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

JULIO MORAIS, JR., **Plaintiff,** **v.** **CITY OF PHILADELPHIA, et al.,** **Defendants.**	**CIVIL ACTION NO. 06-582**

MEMORANDUM & ORDER

Katz, S.J. **March 19, 2007**

I. FACTS[1]

A. The Events of February 19, 2004

Decedent Julio Morais was a 58 year-old man suffering from chronic paranoid schizophrenia. He lived alone in a second-floor apartment but was monitored by social workers at Horizon House in Philadelphia, Pennsylvania.

On February 19, 2004, Decedent's psychological condition began to deteriorate. He began acting in various inappropriate ways, which included banging on the floor of his apartment in response to the barking dogs in the "doggie day care center" below him, exposing himself through his window, and throwing objects out the window.

At approximately 11:15 a.m., the assistant property manager of the

[1] As required at summary judgments, the court's statement of facts closely tracks Plaintiff's Statement of Undisputed Facts, which properly cites to the record.

apartment building reported this behavior to Decedent's case manager, Lonnie Boyd. Mr. Boyd concluded that Decedent needed psychiatric hospitalization, so he headed to Decedent's apartment with a civil commitment he had obtained on February 4, 2007, but had not yet served.

Mr. Boyd contacted the police and asked for a police wagon to meet him to transport Decedent on a "302" commitment order.[2] Officers Aviles and Savino met Mr. Boyd at Decedent's apartment building. The officers and Mr. Boyd knocked on his door and informed Decedent that they intended to take him to the hospital. Decedent refused to unlock his apartment door and became hostile toward his case manager and the police, berating and cursing them. Mr. Boyd informed the officers that Decedent could become violent, so the officers called for backup. When officers Mario Rossi and Kevin Cullen arrived, the officers and Mr. Boyd attempted to open the door with Mr. Boyd's spare key, but Decedent had blocked the door to prevent it from opening more than a few inches. In response, Decedent ran a knife along the narrow opening.

The officers called for a supervisor and a police wagon at about 11:47 a.m.

[2] Upon written application by a physician or other responsible party setting forth facts constituting reasonable grounds to believe a person is severely mentally disabled and in need of immediate treatment, the county administrator may issue a warrant requiring a person authorized by him, or any peace officer, to take such person to the facility specified in the warrant. 50 Pa.C.S. § 7302.

At about 11:50, Tim Pinkney, another of Morais' case managers arrived on the scene. Through the door, Decedent yelled insults, curses and said that if the officer came in he would shoot. Both Mr. Pinkney and Mr. Boyd informed the police that they did not believe Decedent owned a gun.

Shortly after 12:00 p.m., Supervisors Lt. George McAndrews arrived on the scene. Lt. McAndrews spoke with Decedent, who told him that he did not want to go back to the hospital because he got beat up there. At 12:19 p.m., McAndrews decided to call for SWAT and declare a barricaded man situation – governed by Police Directive 111. Soon thereafter, more police, supervisors, Detectives and others started to arrive. SWAT members Defendants Oldrati, McFadden, Degliomini, and Elia arrived at 12:35 p.m., with Defendant Mangini, the team leader, arriving a few moments later. The gas company arrived sometime after 12:50 p.m. to turn off the gas. Police negotiators also arrived on the scene.

As the police began to rope off the area, closing the street to traffic and pedestrians, Decedent gestured with his hands for Mr. Pinkney to come over. When Pinkney came closer, Decedent raised the window and started talking with Mr. Pinkney. As Mr. Pinkney was asking Decedent to cooperate, Inspector Small moved him away from the window, telling him that the police did not need social workers negotiating with Decedent at that time. Mr. Boyd and Mr. Pinkney were

moved over to the police command post, out of sight of the apartment. A mobile Mental Health Team was called in from Hall Mercer, a few blocks away, and was en route to the scene at about 1:02 p.m., but there is no evidence that they were ever consulted.

Detective Carroll of the Central Detective Division, who had purportedly received negotiator training, arrived shortly after 1:00 p.m. and took over negotiations. Between 1:00 and 1:15 p.m., negotiators from the Police Crisis Intervention Unit arrived and took over negotiations. Defendant Braxton was outside the apartment door, supported by Defendant Brian Copeland and supervised by his Lieutenant, Defendant Raymond Hallman. The initial scene commander, taking over from Lt. McAndrews at 1:11 p.m., was 6th District Captain Collier. He was replaced by Inspector Banach of The Central Division, who arrived at about 1:45 p.m.

At about 1:46 p.m. Decedent threw a gallon-sized plastic jug filled with a brown liquid out of his window, toward the corner, where it bounced off the awning of the salon next door and landed on the sidewalk, splashing on Captain Collier's pants. No one reported that there was a smell of gasoline, or anything else that would indicate that this was a dangerous liquid. The liquid was collected but no tests results were provided.

In the five or ten minutes that he was at the scene, Defendant Banach decided to order SWAT to enter and seize Decedent because, Banach claims, his behavior had not improved, and because the negotiator Braxton could not establish contact. Banach claims he was concerned that Decedent might harm himself or endanger the negotiators. There was no information, from any source, that Decedent had indicated intent to hurt himself, nor during the preceding two hours had he made any effort to come out of the apartment or suggested that he would do so to harm the negotiators. The negotiators outside the door were protected by a shield and armed SWAT officers, including one with a machine gun, at all times. Of all the people consulted and involved in the decision process, including Defendant Trzcinski (SWAT Inspector), Defendant Small (Negotiator's Inspector), Defendant Hallman (the Negotiator Team Leader and Lieutenant), Defendant Mangini (SWAT Team Leader and Lieutenant), none suggested waiting.

Shortly before 2:00 p.m., the Negotiators were withdrawn from the building, and the SWAT team prepared to enter. Defendant Mangini unlocked the apartment door with a key, then stepped out of the way of Defendant McFadden,

who had the breaching ram. Elia, who was equipped with a plexiglass riot shield[3] and high power OC spray (MK-9), and who was supposed to be the first man in, stood beside the door. McFadden struck the door with the ram, forcing it open. At that point, Decedent could be seen down the hall, and across the living room, near the windows opening onto 11th Street, over 40 feet from the door.

Instead of stepping aside outside the door, McFadden took the lead and advanced nearly 40 feet down the hall, past a closet, the bedroom door, the bathroom door, the kitchen entrance, into the living room, and past the end of a couch where he then threw or dropped the ram.[4] At this point Decedent badly cut Defendant McFadden on his fingers. Defendant Elia moved into the apartment with his shield, and the other members of the SWAT team followed. Defendant Degliomini used his Taser, but it had no effect on Decedent. Lt. Mangini then attempted to wrestle the knives away from Decedent, but he was unsuccessful. Finally, Lt. Ahrndt then fired one shot hitting Decedent in the head head and

[3]Plaintiff argues that had Defendants believed that Decedent had a gun, the SWAT team would have used their ballistic shield instead of the plexiglass riot shield.

[4]This fact is hotly contested by the parties. Defendants assert that Officer McFadden lost his balance and stumbled five to six feet into the apartment before throwing his ram at Decedent, who was charging. Decedent, however, points to crime scene photos which show the ram on the floor more than 30 feet from the door, which a reasonable fact-finder could find to be inconsistent with Defendants' version of the facts. Plaintiffs further argue that Defendants have offered various versions of how this occurred, which are inconsistent with one another and with the physical evidence.

killing him.

B. Police Training

The City of Philadelphia requires that all police recruits attend the Philadelphia Police Academy to become certified as police officers. The police academy program consists of approximately six months of training in different areas of law enforcement, including, but not limited to, patrol, vehicle laws, use of force, crisis management, behavior management, crisis intervention, dispute intervention, conflict management, and recognizing special needs. The training regarding special needs relates to police encounters with persons who may have some personal issues other than being involved in a criminal act, including a physical or mental disability. The police academy training satisfies all the curriculum requirements mandated by the Commonwealth or Pennsylvania through the Municipal Police Officer Education Training Commission, and includes additional training from a City curriculum, which involves training on the Philadelphia Police Department directives. These Directives include Philadelphia Police Department Directive 136 for dealing with Severely Mentally Disturbed Persons ("SMDPs").

Although the Commonwealth developed a new curriculum in 2000, police recruits entering the police academy prior to 2000 still received much of the same

training regarding recognizing and dealing with mental health issues as new recruits receive today. With regard to police training involving emotionally disturbed and mentally ill persons, all supervisory police officers were given a Commonwealth–mandated course on special needs in 2001, and a Commonwealth-mandated course on police encounters with the mentally ill in 2002. All police officers were given reference booklets and Assist Officer handouts regarding police encounters with mentally ill persons. Additional training on Enhancing Officer and Community Safety involving police encounters with emotionally disturbed or mentally ill persons has been provided to police supervisors since 2003, and police officers since 2005, with over 1,000 police personnel having been trained.

II. DISCUSSION

Plaintiff asserts the following claims against Defendants: (1) a federal civil rights claim under the Fourth Amendment against the individual police officers alleging unreasonable force and unreasonable seizure;[5] (2) a federal civil rights claim under the Fourth Amendment against Defendant City of Philadelphia alleging failure properly to train, supervise, investigate, or discipline its police

[5]Plaintiff's Complaint had asserted alleged violations of the Fourteenth Amendment. Plaintiff's Response to Defendant's Motion for Summary Judgment, however, withdraws these claims.

officers in dealing with mentally ill persons; (3) claims under the Americans with Disabilities Act, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794, for discrimination based upon "mental health disability;" and (4) supplemental state law claims alleging assault and battery, outrageous conduct causing severe emotional distress, and violations of the Pennsylvania Wrongful Death Act, 42 Pa. C.S. § 8301, and the Pennsylvania Survival Act, 42 Pa. C.S. § 8302. Plaintiff seeks compensatory and punitive damages against the individual defendants. Now before the court is Defendants' Motion for Summary Judgment.

A. Standard

Summary judgment is appropriate where the moving party, through affidavits, depositions, admissions, and answers to interrogatories, demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Jalil v. Advel Corp., 873 F.2d 701, 706 (3d Cir. 1989), cert. denied, 110 S.Ct. 725 (1990); FED. R. CIV. P. 56(c). The moving party has the burden of demonstrating the absence of genuine issues of material fact, with all reasonable inferences from the record in favor of the nonmoving party. Jalil, 873 F.2d at 706; see also Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986).

Rule 56 requires that summary judgment be entered "against a party who

fails to make a 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 Corp. v. Catrett, 477 U.S. 317, 322 (1986). To establish that a genuine issue of material fact exists, the nonmoving party must point to specific evidence in the record that supports each essential element of its case. Id. at 22–23; Childers v. Joseph, 842 F.2d 689, 694–95 (3d Cir. 1988). In doing so, a party cannot merely restate the allegations of its complaint, nor rely on self-serving conclusions that are unsupported by specific facts in the record. Celotex, 477 U.S. at 322–23; Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986).

B. Constitutional Claims Against Individual Officers

Plaintiff alleges that the individual police Defendants used excessive force in (1) launching a SWAT team assault on Decedent's apartment and (2) using deadly force to subdue Decedent. Defendants seek dismissal of these claims against the individual police officers on the grounds of qualified immunity.

"The doctrine of qualified immunity protects government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Rogers v. Powell, 120 F.3d

446, 454 (3d Cir. 1997) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982). Courts undertake a two-step inquiry in determining whether a state official is entitled to qualified immunity. See Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156 150 L.Ed.2d 272 (2001). First, the court determines whether the facts alleged demonstrate that the defendant's conduct violated a constitutional or statutory right.[6] See 533 U.S. at 201, 121 S.Ct. at 2156. Second, if there is a constitutional violation, the court determines whether the constitutional or statutory right allegedly violated by the defendant was "clearly established" at the time the violation occurred. See id; Harlow, 457 U.S. at 818, 102 S.Ct. at 2738 ("If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful.").

[6]The court recognizes that a conclusion that no constitutional violation took place would also negate an essential element of the § 1983 claim. See Wright v. City of Philadelphia, 409 F.3d 595, 601 (3d Cir. 2005) (analyzing the threshold inquiry of whether the officers' conduct violated Plaintiff's constitutional rights, as the first part of the qualified immunity analysis). Section 1983 potentially imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983. To prevail under § 1983, a plaintiff must establish (1) that the defendants were "state actors," and (2) that they deprived the plaintiff of a right protected by the Constitution. Groman v. Township of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). It is undisputed that, at all times material to this matter, the individually named defendants were engaged in the performance of their official duties as employees of the Philadelphia Police Department, and were "state actors" for the purposes of the §1983 claims in this case.

1. SWAT Team Assault

a. Constitutional Violation

Plaintiff first claims that the SWAT team's forced entry into Decedent's apartment constituted excessive force in violation of his Fourth Amendment rights. "To state a claim for excessive force as an unreasonable seizure under the Fourth Amendment, a plaintiff must show that a 'seizure' occurred and that it was unreasonable." Abraham v. Raso, 183 F.3d 279, 288 (3d Cir. 1999). Defendants do not contest that Defendant was seized, so the question is whether the seizure was unreasonable.[7]

"The test of reasonableness under the Fourth Amendment is whether, under the totality of the circumstances, 'the officers' actions [were] objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations.'" Estate of Smith v. Marasco, 318 F.3d 497, 515 (3d Cir. 2003) ("Smith I") (quoting Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 1872, 104 L.Ed.2d 443 (1989).

> To determine whether the officers acted reasonably, we may consider eight factors: (1) the severity of the crime at issue; (2) whether the

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[7] See Estate of Smith v. Marasco, 227 F. Supp. 2d. 322 (E.D. Pa. 2003)(holding that such SWAT team conduct constitutes a seizure), rev'd on other grounds Smith I v. Marasco, 318 F.3d 497 at 515).

> suspect poses an immediate threat to the safety of the officers or others; (3) whether he actively is resisting arrest or attempting to evade arrest by flight; (4) the possibility the persons subject to the police action are themselves violent or dangerous; (5) the duration of the action; (6) whether the action takes place in the context of effecting an arrest; (7) the possibility that the suspect may be armed; and (8) the number of persons with whom the police officers must contend at one time.

Wheeler v. City of Philadelphia, 367 F. Supp. 2d 737, 743 (E.D. Pa. 2005) (citations omitted) (summarizing the factors set forth in Graham and Sharrar v. Felsing).

Viewing the facts in the light most favorable to Plaintiff, Defendants' decision to storm Decedent's apartment was unreasonable. The Court of Appeals for the Third Circuit has emphasized the importance of considering whether the suspect poses an immediate threat to the safety of the officers or others in evaluating the reasonableness of the decision to have a SWAT team storm the residence of barricaded individual. See Smith I, 318 F.3d at 516 (reversing the district court for failing to properly consider whether the threat of harm to others was so immediate as to require storming the house). Here, Decedent did not pose an immediate threat to the safety of the officers or others. Although Decedent was armed with a knife, he did not have the ability to harm any individual outside of his apartment, unlike the decedent in Smith who had a gun. See Id.

The court also notes that Defendants were attempting to involuntarily

commit Decedent for the purpose of a mental health evaluation, a purpose of was to protect the well-being of Decedent. Prior to the forced entry into his apartment, there is no evidence that Decedent had harmed anyone – only that he banged on the floor in response to barking dogs, exposed himself to pedestrians and threw objects out the window without hitting anyone.

Defendants' citation to cases involving haste and rapidly evolving events is of limited relevance here, because there is a significant factual dispute as to whether there were exigencies requiring immediate action. Cf. Philadelphia Department of Police Directives 136 and 111 (stating respectively that "time is of no Importance when handling a SMDP" and that "time is of no importance in removing barricaded persons"). Moreover, Plaintiff's expert asserts that the passage of time is an extremely useful and commonly implemented tool for reaching peaceful resolutions with SMDPs, as SMPDs will often exhaust themselves. See Affidavit with Report of Hugh M. McGowan. Moreover, as in *Smith* where the court held that the police's forced entry of residence was unreasonable, the actions of the SWAT officers were not designed to frighten decedent into submission, but rather were designed to cause significant non-lethal harm, either through the use of OC Spray or a Taser. See Estate of Smith v. Marasco, 430 F.3d 140, 152 (3d Cir. 2003) ("Smith II") (distinguishing the facts

of Sharrar v. Felsing, finding that in Sharrar, the actions of the officers were calculated primarily to frighten the plaintiffs into submission and were likely to lead to, at worst, minor physical injuries**)**. Additionally, the officers acknowledge that they were aware that their plan risked use of deadly force. Thus, there are materially disputed facts as to whether the SWAT entry was an unreasonable use of force.

b. Clearly Established Right

"To find that a right is clearly established, the right allegedly violated must be defined at the appropriate level of specificity." Williams v. Bitner, 455 F.3d 186, 191 (3d Cir. 2006) (citation omitted). "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier, 533 U.S. at 201. In this case, a reasonable officer would have concluded that the decision to storm a SMDP's apartment in a manner designed to provoke a violent confrontation in the absence of any threat of bodily harm was an excessive use of force in violation of the Fourth Amendment.

The law was clear that on February 19, 2004, that it would be a constitutionally unreasonable use of force for a SWAT team to storm the home of a mentally-ill suspect, in the absence of an immediate threat of harm. The Court

of Appeals for the Third Circuit set forth this rule in *Smith I*. In *Smith II*, the Third Circuit found that this rule had been clearly established at the time of the use of force in that case, July 10, 1999, stating:

> When viewing the facts in the light most favorable to [Plaintiffs], we believe that a reasonable officer would have concluded that, at the time the decision was made, [Decedent] did not pose a threat that was sufficiently serious and immediate as to require storming his house. At all events, a reasonable officer would have recognized the significant risk that Smith would suffer serious harm as a result of the decision to do so. Balancing these considerations, we think that a reasonable officer would have concluded that storming the house would violate Smith's constitutional rights

Smith II**,** 430 F.3d at 152.

c. Personal Involvement of the Officers

"In order to prevail on a § 1983 claim against multiple defendants, a plaintiff must show that each individual defendant violated his constitutional rights." Smith II, 430 F.3d at 151. An individual is liable under § 1983 only if he personally "participated in violating [another's] rights, or ... directed others to violate them, or ... had knowledge of and acquiesced in his subordinates' violations." Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir.1995). Only those Defendants who made, or contributed to, the decision to use the SWAT team to storm the apartment or who participated in the breach are potentially responsible for the alleged constitutional violation. Plaintiff asserts that the on

scene Commander, Defendant Banach, after consultation with Defendants Small, Trzcinski and Hallman, authorized the SWAT team to enter the apartment. Defendants Lt. Nicholas Mangini, Police Officer Robert Ahrndt, Police Officer Phil Degliomini, Police Officer Patrick McFadden,and Police Officer Timothy Elia were all involved in the breach. Thus, the court will not dismiss the claims against these officers.

2. Use of Deadly Force

Plaintiff next claims that individual Defendants' use of deadly force against Decedent was unreasonable. Am. Compl.¶ 34.[8] There is little evidence to dispute the fact that immediately before the shooting, Decedent posed an immediate threat to the safety of the SWAT team. He was in an enraged state, wielding two knives, which he had just used to wound an officer. He was actively resisting the SWAT team's attempt to take him in to custody, and he had a history of violence. These actions occurred in a matter of seconds and there was no time for detached reflection. Thus, if the court were only to consider the events immediately preceding the shooting there can be little doubt that use of deadly force was reasonable.

[8] Morais was seized when he was shot. See Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 1699, 85 L.Ed.2d 1 (1985). Thus, the question is whether the seizure was reasonable, considering the previously mentioned factors.

Plaintiff's primary contention, however, is that Defendants' actions in breaching the apartment unreasonably created the need for the use of deadly force. Although, Defendant has potentially stated a Fourth Amendment violation for the shooting, the court will decline to decide whether such a claim can be successful, because such a right was not clearly established. See Carswell v. Borough of Homestead, 381 F.3d 235, 243 (3d Cir. 2004) ("All of the events leading up to the pursuit of the suspect are relevant") (citing Abraham v. Raso, 183 F.3d 279, 292 (3d Cir. 1999)).

3. Clearly Established Law

Assuming Plaintiff could establish a violation of the Fourth Amendment under the theory that the officers' actions unreasonablely created the need for deadly force, such a theory was not clearly established law. In arguing that Defendants' reckless actions and violations of police policy created the need for deadly force, Plaintiff attempts to blend his Fourth Amendment excessive force analysis with a claim under the Fourteenth Amendment state-created danger doctrine.

The Third Circuit has deferred deciding "for another day" whether a police officer's actions that create the need for deadly force may establish a Fourth

Amendment violation.[9] See Abraham v. Raso,183 F.3d 279 (3d Cir.1999); see also Grazier ex rel. White v. City of Philadelphia, 328 F.3d 120, 127 (3d Cir. 2003) (holding that the Third Circuit has not endorsed an approach that an officer acts unreasonably if his improper conduct creates the situation making necessary the use of deadly force). The Circuits that have addressed this issue have reached different conclusions. Compare Drewitt v. Pratt, 999 F.2d 774, 780 (4th Cir. 1993) (holding that an officer's failure to display his badge when attempting to detain a suspect was irrelevant as to whether the officer had reason to believe the suspect posed a threat of death or serious bodily harm), Fraire v. City of Arlington, 957 F.2d 1268, 1276 (5th Cir. 1992) (holding that the "constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest") with Estate of Starks v. Enyart, 5 F.3d 230, 234 (7th Cir.1993) (holding that if an officer jumped in front of the decedent's car after the car began accelerating, the officer "would have unreasonably created the encounter that ostensibly permitted the use of deadly force").

Thus, as the Third Circuit has not yet adopted this approach, and other circuits have disagreed about its application, it cannot be said the officers violated

[9]Plaintiff concedes the Third Circuit has not decided this issue.

a clearly established constitutional right. See Neuburger v. Thompson, 124 Fed. Appx. 703, 706-07 (3d Cir. 2003) (applying the same logic in holding that Plaintiff's claim that the police officers' actions created the need for deadly force did not state a violation of a clearly established constitutional right). Thus, regardless of whether such conduct constituted a violation of Decedent's Fourth Amendment rights, the claim must be dismissed against all individual Defendants on the basis of qualified immunity.

C. Constitutional Claims Against the City

The constitutional claims against the City of Philadelphia must be dismissed as well. Municipal liability against the City of Philadelphia can only be imposed if Plaintiff satisfies the requirements of Monell v. New York City Dept. of Soc. Servs., 436 U.S. 658 (1978) and its progeny. This requires Plaintiff to satisfy "rigorous standards of culpability and causation," Bd. of Cty. Commissioners of Bryan Cty. v. Brown, 520 U.S. 397, 405 (1997), because § 1983 "[m]unicipal 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' complained of." Robinson v. City of Pittsburgh, 120 F.3d 1286, 1295 (3d Cir. 1997) (quoting Monell, 436 U.S. at 694)).

In this case, Plaintiff asserts that Defendant City of Philadelphia's failure to train and discipline its police officers are sufficient to establish a claim for municipal liability. When the policy in question "concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to 'deliberate indifference' to the rights of persons with whom those employees will come into contact." Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999) (citing City of Canton, Ohio v. Harris, 489 U.S. 378, 388-89, 109 S.Ct. 1197, 1204-05 (1989)). A municipality exhibits deliberate indifference where the need for more or different training or supervision is obvious, and the inadequacy is very likely to result in violations of constitutional rights. See Carter v. City of Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999).

1. Insufficient Training

Failure to adequately train municipal employees "can ordinarily be considered deliberate indifference only where the failure has caused a pattern of violations." Berg v. County of Allegheny, 219 F.3d 261, 276 (3d Cir. 2000). See City of Canton, 489 U.S. at 390, 109 S.Ct. at 1205, n. 10 (noting that a municipality's "deliberate indifference" can be established by evidence that the police violate constitutional rights so often that the need for further training must have been plainly obvious to the municipalities policymakers).

Plaintiff has not put forth sufficient evidence to establish the existence of a pattern of Philadelphia Police Department violations of the rights of mentally-ill individuals. Plaintiff has identified only two other incidents where mentally-ill individuals have been killed by the police implementation of Directive 136 for dealing with SMDPs.[10] See Mariani v. City of Pittsburgh, 624 F. Supp. 506, 512 (W.D. Pa. 1986) (holding that two previous complaints alleging use of excessive force do not represent the type of widespread abuse contemplated in Monell). Moreover, Plaintiff has not put forth evidence that these incidents represent constitutional violations, rather than proper exercise of deadly force by the police. Cf. Strauss v. City of Chicago, 760 F.2d 765, 769 (7th Cir. 1985) (holding that, at the very least, Plaintiff must identify what made those prior arrests illegal and show that a similar illegality was involved in his case). Thus, it cannot be said that Plaintiff has shown the existence of a pattern of constitutional violations against SMDPs.

Plaintiff also asks the court to infer that the City's training procedures were constitutionally insufficient because the officers in this case allegedly

[10] Although Plaintiff has identified several incidents of wrongful use of deadly force against mentally ill individuals before the implementation of Directive 136 and other improvements to the training program, such incidents lack relevance once the City has taken appropriate steps to fix the problem.

violated Philadelphia Police Department policy for dealing with SMDPs. The mere fact that the officers in the instant case may not have complied with police policy is not sufficient on its own to demonstrate that the training program is inadequate. As the Supreme Court noted in *Canton,* "evidence that a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, because the officer's shortcomings may have resulted from factors other than a faulty training program." See City of Canton, 489 U.S. at 390-391, 109 S.Ct. at 1206.

Plaintiff's expert also fails to identify any specific flaws in the Police Department's training program for dealing with SMDPs. See Affidavit with Report of Hugh M. McGowan. Rather, he concludes the program is insufficient based on the officers' actions in dealing with Decedent. Thus, the Plaintiff has not put forth sufficient evidence to establish that the City is deliberately indifferent to the need to train its police officers regarding SMDPs.

2. Insufficient Disciplinary and Review Procedures

Plaintiff also attempts to establish that the City is indifferent to constitutional abuses against SMDPs by questioning the legitimacy of the Philadelphia Police Department's disciplinary system. In particular, Plaintiff asserts that the review process does not adequately consider whether police

officers have violated departmental policy for dealing with SMDPs.

The fact that a police department has a review process in place is not sufficient on its own to shield a municipality from liability. Beck v. City of Pittsburgh, 89 F.3d 966, 974 (3d Cir. 1996). "The investigative process must be real. It must have some teeth. It must answer to the citizen by providing at least a rudimentary chance of redress when injustice is done." Id. (finding that the defendant police department's disciplinary review process was structured to curtail disciplinary action and stifle investigations into the credibility of the city's police officers because 1) witness testimony was given too little credit and police officers' statements too much credit; 2) the lack of formalized tracking of complaints allowed offending officers to act with impunity; 3) and complaints were effectively dismissed if there were no third-party witness).

Viewing the facts in the light most favorable to Plaintiff, however, it cannot be said that the Philadelphia Police Department's review process is so deficient that it does not have "some teeth." See Glass v. City of Philadelphia, 455 F. Supp. 2d 302, 344 (E.D. Pa. 2006) (holding that the Philadelphia Police Department's review policy for citizens' complaints "has teeth"); Whichard v. Cheltenham Tp., Civ. A. No. 95-3969, 1996 WL 502281, at *4 (E.D. Pa. Aug. 29, 1996) ("This Court is not convinced that the Third Circuit, in rendering its decision in *Beck,*

intended to declare open season on the internal investigation procedures of municipal police departments."). Plaintiff, has cited several examples of police officers being disciplined for violating the rights of mentally-ill individuals prior to Directive 136 being implemented. Even crediting the expert report of Plaintiff which cites deficiencies in the review process, it cannot be said that an imperfect review process demonstrates deliberate indifference on the part of the City. See Beck, 89 F.3d at 974. Thus, the constitutional claims against the City of Philadelphia must be dismissed.

D. Americans with Disabilities Act and Rehabilitation Act

Plaintiff alleges that Defendants violated the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("RA") through the City's failure to sufficiently train, and discipline officers regarding crisis intervention techniques for SMDPs; and through the individual Defendants' failure to follow accepted procedures, directives and instructions regarding crisis intervention techniques for SMDPs.[11]

The Court of Appeals for the Third Circuit has not yet addressed the

[11]There is no individual liability under the ADA or the RA, and thus the individual Defendants cannot be held liable for these alleged violations. See Arnold v. City of York, 340 F. Supp. 2d 550, 554 (M.D. Pa. 2004).

application the ADA or RA to police activities and procedures, but a majority of courts now hold that the ADA applies to arrests and similar police action in some circumstances. Title II of the ADA prohibits discrimination in the provision of services by public entities, and provides as follows: "Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.[12] To establish a violation of Title II, Plaintiff must show 1) that he is a qualified individual with a disability; 2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[13] Here, Defendants do

[12] The court's analysis of the ADA claim applies equally to the RA claim. Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794. The ADA and the Rehabilitation Act share a common substantive core so that the substantive standards for determining liability under both Acts are the same. See Yeskey v. Commonwealth of Pennsylvania Dep't of Corrections, 118 F.3d 168, 170 (3d Cir. 1997) ("Law developed under Section 504 of the Rehabilitation Act is applicable to Title II of the Disability Act."), aff'd, 524 U.S. 206 (1998).

[13] Defendants do not dispute that Decedent was disabled or that the City of Philadelphia Police Department is a public entity.

not contest that Decedent was a "qualified individual with a disability," nor do they contest that the Philadelphia Police Department is a "public entity." Thus, the relevant question for the court is whether Plaintiff was "denied the benefits of some public entity's services, programs, or activities" and, if so, whether the denial was "by reason of Decedent's disability.[14]

1. Law Regarding the Applicability of ADA to Arrests

Those Circuit courts that have addressed the question the applicability of the ADA to arrests have identified two theoretical bases for these claims. See Gohier v. Enright, 186 F.3d 1216, 1220 (10th Cir. 1999) (surveying the case law relating to the applicability of the ADA to arrests).

The first basis is the "wrongful arrest" theory under which the police wrongly arrest an individual with a disability because the police misperceived the effects of his or her disability as criminal activity. See Lewis v. Truitt, 960 F. Supp. 175, 176-78 (S.D. Ind. 1997) (holding that the plaintiff stated a viable ADA

[14] The court reads Plaintiff's Complaint as stating a claim under the "denial of benefits" prong. Am. Comp. ¶ 52. "As a direct and proximate result of all Defendants' conduct, committed under color of state law, Defendants discriminated against plaintiff's decedent by reason of his mental health disability, denying him the benefits of the services, programs and activities to which he was entitled as a person with a mental health disability including but not limited to the right to be free of discriminatory or disparate treatment by virtue of his mental disability, and to due process and equal protection of the law."

claim by demonstrating (1) he was disabled; (2) the arresting officers knew or should have known of his disability; (3) and the officers arrested him because they mistakenly confused his disability with illegal conduct).

The second basis is the "reasonable accommodation" theory under which the police properly investigate and arrest a person with a disability for a crime unrelated to that disability, but fail to reasonably accommodate the disabled person's disability in the course of investigation or arrest, "causing the person to suffer greater injury or indignity in that process than other arrestees." Gohier, 186 F.3d at 1220 (surveying the case law in this area); see also Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (noting that when there is no threat to human safety, police officers have a duty to reasonably accommodate Plaintiff's disability in handling and transporting him to a mental health facility); Gorman v. Bartch, 152 F.3d 907, 912-13 (8th Cir.1998) (holding that the ADA applies to police transportation of an arrestee to the police station because transportation of an arrestee to the station house is a "service" of the police within the meaning of the ADA). But see Rosen v. Montgomery County, 121 F.3d 154, 157-58 (4th Cir.1997) (suggesting in *dicta* that such a claim would not be viable).

The case here, however, does not fit neatly into either the "wrongful arrest" or "reasonable accommodation" theory as it is "logically intermediate between the

two archetypes envisioned by those theories." See Gohier, 186 F.3d at 1221 (holding that case in which the police used force on a mentally-ill individual while he is committing an assault related to his disability is the logical intermediate point between the "wrongful arrest" and "reasonable accommodation" theories). In this case, the police used force on Decedent in response to aggressive and disorderly behavior related to his disability. As, the Decedent has not raised a claim under the "wrongful arrest" theory, the court will consider only the "reasonable accommodation" theory.[15]

2. Application of the Reasonable Accommodation Theory

The Tenth Circuit has noted that under the "reasonable accommodation" theory, a plaintiff might be able argue that Title II requires a city to better train its police officers to recognize disturbances that are likely to involve persons with mental disabilities, and to investigate and arrest such persons in a manner

[15]Here, Plaintiff's complaint does not allege "wrongful arrest" – i.e. that the police improperly believed they had the right to take Decedent into custody. Moreover, the court agrees with those courts that have concluded that similar facts do not fit within the "wrongful arrest" theory. See Gohier, 186 F.3d. at 1222 (holding under similar facts that a claim was not stated under the "wrongful arrest" theory); Hainze v. Richards, 207 F.3d 795, 801 (5th Cir. 2000) (same); Buchanan ex rel. Estate of Buchanan v. Maine, 417 F. Supp. 2d 45, 73 (D. Me. 2006) (holding that there was no evidence that the officers mistook the decedent's lawful actions for unlawful ones; rather the evidence established that the officers recognized that the decedent was mentally ill and, pursuant to their statutory authority, acted to take him into protective custody). Here, Defendants were fully aware that Decedent was mentally ill, and that they therefore had statutory authority to take Decedent into custody. Thus, the wrongful arrest theory does not apply in this case.

reasonably accommodating their disability. Gohier, 186 F.3d. at 1222 (declining to answer whether such a theory had merit because it had not been raised by the Appellant); but see Buchanan v. Maine, 469 F.3d 158, 176 (1st Cir. 2006) (noting that "it is questionable whether the ADA was intended to impose any requirements on police entering a residence to take someone into protective or other custody beyond the reasonableness requirement of the Fourth Amendment").

The benefit being sought by Plaintiff here is the lawful exercise of police powers, including the appropriate use of force by government officials acting under color of law. The court agrees with Plaintiff that the lawful exercise of police power is a benefit of the services, programs, or activities of a public entity. See Schorr v. Borough of Lemoyne, 243 F. Supp. 2d 232, 235 (M.D. Pa. 2003) (holding that one of the most basic government functions is the lawful exercise of police powers, including the appropriate use of force by government officials, and that nothing in the language of the ADA suggests that the ADA does not apply to this type of activity); Hogan v. City of Easton, Civ. A. No. 04-759, 2004 WL 1836992, at *7 (E.D. Pa. Aug. 17, 2004) (similarly holding).

Thus, the question remains whether Plaintiff was denied this benefit "*by reason of*" his mental illness.

> Discrimination against disabled individuals during arrests is a particularly structural and embedded form of discrimination, and it often goes unrecognized. An officer who is taught to use force when confronted with what she perceives as a threat may apply that knowledge when responding to a mentally or physically disabled person, not realizing that by treating this person the same way that she treats others, she may in fact be failing to reasonably accommodate his disability, and thereby discriminate against him.

Rachel E. Brodin, Note, Remedying a Particularized Form of Discrimination: Why Disabled Individuals Can and Should Bring Claims for Police Misconduct Under the Americans with Disabilities Act, 154 U. Pa. L. Rev. 157, 198-99 (2005); see also Helen L. v. DiDario, 46 F.3d 325, 335 (3d Cir. 1995) (holding that the "ADA attempts to eliminate the effects of benign neglect, apathy, and indifference").

In essence, Plaintiff argues that the police overreacted to Decedent's disorderly conduct, which was a symptom of his mental illness. One potential accommodation sought here was to have the police refrain from taking aggressive action against Decedent until he presented an immediate threat to human life, which was the policy of City of Philadelphia Police Department.[16] Because a

[16] Some courts have held that officers who use force on a mentally-ill individual who posed a threat to human life have not denied the mentally ill individual the benefits of the services, programs, or activities of a public entity *by reason of* such disability. Instead these courts hold that the mentally-ill individual was denied the benefits of the services, programs, or activities of a public entity *by reason of* his own life-threatening behavior. See e.g. Hainze v. Richards, 207 F.3d 795, 800 (5th Cir. 2000) (holding that allegations that a police officer acted in

SMDP's disability may prevent him from have a full understanding of the consequences of his actions, the police have to change certain procedures in order to accommodate his disability, subject to the exigencies of the situation.

C. Reasonable Accommodation During Exigent Circumstances

Relying on Hainze v. Richards, Defendants argue the court should dismiss the ADA claims because the police were under no duty to accommodate Decedent's disability during exigent circumstances. See Hainze, 207 F.3d at 801. Defendants' reliance on Hainze is misplaced, however, as the exigency of the situation is a materially disputed fact.

In Hainze, the Fifth Circuit held that "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life." Id. The Court reasoned that "to require officers to factor in whether their actions are going

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contravention of police policies for dealing with SMDPs did not state a claim under the ADA because the SMDP was not denied the benefits and protections of Williamson County's mental health training *by* the County or officer and because the SMDP's assault of a police officer with a deadly weapon denied him the benefits of that program.). This logic is more persuasive when the police have reasonably used force. Here, the court notes a jury could hold that the Decedent's threatening behavior did not require the SWAT assault on his apartment. Thus, the court holds that it cannot be said, at this stage, that Plaintiff's threatening behavior caused the deprivation of a "benefit" as a matter of law.

to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents." Id.. But see Bircoll v. Miami-Dade County, 2007 WL 677764, at *11 (11th Cir. 2007) (holding that the ADA does apply in the presence of safety concerns, but that a court must consider safety concerns in determining whether a modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or an officer's safety).

Even assuming Hainze to be the law of this Circuit, application of its rule would not bar Plaintiff's ADA claims. Viewing the facts in the light most favorable to Plaintiff, Decedent did not pose a threat to innocent parties. The police had confined Decedent to his apartment, closed the nearby street to traffic and pedestrians, and secured the apartment building. Moreover, there was no evidence that Decedent had a gun, flammable substances or any other means to harm anyone located outside of his apartment. The police in this case, therefore, were not facing the type of pressurized situation that the Fifth Circuit seemed to be contemplating in Hainze, because there was no immediate threat to human life before the officers breached the apartment. See Spencer v. Dawson, Civ. A. No. 04-5048, 2006 WL 3253574, at *11 (N.D. Ill. Nov. 7, 2006) (holding that

Hainze's rule did not apply, because, although plaintiff was agitated, there was no threat to police officers or third parties); Brodlic v. City of Lebanon, Civ. A. No. 04-978, 2005 WL 2250840, at *6 (M.D. Pa. Sept. 15, 2005) (holding that because the level of exigency was a materially disputed fact, Hainze was not applicable); Hogan v. City of Easton, Civ. A. No. 04-759, 2004 WL 1836992, at *7 (E.D. Pa. Aug. 17, 2004) (noting that Hainze did not control the case because the Complaint averred that the situation was under control and no one was in danger upon the arrival of the police officers at the decedent's residence).

Thus, construing the facts in Plaintiff's favor, Plaintiff's claim fits within the statutory language of the ADA and RA and will not be dismissed against the City.

E. State Law Claims

Plaintiff claims violations of the Pennsylvania Wrongful Death Act, 42 Pa. C.S. § 8301, the Pennsylvania Survival Act, 42 Pa. C.S. § 8302, assault and battery, and intentional infliction of emotional distress.[17] See Amended

[17] "The Wrongful Death statute and the 'survival action' are not substantive causes of action. Instead, they provide a statutory mechanism to assert claims and recover damages on behalf of a deceased." See Sonnier v. Field, 2007 WL 576655, at *6 (W.D. Pa. 2007) (citing 42 Pa. C.S. §§ 8301, 8302).

Complaint. Defendants claim immunity under the Political Subdivision Tort Claims Act.

The Tort Claims Act grants the City governmental immunity from liability for any damages resulting from an injury to a person or property caused by any act of the City, its employee, or any other person, except as specifically provided for under 42 Pa. C.S. § 8542. This immunity extends to an employee of the City who is liable for civil damages caused by acts which are within the scope of his office or duties. An employee may be indemnified for the payment of a judgment arising from a lawsuit when the employee was acting, or reasonably believed that he was acting, within the scope of his duties. 42 Pa. C.S. § 8548(a). An employee's immunity does not extend to acts that are determined to be "crimes, actual fraud, actual malice, or willful misconduct." 42 Pa. C.S. § 8550. Thus the court must determine whether Plaintiff has stated, and supported with record evidence, claims that the relevant officers committed "willful misconduct."

In cases not involving police conduct, "[w]illful misconduct has been defined by the Pennsylvania Supreme Court as conduct whereby the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied." Sanford v. Stiles, 456 F.3d 298, 315 (3d Cir. 2006) (citation omitted). Courts have held that

"the term 'willful misconduct' is synonymous with the term 'intentional tort.'" Id. The Pennsylvania Supreme Court, however, has held that this standard is not applicable in cases relating to police misconduct. In cases involving alleged police misconduct, "'willful misconduct' means that a police officer committed an intentional tort subjectively knowing that his or her conduct was wrong." Walker v. North Wales Borough, 395 F. Supp. 2d 219, 231 (E.D. Pa. 2005) (citing In re City of Philadelphia Litig, 158 F.3d 723, 728 (3d Cir.1998))**.**

1. Assault and Battery

"Assault is an intentional attempt by force to do an injury to the person of another, and a battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994) (citation omitted). Because police officers are permitted to use reasonable force for lawful purposes, a police officer's actions constitute assault and battery only when the force used in making an arrest is unnecessary or excessive. Renk, 641 A.2d at 293. Additionally, to demonstrate "willful misconduct," it is not enough for Plaintiff to demonstrate that the officer acted, and perhaps intentionally, used excessive force; rather that he must show the officer intended to use excessive force. Id. at 294 (similarly concluding that for an officer to be held liable for wrongful arrest it is

insufficient to show that the officer lacked probable cause to make the arrest; Plaintiff must establish that the officer intentionally arrested Plaintiff knowing that he lacked probable cause to do so). Here, if Plaintiff's version of the facts is believed a reasonable jury could find not only that Defendants used excessive force, but also that the Defendants intended to use force they knew to be excessive. In particular, a police officer's knowing disregard of directives not to use aggressive action could be found by a reasonable jury to be evidence of an intention to pursue a course of action he knew to be wrong. See In re City of Philadelphia Litigation, 938 F. Supp. 1278, 1290 (E.D. Pa. 1996) (suggesting that had the defendant deliberately disobeyed an order from a superior, such deliberate disregard might be found by a factfinder to be evidence – albeit not necessarily conclusive evidence of the defendant's intention to pursue a course of action he knew to be wrong).

2. Intentional Infliction of Emotional Distress ("IIED")

In order to state a claim for IIED in Pennsylvania, Plaintiff must establish four elements: (1) the conduct of the defendant was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; and (4) the distress was severe. Walker v. North Wales Borough, 395 F. Supp. 2d 219, 232 (E.D. Pa. 2005) (citing Chuy v. Phila. Eagles Football Club, 595 F.2d

1265, 1273 (3d Cir.1979)). "For a plaintiff to recover for IIED, 'the conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society.'" Id. Here, viewing the facts in the light most favorable to Plaintiff, a reasonable jury could find that the decision to have a SWAT team storm Decedent's home when he posed no threat constituted extreme and outrageous conduct.

Thus, the court will not grant summary judgment on the state law claims given the existence of disputed material facts for those officers previously identified as either involved in the planning or the execution of the forced entry.

F. Punitive Damages

The Court will deny Defendant's Motion with regard to the issue of punitive damages with leave to renew at trial.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JULIO MORAIS, JR. **Plaintiff,** **v.** **CITY OF PHILADELPHIA, et al.,** **Defendants.**	**CIVIL ACTION NO. 06-582**

ORDER

AND NOW, this 19th day of March, 2007, upon consideration of Defendants' Motion for Summary Judgment, and the response thereto, it is hereby **ORDERED** that said Motion is **GRANTED IN PART** and **DENIED IN PART** as follows.

1. As to Count One against the individual Defendants, Defendants' Motion is **GRANTED in part** and **DENIED in part** as specified in the Memorandum.

2. Defendants' Motion is **GRANTED** as to Count One against Defendant City of Philadelphia.

3. Defendants' Motion is **GRANTED** as to Count Two against the individual Defendants.

4. Defendants' Motion is **DENIED** as to Count Two against City of Philadelphia.

5. Defendants' Motion is **GRANTED in part and DENIED in part** on state law claims in Counts Three, Four, Seven and Eight as specified in the memorandum.

6. Defendants may renew their challenge to punitive damages at trial.

BY THE COURT:

/s/ Marvin Katz

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MARVIN KATZ, S.J