count VIII.” Since these are clearly separate counts, alleging intentional and negligent infliction of emotional distress, respectively, and because the Complaint contains no count labeled “Count VII,” we will refer to the first “Count VIII,” (the allegation of intentional infliction of emotional distress) as Count VII.

damages and punitive damages, as well as compensatory damages.

II. Jurisdiction and Venue

This action was initiated under the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution, and pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. This Court has original jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

Supplemental jurisdiction to hear Plaintiffs' state law claims exists pursuant to 28 U.S.C. § 1367.

Venue is proper in this district under 28 U.S.C. § 1391(b).

III. Parties' Contentions⁴

A. Defendants' Motions to Dismiss⁵

Defendants' Motions to Dismiss argue that all claims against them should be dismissed, except that the Complaint should be amended to assert only a Fourth Amendment claim for excessive force. Defendants challenge the sufficiency of the pleadings on several grounds. First, they assert immunity from suit as to all of Plaintiffs' negligence claims pursuant to the Pennsylvania Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa. Cons. Stat. § 8541 et

⁴ In addition to the following contentions, Defendants also move to strike Plaintiffs' claim for one hundred million dollars, noting such a claim violates Local Rule of Civil Procedure 5.1.1, which requires that no case for unliquidated damages shall include a claim for a specific dollar amount in the pleadings. Plaintiffs' concede this point.

⁵ The Upper Nazareth Defendants' Motion to Dismiss argues along similar lines to that of the Bushkill Defendants. The only two significant differences between the motions relates to allegations against Chief of Police Siegfried and Officer Unangst as compared to their counterparts from Bushkill Township. The Upper Nazareth Defendants point out that the Complaint only claims that Officer Unangst arrived after discharge of the Taser and the handcuffing of Decedent, and that he only aided in keeping Decedent on the ground by applying his body weight. The Upper Nazareth Defendants argue these allegations are insufficient as a matter of law to establish a claim of excessive force. As to supervisory liability, the Upper Nazareth Defendants argue that Plaintiffs have failed to allege any supervisory policy which Upper Nazareth Police Chief, Alan Siegfried, failed to employ, thus rendering claims against him insufficient as a matter of law, especially in light of the fact that Decedent was in Bushkill Township and Defendant Siegfried was never present at the scene.

seq. Second, the Townships argue claims for alleged violations of § 1983 must be dismissed because municipalities are not liable under a theory of respondeat superior, and Plaintiffs cannot establish an official policy or custom for which the Townships could be held liable under Monell v. Dep't of Social Services, 436 U.S. 658 (1978). Third, as to the two police chiefs, Defendants Coopersmith and Siegfried, Defendants argue that Plaintiffs have failed to plead a specific supervisory policy which they failed to employ that created an unreasonable risk of injury, or that Coopersmith and Siegfried were aware of, and deliberately indifferent to, such a risk. Fourth, Defendants' challenge Plaintiffs' ability, given the events as alleged, to prove any set of facts which could make out a claim for intentional infliction of emotional distress. Fifth, Defendants contend that Plaintiffs' allegations of cruel and unusual punishment must be dismissed because Decedent was not convicted and incarcerated at the time of the alleged constitutional violations. Sixth, Defendants argue that alleged violations of the Fifth and Fourteenth Amendments actually constitute allegations of excessive force to be analyzed under the Fourth Amendment, and so must be dismissed as they are pled. Seventh, Defendants maintain Plaintiffs' claims under the Pennsylvania Constitution must be dismissed because private causes of action do not exist for violations of rights under the Pennsylvania Constitution. Eighth, Plaintiffs cannot recover against Bushkill Township for punitive damages for a § 1983 claim because, under the PSTCA, a political subdivision is not liable for punitive damages. Finally, Plaintiffs' assertion that the Bushkill Defendants attempted a "cover up" of the events surrounding Kris Lieberman's demise does not state a claim, since any alleged "cover up" could not have cause a constitutional injury to the deceased.

B. Plaintiffs' Response

Plaintiffs provide a point-by-point response to the Defendants' Motions. First, Plaintiffs counter that the PSTCA does not provide immunity for the individual Defendants who engaged in willful misconduct, and that finding willful misconduct is a question of fact which must survive a motion to dismiss. Second, the allegations satisfy the requirements for municipal liability under a Monell analysis because Plaintiffs have alleged facts which, if proven, would establish an official policy or custom in that all the individual defendants interacted with each other, and the municipality's failure to train its police officers amounted to deliberate indifference. Third, reiterating this reasoning, Plaintiffs argue they have alleged facts which would show the police chiefs' deliberate indifference, and thus render them liable under § 1983 in their capacity as supervisors. Fourth, Plaintiffs argue their claim for intentional infliction of emotional distress must survive because the PSTCA provides for liability for pain and suffering, allowing recovery for this claim. Plaintiffs largely concede the fifth through eighth points made by Defendants, however, Plaintiffs maintain that although it is true the Townships are not liable for punitive damages, the individual police officers are. Finally, Plaintiffs reaffirm their claim against Defendants for damages due to a "cover up," arguing that since Defendants have provided no law as to why such a claim should fail, it must survive the Motions to Dismiss.

IV. Legal Standard

When deciding a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1251, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most

favorable to the plaintiff. Angelastro v. Prudential-Bache Sec., Inc., 764 F.2d 939, 944 (3d Cir. 1985). A Rule 12(b)(6) motion will be granted only when it is certain that no relief could be granted under any set of facts that could be proved by the plaintiff. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

V. Discussion

A. Negligence claims

Counts II, V, VI, and VIII of the Complaints sound in negligence. Defendants argue that the PSTCA, 42 Pa. Cons. Stat. § 8541 et seq., grants them immunity from any such claims. Plaintiffs respond that § 8550 of the PSTCA denies immunity to officers who engage in willful misconduct, and whether Defendants did so is a question of fact which must be proven at trial. Therefore, Plaintiffs argue that it would be premature for the Court to dismiss claims of negligence.

The PSTCA provides, “Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.” 42 Pa. Cons. Stat. § 8541. Immunity does not apply to negligent acts which fit into one of eight exceptions, 42 Pa. Cons. Stat. § 8542(b), or to acts which “constitute a crime, actual fraud, actual malice or willful misconduct” 42 Pa. Cons. Stat. § 8550. There is a clear distinction in the PSTCA between negligent and other wrongful acts. 42 Pa. Cons. Stat. § 8542(a)(2) (“As used in this paragraph, ‘negligent acts’ shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.”)

Plaintiffs’ claims sounding in negligence must be dismissed if they do not fit into one of

the eight categories listed in § 8542(b). These categories are: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) tress, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa. Cons. Stat. § 8542(b). Count II of the Complaint alleges negligent acts or omissions on the part of the officers at the scene of Kris Lieberman’s death, and also negligence on the part of the Townships in developing, implementing, and carrying out the policies, customs or practices which resulted in the officers’ alleged behavior. Plaintiffs’ argument in their Briefs that the immunity exceptions are irrelevant to allegations of willful misconduct is inapt since the Complaint clearly alleges negligence. Moreover, suits against municipal employees acting in their official capacities are “treated as claims against the municipal entities that employ these individuals.” Hafer v. Melo, 502 U.S. 21, 25 (1991). Since Plaintiffs do not plead any facts which allege injuries resulting from one of the eight categories listed in § 8542(8), Count II fails to state a claim for which relief can be granted, and will be dismissed with prejudice as to all Defendants.

Count V is a survival action brought on behalf of Decedent’s estate, Count VI claims wrongful death, and Count VIII alleges negligent infliction of emotional distress. All of these counts sound in negligence, and rely on the same factual allegations as Count II. Therefore, Counts V, VI and VIII will also be dismissed with prejudice.

B. Section 1983 claims

1. Municipal Defendants

Count I alleges violations of 42 U.S.C. § 1983. Defendants move to dismiss the claims against the Townships, arguing they are not liable because the alleged constitutional deprivation

did not result from an official policy or custom. Plaintiffs contend that such a policy or custom did exist.

It is well settled that to establish a violation of 42 U.S.C. § 1983 by a municipality, a plaintiff must show that the alleged misconduct was caused by an official government custom or policy. Monell, 436 U.S. at 694. Municipal custom or policy can be demonstrated either by reference to express, codified policy or by evidence that a particular practice, although not authorized by law, is so permanent and well-settled that it constitutes law. Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996). Further, Plaintiffs must demonstrate causation, as "a municipality can be liable under § 1983 only where its policies are the moving force behind the constitutional violation." City of Canton v. Harris, 489 U.S. 378, 389 (1989) (internal quotations omitted). Additionally, for liability to attach under a failure-to-train theory, Defendants' failure to train their employees must "reflect a 'deliberate' or 'conscious' choice by [a] municipality" such that one could call it a policy or custom. Id. at 388-89; Grazier v. City of Philadelphia, 328 F.3d 120, 124 (3d Cir. 2003). This standard will not be satisfied by a mere allegation that a training program represents a policy for which the city is responsible, but rather, the focus must be on whether the program is adequate to the tasks the particular employees must perform. Harris, 489 U.S. at 389-90. Moreover, such liability arises "only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants." Id.

In the instant case, Plaintiffs clearly accuse Bushkill and Upper Nazareth Townships of failing to train their officers in what Plaintiffs would characterize as the proper use of a Taser, and that this failure to train shows Defendants' deliberate indifference to Decedent's

constitutional rights. Plaintiffs seek to hold Defendants liable for “deliberately failing to train all the Defendants in the recognition of, and proper response to, known dangers created by the use of the taser [sic] device.” (Compl. ¶ 91.) Plaintiffs clearly allege that deficient training and operating manuals caused the individual defendants to misuse the Taser and defibrillator in such a way as to deprive Decedent of his constitutional rights, and that the Townships should have known this was the case. Plaintiffs’ Complaint goes well beyond the requirements of notice pleading, and is sufficient to require Defendants to defend the case. See Carter v. City of Philadelphia, 181 F.3d 339, 357-358 (3d Cir. 1999) (“The District Court’s insistence that Carter must identify a particular policy and attribute it to a policymaker, at the pleading stage without benefit of discovery, is unduly harsh.”) Accordingly, Defendants’ motions as to Plaintiffs’ § 1983 claims against Bushkill Township and Upper Nazareth Township will be denied.

2. Police Chief Defendants

According to the allegations in the Complaint, neither Chief Stanley Coopersmith of Bushkill Township nor Chief Alan Siegfried of Upper Nazareth Township was present at the time Officer Marino used the Taser stun gun on Kris Lieberman. Liability cannot be premised on respondeat superior. Instead, “absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve.” Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989). Defendant Coopersmith’s late arrival, and Defendant Siegfried’s complete absence from the scene are not relevant to whether Plaintiffs have stated a claim for supervisory liability. The Third Circuit has set out a specific test for the sufficiency of the evidence to support a claim of

supervisory liability.⁶ A supervisor's presence is not a fact which must be proven to prevail on such a claim. Since Plaintiffs have alleged facts which, if proven, would be sufficient to support a claim, Defendants' Motions to Dismiss Plaintiffs' § 1983 claims against Defendants Coopersmith and Siegrfried will be denied.

3. Individual Officers

In moving to dismiss claims against the individual police officers who responded to the scene, Defendants object to Plaintiffs invoking the Fifth, Eighth and Fourteenth Amendments, arguing that the officers' actions should be analyzed solely for excessive force under a Fourth Amendment analysis. Plaintiffs concede that the Fifth and Eighth Amendments are inapplicable to the facts of this case.⁷ However, Count I of the Complaint clearly alleges violations of Decedent's Fourth Amendment rights, an allegation Defendants do not now move to dismiss.

C. Intentional Infliction of Emotional Distress

Defendants move to dismiss Count VII on the ground that, (1) given the facts alleged in the Complaint, Plaintiffs could not possibly produce medical evidence supporting the existence of emotional distress, and (2) that the PSTCA does not allow recovery against a municipality for

⁶ "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." Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001).

⁷ Indeed, Plaintiffs have conceded to the removal of the offending language in the Complaint at Paragraph 91(k) which characterizes the officers' actions as "cruel and unusual punishment." The Complaint only mentions the Fifth and Fourteenth Amendments in its statement of jurisdiction, and the only allegation which even suggests a Fifth Amendment claim states that Defendants' actions "effectively deprive[d] the Decedent of his Constitutional rights and life, liberty and the pursuit of happiness." (Compl. ¶ 81.) The allegations Plaintiffs have conceded as improper will be stricken.

emotional distress.

Defendant's first argument is without merit. It is true courts require plaintiffs to provide expert medical support for the claimed injury. However, this requirement applies at summary judgment, Tuman v. Genesis Assoc., 935 F.Supp. 1375, 1393 (E.D. Pa. 1996), or at trial, Kazatsky v. King David Memorial Park, 527 A.2d 988, 995 (Pa. 1987). The requirement does not apply to a motion to dismiss, where the plaintiffs allegations are taken to be true.

Schmoltze v. County of Berks, No. 99-1069 2000 WL 62600 (E.D. Pa. Jan. 14, 2000).

The issue, then, is not whether Plaintiffs have alleged facts which would support their claim of intentional infliction of emotional distress. Rather, the issue is whether the PSTCA allows recovery from municipalities for the alleged tort in question. Section 8553(c) of the PSTCA allows recovery of damages for:

- (1) Past and future loss of earnings and earning capacity.
- (2) Pain and suffering in the following instances:
 - (i) death; or
 - (ii) only in cases of permanent loss of a bodily function, permanent disfigurement or permanent dismemberment where the medical and dental expenses referred to in paragraph (3) are in excess of \$1,500.
- (3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant.
- (4) Loss of consortium.
- (5) Loss of support.
- (6) Property losses.

42 Pa. Cons. Stat. § 8553(c).

Here, Plaintiffs argue the allegation of intentional infliction of emotional distress entitles them to compensation for pain and suffering. In order to prove intentional infliction of emotional distress, Plaintiffs must prove the following three elements: (1) the conduct must be extreme and

outrageous; (2) the conduct must be intentional and reckless; and (3) the plaintiff [here, Decedent] must sustain severe emotional distress. Miniscalco v. Gordon, 916 F. Supp. 478, 481 (E.D. Pa. 1996). If Plaintiffs meet this burden, they will have clearly established pain and suffering. Accordingly, Defendants' motion to dismiss Count VII will be denied.

D. Availability of punitive damages

Plaintiffs concede punitive damages are not available under Pennsylvania's Constitution, see Douris v. Schweiker, 229 F. Supp.2d 391, 405 (E.D. Pa. 2002), and that the PTSCA does not allow for punitive damages against municipalities. 42 Pa. Cons. Stat. § 8541; City of Newport News v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981). However, Plaintiffs maintain that punitive damages are available against all individual Defendants in their individual capacities. To the extent Plaintiffs allege intentional torts against individual defendants, punitive damages are available under the PSTCA. Holloway v. Brechtse, 279 F. Supp.2d 613, 615 (E.D. Pa. 2003) (Joyner, J.).

E. Allegations of a "cover up"

Defendants' argument for dismissal of claims a "cover up" appear to stem from Plaintiffs' allegations that the individual officers conferred with one another to "fabricate or configure" their report of the events which led to Kris Lieberman's death so as to justify their conduct, and that the officers' supervisors encouraged or allowed the officers to do so. The "cover up" does not exist as a separate count for which Plaintiffs seek redress. Rather, these are factual allegations which Plaintiffs assert as part of their claims under federal and state laws as described count-by-count, *supra*. As factual allegations, Plaintiffs statements must be accepted as true for the purposes of the instant motions. As such, Defendants' motions to dismiss allegations of a "cover

up” will be denied.

VI. Conclusion

For the foregoing reasons, Defendants’ Motions to Dismiss will be granted in part, and denied in part. An appropriate order follows.

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

RICHARD LIEBERMAN, SR. and	:	
RICHARD LIEBERMAN, JR., as	:	
Co-Administrators of the Estate of	:	
Kris Lieberman,	:	
	:	
Plaintiffs,	:	CIVIL ACTION
	:	
v.	:	No. 06-2745
	:	
DAVID MARINO, et al.,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 13th day of March, 2007, upon consideration of Defendants, David Marion, Sean Stuber, Randy Knauss, Stanley Coopersmith and Bushkill Township's Motion to Dismiss (Doc. No. 11), Defendants, Alan Siegfried, Tyson Unangst and Township of Upper Nazareth's Motion to Dismiss (Doc. No. 14), and Plaintiffs' Responses thereto, and in accordance with the attached Memorandum, it is hereby ORDERED that Defendants' Motions are GRANTED in part, and Counts II, V, VI and VIII of the Complaint are dismissed with prejudice, and are otherwise DENIED.

The following allegations are stricken:

- (1) Plaintiffs' claim for a specific dollar amount;
- (2) alleged violations of the Fifth and Eighth Amendments;
- (3) claims for monetary damages premised on alleged violations of the

Pennsylvania Constitution; and

- (4) claims for punitive damages against Bushkill Township and Upper Nazareth Township.

All Defendants shall answer the Complaint within fourteen (14) days from the date of this Order.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.