UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SUSAN VINCENT and CHRISTINA COOKSON, personal representatives of the ESTATE of JAMES LEVIER,	)	
Plaintiffs	)	
v.	)	
TOWN OF SCARBOROUGH, et al.,	)	***Civil No. 02-239-P-H***
Defendants	)	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND MEMORANDUM DECISION ON MOTIONS TO STRIKE

Defendants Town of Scarborough ("Town"), the Scarborough Police Department ("SPD") and Scarborough police officers Robert Moulton, Robert Moore and Ivan Ramsdell (collectively, "Town Defendants"), as well as defendants the Maine State Police ("MSP"), Colonel Michael R. Sperry and Trooper Mark A. Sperrey (collectively, "State Defendants") seek summary judgment as to all counts against them in this action brought by Susan Vincent and Christina Cookson ("Plaintiffs") as personal representatives of the estate of Jamies Levier, who was shot and killed by police in Scarborough, Maine on March 16, 2001. *See* Defendants Town of Scarborough, Scarborough Police Department, Robert Moulton, Robert Moore and Ivan Ramsdell's Motion for Summary Judgment, etc. ("Town S/J Motion") (Docket No. 11) at 1, 20; Amended Motion for Summary Judgment by the Maine State Police, Colonel Michael R. Sperry and Trooper Mark A[.] Sperrey ("State S/J Motion") (Docket No. 14) at 1-2.

Incident thereto, the Plaintiffs, the Town Defendants and the State Defendants (both groups, "Defendants") all have filed motions to strike. *See* Plaintiffs' Motion To Strike Portions of Defendants Town of Scarborough, Scarborough Police Department, Robert Moulton, Robert Moore and Ivan Ramsdell's Statement of Material Facts ("Plaintiffs' Motion To Strike") (Docket No. 17); Defendants Town of Scarborough, Scarborough Police Department, Robert Moulton, Robert Moore and Ivan Ramsdell's Motion To Strike Plaintiffs' Statement of Additional Facts, etc. ("Town Defendants' Motion To Strike Additional Facts") (Docket No. 25); Defendants Town of Scarborough, Robert Moulton, Robert Moore and Ivan Ramsdell's Motion To Deem Material Facts Admitted or, in the Alternative, Motion To Strike Plaintiffs' Response to the Defendants' Statement of Material Facts ("Town Defendants' Motion To Strike Opposing Facts") (Docket No. 26); Motion To Strike Plaintiffs' Statement of Additional Facts by State of Maine Defendants Maine State Police, Colonel Michael R. Sperry and Trooper Mark A. Sperrey ("State Defendants' Motion To Strike") (Docket No. 30). For the reasons that follow, I grant in part and deny in part the Plaintiffs' Motion To Strike, the Town Defendants' Motion To Strike Opposing Facts and the State Defendants' Motion To Strike, grant the Town Defendants' Motion To Strike Additional Facts, and recommend that the motions for summary judgment be granted.

I. Summary Judgment Standards

Summary judgment is appropriate only if the record shows "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). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant . . . . By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir.

1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Context

A. Town S/J Motion

1. Plaintiffs' and Town Defendants' Motions To Strike

a. Plaintiffs' Motion To Strike

The Plaintiffs' motion to strike paragraphs 9, 96,[1] 99, 101, 106, 108, 121, 136, 138-39, 142, 152, 155, 176, 228, 232, 237-38, 240-41, 260, 264, 275 and 277 of the Town Defendants' statement of material facts, *see* Plaintiffs' Motion To Strike at 1-2, is granted in part and denied in part as follows:

1. **Paragraph 9: Granted**. While SPD chief Moulton is qualified to explain why his department has chosen not to adopt a specific policy, paragraph 9 is worded in such a way as to proclaim

[1] This paragraph is misidentified on the first page of the Plaintiffs' brief as "92." *Compare* Plaintiffs' Motion to Strike at 1 (continued…)

as a fact that "the presence of disability [does] not change the legal standards applicable to an officer's lawful use of force." Defendants Town of Scarborough, Scarborough Police Department, Robert Moulton, Robert Moore and Ivan Ramsdell's Statement of Uncontroverted Facts in Support of Their Motion for Summary Judgment ("Town Defendants' SMF") (Docket No. 12) ¶ 9; *see also* Affidavit of Robert Moulton ("Moulton Aff."), attached as Exh. 1 to Town Defendants' SMF, ¶ 1. Moulton is not qualified to offer such an opinion.

2. **Paragraph 96: Denied**. The testimony of SPD officer Thomas Chard, on which paragraph 96 is based, stems from direct personal observation. *See* Affidavit of Thomas Chard ("Chard Aff."), attached as Exh. 4 to Town Defendants' SMF, ¶¶ 1-2, 5. Chard is competent to describe the gestures he observed Levier make and his contemporaneous understanding of what those gestures meant, even assuming that, as a result of his lack of knowledge of American Sign Language ("ASL"), he did not understand the meaning of some or all of those gestures.

3. **Paragraph 99: Denied**. While the Town Defendants' assertion that SPD officer Jeff Greenleaf "had to change positions to keep his cruiser between himself and the gunman" is a conclusion, it is supported by the stated fact that the distance between Greenleaf and Levier kept shifting as Levier moved – a circumstance in which the First Circuit has instructed that a conclusion is cognizable as a fact. *See* Town Defendants' SMF ¶ 99; *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989) ("Most often, facts are susceptible to objective verification. Conclusions, on the other hand, are empirically unverifiable in the usual case. They represent the pleader's reactions to, sometimes called 'inferences from,' the underlying facts. It is only when such conclusions are logically compelled, or at least supported, by the

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with id. at 2.

stated facts, that is, when the suggested inference rises to what experience indicates is an acceptable level of probability, that 'conclusions' become 'facts' for pleading purposes."); *see also Perez v. Volvo Car Corp*., 247 F.3d 303, 316 (1st Cir. 2001) (citing *Dartmouth* in summary-judgment context for proposition that "[w]hile the line between facts and non-facts often seems blurry, courts nonetheless must strive to plot it.").

4. **Paragraph 101: Denied.** The Town Defendants' assertion that SPD officer Robert Moore had to change positions "for his own safety" is a conclusion; however, it is buttressed by the stated fact that Moore moved from side to side of the pickup truck behind which he had sought cover as Levier paced back and forth. *See Dartmouth*, 889 F.2d at 16.

5. **Paragraph 106: Denied.** The Town Defendants' assertion that the situation was "very dangerous" is a conclusion; however, it is premised on affiant Greenleaf's observations of the way Levier was acting and the fact that Levier was holding what Greenleaf knew to be a high-powered rifle. *See Dartmouth*, 889 F.2d at 16.

6. **Paragraph 108: Denied.** Moore, who was present at the scene, *see* Affidavit of Robert Moore ("Moore Aff."), attached as Exh. 3 to Town Defendants' SMF, ¶¶ 1-5, is competent to testify as to his state of mind on the day in question and his observations as to Levier's appearance and conduct that day.

7. **Paragraph 121:Denied.** The Plaintiffs mischaracterize paragraph 121 as stating that "a civilian sign language interpreter could not be used safely." *Compare* Plaintiffs' Motion To Strike at 4 *with* Town Defendants' SMF ¶ 121.

8. **Paragraphs 136, 138-39, 142: Denied.** Greenleaf, who was present at the scene, is competent to testify as to his personal observations of Levier's gestures and what he contemporaneously

understood them to mean, even assuming that as a result of lack of proficiency in ASL he misunderstood some or all of them. *See* Affidavit of Jeff Greenleaf ("Greenleaf Aff."), attached as Exh. 5 to Town Defendants' SMF, ¶¶ 1-4.

9. **Paragraph 152: Denied**. Whether the police were responsible for the interpreter's safety is not, as the Plaintiffs posit, a question of law, but rather a question of fact.

10. **Paragraph 155: Denied**. That Greenleaf heard about a plan to get the interpreter closer to Levier is not hearsay inasmuch as it is offered to show Greenleaf's contemporaneous understanding, not for the truth of the matter asserted. *See* Defendants' Town of Scarborough, Scarborough Police Department, Robert Moulton, Robert Moore and Ivan Ramsdell's Opposition to Plaintiffs' Motion To Strike Portions of Defendants' Statement of Material Facts ("Town Defendants' Strike Opposition") (Docket No. 31) at 4-5.

11. **Paragraph 176: Denied**. Greenleaf, who was personally present at the scene, is competent to testify concerning his observations of Levier's actions and whether Levier "appeared to be ready to fire at someone." Town Defendants' SMF ¶ 176; *see also* Greenleaf Aff. ¶¶ 1-2, 5. The Plaintiffs' argument notwithstanding, *see* Plaintiffs' Motion To Strike at 5, this testimony is grounded in fact (that Levier walked toward officers and assumed a shooter's stance) and cannot fairly be labeled a "conclusory opinion."

12. **Paragraph 179: Granted**. In the circumstances, in which there is no evidence that Moore was in a position at the relevant point in time to know whether the weapon Levier was brandishing was loaded, the assertion that the officers in the group had been "threatened with deadly force" is a conclusory opinion, crossing the line demarcated in *Dartmouth*.

13. **Paragraphs 228, 232, 240-41: Granted**. An officer's subjective beliefs as to the reasonableness and/or good faith of his/her conduct are irrelevant to Fourth Amendment and qualified-immunity analysis. *See, e.g., United States v. Garner*, 338 F.3d 78, 80 (1st Cir. 2003) ("whether a Fourth Amendment violation has occurred turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time and not on the officer's actual state of mind at the time the challenged action was taken.") (citations and internal punctuation omitted); *Tower v. Leslie-Brown*, 326 F.3d 290, 296 (1st Cir. 2003) ("actual motives for conduct" not to be considered in evaluating qualified-immunity defense). While, as the Town Defendants posit, *see* Town Defendants' Strike Opposition at 2-3, such subjective beliefs appear to be relevant to whether officers are entitled to immunity on the Plaintiffs' state-law claims pursuant to the Maine Tort Claims Act ("MTCA"), 14 M.R.S.A. § 8101 *et seq*., *see, e.g.,* 14 M.R.S.A. § 8111(1)(E) (governmental employees absolutely immune from personal civil liability for intentional acts or omissions within scope of employment unless "an employee's actions are found to have been in bad faith"), in this case, ultimately nothing turns on the exclusion of that evidence.

14. **Paragraphs 237-38: Denied**. While, as discussed above, officers' motives are irrelevant, their observations and perceptions of contemporaneous events are relevant. *See, e.g., Tower*, 326 F.3d at 296 (objective reasonableness of conduct judged "in light of the facts actually known to the officer").

15. **Paragraph 260: Granted**. The conclusion that the "officers could not have allowed Mr. Levier to leave the perimeter" is supported not by specific facts but rather by a second conclusion: that Levier posed a danger to those who had taken refuge in the stores. Thus, the statement falls on the impermissible-opinion side of the *Dartmouth* line.

16. **Paragraph 264: Denied**. The statement that the leaders on the scene were faced with a "very complex" problem is a conclusion; however, it is buttressed by the stated facts of the open nature of

the parking lot, Levier's agitated state and his possession of a high-powered rifle. *See Dartmouth*, 889 F.2d at 16.

17. **Paragraph 275: Granted**. No factual predicate supports the conclusion that there was no guarantee that use of alternative strategies (such as firing beanbag rounds or turning the K-9 dogs on Levier) would resolve the Levier matter peaceably. *See Dartmouth*, 889 F.2d at 16.

18. **Paragraph 277: Denied**. Chief Moulton's opinion that SPD officers who fired at Levier acted in accordance with their training and SPD policy is buttressed by his review of a surveillance videotape that capture the shooting, informed by his knowledge of SPD training and policy in his capacity as SPD chief of police. *See Dartmouth*, 889 F.2d at 16; *see also* Moulton Aff. ¶ 1-2, 13 & Exh. A thereto.

b. Town Defendants' Motion To Strike Additional Facts

The Town Defendants' motion to strike paragraphs 280-285 and 287-315 of the Plaintiffs' statement of additional facts, *see* Town Defendants' Motion To Strike Additional Facts at 4, is granted.

The Plaintiffs concede that the court can evaluate the immunity defenses of individual defendants without consideration of the expert opinions in question, although they assert (opaquely) that "other claims do not necessarily exclude the opinions and conclusions of experts[.]" *See* Plaintiffs' Opposition to the Scarborough Defendants [sic] Motion To Strike ("Plaintiffs' Strike Opposition/Additional SMF") (Docket No. 32).[2]

[2] To the extent the Plaintiffs intend to argue that the statements in question are relevant to other legal issues, they fail to develop that argument, thereby waiving it. *See, e.g., Graham v. United States*, 753 F. Supp. 994, 1000 (D. Me. 1990) ("It is settled beyond peradventure that issues mentioned in a perfunctory manner, unaccompanied by some effort at developed argumentation are deemed waived.") (citation and internal quotation marks omitted).

Inasmuch as appears, the statements in question bear on two core claims: (i) whether excessive force was deployed against Levier on March 16, 2001 and (ii) whether his rights pursuant to the Americans with Disabilities Act ("ADA") and the Rehabilitation Act were transgressed. *See* Complaint and Demand for Jury Trial ("Complaint") (Docket No. 1) ¶¶ 43-49, 53-68; Plaintiffs' Statement of Additional Material Facts ("Plaintiffs' Additional SMF/Town"), contained at pages 52-62 of Plaintiffs' Response to Defendants Town of Scarborough, Scarborough Police Department, Robert Moulton, Robert Moore and Ivan Ramsdell's Statement of Material Facts and Plaintiffs' Statement of Additional Material Facts ("Plaintiffs' Opposing SMF/Town") (Docket No. 21), ¶¶ 280-285, 287-315.[3]

To the extent the statements implicate the ADA and Rehabilitation Act claims, they consist largely of conclusory assertions that the police discriminated against Levier based on his disability and otherwise violated the ADA. *See* Plaintiffs' Additional SMF/Town ¶¶ 308-11. As such, they raise no genuine issue of material fact. *See, e.g., Hayes v. Douglas Dynamics, Inc*., 8 F.3d 88, 92 (1st Cir. 1993) ("Although expert testimony may be more inferential than that of fact witnesses, in order to defeat a motion for summary judgment an expert opinion must be more than a conclusory assertion about ultimate legal issues.").

To the extent the statements implicate the question of use of excessive force, I understand the Plaintiffs to be conceding that any such claim can be decided without reference to the opinions of experts Thomas Walton or R. Paul McCauley, Ph.D., at least as regards the issue of whether the individual defendants are entitled to qualified immunity. *See* Plaintiffs' Strike Opposition/Additional SMF. In any

[3] The parties agree that for purposes of the instant analysis, no distinction need be drawn between the ADA and the Rehabilitation Act. *See* Town S/J Motion at 9; State S/J Motion at 3; Plaintiffs' Amended Joint Response to Defendants Town of Scarborough, Scarborough Police Department, Robert Moulton, Robert Moore and Ivan Ramsdell's Motion for Summary Judgment and Defendants Maine State Police, Colonel Michael R. Sperry and Trooper Mark A. Sperrey's Motion for Summary Judgement [sic], etc. ("Plaintiffs' S/J Opposition") (Docket No. 23) at 6 n.1; *see also, e.g., Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 4 (1st Cir. 2000). Thus, further references to the "ADA" should be understood to (continued…)

event, I agree with the Town Defendants that the statements are insufficient as a matter of law to raise a genuine issue of material fact with respect to any of the Defendants' potential liability for use of excessive force. *See* Town Defendants' Motion To Strike Additional Facts at 3-4.

In a nutshell, Walton and Dr. McCauley conclude that had proper procedures, policies and/or practices been followed, including establishment of a clear chain-of-command, effective radio communication among police and a properly composed inner perimeter surrounding Levier, and had available resources been deployed, such as bean-bag ammunition, K-9 dogs and an interpreter for the deaf, Levier more likely than not would have survived the standoff of March 16, 2001. *See* Plaintiffs' Additional SMF/Town ¶¶ 280-85, 287-308, 312-15. Walton and Dr. McCauley also opine that certain of the identified deficiencies contributed to Levier's death. *See id*. ¶¶ 291 (lack of proper radio communications), 305 (improper setup of inner perimeter), 306 (use of police officer who was not fluent in ASL to communicate with Levier), 314 (failure of Town police command to actively and timely engage non-lethal force).

While failure to follow reasonable police policies and practices (including failure to deploy alternate means to confront an exigency) may amount to negligence on the part of responding officers and their supervisors, an expert opinion to the effect that such failings existed is insufficient – without more – to raise a genuine issue of material fact with respect to a claim of excessive force pursuant to 42 U.S.C. § 1983. *See, e.g., Hegarty v. Somerset County*, 53 F.3d 1367, 1377 (1st Cir. 1995) ("officers need not avail themselves of the least intrusive means of responding to an exigent situation; they need only act within that range of conduct which is reasonable; contrary rule would inevitably induce tentativeness by officers")

include the Rehabilitation Act.

(citation and internal punctuation omitted); *Roy v. City of Lewiston*, Civ. No. 93-218-P-H, 1994 WL 129774, at *7 (D. Me. Feb. 16, 1994), *aff'd*, 42 F.3d 691 (1st Cir. 1994) (in absence of evidence that police chief and city were aware of advantages of use of red-pepper mace and consciously rejected them, expert's testimony that its advantages "should have been obvious" not enough to show deliberate indifference for purposes of section 1983 excessive-force claim; "The federal courts are not in the business of dictating to municipal police departments what equipment must be made available to police officers or in requiring them to be up to date on the newest developments in controlling unruly individuals."); *see also, e.g., Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir. 2001) (expert affidavit did not raise genuine issue of material fact for purposes of excessive-force analysis inasmuch as violations of state law and police procedures not actionable pursuant to section 1983 and, in any event, "the [Fourth Amendment] reasonableness standard does not require that officers use alternative less intrusive means").

Inasmuch as the statements in question raise no genuine issue of material fact for purposes of the Town Defendants' motion for summary judgment, their motion to strike those statements is granted.

c. Town Defendants' Motion To Strike Opposing Facts

Finally, the Town Defendants ask that the court deem their initial statement of material facts admitted or, alternatively, strike an unspecified number of the Plaintiffs' responses to those facts on the bases that the Plaintiffs' statements are sufficiently (i) non-responsive to the Town Defendants' statements and/or (ii) conclusory, speculative or argumentative as to violate Local Rule 56. *See* Loc. R. 56(c) & (e); Town Defendants' Motion To Strike Opposing Facts at 1-2. The Town Defendants proclaim it "too cumbersome" to detail every asserted flaw. *See id*. at 2. However, a party seeking a court ruling on a motion to strike has an obligation at least to identify the numbered statements that are the object of its ire. Hence, I confine my ruling to the following statements expressly targeted by the Town Defendants:

paragraphs 30, 32-34, 40, 44, 75-79, 149-51, 156, 164, 166, 169-71, 179-80, 188, 206, 216, 218, 228, 240, 248 and 276 of the Plaintiffs' Opposing SMF/Town. With respect to those, the motion is granted as to the following:

Sentences 1-2, Paragraph 32: The underlying statement notes that Chard learned the gunman was Levier, a deaf man who had been involved in a prior legal proceeding against the SPD; sentences 1-2 of the responsive statement veer off on a loosely related tangent about the details of that legal proceeding. These statements should have been presented as "additional" facts.

Sentence 2, Paragraph 40; Paragraph 79: Even making allowances for the provision of expert opinion, these statements are impermissibly conclusory. *See, e.g.*, *Hayes*, 8 F.3d at 92 ("Where an expert presents nothing but conclusions – no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected, such testimony will be insufficient to defeat a motion for summary judgment.") (citation and internal quotation marks omitted). Nothing in expert Walton's affidavit illuminates their underpinnings. *See generally* Affidavit of Thomas Walton ("Walton Aff."), attached as Exh. 3 to Plaintiffs' Opposing SMF/Town.

Paragraphs 75-77: These purported qualifications are more in the nature of statements of additional facts. The underlying statements describe how Chief Moulton learned of, and first responded to, the event in question. The responsive statements address the separate issue of the SPD's attempts to secure a sign-language interpreter.

Sentences 1-3, 8, Paragraph 78. These sentences are argumentative, not factual.

Paragraph 156. Although the Plaintiffs purport to deny most of paragraph 156 of the Town Defendants' SMF, their responsive statements do not effectively controvert that paragraph.

Paragraph 179. Inasmuch as I grant the Plaintiffs' own motion to strike the portion of the underlying statement referencing "deadly force," *see* above, their qualifying response no longer is in play.

Paragraph 216. While affiants Mary F. Mackay and Roxanne Baker are competent, as sign-language interpreters, to testify as to the meaning of signs in ASL, they are not competent to testify as to what Levier did or did not understand. *See* Affidavit of Mary F. Mackay ("Mackay Aff."), attached as Exh. 2 to Plaintiffs' Opposing SMF/Town, ¶ 1; Affidavit of Roxanne Baker ("Baker Aff."), attached as Exh. 8 to Plaintiffs' Opposing SMF/Town, ¶ 1.

Paragraph 228. The portion of this paragraph denying (in the alternative to an objection) paragraph 228 of the Town Defendants' SMF cites itself in support of the denial.

The motion is denied as to the following, which are sufficiently responsive to the Town Defendants' statements and/or sufficiently factual to pass muster pursuant to Local Rule 56(c): paragraphs 30, 33-34, 44, 149-51, 164, 166, 169-71, 180, 188, 206, 218, 240, 248 and 276, and sentences 3-5 of paragraph 32, sentence 1 of paragraph 40 and sentences 4-7 of paragraph 78.

2. Facts Pertaining to Town S/J Motion

Taking into account the disposition of the foregoing peripheral motions, the Town Defendants' and Plaintiffs' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to the Plaintiffs as the non-moving parties, reveal the following relevant to this recommended decision:

Moulton commenced his employment with the SPD as a patrol officer in 1978 and was promoted to sergeant in 1984, lieutenant in 1986, captain in 1992 and chief of police in May 1999. Town Defendants' SMF ¶ 1; Plaintiffs' Opposing SMF/Town ¶ 1. He is a graduate of the Maine Criminal Justice Academy ("Maine Academy") and the FBI National Academy. *Id*. ¶ 2.

The SPD offers a minimum of forty hours of training annually to its police officers. Town Defendants' SMF ¶ 3; Moulton Aff. ¶ 2.[4] In addition, officers attend training sponsored by the Maine Chiefs of Police Association, in-service training at other departments and training at the Maine Academy. Town Defendants' SMF ¶ 5; Moulton Aff. ¶ 2. Annual training is required by the Maine Academy for a police officer to maintain his or her certification with the state. Town Defendants' SMF ¶ 6; Plaintiffs' Opposing SMF/Town ¶ 6. Included in this required annual training is training on the lawful use of force, including deadly force, pursuant to SPD standard operating procedure and state and federal law governing the use of force. *Id*. ¶ 7. SPD officers also are given legal updates and training in other areas, such as domestic violence, sexual harassment and the ADA. Town Defendants' SMF ¶ 8; Moulton Aff. ¶ 2. In

[4] The Plaintiffs qualify this statement, as well as paragraphs 4-5, 8, 226-27 and 239 of the Town Defendants' SMF, with the assertion that the annual training only tangentially covered (i) applicable disability statutes or (ii) dealing with deaf or hearing-impaired suspects. Plaintiffs' Opposing SMF/Town ¶¶ 3-5, 8, 226-27, 239; Deposition of Jeff Greenleaf ("Greenleaf Dep."), filed by Plaintiffs, at 11-12; Deposition of Robert Moore ("Moore Dep."), filed by Plaintiffs, at 7, 108; Deposition of William Jipson ("Jipson Dep."), filed by Plaintiffs, at 5-6.

March 2001 the SPD had no standard operating procedure specifically relating to the use of force, including deadly force, against persons with disabilities. Town Defendants' SMF ¶ 9; Moulton Aff. ¶ 2.

Ramsdell has been an SPD officer since 1987 and became a detective in 1997. Town Defendants' SMF ¶ 10; Plaintiffs' Opposing SMF/Town ¶ 10. He graduated from the Maine Academy in 1987, obtained an associates' degree in law enforcement technology from Southern Maine Vocational Technical Institute in 1984 and a bachelor's degree in criminal justice from Husson College in 2002. Town Defendants' SMF ¶ 11; Affidavit of Ivan Ramsdell ("Ramsdell Aff."), attached as Exh. 2 to Town Defendants' SMF, ¶ 1.[5] Ramsdell has also been to several schools for training on how to provide police services to crime victims with mental or physical disabilities. Town Defendants' SMF ¶ 12; Plaintiffs' Opposing SMF/Town ¶ 12.

Moore has been employed as an SPD officer since April 17, 1990. *Id*. ¶ 13. On March 16, 2001 he was also a member of the SPD Special Response Team. *Id*. ¶ 14. A Special Response Team trains monthly together and also goes to specialty schools to be trained to handle more dangerous situations than the average patrol officer has the equipment or training to handle. *Id*. ¶ 15. Chard has been employed as an SPD officer since 1987. *Id*. ¶ 16. He is a graduate of the Maine Academy and also has been trained as a K-9 handler through the New Hampshire Police K-9 Academy. *Id*. ¶ 17. He has also been a member of the SPD Special Response Team since 1990. *Id*. ¶ 18. Greenleaf has been an SPD officer since 1989. *Id*. ¶ 19. He has a bachelor's degree from the University of Southern Maine and is a graduate of the Maine Academy. *Id*. ¶ 20. As part of his duties with the SPD, Greenleaf is a firearms instructor, a field training

[5] The Plaintiffs qualify this statement, noting that while Ramsdell had gone through training related to disabled crime victims, such training did not cover situations in which deaf or hearing-impaired persons were subject to a potential arrest or other police actions. Plaintiffs' Opposing SMF/Town ¶ 11; Deposition of Ivan Ramsdell ("Ramsdell Dep."), filed by Plaintiffs, at 6.

officer and the department armorer, as well as being a member of the Special Response Team, although he was not a member of that team on March 16, 2001. Town Defendants' SMF ¶ 21; Greenleaf Aff. ¶ 1.[6]

At or about 3 p.m. on March 16, 2001 Levier drove his van into the parking lot of a shopping area located just off Route 1 in Scarborough, Maine. Town Defendants' SMF ¶ 22; Complaint ¶ 24.[7] Just after 3 p.m. that day, Greenleaf was on patrol helping a disabled motorist when he received a call from dispatch reporting the presence of an armed gunman in the parking lot at Shop 'N Save and requesting that all officers on duty go to that location. Town Defendants' SMF ¶ 23; Greenleaf Aff. ¶ 2.[8] Ramsdell was at the SPD police station when the call went out for officers to respond to the Shop 'N Save parking lot to deal with a man with a gun. Town Defendants' SMF ¶ 24; Ramsdell Aff. ¶ 2. He immediately left the police station, which is a short distance away, accompanied by detective Rick Rouse. *Id*.

Sergeant William Jipson, the Special Response Team commander, contacted dispatch at 3:22 p.m. after having been paged, and gave instructions to mobilize the tactical unit, calling in officers who were then off-duty. Town Defendants' SMF ¶ 26; Plaintiffs' Opposing SMF/Town ¶ 26. Officers Chard and Moore, two members of the Special Response Team who were then off duty, went to the police station to retrieve their equipment. *Id*. ¶ 27. Chard also took his K-9 dog to the scene. *Id*. ¶ 28. Prior to departing the police station, Chard obtained a bullet-resistant shield. *Id*. ¶ 29. The shield is resistant to certain

[6] The Plaintiffs purport to qualify this statement, Plaintiffs' Opposing SMF/Town ¶ 121; however, the qualification is completely unresponsive and is on that basis disregarded.

[7] The Plaintiffs impliedly qualify this statement, asserting that instead of parking his van in the most crowded area of the parking lot in front of the Scarborough Shop 'N Save supermarket ("Shop 'N Save"), the major store in the shopping center, Levier parked his van in the most isolated and furthest row away from the major pedestrian traffic in front of the Key Bank. *See* Plaintiffs' Opposing SMF/Town ¶ 22; Mackay Aff. ¶ 16.

[8] The Plaintiffs qualify this statement, asserting that the dispatcher stated that there was a "man with a gun" (not an "armed gunman") in the parking lot. *See* Plaintiffs' Opposing SMF/Town ¶ 23; Deposition of Thomas Chard ("Chard Dep."), filed by Plaintiffs, at 15-16.

rounds, although Chard was not sure if it would be sufficient to withstand a bullet from the high-powered rifle that the gunman was holding. Town Defendants' SMF ¶ 30; Chard Aff. ¶ 4.[9]

At the police station, Chard met with Special Response Team commander Jipson. Town Defendants' SMF ¶ 31; Plaintiffs' Opposing SMF/Town ¶ 31. Chard learned from Jipson that the gunman was Levier, a deaf man who had been involved in a prior legal proceeding against the SPD. Town Defendants' SMF ¶ 32; Chard Aff. ¶ 4.[10]

Greenleaf was the third officer to arrive on the scene, arriving just after officers Plourde and Brown, who had stationed themselves behind their cruisers in a position of cover. Town Defendants' SMF ¶ 33; Greenleaf Aff. ¶ 2.[11] Greenleaf pulled around to their left side and also took a position of cover. Town Defendants' SMF ¶ 34; Greenleaf Aff. ¶ 2.[12]

Upon his arrival at the scene, Ramsdell observed that the gunman had an unobstructed path to the stores in the mini-mall. Town Defendants' SMF ¶ 35; Plaintiffs' Opposing SMF/Town ¶ 35. He obtained a shotgun loaded with "00" buckshot because he was concerned that the distance from his intended position

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[9] The Plaintiffs qualify this statement as well as paragraph 145 of the Town Defendants' SMF, asserting that there are shields capable of withstanding a bullet from a high-powered rifle and, in the opinion of expert Walton, such shields are essential for dealing with armed subjects who might be suicidal. Plaintiffs' Opposing SMF/Town ¶¶ 30, 145; Walton Aff. ¶ 6.

[10] The Plaintiffs qualify this statement as well as paragraph 80 of the Town Defendants' SMF, asserting that Chard knew Levier had sued the SPD for its failure to provide him with a sign-language interpreter when arresting him on a warrant and, based on a staff meeting, Chard believed that the police won the case, with the court ruling that Levier was not entitled to an interpreter in that situation. Plaintiffs' Opposing SMF/Town ¶¶ 32, 80; Chard Dep. at 22-24. The Plaintiffs further assert that (i) this was a staff meeting that would have been attended by most of the supervisors on the scene with the rank of sergeant or above, and (ii) at this meeting, the possibility of providing interpreters to Levier in the future was discussed. Plaintiffs' Opposing SMF/Town ¶¶ 32, 80; Chard Dep. at 23, 25.

[11] No first names are provided for officers Plourde and Brown. *See* Greenleaf Aff. ¶ 2. The Plaintiffs qualify this statement, asserting that Brown, Plourde and Greenleaf all arrived "pretty much simultaneously" and by the time Greenleaf arrived, Brown and Plourde already had their weapons drawn and pointed at Levier and were ordering him to put his gun down. Plaintiffs' Opposing SMF/Town ¶ 33; Greenleaf Dep. at 6-8. The Plaintiffs further assert that during this entire time, Levier had his gun pointed in an upright position and was marching back and forth in front of his vehicle. Plaintiffs' Opposing SMF/Town ¶ 33; Greenleaf Dep. at 7.

[12] The Plaintiffs qualify this statement as well as paragraph 45 of the Town Defendants' SMF with the assertion that in addition to taking cover, Greenleaf drew his weapon and pointed it at Levier although he was aware at the time that Levier (continued…)

was too far from the gunman to ensure accuracy with his pistol. *Id.* ¶ 36. Ramsdell also knew that a pistol bullet can travel a great distance, and the proximity of a number of stores and people made him fear someone might be hit with a pistol round if it missed its target. *Id.* ¶ 37.[13] Ramsdell gave his pistol to SPD sergeant Dave Grover, who had been shopping in one of the stores with his family and had come out to the parking lot unarmed. *Id.* ¶ 38. Ramsdell moved to place himself between the gunman and the stores, taking up a position at the end of a row of parked cars, using the vehicles for cover, approximately forty feet from the cluster of officers who were the first responders and who were taking cover behind their cruisers. Town Defendants' SMF ¶ 39; Ramsdell Aff. ¶¶ 2-3.[14] All the officers used their vehicles for cover. Town Defendants' SMF ¶ 40; Greenleaf Aff. ¶ 2.[15]

In Ramsdell's haste to respond to the scene he had not obtained a portable radio. Town Defendants' SMF ¶ 156; Ramsdell Aff. ¶ 5. Because he was taking cover behind some civilian cars, he was not close enough to any cruiser to hear radio traffic during the approximately one-hour standoff. Town Defendants' SMF ¶ 157; Plaintiffs' Opposing SMF/Town ¶ 157.

Upon his arrival Greenleaf was the closest officer to the gunman, approximately fifty to eighty feet from him. Town Defendants' SMF ¶ 41; Greenleaf Aff. ¶ 2.[16] Ramsdell was approximately twenty-five

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was not committing any crime. Plaintiffs' Opposing SMF/Town ¶ 34; Greenleaf Dep. at 8.

[13] The Plaintiffs qualify this statement, admitting it only for Ramsdell's state of mind or in the alternative denying it. *See* Plaintiffs' Opposing SMF/Town ¶ 37. Inasmuch as the statement on its face reflects that it is limited to Ramsdell's state of mind, I deem it admitted.

[14] The Plaintiffs qualify this statement, noting that Ramsdell also aimed his gun at Levier. Plaintiffs' Opposing SMF/Town ¶ 39; Ramsdell Dep. at 23.

[15] The Plaintiffs qualify this statement as well as paragraph 87 of the Town Defendants' SMF, asserting that, in the opinion of expert Walton and interpreter Mackay, the SPD officers did not take the need for cover seriously as evidenced by their actions leaning over the vehicles and talking among themselves and moving constantly between vehicles and in and out of the inner and outer perimeters without any regard for cover. Plaintiffs' Opposing SMF/Town ¶¶ 40, 87; Walton Aff. ¶ 7; Mackay Aff. ¶ 31.

[16] The Plaintiffs qualify this statement, asserting that for a large part of the standoff Greenleaf was approximately thirty to fifty feet away from Levier and sometimes was as close as within ten feet of him depending on where Levier was walking. Plaintiffs' Opposing SMF/Town ¶ 41; Greenleaf Aff. ¶ 3; Deposition of Robert Moulton ("Moulton Dep."), filed by (continued…)

yards from Levier as Levier paced back and forth in the parking lot. Town Defendants' SMF ¶ 42; Ramsdell Aff. ¶ 3.[17] Greenleaf could see that the gunman had a .30-.30-caliber lever-action rifle, a high-powered hunting rifle with which he was familiar. Town Defendants' SMF ¶ 43; Plaintiffs' Opposing SMF/Town ¶ 43. The gunman was holding the rifle, marching back and forth in front of a white van. Town Defendants' SMF ¶ 44; Greenleaf Aff. ¶ 2.[18] Along with the other officers, Greenleaf had his weapon drawn and was aiming it at the gunman. Town Defendants' SMF ¶ 45; Greenleaf Aff. ¶ 2. The officers were all trying to talk to the subject and ordering him to put his gun down. Town Defendants' SMF ¶ 46; Greenleaf Aff. ¶ 2.[19]

Upon Moore's arrival, Captain Angelo Mazzone, the senior SPD officer at the scene, gave him orders to proceed to the Shop 'N Save and have store employees keep all customers inside with the doors locked. Town Defendants' SMF ¶ 47; Plaintiffs' Opposing SMF/Town ¶ 47; *see also id.* ¶ 246. On that day, Robert Sanborn was working at the Shop 'N Save as a loss-prevention coordinator when he became aware of an incident transpiring in the parking lot outside the store. *Id.* ¶ 48. The Shop 'N Save was equipped with surveillance cameras that could be used to monitor activity in the parking lot. *Id.* ¶ 49.

Plaintiffs, at 60.

[17] The Plaintiffs qualify this statement, asserting that the distance between Ramsdell and Levier was as close as forty to fifty feet when Levier was marching. Plaintiffs' Opposing SMF/Town ¶ 42; Ramsdell Dep. at 23-24.

[18] The Plaintiffs qualify this statement and paragraph 252 of the Town Defendants' SMF, asserting that Levier was staging a symbolic march to protest the treatment of deaf persons in this society, marching back and forth like a soldier with his rifle in "port arms" position, with the barrel pointing up at the sky and one hand cupped underneath the stock. Plaintiffs' Opposing SMF/Town ¶¶ 44, 252; Deposition of David Grover ("Grover Dep."), filed by Plaintiffs, at 12; Deposition of Rick Rouse ("Rouse Dep."), filed by Plaintiffs, at 16-17; Critical Incident Report, *Sperrey, at al.*, Case No. 2001-028-21P (Me. Atty. Gen. Apr. 4, 2001), attached as Exh. 3 to Plaintiffs' Response to State of Maine Defendants' Statement of Material Fact ("Plaintiffs' Opposing SMF/State") (Docket No. 20), at SP 001, SP 009. The Plaintiffs further assert that police officers present did not believe that Levier was committing any crime. Plaintiffs' Opposing SMF/Town ¶¶ 44, 252; Greenleaf Dep. at 7-9; Deposition of Richard Golden ("Golden Dep."), filed by Plaintiffs, at 23-24. The Plaintiffs' further assertions that Levier's weapon was in a position in which "it presented no danger to anyone," and that he "was not threatening any police officers or civilians at any time," Plaintiffs' Opposing SMF/Town ¶¶ 44, 252, are disregarded inasmuch as they are not fairly supported by the citations given.

[19] The Plaintiffs qualify this statement, asserting that at the time the officers were doing so, they knew that Levier was (continued…)

Sanborn operated the surveillance camera so as to capture the events occurring in the parking lot. *Id*. ¶ 50. He turned the camera on the gunman at 3:25:28 p.m. and filmed events until a short time after the gunman had been shot by police. Town Defendants' SMF ¶ 51; Affidavit of Robert Sanborn ("Sanborn Aff."), attached as Exh. 6 to Town Defendants' SMF, ¶ 2.[20] The surveillance tape ("Sanborn Videotape") was seized as evidence at the conclusion of the events. Town Defendants' SMF ¶ 52; Plaintiffs' Opposing SMF/Town ¶ 52.

Moore also went to Shirley's Hallmark, a hair salon and a video store, racing from one to the other telling people to have everyone stay inside, get down and stay away from the windows. *Id*. ¶ 53. After Moore stopped at each business, he looked at the perimeter that was forming around Levier and saw a single officer, Officer Giacomantonio, alone behind a vehicle and isolated. *Id*. ¶ 54. He noticed that Giacomantonio was armed only with his service pistol, and viewed that position as a weak spot in the forming perimeter. *Id*. ¶ 55. At that point, Moore could see a number of police cars at one end of the parking lot, Giacomantonio off to the side of Shop 'N Save alone behind a vehicle, and a marine patrol officer who had responded to the scene by the Shop 'N Save. *Id*. ¶ 56. Moore ran toward Giacomantonio to see if he needed anything and to assist in maintaining the perimeter from that position. *Id*. ¶ 57. Giacomantonio was too far from his cruiser to be able to hear radio traffic and did not have a portable radio with him. *Id*. ¶ 58. Moore had his portable radio, and advised Giacomantonio that he would remain with him. *Id*. ¶ 59. Based on his training and experience, Moore believed that the perimeter was not at that

hearing-impaired. Plaintiffs' Opposing SMF/Town ¶ 46; Greenleaf Dep. at 8.

[20] The Plaintiffs qualify this statement, asserting that approximately the first twenty-five minutes of what they term Levier's "peaceful protest" was unrecorded. Plaintiffs' Opposing SMF/Town ¶ 51. However, the qualification is largely unsupported by the citations given and is on that basis disregarded.

point manned enough to keep civilians outside or to keep the gunman and his weapon inside of it. *Id*. ¶ 60.[21]

When Chard arrived on the scene, he observed a K-9 dog belonging to the South Portland Police Department, along with its handler, fairly close to the position of the gunman in the parking lot, with the dog in the "down" position. *Id*. ¶ 61. He left his dog in his parked cruiser, believing that if a K-9 unit were needed, the South Portland handler could take care of that need. *Id*.

As the event went on more officers arrived, and the inner and outer perimeters began to form. *Id*. ¶ 63. Traffic control was established outside the inner perimeter, and a command van arrived at the outer perimeter. *Id*. As other officers arrived, including members of the MSP Tactical Team, they began to develop a perimeter of officers around the gunman to prevent him from going into any of the nearby businesses, in which a number of civilians had taken refuge. *Id*. ¶ 64. Mark Sperrey, who had been a member of the MSP Tactical Team since January 1999, was traveling in a car with then-detective Eric Baker of the MSP when they were instructed by the MSP Tactical Team commander, Sergeant Dick Golden, to respond to the scene of the incident in Scarborough. *Id*. ¶¶ 65-66.[22]

Upon arrival at the scene, Trooper Sperrey and then Baker met with Golden. *Id*. ¶ 67. Golden instructed Trooper Sperrey to go to his truck and get a shield. *Id*. ¶ 68. When Trooper Sperrey returned, Golden informed him he needed to leave and instructed him to slide into his position. *Id*. ¶ 69. Golden laid his rifle on its side and slid out, and Trooper Sperrey positioned himself where Golden had been, behind a car that was angled slightly, pointing toward Levier. Town Defendants' SMF ¶ 70; Deposition of Mark

[21] The Plaintiffs qualify this statement, admitting it only for Moore's state of mind or in the alternative denying it. *See* Plaintiffs' Opposing SMF/Town ¶ 60. Inasmuch as the statement on its face reflects that it is limited to Moore's state of mind, I deem it admitted.

[22] I refer to Sperrey henceforth as "Trooper Sperrey" to avoid confusion with co-defendant Michael Sperry, to whom I (continued…)

Sperrey ("Trooper Sperrey Dep."), filed by Plaintiffs, at 28.[23] Trooper Sperrey was armed with a Remington 700-series .233-caliber bolt-action rifle with a scope – a weapon sometimes referred to as a "sniper rifle." Town Defendants' SMF ¶ 71; Plaintiffs' Opposing SMF/Town ¶ 71.

Shortly after Greenleaf started trying to communicate with Levier, he got the impression that the gunman was hearing-impaired, observing the gunman making hand gestures that included pointing to his ear several times and pointing to the muzzle of his rifle and then to the sky. *Id.* ¶ 72. The gunman was able to speak so that Greenleaf could understand him, and he stated in a kind of muffled, broken speech that he was not going to shoot Greenleaf and wanted Greenleaf to shoot him. Town Defendants' SMF ¶ 73; Greenleaf Aff. ¶ 2.[24]

Chief Moulton was attending a department-head meeting at Scarborough Town Hall at approximately 3:30 p.m. Town Defendants' SMF ¶ 74; Plaintiffs' Opposing SMF/Town ¶ 74. Moulton returned to the police station and was advised that there was an armed individual in the parking lot of the Shop 'N Save Plaza, that the person had a rifle and was marching back and forth in the parking lot, that several SPD officers had reported to the scene, that South Portland's assistance had been requested and that MSP units had also been contacted for assistance because of the number of people and high traffic volume in that area. Town Defendants' SMF ¶ 75; Moulton Aff. ¶ 3. Moulton, who arrived at the scene at approximately 3:36 p.m., could see the gunman in the parking lot but did not know who he was. Town

refer as "Colonel Sperry."

[23] The Plaintiffs qualify this statement, asserting that once Trooper Sperrey took over Golden's position, he picked up Golden's sniper rifle and trained it at Levier. Plaintiffs' Opposing SMF/Town ¶ 70; Trooper Sperrey Dep. at 28-29. Further, the Plaintiffs assert that Trooper Sperrey kept Levier in the crosshairs of the sights of his rifle for the rest of the confrontation, initially aiming the rifle between Levier's eyes. Plaintiffs' Opposing SMF/Town ¶ 70; Trooper Sperrey Dep. at 35-36, 60.

[24] The Plaintiffs qualify this statement, asserting that Greenleaf did not know sign language but, based on what he heard and saw, believed that Levier was stating he was not going to shoot him. Plaintiffs' Opposing SMF/Town ¶ 73; Greenleaf Dep. at 8, 10-11.

Defendants' SMF ¶ 76; Moulton Aff. ¶ 6. Moulton was advised by one of his officers that the man with the rifle had been identified by Captain Marla St. Pierre as James Levier, and that she had provided that information to SPD dispatch when requesting that an interpreter be summoned to the scene. Town Defendants' SMF ¶ 77; Moulton Aff. ¶ 6.

SPD dispatch was already in the process of trying to locate an interpreter prior to Moulton's arrival on the scene. Town Defendants' SMF ¶ 78; Moulton Aff. ¶ 6.[25] During the process of attempting to locate an interpreter, the perimeter around Levier had been established in part, but the task of establishing an inner perimeter was complicated by the need to avoid crossfire and the large amount of space occupied by the parking lot. Town Defendants' SMF ¶ 79; Moulton Aff. ¶ 7.

Levier's name was known to Moulton inasmuch as Levier had previously filed a lawsuit against the SPD that had been terminated in the Town's favor. Town Defendants' SMF ¶ 80; Moulton Aff. ¶ 6. As a result of the prior lawsuit, Moulton was aware that Levier had a history of treatment for psychiatric problems, and this information was shared over the radio. Town Defendants' SMF ¶ 81; Moulton Aff. ¶ 7.[26]

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[25] The Plaintiffs qualify this statement, asserting, *inter alia*, that the SPD dispatcher first called Ingraham Volunteers, which is not a sign-language interpreter agency, then called 774-HELP at 3:21 p.m. and was referred to Pine Tree Services ("Pine Tree"), first spoke to Pine Tree at 3:22 p.m., then at 3:26 p.m. called the MSP barracks and the South Portland Police Department to obtain their contact information for obtaining an interpreter; then at 3:30 p.m. requested interpreter information from the Portland Police Department; then at 3:31 p.m. called Governor Baxter School for the Deaf; then at 3:38 p.m. called the Department of Labor, Bureau of Licensing for an interpreter list before finally being informed at 3:45 p.m. that an interpreter was *en route* from Pine Tree. Plaintiffs' Opposing SMF/Town ¶ 78; Affidavit of Mary Edgerton ("Edgerton Aff."), attached as Exh. 5 to Plaintiffs' Opposing SMF/Town, ¶ 6; Sequence of Events, attached as Exh. 6 to Plaintiffs' Opposing SMF/Town, at 100152-53. The Plaintiffs also assert that (i) Mazzone, who was the first person in charge of the scene, had attended Maine Center of Deafness training related to police enforcement and had received information pertaining to the two proper agencies to call to obtain an interpreter, one of which was Pine Tree, and (ii) the SPD had also received information from Pine Tree regarding training opportunities. Plaintiffs' Opposing SMF/Town ¶ 78; Edgerton Aff. ¶ 8.

[26] The Plaintiffs qualify this statement, asserting that the information was shared over the radio at approximately 3:47 p.m. Plaintiffs' Opposing SMF/Town ¶ 81; Sequence of Events at 100153-54.

Once Jipson and Chard arrived on the scene, Jipson had Chard go with him to the staging area to meet with Moulton. Town Defendants' SMF ¶ 82; Plaintiffs' Opposing SMF/Town ¶ 82. While Jipson spoke to Moulton, Chard went to the area of the perimeter that was being set up around the gunman and stayed behind a cruiser that was to the rear of a group of three cruisers parked together. *Id*. ¶ 83. The three cruisers were the closest to the area where the gunman was pacing in the parking lot. *Id*. ¶ 84. Chard was armed with his Special Response Team M-16 rifle. *Id*. ¶ 88. He observed some type of writing on the white van near Levier but was too far away to read it. *Id*. ¶ 89.

Moore and Ramsdell observed other officers attempting to communicate with gestures to Levier, ordering him to put his gun on the ground or to lie down. *Id*. ¶¶ 91-92. Ramsdell saw Levier mimic the officers' gestures back at them, but Levier did not comply with their directions. Town Defendants' SMF ¶ 93; Ramsdell Aff. ¶ 3.[27] Chard observed other officers, including Greenleaf, trying to communicate with Levier with hand gestures. Town Defendants' SMF ¶ 94; Plaintiffs' Opposing SMF/Town ¶ 94. In response, Levier repeatedly pointed to his right ear and made hand gestures as if to indicate that he could not or would not hear the message that was being sent to him. Town Defendants' SMF ¶ 96; Chard Aff. ¶ 5.[28] The gunman continued to pace back and forth, and appeared to be in an agitated state. Town Defendants' SMF ¶ 97; Chard Aff. ¶ 3.[29]

When Levier would face Moore, Moore would use gestures to communicate to Levier that Moore wanted him to lower his weapon. Town Defendants' SMF ¶ 100; Plaintiffs' Opposing SMF/Town ¶ 100.

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[27] The Plaintiffs qualify this statement, asserting that Levier in fact attempted on at least six occasions to express a willingness to negotiate putting his rifle down, but his signs were not understood by police. Plaintiffs' Opposing SMF/Town ¶ 93; Baker Aff. ¶ 6; Mackay Aff. ¶ 51.

[28] The Plaintiffs qualify this statement, asserting that Levier repeatedly pointed to his right ear and signed in ASL that he could not hear. Plaintiffs' Opposing SMF/Town ¶ 96; Baker Aff. ¶ 13.

[29] The Plaintiffs deny this statement, *see* Plaintiffs' Opposing SMF/Town ¶ 97; however, the Sanborn Videotape, which (continued…)

When Moore would make these hand gestures to Levier, Levier would repeat the same thing to Moore, only in a much faster and aggressive manner. Town Defendants' SMF ¶ 102; Affidavit of Robert Moore ("Moore Aff."), attached as Exh. 3 to Town Defendants' SMF, ¶ 4.[30] Levier was also yelling at Moore, saying things like "shoot me, shoot me!" Town Defendants' SMF ¶ 103; Plaintiffs' Opposing SMF/Town ¶ 103. Levier repeated the command "shoot me" a number of times, as well as calling out names such as "murderer" and "baby killer." *Id*. ¶ 104. Ramsdell could hear Levier challenging officers to shoot him, calling them names and yelling, "shoot me, shoot me, faggot!" *Id*. ¶ 105.[31]

As the standoff progressed, Moore received information over the radio that Levier was deaf and that he had some type of psychiatric issues for which he had required treatment. *Id*. ¶ 107. Moore was concerned for his safety and the safety of others because Levier was armed with a high-powered rifle, appeared very agitated and showed no inclination to follow the obvious commands he was given by a number of police officers to put his weapon down. *Id*. ¶ 108.[32] At one point Ramsdell saw Levier level his weapon in the direction of Shop 'N Save, but he did not remain in this position long before he resumed pacing back and forth. Town Defendants' SMF ¶ 109; Ramsdell Aff. ¶ 4.[33] Ramsdell could see that

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they cite in support of their denial, does not refute the proposition that Levier "appeared agitated."

[30] The Plaintiffs qualify this statement, asserting that the speed and manner in which a sign is made are part of the visual grammer of ASL, which can seem fast and aggressive or agitated to hearing persons who are not used to it. Plaintiffs' Opposing SMF/Town ¶ 102; Baker Aff. ¶¶ 3, 26. The Plaintiffs further assert that Levier was not mimicking Moore but indicating that the officers would have to put their guns down first. Plaintiffs' Opposing SMF/Town ¶ 102; Baker Aff. ¶ 27.

[31] The Town Defendants further assert that the way Levier was acting and the fact that he was holding what Greenleaf knew to be a high-powered rifle made it a very dangerous situation, Town Defendants' SMF ¶ 106; however, the Plaintiffs deny this statement on the basis of their qualification, above, to paragraph 44 of the Town Defendants' SMF, Plaintiffs' Opposing SMF/Town ¶ 106, and I view the record in the light most favorable to the Plaintiffs as non-movants.

[32] The Plaintiffs qualify this statement, admitting it only for Moore's state of mind or in the alternative denying it. *See* Plaintiffs' Opposing SMF/Town ¶ 108. Inasmuch as the statement on its face reflects that it is limited to Moore's perceptions, I deem it admitted.

[33] The Plaintiffs qualify this statement, asserting that over time Levier showed signs of slowing down and becoming tired, and the officers who were present when he momentarily lowered his gun interpreted the gesture as stemming from tiredness rather than as a threat. Plaintiffs' Opposing SMF/Town ¶ 109; Ramsdell Aff. ¶ 4.

Levier had his right hand in the trigger guard and lever of the rifle and his left hand on the upper stock. Town Defendants' SMF ¶ 111; Plaintiffs' Opposing SMF/Town ¶ 111. At one point, Levier lifted his shirt to reveal that he was wearing an ammunition belt at his waist. Town Defendants' SMF ¶ 112; Chard Aff. ¶ 6.[34]

At approximately 3:45 p.m. the SPD was advised that an interpreter named Mary Mackay was *en route* and would arrive in an estimated five minutes. Town Defendants' SMF ¶ 113; Plaintiffs' Opposing SMF/Town ¶ 113. The South Portland Police Department brought its mobile command van to the scene, and Moulton met there with Golden, Jipson and Edward Googins, South Portland chief of police, who had come to see if he could assist in some way. *Id*. ¶ 116. The interpreter advised Moulton that she was familiar with Levier and had some experience interpreting for him. Town Defendants' SMF ¶ 117; Moulton Aff. ¶ 7.[35] She spoke about a prior incident in which he had become agitated and she had been successful in calming him down. Town Defendants' SMF ¶ 118; Moulton Aff. ¶ 7.[36] Moulton asked Mackay how

[34] The Plaintiffs purport to qualify this statement, Plaintiffs' Opposing SMF/Town ¶ 112; however, the qualification is unrelated to the statement and on that basis is disregarded.

[35] The Plaintiffs qualify this statement, asserting that Mackay told the four officers she knew Levier very well and felt very capable of interpreting for him because she had done so many times in the past during emotional/crisis situations. Plaintiffs' Opposing SMF/Town ¶ 117; Mackay Aff. ¶ 15. The Plaintiffs further assert that "the leader" asked Mackay if she could tell him what she was seeing from where she was, and she explained that although Levier was saying something, the distance was to great to attempt an accurate interpretation. Plaintiffs' Opposing SMF/Town ¶ 117; Mackay Aff. ¶¶ 17-18.

[36] The Plaintiffs qualify this statement, asserting, *inter alia*, that Mackay explained that (i) based on her experience working in mental health crisis situations, she was very concerned that the situation could escalate any moment in that the officers were just letting Levier stand there without communication, (ii) she believed Levier's life could not be saved without use of interpreting services to communicate, (iii) when a deaf person is in a situation where he or she cannot communicate, the deaf person often shuts down and refuses to try to communicate, (iv) the arrival of someone whom the deaf person knows and with whom the deaf person can communicate gives the deaf person someone on whom to focus, with resulting de-escalation of the crisis, and (v) in past instances Levier had calmed down immediately after she or another interpreter had arrived (including a previous serious confrontation with the Portland police in which Levier had a large knife and was threatening to kill himself). Plaintiffs' Opposing SMF/Town ¶ 118; Mackay Aff. ¶¶ 24-29.

close she needed to get to Levier to be able to assist him in communicating other than by hand signals. Town Defendants' SMF ¶ 119; Plaintiffs' Opposing SMF/Town ¶ 119.[37]

Mackay told Moulton she felt that it might help if Levier were told that she was at the scene, and said she could teach one of the officers how to communicate "her sign" in ASL. Town Defendants' SMF ¶ 125; Moulton Aff. ¶ 7.[38] Moulton requested that Greenleaf, who was on the perimeter, come back to speak with the interpreter to be taught her sign. Town Defendants' SMF ¶ 126; Plaintiffs' Opposing SMF/Town ¶ 126. Moulton thought Greenleaf was a logical choice because Levier had seemed to focus a great deal on him. *Id*. ¶ 127. The interpreter showed Greenleaf how to make the sign, and he returned to the perimeter to make the sign so that Levier could see it. *Id*. ¶ 133. Once there, he exposed himself to Levier and made the sign several times. Town Defendants' SMF ¶ 135; Greenleaf Aff. ¶ 4.[39] The Sanborn Videotape shows Greenleaf making these attempts at 4:05:30 and 4:05:55 p.m. Town Defendants' SMF ¶

[37] The Town Defendants assert that Mackay responded that she needed to be within twenty-five to thirty feet of Levier to communicate effectively with him, Town Defendants' SMF ¶ 120; however, the Plaintiffs deny this, asserting, *inter alia*, that Mackay explained that she needed to be close enough so that she could clearly see Levier and he could clearly see her and, rather than indicating a certain distance, she suggested slowly advancing behind the parked vehicles and periodically standing up, attempting to make eye contact with Levier, and only advancing further if things did not escalate, Plaintiffs' Opposing SMF/Town ¶ 120; Mackay Aff. ¶¶ 19-21. For purposes of summary judgment, I view the cognizable record in the light most favorable to the Plaintiffs as non-movants.

[38] The Plaintiffs qualify this statement, asserting, *inter alia*, that Mackay had suggested every option she could think of, including simply writing her name on a piece of cardboard and showing it to Levier, an option police vetoed, but by the time she had been standing around wearing a bulletproof vest for twenty minutes, they accepted another option she suggested of teaching a police officer a few signs to convey to Levier that she was there. Plaintiffs' Opposing SMF/Town ¶ 125; Mackay Aff. ¶¶ 37-38. The Plaintiffs further assert that Mackay expressed concern about attempting to teach someone something so foreign and have that person attempt to convey it to someone in distress and made alternative suggestions of conveying the message, including simply holding out a sign, but those suggestions were ignored. Plaintiffs' Opposing SMF/Town ¶ 125; Mackay Aff. ¶¶ 37-38, 40-41.

[39] In a denial that is more in the nature of a qualification, and hence is treated as such, the Plaintiffs assert that review of the Sanborn Videotape reveals that Greenleaf did not appear to be making a proper letter "m" but instead left his hand open, which is the sign for "know" or "hat." Plaintiffs' Opposing SMF/Town ¶ 135; Mackay Aff. ¶¶ 47-48. The Plaintiffs further assert that Levier is seen signing "know" or "hat" and "here" back to Greenleaf and additionally signing his frustration that the officers were not communicating to him in sign language. Plaintiffs' Opposing SMF/Town ¶ 135; Baker Aff. ¶¶ 14-18.

137; Moulton Aff. ¶ 7. On that tape, Levier can be seen making dismissive gestures and walking away from Greenleaf. Town Defendants' SMF ¶ 138; Moulton Aff. ¶ 7.[40]

To this point in time, Greenleaf felt police had been communicating effectively with Levier. Town Defendants' SMF ¶ 139; Plaintiffs' Opposing SMF/Town ¶ 139.[41] Levier appeared to understand that the officers wanted him to put his gun down. *Id*. ¶ 140. The officers understood that Levier was trying to get them to shoot him and was refusing to put his gun down. Town Defendants' SMF ¶ 141; Greenleaf Aff. ¶ 4.[42] Greenleaf radioed back to the command staff that signing the interpreter's sign to Levier was not accomplishing the desired effect. Town Defendants' SMF ¶ 143; Plaintiffs' Opposing SMF/Town ¶ 143. Greenleaf then left the perimeter and went back to the interpreter to tell her they needed to try something else. *Id*. ¶ 144.

An armored shield, capable of deflecting a bullet from a high-powered rifle such as Levier carried, was brought to the scene. Town Defendants' SMF ¶ 145; Moulton Aff. ¶ 8. At the command van, Moulton, Googins and Mazzone, as well as Lieutenant McCue from the South Portland Police Department and Lieutenant Nichols from the MSP, asked the two tactical commanders (Jipson and Golden) whether they could get Mackay close enough to interpret for Levier while keeping her behind the armored shield for her safety. Town Defendants' SMF ¶ 147; Plaintiffs' Opposing SMF/Town ¶ 147. The tactical commanders indicated they believed they could get Mackay close enough and still pull her back behind the

[40] In a denial that is more in the nature of a qualification, and hence is treated as such, the Plaintiffs again assert that Greenleaf did not make the sign properly. Plaintiffs' Opposing SMF/Town ¶ 138; Mackay Aff. ¶¶ 47-48.

[41] The Plaintiffs qualify this statement, admitting it only for Greenleaf's state of mind. Plaintiffs' Opposing SMF/Town ¶ 139.

[42] The Plaintiffs qualify this statement, asserting, *inter alia*, that without an interpreter police officers missed the opportunity to understand other statements Levier made that could have been the start of negotiations of conditions under which he would agree to put his gun down. Plaintiffs' Opposing SMF/Town ¶ 141; Walton Aff. ¶¶ 13-15.

shield if any danger arose from Levier. Town Defendants' SMF ¶ 149; Moulton Aff. ¶ 8.[43] Moulton also was advised that two officers had shotguns with beanbag rounds, which are less lethal than conventional bullets though still characterized as lethal by the State of Maine and only authorized by the state for use where deadly force is warranted. Town Defendants' SMF ¶ 150; Plaintiffs' Opposing SMF/Town ¶ 150.[44] The tactical commanders also advised Moulton that they had two police K-9 dogs on standby, and that if they could stun Levier with a beanbag round they could send the dogs to try to hold him until the officers could reach him. Town Defendants' SMF ¶ 151; Moulton Aff. ¶ 8.[45]

Mackay had offered to approach Levier alone, without use of the armored shield; however, that offer was not accepted because of concern for her safety and/or because she could provide Levier with a hostage, further complicating the already difficult situation. Town Defendants' SMF ¶ 153; Moulton Aff. ¶ 8.[46]

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[43] The Plaintiffs qualify this statement as well as paragraphs 206, 207 and 265 of the Town Defendants' SMF on the basis that tactical team members' deposition testimony conflicted as to whether a plan actually was in effect to use Mackay. Plaintiffs' Opposing SMF/Town ¶¶ 149 206-07, 265; *compare* Golden Dep. at 27-29 *with* Jipson Dep. at 35-37. The Plaintiffs further assert, *inter alia*, that all necessary equipment for use in the plan Moulton claimed had been formulated was available approximately thirty minutes before Levier was shot to death by police. Plaintiffs' Opposing SMF/Town ¶¶ 149, 206-07, 265; Moulton Dep. at 32-33, 36. That plan included the possible use of less lethal beanbag shotgun round and deployment of the two K-9 dogs on the scene if things developed in such a way as to make those tools the appropriate ones to use in response. Town Defendants' SMF ¶ 269; Plaintiffs' Opposing SMF/Town ¶ 269.

[44] The Plaintiffs qualify this statement, asserting that (i) officers with beanbag rounds were present at the scene before Levier was shot, (ii) MSP sergeant Baker's bean-bag system could deliver five to six rounds at a time and was within the maximum effective range for its usage, and (iii) Chief Moulton was aware that Levier was trying to build up his courage. Plaintiffs' Opposing SMF/Town ¶ 150; Golden Dep. at 42-43; Moulton Dep. at 34, 138. The Plaintiffs' further assertions that the beanbag rounds were present on the scene at least half an hour before Levier was shot and that Moulton gave no instructions as to the deployment of that equipment, Plaintiffs' Opposing SMF/Town ¶ 150, are disregarded inasmuch as they are not supported by the citations given.

[45] The Plaintiffs qualify this statement, asserting that Chief Moulton knew that two K-9 units were on the scene at least half an hour before Levier was fatally shot, yet despite knowing that these units were available and that Levier was getting bolder and trying to build up his courage, did not instruct these units as to the conditions under which the K-9 dogs could be deployed – a violation of reasonable police procedures. Plaintiffs' Opposing SMF/Town ¶ 151; Moulton Dep. at 32-34, 138; Walton Aff. ¶ 17.

[46] The Plaintiffs qualify this statement, asserting that Mackay did not offer to approach Levier alone until near the time the police fatally shot him, when, as a result of the way he had withdrawn and was no longer trying to communicate, she was frantically concerned that something soon would happen. Plaintiffs' Opposing SMF/Town ¶ 153; Mackay Aff. ¶ 57.

While Greenleaf was speaking to the interpreter, he had his back to Levier, and the interpreter was looking at Levier through binoculars. Town Defendants' SMF ¶ 160; Greenleaf Aff. ¶ 5.[47] The interpreter advised Greenleaf that Levier was blessing himself. Town Defendants' SMF ¶ 161; Greenleaf Aff. ¶ 5. Greenleaf turned around in time to observe Levier making the sign of the cross. Town Defendants' SMF ¶ 163; Plaintiffs' Opposing SMF/Town ¶ 163. After being on the scene for approximately twenty to thirty minutes, Chard observed Levier make the sign of the cross on himself, suddenly bring his rifle to his shoulder and assume a shooter's stance, aiming his rifle directly at officers taking cover behind their cruisers a short distance away. Town Defendants' SMF ¶ 164; Chard Aff. ¶ 7.[48] Chard was approximately one hundred feet from Levier and had an unrestricted view of him. Town Defendants' SMF ¶ 165; Plaintiffs' Opposing SMF/Town ¶ 165. Among the officers at whom Levier's rifle was aimed was an MSP sharpshooter who was aiming a rifle back at Levier. *Id*. ¶ 172.

[47] The Plaintiffs qualify this statement and paragraph 161 of the Town Defendants' SMF on the basis that Mackay does not remember Greenleaf ever coming back to talk to her. Plaintiffs' Opposing SMF ¶¶ 160-61; Mackay Aff. ¶ 43.

[48] The Plaintiffs qualify this statement, asserting, *inter alia*, that the Sanborn Videotape shows Levier turning his head ninety degrees and looking toward police officers on his right at approximately 4:16:16 p.m., glancing toward those officers in front of him and to his left at approximately 4:16:18 p.m., then again turning his head approximately ninety degrees, toward police officers on his right, at approximately 4:16:21 p.m., before he was shot at approximately 4:16:22 p.m. *See* Plaintiffs' Opposing SMF/Town ¶ 164; Sanborn Videotape, Exh. A to Sanborn Aff. In addition, the Plaintiffs point out that Levier did not fire his gun at Trooper Sperrey although Trooper Sperrey pulled the trigger of his malfunctioning gun at Levier not once, but three times, and (per the testimony of Greenleaf) Levier had earlier demonstrated by his actions and words that he did not want to shoot at the police but wanted the police to shoot him. Plaintiffs' Opposing SMF/Town ¶ 164; Trooper Sperrey Dep. at 57-68; Greenleaf Dep. at 8-10. The Plaintiffs also state that (i) at the time Levier was first shot in the right shoulder, his rifle was pointing straight ahead with his head turned at almost a ninety-degree angle to the right of his rifle, and (ii) the gunshot caused Levier to throw his weapon into the air and spin to the right, effectively disarming him, and thus there was no need to shoot him further. Plaintiffs' Opposing SMF/Town ¶ 164; Walton Aff. ¶¶ 25-26. The Plaintiffs further characterize the foregoing as evidencing that "Levier did not aim his rifle at any particular police officer," Plaintiffs' Opposing SMF/Town ¶ 164; however, the videotape makes clear only that Levier's attention (as opposed to his weapon) was not focused on any particular officer in the seconds before the fatal shooting. Inasmuch as appears from the videotape, Levier's rifle remained pointed in the direction of the officers during that time interval.

Several times during the standoff, Greenleaf had witnessed Levier cocking the hammer back on his rifle, then releasing it. Town Defendants' SMF ¶ 174; Greenleaf Aff. ¶ 5.[49] Levier would cock the hammer, which would make that weapon ready to fire, and put his finger on the trigger. Town Defendants' SMF ¶ 175; Greenleaf Aff. ¶ 5. When Levier assumed the shooter's stance and aimed his rifle at nearby police officers, he appeared to be ready to fire at someone. Town Defendants' SMF ¶ 176; Greenleaf Aff. ¶ 5.

Levier came to a stop toward Trooper Sperrey's position and lowered his firearm, pointing it at Trooper Sperrey and then at Baker. Town Defendants' SMF ¶ 177; Plaintiffs' Opposing SMF/Town ¶ 177. There was a pause of ten to twelve seconds, and Moore could not understand why none of the officers in the group had fired. Town Defendants' SMF ¶ 179; Moore Aff. ¶ 6. Moore knew there were Tactical Team members with rifles in that vicinity, and he felt that they were in a better position to shoot than he was inasmuch as he was armed only with a pistol and was further away from Levier than they were. Town Defendants' SMF ¶ 181; Plaintiffs' Opposing SMF/Town ¶ 181.[50] Moore felt justified in firing at Levier immediately upon Levier's aiming his rifle at the officers, and did not do so only because he believed one of the officers in that group armed with a rifle was in a better position and would fire. *Id*. ¶ 182. Ramsdell did not want to shoot Levier and thought that Tactical Team members with rifles in or near the threatened group of officers surely would shoot first. *Id*. ¶ 183.[51]

[49] The Plaintiffs qualify this statement as well as paragraph 175 of the Town Defendants' SMF on the basis that when Levier did so, the muzzle of his rifle was pointed up at the sky. Plaintiffs' Opposing SMF/Town ¶¶ 174-75; Greenleaf Dep. at 31-32.

[50] The Plaintiffs qualify this statement and paragraph 182 of the Town Defendants' SMF, admitting them for Moore's state of mind only. Plaintiffs' Opposing SMF/Town ¶¶ 181-82.

[51] The Plaintiffs qualify this statement, admitting it for Ramsdell's state of mind only. Plaintiffs' Opposing SMF/Town ¶ 183.

Right after Levier leveled his weapon, Trooper Sperrey attempted to fire his rifle but was unable to do so because when he had attempted to switch the safety off, it did not disengage completely. *Id*. ¶ 184. Trooper Sperrey disengaged the safety, again attempted to discharge the firearm and again was unable to do so because the bolt carrier group was not fully in place for the weapon to function. *Id*. ¶ 185. Trooper Sperrey closed the bolt carrier group and fired his weapon at Levier. *Id*. ¶ 186. He fired because he felt Levier was going to shoot him. *Id*. ¶ 188.[52] The bullet struck Levier, causing the muzzle of his rifle to move up as his right shoulder area recoiled from its impact. *Id*. ¶ 221.

When Greenleaf heard the initial gunshot, he believed that it was the sound of Levier firing his weapon. *Id*. ¶ 190.[53] Moore heard a gunshot and saw Levier move and the muzzle of his rifle rise in the air. Town Defendants' SMF ¶ 191; Moore Aff. ¶ 7.[54] Levier's hand was in the trigger and hand guard of the lever-action rifle, and Moore thought he saw Levier begin to work that action to chamber another round in the rifle. Town Defendants' SMF ¶ 192; Plaintiffs' Opposing SMF/Town ¶ 192.[55] As Moore heard the shot, he believed he saw a muzzle blast from Levier's rifle. *Id*. ¶ 193. He now understands that investigators believe Levier did not fire his rifle, but that was not his perception at the time. *Id*. ¶ 194. The combined effect of hearing a gunshot at a time when Levier was in a shooter's stance and aiming at police

[52] The Plaintiffs qualify this statement, admitting it for Trooper Sperrey's state of mind only or alternatively denying it. Plaintiffs' Opposing SMF/Town ¶ 188. Inasmuch as the statement on its face speaks solely to Trooper Sperrey's state of mind, I deem it admitted.

[53] The Plaintiffs qualify this statement, admitting it for Greenleaf's state of mind only. Plaintiffs' Opposing SMF/Town ¶ 190.

[54] The Plaintiffs qualify this statement, asserting that Moore alleged in his post-accident interviews and report that he saw the muzzle of Levier's rifle flash, but he later admitted that this did not happen as post-accident reconstruction established that Levier never fired his rifle. Plaintiffs' Opposing SMF/Town ¶ 191; Moore Aff. ¶ 7.

[55] The Plaintiffs qualify this statement, admitting it only for Moore's state of mind. Plaintiffs' Opposing SMF/Town ¶ 192.

officers and seeing his body and rifle move in response convinced Moore that Levier had fired at the officers. *Id*. ¶ 222.[56]

Chard heard a gunshot and saw Levier's rifle move, with his hand in the trigger guard/lever. *Id*. ¶ 196. He thought Levier had fired and was racking another round into the rifle's chamber. *Id*. ¶ 197.[57] He fired one round from his M-16 at that time, within one second or less of having heard the sound of a gunshot. *Id*. ¶ 198. Moore fired three rounds at Levier in quick succession from his service pistol. *Id*. ¶ 199. Ramsdell heard the gunshot and saw Levier's right shoulder kick back as it would from the impact of firing a high-powered rifle such as he had. *Id*. ¶ 200.[58] Levier's right hand was in the rifle's lever mechanism, and it appeared that his right hand was moving the lever as if to chamber another round. *Id*. ¶ 201. At that point, Ramsdell felt he had no choice and fired one round from his shotgun immediately following that first shot. *Id*. ¶ 202. All of these shots came in quick succession, taking only about one second from the first to the last shot. *Id*. ¶ 211.

The tactical commanders and chiefs Moulton and Googins began to leave the command van so that officers on the perimeter and the K-9 handlers in reserve could be advised of the approach they had decided to employ to try to get the interpreter safely close enough to communicate with Levier. Town Defendants' SMF ¶ 206; Moulton Aff. ¶ 9. As they left the command van, Moulton heard several shots fired and was advised Levier had assumed a shooter's stance, had leveled his rifle at an MSP sharpshooter and had been shot. Town Defendants' SMF ¶ 207; Moulton Aff. ¶ 9. Initially, Moulton was advised that

[56] The Plaintiffs qualify this statement, admitting it only for Moore's state of mind. Plaintiffs' Opposing SMF/Town ¶ 222.

[57] The Plaintiffs admit this statement for Chard's state of mind only. Plaintiffs' Opposing SMF/Town ¶ 197.

[58] The Plaintiffs admit this statement and paragraphs 201 and 202 of the Town Defendants' SMF for Ramsdell's state of mind only. Plaintiffs' Opposing SMF/Town ¶¶ 201-03. They alternatively deny paragraph 203. *Id*. ¶ 203. Inasmuch as all three statements on their face are limited to Ramsdell's state of mind, they are deemed admitted.

Levier had fired his weapon first and that the officers on the scene had fired in response. Town Defendants' SMF ¶ 208; Plaintiffs' Opposing SMF/Town ¶ 208. Moulton subsequently learned that Levier's weapon had not been fired, although it was cocked and loaded, and that apparently the MSP sharpshooter had fired first. *Id*. ¶ 209. Emergency medical attention was immediately provided to Levier after he was shot. *Id*. ¶ 212.

Throughout the standoff, Greenleaf and other officers closest to Levier communicated to him, by gesture, that they wanted him to put his gun down. *Id*. ¶ 214. Greenleaf believed that Levier was trying to provoke the officers into shooting him. *Id.* ¶ 217. Despite the fact that Greenleaf heard Levier say he would not shoot him, Greenleaf still felt in danger and felt exposing himself to sign the interpreter's sign to Levier was very dangerous. *Id*. ¶ 218.[59] Greenleaf exposed himself, however, because there were other officers who could have taken action had Levier suddenly pointed his rifle at Greenleaf once he was exposed. *Id*. ¶ 219.

As SPD officers, Moore, Ramsdell and Chard had been trained in the lawful use of force, including the use of deadly force, and in the SPD's standard operating procedures and laws regarding the use of force. Town Defendants' SMF ¶¶ 226-27, 239; Moore Aff. ¶ 9; Ramsdell Aff. ¶ 7; Chard Aff. ¶ 8.

Officers are trained to fire three shots in quick succession from their pistols, then to reassess the situation and, if necessary, fire another burst of three shots. Town Defendants' SMF ¶ 203; Plaintiffs' Opposing SMF/Town ¶ 203. Because Levier went to the ground after Moore's first three shots, Moore did not fire anymore. Town Defendants' SMF ¶ 204; Moore Aff. ¶ 8.[60] Moore realizes that his perception

[59] The Plaintiffs qualify this statement, admitting it for Greenleaf's state of mind only. Plaintiffs' Opposing SMF/Town ¶ 218.

[60] The Plaintiffs qualify this statement, asserting that Levier already had been wounded and effectively disarmed when Moore fired. Plaintiffs' Opposing SMF/Town ¶ 204; Walton Aff. ¶ 26.

of the last few seconds of the standoff may have been colored by the extreme stress they were all under. Town Defendants' SMF ¶ 224; Plaintiffs' Opposing SMF/Town ¶ 224. He did not want to shoot another human being and did so only because he believed Levier had just shot at other police officers who, for some reason unknown to Moore, had not fired at him when he first leveled his gun and aimed at them. *Id*. ¶ 225.

At the time Ramsdell used deadly force against Levier, Levier had aimed a high-powered rifle directly at a group of police officers a very short distance away from him, and Ramsdell believed Levier had fired a shot at them. Town Defendants' SMF ¶ 229; Ramsdell Aff. ¶ 7.[61] Ramsdell now understands that investigators believe Levier did not actually fire his rifle, though it was cocked and loaded. Town Defendants' SMF ¶ 230; Plaintiffs' Opposing SMF/Town ¶ 230. Levier had his back to Ramsdell when Ramsdell fired, and the combination of the gunshot Ramsdell heard and Levier's right shoulder moving backward at the same time convinced Ramsdell that he had just witnessed Levier firing a rifle shot. *Id*. ¶ 231.[62]

Chard knew members of the MSP Tactical Team, including a sharp shooter, were among the group directly in front of Levier, and he believed one of those officers would fire first. *Id*. ¶ 236.[63] When Chard heard the first gunshot and saw Levier's body and rifle move, apparently in response to being struck by a bullet, he believed Levier had just fired a shot and was recoiling from the force of his own rifle against his shoulder. *Id*. ¶ 237. At that point, he decided he had no choice but to fire. Town Defendants' SMF ¶

[61] The Plaintiffs qualify this statement, admitting it for Ramsdell's state of mind only and asserting that the group of officers was approximately forty to fifty yards away from Levier. Plaintiffs' Opposing SMF/Town ¶ 229; Trooper Sperrey Dep. at 54.

[62] The Plaintiffs qualify this statement, admitting it for Ramsdell's state of mind only. Plaintiffs' Opposing SMF/Town ¶ 231.

[63] The Plaintiffs admit this statement and paragraph 237 of the Town Defendants' SMF for Chard's state of mind only. Plaintiffs' Opposing SMF/Town ¶¶ 236-37. Inasmuch as the statements on their face are limited to Chard's state of mind, I deem them admitted.

238; Chard Aff. ¶ 8.[64] In examining the scene after the fact, Chard determined that his M-16 round had not struck Levier but had hit the open driver's side door of a cruiser. Town Defendants' SMF ¶ 213; Plaintiffs' Opposing SMF/Town ¶ 213. Although Chard's K-9 dog was an option that might have been used had the opportunity presented itself, at that time the dog was still back in his cruiser approximately two hundred yards away. Town Defendants' SMF ¶ 242; Chard Aff. ¶ 6.[65] Decisions regarding use of the dog would have to be made by the tactical commanders and Moulton and then relayed to Chard so that he could deploy the dog to a position from which Chard could send him to grab Levier. Town Defendants' SMF ¶ 244; Plaintiffs' Opposing SMF/Town ¶ 244.

From Moulton's review of dispatch records, it appears that the initial phone call concerning Levier's presence in the Shop 'N Save parking lot with a gun was received at 3:08 p.m., and that the first SPD officers began to arrive at the scene within a few minutes. *Id.* ¶ 245. Moulton's second-in-command for patrol, Captain Angelo Mazzone, arrived at the scene at 3:11 p.m., or within three minutes of the initial 911 call. *Id.* ¶ 246. By 3:16 p.m., eight minutes after the initial 911 call, Captain Marla St. Pierre had radioed to dispatch that the man was James Levier, whom she knew, and that he was deaf. Town Defendants' SMF ¶ 247; Moulton Aff. ¶ 3. From the time of Moulton's arrival on the scene to the point at which Levier was shot, approximately thirty-eight minutes elapsed. Town Defendants' SMF ¶ 249; Moulton Aff. ¶ 10.[66]

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[64] The Plaintiffs deny this statement, Plaintiffs' Opposing SMF/Town ¶ 238; however, their denial is supported by cross-reference to a statement with respect to which the Town Defendants' motion to strike was granted and is on that basis disregarded.

[65] The Plaintiffs qualify this statement, asserting that Chief Moulton knew that two K-9 units were on the scene at least half an hour before Levier was fatally shot, yet gave no commands to either dog trainer in violation of reasonable police practices under the circumstances. Plaintiffs' Opposing SMF/Town ¶ 242; Moulton Dep. at 32, 72; Walton Aff. ¶¶ 16-17, 19.

[66] The Plaintiffs qualify this statement, asserting that Moulton was not called out of a routine briefing meeting he was attending at Scarborough City Hall, left to return to the police station at 3:15 or 3:20 p.m., and when he arrived at the scene, instead of establishing a plan to use a sign-language interpreter, spent time briefing the town manager, the town selectman and the South Portland chief of police on the situation. Plaintiffs' Opposing SMF/Town ¶ 249; Moulton Dep. (continued…)

The objective of police at the scene initially was to contain Levier to ensure he did not enter any of the nearby buildings, which were occupied by a large number of civilians. Town Defendants' SMF ¶ 251; Plaintiffs' Opposing SMF/Town ¶ 251. As officers from the SPD and other agencies arrived at the scene, they were confronted with the sight of a man marching back and forth in a parking lot with a lever-action high-powered rifle in his hands. Town Defendants' SMF ¶ 252; Moulton Aff. ¶ 5.

The plaza contains not only a Shop 'N Save but also a number of other small businesses, including a bank, a restaurant and a day-care center in the immediate vicinity of the parking lot. Town Defendants' SMF ¶ 253; Plaintiffs' Opposing SMF/Town ¶ 253. The officers had to shut down the access road to prevent vehicles from driving into the parking lot and also had to deal with bystanders climbing up on nearby snow banks to see what was happening. *Id.* ¶ 254. Because the Shop 'N Save was filled with shoppers, the officers contacted the store to request that its employees take customers to the rear of the store and keep them away from the front window, where they were gathering to watch events in the parking lot. *Id.* ¶ 255. They also had to evacuate a nearby day-care center, as the time was approaching when parents would start arriving to pick up their children. *Id.* ¶ 256. Even traffic on Route 1, a main thoroughfare, was in range of the high-powered rifle being carried by the gunman. Town Defendants' SMF ¶ 258; Moulton Aff. ¶ 5.[67]

Although several officers had taken up positions behind automobiles in the parking lot so as to place themselves between Levier and the business entrances, there was no way of knowing throughout the event

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at 52, 136. The Plaintiffs further assert that a sign-language interpreter arrived shortly after Moulton did, and Moulton knew that one of his officers had reported that Levier was trying to build up his courage. Plaintiffs' Opposing SMF/Town ¶ 249; Moulton Dep. at 56, 138, 141-42. The Plaintiffs' additional assertion that because of the briefing it was at least a half-hour before Moulton established a command post, Plaintiffs' Opposing SMF/Town ¶ 249, is disregarded inasmuch as it is not supported by the citations given.

[67] The Plaintiffs deny this statement by reference to their qualification to paragraph 44 of the Town Defendants' SMF, (continued…)

whether he would attempt to leave the perimeter they had established around him. Town Defendants' SMF ¶ 259; Plaintiffs' Opposing SMF/Town ¶ 259. As a result of the range of Levier's high-powered rifle and the proximity of the parking lot to a number of businesses and to Route 1, there was always a chance that Levier would have a target within range had he suddenly chosen to shoot, even while contained within the police perimeter. Town Defendants' SMF ¶ 261; Moulton Aff. ¶ 10.[68] Any person who could be seen by Levier for purposes of communicating with him also presented a possible target for him. Town Defendants' SMF ¶ 265; Moulton Aff. ¶ 11. Given the open nature of the parking lot, Levier's agitated state and his possession of a high-powered rifle, the senior leaders on the scene were faced with a very complex problem. Town Defendants' SMF ¶ 264; Moulton Aff. ¶ 11.

Based on his review of the Sanborn Videotape, Chief Moulton believes those SPD officers who fired their weapons at Levier acted in accordance with their training and the SPD's use of force policy. Town Defendants' SMF ¶ 277; Moulton Aff. ¶ 13.

Plaintiffs' Opposing SMF/Town ¶ 258; however, the material cited does not effectively controvert the statement inasmuch as it addresses whether Levier's conduct was threatening , not whether Route 1 was in range of his rifle, *id*. ¶ 44.

[68] The Plaintiffs deny this statement by reference to their qualification to paragraph 44 of the Town Defendants' SMF, Plaintiffs' Opposing SMF/Town ¶ 261; however, the material cited does not effectively controvert the statement inasmuch as it addresses whether Levier's conduct was threatening , not whether he would have a target within range had he suddenly chosen to shoot, *id*. ¶ 44.

B. State S/J Motion

1. State Defendants' Motion To Strike

The State Defendants seek to strike paragraphs 94 through 129 of the Plaintiffs' statement of additional facts on grounds, *inter alia*, of irrelevance, asserting that virtually all of the proferred statements relate solely to the potential liability of their co-defendants (the Town Defendants). *See* State Defendants' Motion To Strike. I agree.

Certain statements, on their face, address only the alleged acts and omissions of the Town Defendants. *See* Plaintiffs' Statement of Additional Material Facts ("Plaintiffs' Additional SMF/State"), contained at pages 16-27 of Plaintiffs' Opposing SMF/State, ¶¶ 99, 107, 113, 117, 120, 128. The majority of the remaining statements not only omit mention of the State Defendants but also, from the context of the expert reports cited, fairly can be construed to pertain solely to the Town Defendants. *See* Letter dated June 13, 2003 from Thomas M. Walton to Mr. Dan Lilley, attached to Walton Aff., at 3 (faulting SPD chief Moulton, "the apparent person in authority at the scene," for failure to (i) establish "command and control" of scene, (ii) devise plan of action (including plan to use interpreter), (iii) give orders to police at scene (including K-9 units) or (iv) establish effective communications among officers; noting, "Since a police organization is a quasi-military operation and requires command and orders, this operation failed to meet reasonable standards, since no command or control was established nor were orders ever given."); Letter dated June 11, 2003 from R. Paul McCauley, Ph.D., BCFE, to Mr. Daniel G. Lilley, attached to Affidavit of R. Paul McCauley, Ph.D., Exh. 10 to Plaintiffs' Opposing SMF/Town, at 5-6, ¶¶ 6-7 ("It was imperative for the Scarborough Chief of Police to know what resources he had available on site, including the non-lethal weapons. . . . Failure of the Scarborough police command/policymaker at the

scene to actively and timely engage in non-lethal force resulted in Mr. Levier's death by indifference."); *see also* Plaintiffs' Additional SMF/State ¶¶ 94-98, 101-06, 108-12, 114, 121-27, 129.

The State Defendants concede that paragraph 100 of the Plaintiffs' Additional/SMF pertains to them. *See* State Defendants' Motion To Strike at 2. In addition, giving the Plaintiffs the benefit of the doubt, I find that paragraphs 115, 116, 118 and 119 (which address the actions of tactical officers in the inner perimeter) bear on the State Defendants' role in the events of March 16, 2001. *See* Plaintiffs' Additional SMF/State ¶¶ 115-16, 118-19. The State Defendants lodge one additional objection arguably pertinent to these paragraphs: that they should be stricken inasmuch as they contain more than one factual assertion and thus are not "separate, short and concise" as required by Local Rule 56(e). *See* State Defendants' Motion To Strike at 1. That objection is overruled.

In accordance with the foregoing, the State Defendants' Motion To Strike is granted as to paragraphs 94-99, 101-114, 117 and 120-29, and denied as to paragraphs 100, 115-16 and 118-19.

2. Facts Pertaining to State S/J Motion

Taking into account the above disposition of the State Defendants' Motion to Strike, the parties' statements of material facts, credited to the extent either admitted or supported by record citations in accordance with Local Rule 56 and viewed in the light most favorable to the Plaintiffs as the non-moving parties, reveal the following relevant to this recommended decision:

Susan Vincent and Christina Cookson, personal representatives of the Estate of James Levier, are Levier's daughters. Amended Statement of Material Fact by the State of Maine Defendants, Maine State Police, Michael R. Sperry and Mark A. Sperrey ("State Defendants' SMF") (Docket No. 15) ¶ 1; Plaintiff's Opposing SMF/State ¶ 1. Levier, a resident of Scarborough, was born on June 23, 1940. *Id.* ¶ 2. Having lost his hearing while a young child, he attended the Baxter School for the Deaf in Falmouth,

Maine, from 1949-60. *Id*. Levier was prescribed medication for anxiety in 2000 and expressed suicidal thoughts to family members all his life. *Id*. ¶ 3.

At approximately 3 p.m. on March 16, 2001 Levier drove his 1996 Chevrolet Tahoe van into the parking lot at Shop 'N Save Plaza near Route 1 in Scarborough, Maine. *Id*. ¶ 14. He turned on the van's hazard lights, got out of the vehicle and began walking back and forth in the parking lot while carrying a rifle. *Id*. ¶ 15.

On March 16, 2001 Trooper Sperrey was returning from a training exercise when he heard radio traffic about an incident in Scarborough. *Id*. ¶¶ 9, 17. Initially Trooper Sperrey, who was traveling in a car with Trooper Baker, heard only that the incident involved someone with a firearm. *Id*. ¶ 18. MSP Tactical Team commander Golden instructed Troopers Sperrey and Baker to respond to the scene of the incident in Scarborough. *Id*. ¶ 19. Once at the Shop 'N Save parking lot Trooper Sperrey donned protective gear, including a protective vest. *Id*. ¶ 20. A police officer at the scene told Trooper Sperrey that the man with the gun was deaf. *Id*. ¶ 21. Trooper Sperrey saw the man in the parking lot and was struck by how "very close" he was to him. *Id*. ¶ 22.[69] Troopers Sperrey and Baker reported to Golden, who instructed Trooper Sperrey to obtain a shield from Golden's truck. *Id*. ¶¶ 23-24. After obtaining the shield, Trooper Sperrey reported back to Golden and took over his position behind the trunk of a Scarborough cruiser. *Id.* ¶ 25. Trooper Sperrey also took over Golden's scope-mounted Remington 700-series .233 caliber bolt-action sniper rifle. *Id*. ¶ 26.

With Baker behind him, Trooper Sperrey watched Levier walk continuously back and forth in the parking lot. *Id*. ¶ 27. Trooper Sperrey does not recall how long he was in position, but he observed

[69] The Plaintiffs qualify this statement, admitting it only for Trooper Sperrey's state of mind or, in the alternative, denying (continued…)

Levier's movements through the scope of his rifle while kneeling behind the trunk of the Scarborough cruiser. State Defendants' SMF ¶ 28; Trooper Sperrey Dep. at 34-36, 47.[70] Trooper Sperrey did not gesture to, or speak with, Levier on March 16, 2001. State Defendants' SMF ¶ 29; Plaintiffs' Opposing SMF/State ¶ 29. While Trooper Sperrey could see Levier's van, he could not see any writing on it. *Id*. ¶ 30.[71] Trooper Sperrey lost sight of Levier occasionally when Levier walked behind his van, but Levier would reemerge and continue walking back and forth in the parking lot. *Id*. ¶ 31. As Levier walked, he held a rifle in an upright position. *Id*. ¶ 32. On one occasion, Trooper Sperrey saw the barrel of Levier's rifle go "from the sky down past the parallel towards the ground then back up." State Defendants' SMF ¶ 33; Trooper Sperrey Dep. at 52.[72]

Levier stopped and lowered his rifle when he was approximately forty to sixty yards from Trooper Sperrey. State Defendants' SMF ¶ 34; Plaintiffs' Opposing SMF/State ¶ 34. Levier aimed his rifle in Troopers Sperrey's and Baker's direction. State Defendants' SMF ¶ 35; Trooper Sperrey Dep. at 55.[73]

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it. *See* Plaintiffs' Opposing SMF/State ¶ 22. Inasmuch as the statement on its face reflects that it is limited to Trooper Sperrey's subjective perceptions, I deem it admitted.

[70] The Plaintiffs qualify this statement, noting that Trooper Sperrey kept Levier in the crosshairs of the sights of his rifle for the entire time and Sperrey's "sight picture,"or point of aim, focused on the area between Levier's eyes. Plaintiffs' Opposing SMF/State ¶ 28; Trooper Sperrey Dep. at 35-36, 60.

[71] The Plaintiffs qualify this statement, admitting it only for Trooper Sperrey's state of mind. Plaintiffs' Opposing SMF/State ¶ 30.

[72] The Plaintiffs qualify this statement, noting that Levier lowered his gun momentarily, a movement that police officers at the scene attributed to his being tired. Plaintiffs' Opposing SMF/State ¶ 33; Ramsdell Aff. ¶ 4; Deposition of Joseph Giacomantonio, filed by Plaintiffs, at 13-14.

[73] The Plaintiffs qualify this statement, asserting that the Sanborn Videotape shows Levier leveling his gun in Troopers Sperrey's and Baker's direction at approximately 4:16:10 p.m. but turning his head ninety degrees and looking toward police officers on his right at approximately 4:16:16 p.m., glancing toward those officers in front of him and to his left at approximately 4:16:18 p.m., then again turning his head approximately ninety degrees, toward police officers on his right, at approximately 4:16:21 p.m., before he was shot at approximately 4:16:22 p.m. Plaintiffs' Opposing SMF/State ¶ 35; Sanborn Videotape. In addition, the Plaintiffs point out that Levier did not fire his gun at Trooper Sperrey although Trooper Sperrey pulled the trigger of his malfunctioning gun at Levier not once, but three times, and (per the testimony of Greenleaf) Levier had earlier demonstrated by his actions and words that he did not want to shoot at the police but wanted the police to shoot him. Plaintiffs' Opposing SMF/State ¶ 35; Trooper Sperrey Dep. at 57-60; Greenleaf Dep. at 8-10. The Plaintiffs also state that (i) at the time Levier was first shot in the right shoulder, his rifle was pointing straight ahead with his head turned at almost a ninety-degree angle to the right of his rifle, and (ii) the gunshot caused Levier to (continued…)

Trooper Charles Granger was next to Troopers Sperrey and Baker when Levier aimed his rifle in their direction. State Defendants' SMF ¶ 36; Trooper Sperrey Dep. at 17, 55-56.[74] At his deposition, Trooper Sperrey testified: "I felt that I was looking right down the barrel of [Levier's] rifle." State Defendants' SMF ¶ 37; Plaintiffs' Opposing SMF/State ¶ 37.[75] Trooper Sperrey attempted to fire his rifle at Levier but could not as a result of his failure to disengage the safety mechanism completely. *Id*. ¶ 38. He attempted to correct this problem by disengaging the safety and reseating the bolt-carrier group in the rifle. State Defendants' SMF ¶ 39; Trooper Sperrey Dep. at 58-60.[76] As Trooper Sperrey attempted to disengage the safety and reseat the bolt-carrier group, Baker said: "Shoot." State Defendants' SMF ¶ 40; Trooper Sperrey Dep. at 68.[77] Trooper Sperrey testified that the amount of time that elapsed between the time Levier aimed his rifle at him and the time Trooper Sperrey fired "felt like only seconds." State Defendants' SMF ¶ 41; Plaintiffs' Opposing SMF/State ¶ 41.[78]

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throw his weapon into the air and spin to the right, effectively disarming him, and thus there was no need to shoot him further. Plaintiffs' Opposing SMF/State ¶ 35; Walton Aff. ¶¶ 25-26. The Plaintiffs further characterize the foregoing as evidencing that "Levier did not keep his gun trained on Trooper Sperrey or any officer in particular in the twelve seconds before he was shot," Plaintiffs' Opposing SMF/State ¶ 35; however, the videotape makes clear only that Levier's attention (as opposed to his weapon) was not focused on any particular officer in the seconds before the fatal shooting. Inasmuch as appears from the videotape, Levier's rifle remained pointed in the direction of the officers during that time interval.

[74] The Plaintiffs qualify this statement for the same reasons given in response to paragraph 35 of the State Defendants' SMF. Plaintiffs' Opposing SMF/State ¶ 36.

[75] The Plaintiffs qualify this statement, admitting it only for Trooper Sperrey's state of mind or, in the alternative, denying it. Plaintiffs' Opposing SMF/State ¶ 37. Inasmuch as the statement on its face reflects that it is limited to Trooper Sperrey's subjective perceptions, I deem it admitted.

[76] The Plaintiffs qualify this statement, noting that after disengaging the safety Trooper Sperrey attempted to fire again, but his gun still did not fire because the bolt-carrier group was not fully seated and the lever on the bolt was not fully down. Plaintiffs' Opposing SMF/State ¶ 39; Trooper Sperrey Dep. at 59-60.

[77] The Plaintiffs qualify this statement, noting that Trooper Sperrey actually had two failed attempts at firing the rifle. Plaintiffs' Opposing SMF/State ¶ 40; Trooper Sperrey Dep. at 57-60.

[78] The Plaintiffs qualify this statement, admitting it only for Trooper Sperrey's state of mind or, in the alternative, denying it. *See* Plaintiffs' Opposing SMF/State ¶ 41. Inasmuch as the statement on its face reflects that it is limited to Trooper Sperrey's subjective perceptions, I deem it admitted.

At about the same time that Trooper Sperrey fired at Levier, his "sight picture" changed because the cruiser moved. State Defendants' SMF ¶ 42; Trooper Sperrey Dep. at 60.[79] When the cruiser moved, Trooper Sperrey's "sight picture," or point of aim, moved from an area between Levier's eyes to an area between his collarbone, sternum and right nipple. State Defendants' SMF ¶ 44; Plaintiffs' Opposing SMF/State ¶ 44. No one ever told Trooper Sperrey that his shot fatally wounded Levier. *Id*. ¶ 45.[80] Asked why he fired at Levier, Trooper Sperrey testified: "Because I felt he was going to shoot me." *Id*. ¶ 46. Asked if he felt he had any other options to avoid being hurt, Trooper Sperrey testified: "No." *Id*. ¶ 47.

When Trooper Sperrey fired his rifle, he estimated Levier was approximately 120 to 180 feet away from him. *Id*. ¶ 49. According to a scaled diagram of the Shop 'N Save Plaza, Levier was approximately 100 feet away from Trooper Sperrey when Trooper Sperrey fired. *Id*. ¶ 50. Asked why he used deadly force against Levier, Trooper Sperrey testified: "Because at that moment in time I was protecting myself and the people behind me from his imminent use of deadly force." *Id*. ¶ 51.[81] Trooper Sperrey was not aware of what others at the scene might have been doing to address the situation Levier presented because he was focused on his "own incident." *Id*. ¶ 52. After he fired his rifle at Levier, Trooper Sperrey heard the sound of other gunshots. *Id*. ¶ 53.

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[79] The Plaintiffs qualify this statement, noting that Trooper Sperrey thought someone had actually bumped into the cruiser, which caused his gun resting on its trunk to move. *See* Plaintiffs' Opposing SMF/State ¶ 42; Trooper Sperrey Dep. at 61.

[80] The Plaintiffs qualify this statement, as well as paragraphs 46-47 of the State Defendants' SMF, admitting them only for Trooper Sperrey's state of mind or, in the alternative, denying them. *See* Plaintiffs' Opposing SMF/State ¶¶ 45-47. Inasmuch as these statements clearly are limited to Trooper Sperrey's subjective perceptions, I deem them admitted.

[81] The Plaintiffs qualify this statement, admitting it only for Trooper Sperrey's state of mind or, in the alternative, denying it. *See* Plaintiffs' Opposing SMF/State ¶ 51. Inasmuch as the statement on its face reflects that it is limited to Trooper Sperrey's subjective perceptions, I deem it admitted.

Colonel Sperry has worked for the MSP for 26 years and was its chief at the time of Levier's death. *Id*. ¶ 4. Although not present at the scene of the Levier shooting, he was told about it by Robert Williams, major in charge of operations for the MSP. *Id*. ¶ 5. As chief of the MSP, Colonel Sperry is ultimately responsible for ensuring that department personnel receive all training required by the Maine Academy. *Id*. ¶ 6. The Maine Academy's board of trustees establishes mandatory training requirements for the MSP. *Id*. ¶ 7. A training unit within the MSP ensures that department personnel receive all training mandated by the Maine Academy. *Id*. Lieutenant Charles Howe is in charge of the training unit and is the person with whom Colonel Sperry communicates to ensure that department personnel receive all training mandated by the Maine Academy. *Id*. ¶ 8. Trooper Sperrey is a Maine Academy graduate and has been a member of the MSP Tactical Team since January 1999. *Id*. ¶ 9. There are twenty-two members of the MSP Tactical Team who are trained to respond to situations that an "everyday police officer" is not. State Defendants' SMF ¶ 11; Trooper Sperrey Dep. at 5.[82] The MSP Tactical Team uses a chain of command that places a Tactical Team commander, assisted by two Tactical Team leaders, in overall charge of the team. State Defendants' SMF ¶ 12; Plaintiffs' Opposing SMF/State ¶ 12. The commander of the MSP Tactical Team on March 16, 2001 was Golden. *Id*. ¶ 13.

Plaintiffs' expert Walton concluded that standard operating procedures were breached, *inter alia*, in that there were two tactical teams on site, one from the MSP and one from Scarborough, with no efforts at coordination or communication between the two, including some officers not having radios. Plaintiffs' Additional SMF/State ¶ 115; Reply to Plaintiffs' Statement of Additional Facts by State of Maine

[82] The Plaintiffs qualify this statement, noting that Trooper Sperrey could not remember receiving any specific training in how the ADA relates to hearing-impaired people and did not believe that there were any formal training seminars on this issue. Plaintiffs' Opposing SMF/State ¶ 11; Trooper Sperrey Dep. at 8. In addition, the Plaintiffs note that Colonel Sperry, head of the MSP, has not taken any course involving people with hearing and speech impairment in law enforcement. (continued…)

Defendants Maine State Police, Colonel Michael R. Sperry and Trooper Mark A. Sperrey ("State Defendants' Reply SMF") (Docket No. 29) ¶ 115. According to Walton, it was also a breach of standard operating procedure that the tactical officers did not take control of the inner perimeters as they should have. *Id*. ¶ 116. Walton concluded that not establishing effective inner and outer perimeters within one hour and six minutes was a breach of standard operating procedures and reasonable operating procedures. *Id*. ¶ 118. In Walton's opinion, the police did not set up the inner perimeter in a such a way as to avoid potential cross-fire, and this failure contributed to Levier's death by causing the confusion in which the police officers behind Levier wrongly believed that he had fired at the officers in front of him when he had not. *Id*. ¶ 119.[83]

Plaintiffs' Opposing SMF/ State ¶ 11; Deposition of Colonel Michael Sperry, filed by Plaintiffs, at 3-4, 26.

[83] The Plaintiffs further assert that "[a]ll police officers involved report that they had no direct orders on what to do the whole time that they were on the scene." Plaintiffs' Additional SMF/State ¶ 100. As the State Defendants point out, *see* State Defendants' Reply SMF ¶ 100, this statement is not supported by the citations given. It accordingly is disregarded.

III. Analysis

A. Count I: ADA/Rehabilitation Act

The Plaintiffs assert in Count I of their complaint that the Town, by and through the SPD, the State, by and through the MSP, and their agents excluded Levier, by reason of his disability, from benefits of their services, programs and/or activities in violation of the Rehabilitation Act and Title II of the ADA. *See* Complaint ¶ 46.[84] They allege that the Town, the MSP and their agents discriminated against Levier by virtue of their misperception of the effects of his disability as criminal activity and/or their failure to reasonably accommodate his disability in the course of their interaction with him. *See id.* ¶ 47.

To make out a claim pursuant to Title II of the ADA, a plaintiff must show that (i) he or she is a qualified individual with a disability, (ii) he or she was excluded from participation in, or denied the benefits of, a public entity's services, programs or activities or was otherwise discriminated against by a public entity, and (iii) such exclusion or denial of benefits was by reason of the plaintiff's disability. *See, e.g., Badillo-Santiago v. Andreu-Garcia*, 70 F. Supp.2d 84, 89 (D.P.R. 1999). For purposes of the instant motions, the Defendants acknowledge that the Plaintiffs satisfy the first of these elements. *See* Town S/J Motion at 9; State S/J Motion at 4.

To prove a claim pursuant to the Rehabilitation Act, a plaintiff must establish that (i) he or she is a "handicapped individual," (ii) he or she is "otherwise qualified" for participation in a program, (iii) the program receives "federal financial assistance," and (iv) he or she was "denied the benefits of" or "subject to discrimination" under the program. *See, e.g., Darian v. University of Mass. Boston*, 980 F. Supp. 77,

[84] While the Plaintiffs occasionally refer to the State of Maine as a defendant, it is not (as the State Defendants point out, *see* State S/J Motion at 13 n.8) a named defendant in this action.

84-85 (D. Mass. 1997). For purposes of the instant motions, the Defendants acknowledge that the Plaintiffs satisfy the first three of these elements. *See* Town S/J Motion at 9; State S/J Motion at 4.

The Defendants seek summary judgment as to Count I on grounds that (i) the individual defendants are not amenable to suit pursuant to the ADA, (ii) with respect to this and all other counts of the Complaint, the SPD, as a department of a municipality, is not a separate entity that can sue and be sued, and (iii) the Defendants neither deprived Levier of a benefit to which he was entitled nor discriminated against him based on his disability. *See* Town S/J Motion at 8-10; State S/J Motion at 2-5.

To the extent the Plaintiffs target the individual defendants in Count I, the Defendants correctly note that they miss the mark. In the absence of a definitive ruling from the First Circuit, this court has followed other circuit courts of appeals in construing the ADA not to authorize a cause of action against individuals. *See, e.g., Gough v. Eastern Me. Dev. Corp.*,172 F. Supp.2d 221, 224-25 (D. Me. 2001). On that basis defendants Moulton, Moore, Ramsdell, Colonel Sperry and Trooper Sperrey are entitled to summary judgment as to Count I.

As the Town Defendants observe, *see* Town S/J Motion at 9, the SPD is entitled to summary judgment as to all counts of the Complaint on the ground that it is an integral part of the Town and not separately amenable to suit, *see* Fed. R. Civ. P. 17(b) (capacity to sue and be sued, with respect to parties other than individuals and corporations, is determined (with exceptions not here relevant) by the law of the state in which the district court is held); 30-A M.R.S.A. § 2002 ("The residents of a municipality are a body corporate which may sue and be sued, appoint attorneys and adopt a seal."); Scarborough, Me., Ordinances ch. 301, art. V, § 501, *available at* http://www.scarborough.me.us/townhall/manager/ordinances.html (police chief and policemen are appointed by town manager, except to extent town manager delegates appointive power to police chief); *see also,*

e.g., Fanelli v. Town of Harrison, 46 F. Supp.2d 254, 257 (S.D.N.Y. 1999) ("Plaintiff has sued both the Town of Harrison and its Police Department. Municipalities, like Harrison, are included among those persons to whom § 1983 applies. However, pursuant to Federal Rule of Civil Procedure 17, New York law governs the capacity of a police department to sue or be sued. Under New York law, departments such as the Town of Harrison Police Department, which are merely administrative arms of a municipality, do not have a legal identity separate and apart from the municipality and cannot sue or be sued. The Town of Harrison is named as a Defendant in this action, and the Town is the real party in interest.") (citations omitted); *Cronin v. Town of Amesbury*, 895 F. Supp. 375, 383 (D. Mass. 1995), *aff'd*, 81 F.3d 257 (1st Cir.1996) (entities that are integral part of town, such as police department, lack legal identity apart from town and therefore are not properly named as defendants in section 1983 suit). The Town, a named defendant, is the proper defendant for purposes of the alleged acts and omissions of the SPD.

The Defendants' third and final ground for summary judgment as to Count I implicates the substantive law underpinning that claim. Federal courts generally have recognized two distinct types of disability discrimination claims arising out of arrests:

> The first is that police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity. The second is that, while police properly investigated and arrested a person with a disability for a crime unrelated to that disability, they failed to reasonably accommodate the 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 v. Enright, 186 F.3d 1216, 1220-21 (10th Cir. 1999) (citations omitted). This court has some experience with both types, *see Jackson v. Town of Sanford*, 3 A.D. Cases 1366, 1994 WL 589617 (D. Me. Sept. 23, 1994), at *1, *6 (plaintiff arrested because of his disability); and *Barber v. Guay*, 910 F.

Supp. 790, 802 (D. Me. 1995) (plaintiff claimed he was denied proper police protection and fair treatment because of his psychological and alcohol problems).

The Plaintiffs posit that they make out a viable claim of wrongful arrest inasmuch as police mistook Levier's attempts to communicate in ASL – which can appear aggressive to hearing individuals – as mimicking and refusal to cooperate. *See* Plaintiffs' S/J Opposition at 12-13. The Plaintiffs suggest that had the officers understood Levier's gestures, they would have been able to respond to a window of opportunity for negotiation leading to peaceful resolution of the situation. *See id*.

As an initial matter, there is no cognizable evidence that the State Defendants misconstrued Levier's attempts to communicate as a refusal to cooperate. The State Defendants hence are entitled to summary judgment as to any wrongful-arrest ADA claim against them. In any event, as the Defendants contend, *see* Reply to Plaintiff's [sic] Opposition to Motion for Summary Judgment by Town of Scarborough, Scarborough Police Department, Moulton, Moore and Ramsdell ("Town S/J Reply") (Docket No. 24) at 3; Reply to Plaintiffs' Opposition to Motion for Summary Judgment by State of Maine Defendants Maine State Police, Colonel Michael R. Sperry and Trooper Mark A. Sperrey ("State S/J Reply") (Docket No. 28) at 3-4, even assuming *arguendo* that police did misperceive Levier's attempts to communicate as refusals to cooperate, a trier of fact could not draw a reasonable inference that they "arrested" him because of those misperceptions. While one could speculate that the standoff might have been resolved differently (even peaceably) had one or more officers been proficient in ASL, one can only reasonably conclude that the officers trained their weapons on Levier because he was carrying a high-powered rifle in a crowded shopping plaza – not because of misperceptions stemming from his disability.

Levier's case is in this respect materially distinguishable from *Jackson*, in which officers arrested the plaintiff for OUI when they mistakenly perceived his slurred speech and unsteadiness resulting from a brain

injury as impairment caused by drug or alcohol use. *Compare Jackson*, 1994 WL 589617, at *2; *see also Gohier*, 186 F.3d at 1222 (noting, in case in which police shot mentally ill individual who advanced on them with knife, "Officer Enright did not misperceive lawful conduct caused by Mr. Lucero's disability as criminal activity and then arrest him for that conduct. . . . Enright used force on Lucero not to effect an arrest, but to defend himself from a perceived threat.").

The Defendants accordingly are entitled to summary judgment as to the wrongful-arrest prong of Count I.

This leaves the reasonable-accommodations prong, with respect to which the Plaintiffs press two arguments: that the Defendants failed (i) to reasonably accommodate Levier's disability during the standoff at Shop 'N Save and (ii) to adopt policies and procedures to secure an interpreter in an emergency situation or train their officers with respect to dealing with hearing-impaired persons. *See* Plaintiffs' S/J Opposition at 3.

As the Plaintiffs themselves observe, the critical question for purposes of this aspect of their ADA claim is whether there is a triable issue that "such exigent circumstances existed [as] would temporarily lift the normal ADA requirement of reasonable accommodations[.]" *Id*. at 4 (citing *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000) ("Once the area was secure and there was no threat to human safety, the Williamson County Sheriff's deputies would have been under a duty to reasonably accommodate Hainze's disability[.]").

In the Plaintiffs' view, there are triable issues material to this question, including whether (i) Levier posed a threat to human safety, inasmuch as he was marching with his gun pointed skyward, not threatening officers or civilians, (ii) whether, if such a threat did exist, the scene had been secured and adequate precautions put in place to permit a sign-language interpreter to have been used safely, (iii) whether the

police's failure to establish proper policies and procedures relating to obtaining an interpreter contributed to Levier's death, and (iv) whether a failure to train officers in dealing with hearing-impaired suspects, including potential cultural miscommunication and misinterpretation, resulted in Levier's efforts to negotiate being ignored. *See id*.

The Plaintiffs note that *Hainze* involved a confrontation lasting only a matter of seconds while, in this case, an hour and sixteen minutes elapsed before Levier was shot, in their view affording time for reasonable accommodations to have been made. *See id*. at 3-4; *see also Hainze*, 207 F.3d at 801 (twenty-second confrontation).

The Defendants do not contest application of the *Hainze* standard; rather, they suggest (in essence) that there is no triable issue whether, prior to the shooting of Levier, the exigency had ended inasmuch as no reasonable fact-finder could conclude that it had. *See* Town S/J Reply at 2; State S/J Reply at 2; *see also* Town S/J Motion at 10; State S/J Motion at 5. The Defendants have the better of the argument.

The fact that Levier did not literally point his rifle at anyone until the final seconds before his death – even going so far as to communicate that he would not shoot the police but rather wanted them to shoot him – does not raise a triable issue whether a threat to human safety existed. The situation, in which a man with a history of psychiatric treatment was marching with a high-powered rifle at midday in a crowded shopping plaza, inherently posed a safety threat. No one could know whether he would continue marching with his rifle shouldered, lay it down or (as he eventually did) decide to aim it at someone. No one could know whether he might decide to fire his weapon or whether, even if he did not, his gun might discharge accidentally. The stores of the plaza, filled with shoppers, and even Route 1 were in range of his rifle. There never came a point, prior to the standoff's tragic end, when "the area was secure and there was no threat to human safety[.]" *Hainze*, 207 F.3d at 802.

The Plaintiffs suggest that there is more to the analysis, positing that even if a threat to human safety persisted, there remains a triable issue whether police had sufficient time during the relatively lengthy standoff to accommodate Levier's disability (for example, by bringing the interpreter safely within close enough range to communicate). *See* Plaintiffs' S/J Opposition at 4. In so arguing, they demand more than the ADA requires.

While, as it happens, the exigency in *Hainze* was of brief duration, the rule of that case is that an exigency excuses the need for police to afford reasonable accommodations pursuant to the ADA. *See Hainze*, 207 F.3d at 801 ("[W]e hold 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. . . . While the purpose of the ADA is to prevent the discrimination of [sic] disabled individuals, we do not think Congress intended that the fulfillment of that objective be attained at the expense of the safety of the general public."). As noted above, no reasonable fact-finder could find that both of the conditions set forth in *Hainze* (securing of area, ensuring of no threat to human life) were met at any point prior to the end of the standoff with Levier. The ADA accordingly did not oblige the Defendants to accommodate Levier's hearing disability during the duration of the standoff.

For the foregoing reasons, the Defendants are entitled to summary judgment as to Count I.

B. Count II: 42 U.S.C. § 1985

In Count II of the Complaint, the Plaintiffs assert that the Defendants acted in concert, agreeing to commit acts against Levier denying him the protections of the First, Second, Fourth, Fifth and Fourteenth amendments to the United States Constitution, in violation of 42 U.S.C. § 1985. *See* Complaint ¶ 51. The Defendants seek summary judgment on grounds that (i) although the Plaintiffs omit to specify the subsection

pursuant to which this claim is brought, only subsection (3) arguably is implicated, and (ii) the Plaintiffs fail even to allege (let alone substantiate) the presence of the type of invidious discriminatory animus necessary to sustain a subsection (3) claim. *See* Town S/J Motion at 10-11; State S/J Motion at 5-6. The Plaintiffs offer no argument in opposition to summary judgment as to this count, *see generally* Plaintiffs' S/J Opposition, seemingly impliedly conceding the Defendants' entitlement to prevail with respect to it.

In any event, I find the Defendants' arguments meritorious. As the First Circuit recently has noted:

> Section 1985 has three subsections, each of which sets forth a distinct cause of action. . . . [Section] 1985(1) protects federal officers from those conspiring to prevent (by force, intimidation, or threat) the officer from discharging his or her duties; and § 1985(2) protects parties and witnesses in federal court from conspiracies to deter them from appearing or testifying. Section 1985(3) is broader in its reach and prohibits, in general terms, conspiracies to violate civil rights.

Donahue v. City of Boston, 304 F.3d 110, 122 n.9 (1st Cir. 2002). In this case, subsection (3) is indeed the only subsection arguably implicated. "Under § 1985(3), a conspiracy must be motivated by some racial, or perhaps otherwise class-based, invidiously discriminatory animus." *Torres-Rosado v. Rotger-Sabat*, 335 F.3d 1, 14 (1st Cir. 2003) (citations and internal quotation marks omitted). No such motivation is alleged, *see* Complaint ¶¶ 14-52, nor can any such animus on the part of any of the Defendants reasonably be inferred from the cognizable evidence.

The Defendants hence are entitled to summary judgment as to Count II.

C. Count III: 42 U.S.C. § 1983

In Count III of the Complaint, the Plaintiffs seek redress pursuant to 42 U.S.C. § 1983 for Moore's, Ramsdell's and Trooper Sperrey's alleged violations of Levier's (i) First Amendment free speech rights, (ii) Fourth Amendment rights to freedom from arrest without probable cause and the use of excessive force, (iii) substantive and procedural due-process rights, and (iv) right to bear arms. Complaint ¶¶ 54-60.

They further allege that SPD chief Moulton is liable for Moore's and Ramsdell's asserted constitutional violations by virtue, *inter alia*, of his "grossly negligent policies and customs in the recruitment, training, supervision and discipline of police officers especially with respect to treatment of disabled individuals," *id.* ¶ 62, and that the Town and the MSP are liable for the alleged constitutional violations by virtue of policies and customs alleged to have been the moving force behind those transgressions, *id*. ¶¶ 65-68.

The Defendants seek summary judgment as to this count with respect to Ramsdell, Moore and Trooper Sperrey on the bases that (i) the only viable constitutional claim stated is for use of excessive force in violation of the Fourth Amendment, and (ii) as to that claim, qualified immunity is warranted inasmuch as, *inter alia*, the officers committed no underlying violation of that right. *See* Town S/J Motion at 11-14; State S/J Motion at 6-8. They seek summary judgment with respect to the Town on the basis of the asserted adequacy of its policies, procedures and training regarding the use of force and, with respect to supervisors Moulton and Colonel Sperry, on the basis of the absence of "deliberate indifference" on the part of either supervisor and the lack of any underlying constitutional violation on the part of a subordinate. *See* Town S/J Motion at 15-17; State S/J Motion at 13-14; Town S/J Reply at 6-7.[85]

In response, the Plaintiffs clarify that they continue to press two constitutional claims pursuant to section 1983: their Fourth Amendment claims for arrest without probable cause and use of excessive force. *See* Plaintiffs' S/J Opposition at 15. They contend that triable issues remain whether the individual defendants collectively are entitled to qualified immunity with respect to the first of these claims and whether

[85] As the State Defendants point out, *see* State S/J Motion at 13 n.8, the MSP, as a state agency, cannot be sued for damages pursuant to section 1983, *see, e.g.*, *Destek Group, Inc. v. New Hampshire Pub. Utils. Comm'n*, 318 F.3d 32, 40 (1st Cir. 2003) ("It is well settled beyond peradventure that neither a state agency nor a state official acting in his official capacity may be sued for damages in a § 1983 action.") (citations and internal punctuation omitted). The MSP is entitled to summary judgment as to Count III on that basis.

supervisors Moulton and Colonel Sperry are entitled to qualified immunity with respect to the second. *See id*. at 16-19.[86]

> As the First Circuit recently has observed, public-official defendants
>
> > are entitled to qualified immunity unless (1) the facts alleged show the defendants' conduct violated a constitutional right, and (2) the contours of this right are "clearly established" under then-existing law so that a reasonable officer would have known that his conduct was unlawful. *Saucier* [*v. Katz*, 533 U.S. 194 (2001),] instructs that the reviewing court should begin with the former question. A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?
>
> *Santana v. Calderón*, 342 F.3d 18, 23 (1st Cir. 2003) (citations and internal quotation marks omitted).

The Defendants assert that one need go no further than this initial inquiry to conclude that the individuals in question are entitled to qualified immunity as to both claims. *See* Town S/J Motion at 13-14; State S/J Motion at 9-10; *see also Katz*, 533 U.S. at 201 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity."). I agree.

As to the first of the asserted constitutional violations (arrest without probable cause), the Plaintiffs posit that (i) police effected Levier's arrest within seconds of their arrival on the scene by surrounding him with their weapons drawn, and (ii) his arrest was without probable cause inasmuch as (as some officers have admitted) he was committing no crime. *See* Plaintiffs' S/J Opposition at 16-18. The Defendants rejoin that (i) the encircling of Levier was not tantamount to an arrest and, (ii) in any event, the action police took was justified under the circumstances. *See* Town S/J Reply at 4; State S/J Reply at 4.[87]

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[86] In their opposing and reply briefs, the parties mistakenly refer to Count III as Count II. *See* Plaintiffs' S/J Opposition at 14; Town S/J Reply at 4; State S/J Reply at 4.

[87] Although the proffer of an argument for the first time in a reply memorandum typically counsels its disregard, s*ee, e.g.*, (continued…)

For Fourth Amendment purposes, "a seizure occurs when a police officer, by means of physical force or a show of authority, has in some way restrained the liberty of a citizen." *United States v. Sealey*, 30 F.3d 7, 9 (1st Cir. 1994). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id*. (citations and internal quotation marks omitted). But there is more: A person's reasonable belief that he or she was not free to leave is "a *necessary*, but not *sufficient* condition for seizure." *Id*. (citation and internal quotation marks omitted) (emphasis in original). "[W]ith respect to a seizure based upon an officer's show of authority, no seizure occurs until the suspect has submitted to that authority." *Id*. *See also, e.g., United States v. Jone*s, 187 F.3d 210, 216 n.7 (1st Cir. 1999) ("The Supreme Court has held that 'seizure' requires either application of physical force to restrain movement or a show of authority to which the subject submits.") (citation and internal quotation marks omitted).

In this case, Levier was subjected to a substantial show of authority; however, he never submitted to it. He continued to march, shouldering his rifle, throughout the standoff. As a matter of law, he was not "seized" for Fourth Amendment purposes until he was shot. He therefore was not, by virtue of the officers' show of authority, arrested without probable cause. Inasmuch as the Plaintiffs fall short of establishing the occurrence of the underlying violation, the individual defendants are entitled to qualified immunity, and all Defendants are entitled to summary judgment, with respect to this claim.

As to the second claimed constitutional violation (use of excessive force), the Plaintiffs posit that despite knowing that (i) Levier was deaf, mentally ill and potentially attempting "suicide by cop," (ii)

In re One Bancorp Sec. Litig., 134 F.R.D. 4, 10 n.5 (D. Me. 1991) (court generally will not address an argument advanced for the first time in a reply memorandum), the Defendants in this instance fairly respond to a point put in play by the Plaintiffs, *see* Loc. R. 7(c) (reply memorandum "shall be strictly confined to replying to new matter raised in the objection or opposing memorandum."). Accordingly, I address its merits.

establishing communications as quickly as possible is essential in a standoff situation, especially one involving a mentally ill person and (iii) removing threatening police presence is essential in a potential suicide-by-cop situation, the Defendants surrounded him with approximately thirty officers with their guns illegally trained on him and made no effort to use a sign-language interpreter or other non-lethal option even though such options were available to them. *See* Plaintiffs' S/J Opposition at 18. The Plaintiffs argue that the foregoing manifests deliberate indifference on the part of the supervisory defendants. *See id*. at 19. Here, again, however, the Plaintiffs fall short of demonstrating a trialworthy issue that the underlying violation transpired.

While the Plaintiffs argue vociferously that the use of lethal force could and should have been averted, they evidently do not argue that its actual use by Trooper Sperrey, Moore or Ramsdell constituted excessive force at the moment deployed. Nor could a reasonable trier of fact so find. Levier assumed a shooter's stance and pointed a high-powered rifle at Trooper Sperrey. Regardless of whether Levier was turning his head from side to side and hesitating to fire (thus arguably indicating a lack of intention to shoot), Trooper Sperrey's decision to deploy deadly force was objectively reasonable under the circumstances. *See, e.g., Tennessee v. Garner*, 471 U.S. 1, 3 (1985) (use of deadly force found objectively reasonable when "officer has probable cause to believe that the suspect poses a significant threat of death or serious physical harm to the officer or others.").

Tragically, in those tense moments, Ramsdell and Moore mistook Levier as having fired his rifle, as a result of which they in turn opened fire on him. Nonetheless a mistake – even a fatal mistake – does not form the basis for a Fourth Amendment violation if the use of force is objectively reasonable based on the facts and circumstances known to the officer at the time. *See, e.g., Milstead v. Kibler*, 243 F.3d 157, 165 (4th Cir. 2001) ("[C]ourts cannot second guess the split-second judgments of a police officer to use deadly force in a context of rapidly evolving circumstances, when inaction could threaten the safety of the officers

or others. While we know in hindsight that Officer Kibler mistakenly shot Milstead, instead of Ramey, this mistake does not negate the justification for the use of deadly force where Officer Kibler had an objectively reasonable belief that Milstead was Ramey. [T]he Fourth Amendment addresses misuse of power, not the accidental effects of otherwise lawful conduct.") (citations and internal quotation marks omitted); *see also, e.g., Katz,* 533 U.S. at 206 ("Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example, and in those situations courts will not hold that they have violated the Constitution.").

So it was with Ramsdell and Moore, both of whom (i) saw Levier in a shooter's stance, aiming at Trooper Sperrey and others, (ii) heard a gunshot following a pause, and (iii) saw Levier's right shoulder recoiling backwards, as it might from the force of firing his own weapon, as a result of which they reasonably perceived that Levier had fired his weapon.

In view of the lack of any underlying constitutional violation on the part of Ramsdell, Moore or Trooper Sperrey, it follows that neither Colonel Sperry nor Chief Moulton (nor, for that matter, the Town) can be held liable for a constitutional violation on the basis of the acts or omissions of a subordinate. *See, e.g., Wilson v. Town of Mendon*, 294 F.3d 1, 6-7 (1st Cir. 2002) ("A supervisory officer may be held liable for the behavior of his subordinate officers where his action or inaction is affirmatively linked to that behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence amounting to deliberate indifference. If, however, the officer has inflicted no constitutional harm, neither the municipality nor the supervisor can be held liable.") (citations and internal punctuation omitted).

To the extent the Plaintiffs seek to hold the supervisors liable for their own direct acts and omissions, the claim again founders.[88] As an initial matter, there is no evidence that Colonel Sperry played any active role in the events of the day. The cognizable evidence is to the contrary: Colonel Sperry was not present at the scene and was informed about the event after the fact. That is too weak a foundation on which to predicate section 1983 liability. *See, e.g., Febus-Rodriguez v. Betancourt-Lebron*, 14 F.3d 87, 91-92 (1st Cir. 1994) ("Supervisory liability may not be predicated upon a theory of *respondeat superior*. A supervisor may be found liable only on the basis of his own acts or omissions.") (citations omitted). Nor is there evidence that Colonel Sperry was responsible for any deficiency in use-of-force policy or training that could be said to have been "the moving force" behind a violation of Levier's federally protected rights. *See, e.g., Wilson*, 294 F.3d at 6 ("Liability will attach to the municipal employer where its failure to properly train its officers amounts to deliberate indifference to the rights of persons with whom the police come into contact, and where a specific deficiency in training is the moving force behind a constitutional injury.") (citation and internal quotation marks omitted). Colonel Sperry hence is entitled to qualified immunity with respect to the excessive-force claim.

Unlike Colonel Sperry, Chief Moulton played a significant role in the unfolding of events at the Shop 'N Save Plaza on March 16, 2001. His conduct is to be judged by a test of "objective reasonableness":

> Because police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation, the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective. [The Supreme Court has] set out a test that cautioned against the 20/20 vision of hindsight in favor of deference to the judgment of reasonable officers on the scene.

[88] The First Circuit has suggested that lack of subordinate liability, alone, is not necessarily dispositive of a supervisory liability claim. *See Giroux v. Somerset County*, 178 F.3d 28, 34 n.10 (1st Cir. 1999); *see also, e.g., Hernandez v. Keane*, 341 F.3d 137, 145 (2d Cir. 2003) (liability of a supervisor under section 1983 can be shown, *inter alia*, by supervisor's "actual direct participation in the constitutional violation").

Katz, 533 U.S. at 204-05 (citations and internal quotation marks omitted). Viewing the cognizable evidence in the light most favorable to the Plaintiffs, one could find (as the Plaintiffs posit) that Chief Moulton knew that Levier was deaf, mentally ill and potentially attempting suicide-by-cop and that it is essential to establish communications as quickly as possible in a standoff situation, particularly one involving a mentally ill person. Nonetheless, the evidence does not bear out Plaintiffs' further assertions that, despite this, Chief Moulton (i) permitted thirty officers to train their weapons "illegally" on Levier and (ii) made no effort to use a sign-language interpreter or other non-lethal option.

Chief Moulton did indeed permit a number of officers to surround Levier with their weapons drawn; however, that he did so was objectively reasonable under the circumstances. In the Plaintiffs' view, Levier was staging a peaceful and lawful protest. His rifle was shouldered, its muzzle pointing skyward, and he signaled in gestures and words that he did not intend to hurt the officers. Nonetheless, there is no dispute that this protest took place in a large public shopping plaza in the middle of the day and that Levier was armed with a high-powered rifle capable of striking someone inside one of the stores in the plaza or an object as far away as nearby Route 1. No one could predict Levier's actions; no one could know whether he would decide to fire his weapon or even accidentally discharge it. Whatever Levier's subjective intentions, his conduct was provocative, and the situation inherently posed an appreciable public safety risk.

Before Chief Moulton's arrival, officers responding to the scene began constructing inner and outer "perimeters" to surround and contain Levier, their weapons drawn and poised for use should the need suddenly arise. Even accepting that Chief Moulton knew of the risks to Levier, a reasonable police chief in his position would have been forced to balance those risks against risks to the police and the general public. The decision to deploy and maintain the perimeters (as various officers continued to urge Levier to lay

down his weapon and, following some initial delays, those in charge huddled to attempt to devise a strategy for communication) was not objectively unreasonable under the circumstances.

Nor can one reasonably conclude that Chief Moulton did nothing to devise a non-lethal option. He dispatched Greenleaf in a failed attempt to sign the interpreter's sign to Levier, then went back to the drawing board with other tactical leaders to devise an alternate plan. While one might conclude that Chief Moulton could have done things differently and better, did not follow reasonable police procedure or was otherwise negligent in confronting the known risks to Levier, one can only reasonably conclude from the cognizable evidence that he was attempting to address those risks. His conduct does not betray "deliberate indifference" to Levier's constitutional right to be free from use of excessive force. *Compare, e.g.*, *Febus-Rodriguez*, 14 F.3d at 92 (for purposes of section 1983, an official can be said to have been deliberately indifferent "when it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights.").

Nor is there evidence that Chief Moulton or the Town were responsible for any deficiency in use-of-force policy or training that could be said to have been "the moving force" behind a violation of Levier's federally protected rights. *See, e.g.*, *Wilson*, 294 F.3d at 6. For these reasons, Chief Moulton is entitled to qualified immunity, and Chief Moulton and the Town are entitled to summary judgment, with respect to the Plaintiffs' excessive-force claim.

For all of the foregoing reasons, the Defendants demonstrate entitlement to summary judgment with respect to Count III.

D. Count IV: 5 M.R.S.A. § 4682

In Count IV of their complaint, the Plaintiffs assert that the Defendants "intentionally attempted to interfere by physical force and threats of physical force with the exercise and enjoyment of Levier's rights

secured by the United States and Maine Constitutions and the laws of the United States and the State of Maine," in violation of 5 M.R.S.A. § 4682. Complaint ¶ 70.

As the Defendants suggest, *see* Town S/J Motion at 17; State S/J Motion at 15, and the Plaintiffs do not dispute, *see generally* Plaintiffs' S/J Opposition, the qualified-immunity analysis undertaken in the context of a section 1983 claim is dispositive of a claim brought pursuant to the Maine Civil Rights Act, 5 M.R.S.A. § 4682, which was patterned after section 1983, *see, e.g., Jenness v. Nickerson*, 637 A.2d 1152, 1158-59 (Me. 1994). On that basis the Defendants are entitled to summary judgment as to Count IV.

E. Count V: Civil Conspiracy

In Count V of the Complaint, the Plaintiffs allege that the Defendants committed independently recognized torts or violated Levier's constitutional and statutory rights, acting in concert to commit those acts "through unlawful means and in bad faith." Complaint ¶¶ 73-74. As the Defendants point out, *see* Town S/J Motion at 17; State S/J Motion at 15, Count V could be construed as stating a claim of civil conspiracy under both federal and state law.

For purposes of federal law, a civil conspiracy is defined as "a combination of two or more persons acting in concert to commit an unlawful act or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another and an overt act that results in damages." *Comfort v. Town of Pittsfield*, 924 F. Supp. 1219, 1229 (D. Me. 1996) (citations and internal quotation marks omitted). "Conspiracy claims are actionable under § 1983, however it is necessary that there have been, besides the agreement, an actual deprivation of a right secured by the Constitution and laws." *Id*. (citation and internal quotation marks omitted).

"In Maine, conspiracy is not a separate tort but rather a rule of vicarious liability." *McNally v. Mokarzel*, 386 A.2d 744, 748 (Me. 1978). Thus, a claim of civil conspiracy "is only a way of obtaining vicarious liability against someone who did not himself perform the tortious act." *Forbis v. City of Portland*, 270 F. Supp.2d 57, 61 (D. Me. 2003) (construing Maine law). As in the case of federal law, elements of the claim include a meeting of the minds and the actual commission of an underlying wrong – specifically, in the case of Maine law, a tort. *See, e.g., Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286 (Me. 1998) ("[A]bsent the actual commission of some independently recognized tort, a claim for civil liability for conspiracy fails.");

Franklin v. Erickson, 146 A. 437, 438 (Me. 1929) ("A conspiracy at common law may be defined, in short, as an agreement or combination formed by two or more persons to do an unlawful act, or to do a lawful act by unlawful means.").

The Defendants seek summary judgment (i) as to the federal civil-conspiracy claim on the basis that Ramsdell, Moore and Trooper Sperrey neither had an opportunity to agree to a course of action nor committed an underlying constitutional violation, and (ii) as to the state civil-conspiracy claim on the bases that there is no underlying liability in tort and, additionally, as to Ramsdell, Moore and Trooper Sperrey, there are no allegations of vicarious liability. *See* Town S/J Motion at 17-18; State S/J Motion at 15-16.[89]

The Plaintiffs offer no argument in opposition to summary judgment as to this count, *see generally* Plaintiffs' S/J Opposition, seemingly impliedly conceding the Defendants' entitlement to prevail with respect to these claims. In any event, the Defendants demonstrate entitlement to summary judgment as to Count V in view of the absence of (i) any evidence tending to show a meeting of the minds among them to commit an

[89] Additionally, the State Defendants seek summary judgment as to the state civil-conspiracy claim on the basis that there (continued…)

unlawful act, (ii) any underlying constitutional violation, and (iii) any basis for the imposition of vicarious liability as to Ramsdell, Moore or Trooper Sperrey.

F. Counts VI-VIII: Assault and Battery; False Imprisonment; IIED

In Counts VI through VIII of their complaint, the Plaintiffs allege that the Defendants committed the torts of assault and battery (Count VI), false imprisonment (Count VII) and intentional infliction of emotional distress ("IIED") (Count VIII). *See* Complaint ¶¶ 76-85. To deflect these state-law claims, the Defendants raise the shield of the MTCA. *See* Town S/J Motion at 19; State S/J Motion at 16-17.

Section 8111(1)(C) of the MTCA affords absolute immunity to governmental employees for "[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid." 14 M.R.S.A. § 8111(1)(C). For purposes of the MTCA, "[a] law enforcement official's use of force is a discretionary act." *Comfort*, 924 F. Supp. at 1236. Nonetheless, such immunity has been held inapplicable to the extent that police "act in a manner so egregious as to clearly exceed, as a matter of law, the scope of any discretion they could have possessed in their official capacity as police officers." *Id*. (citations and internal punctuation omitted); *see also, e.g.*, *Leach v. Betters*, 599 A.2d 424, 426 (Me. 1991) (assuming, without deciding, that execution of an arrest in a wanton or oppressive manner would vitiate protections of section 8111(1)(C)).

Also of note, section 8111(1)(E) of the MTCA provides absolute immunity to governmental employees for "[a]ny intentional act or omission within the course and scope of employment; provided that

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was no underlying meeting of the minds. *See* State S/J Motion at 15-16.

such immunity does not exist in any case in which an employee's actions are found to have been in bad faith[.]" 14 M.R.S.A. § 8111(1)(E).

The Defendants assert that the evidence falls short of disclosing the type of bad faith on the part of the individual actors necessary to vitiate absolute-immunity protection pursuant to sections 8111(1)(C) & (E) and *Leach*. *See* Town S/J Motion at 19; State S/J Motion at 16-17. The Plaintiffs rejoin that there is yet a triable issue concerning their claim of assault and battery, inasmuch as the Defendants placed Levier in fear of imminent bodily harm and in fact physically touched him in an offensive manner. *See* Plaintiffs' S/J Opposition at 20. However, even assuming *arguendo* that the Defendants acted as alleged, the issue is whether they did so in bad faith or in such a manner as to clearly exceed the scope of such discretion as they could have possessed in their capacity as police officers. Here, as in *Leach*, "the record . . . contains no suggestion that [the officers] used more force than they reasonably thought to be necessary. There is no hint of ill will, bad faith, or improper motive." *Leach*, 599 A.2d at 426. Accordingly, the MTCA affords the individual defendants absolute immunity with respect to the Plaintiffs' assault and battery, false imprisonment and IIED claims.

The Town Defendants resort to a different provision of the MTCA, 14 M.R.S.A § 8104-A, in defense of the Town. *See* Town S/J Motion at 19. They assert, and the Plaintiffs do not contest, that (i) a governmental entity is immune from a tort suit seeking damages unless an exception codified at section 8104-A pertains, and (ii) no such exception applies in this case. *See id.*; Plaintiffs' S/J Opposition at 19-20. None of the exceptions listed in section 8104-A, which concerns (i) ownership, maintenance or use of vehicles, (ii) construction, operation or maintenance of public buildings, (iii) discharge of pollutants and (iv) road construction, street cleaning or repair, is apposite.

The Town accordingly is immune from suit as to the Plaintiffs' assault and battery, false imprisonment and IIED claims.[90]

For the foregoing reasons, the Defendants are entitled to summary judgment as to Counts VI, VII and VIII of the Complaint.

G. Punitive Damages

The Defendants finally seek summary judgment with respect to the Plaintiffs' requests for punitive damages, *see* Complaint at 8-9, 12-16, on the basis that the evidence falls well short of demonstrating that they engaged in the type of egregious conduct necessary to sustain punitive damages pursuant to federal or state law, *see* Town S/J Motion at 19-20; State S/J Motion at 18-19; *see also, e.g.*, *Smith v. Wade*, 461 U.S. 30, 56 (1983) (defendant in section 1983 action may be subject to punitive damages for conduct "shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others."); *Palleschi v. Palleschi*, 704 A.2d 383, 385-86 (Me. 1998) (under Maine law, "[p]unitive damages are available if the plaintiff can establish by clear and convincing evidence that the defendant's conduct was motivated by actual ill will or was so outrageous that malice is implied."). Again, I agree. While the Defendants can be faulted for their handling of the events of March 16, 2001, one cannot but reasonably conclude from the totality of the cognizable evidence that they endeavored to resolve the Levier standoff peaceably while addressing the appreciable public-safety threat Levier's conduct posed.

[90] The State Defendants neglect to make any argument for MTCA immunity on behalf of the MSP. *See* State S/J Motion at 16-17. However, from all that appears, the MSP would be entitled to qualified immunity on the same basis as the Town. In any event, as the State Defendants assert, *see* State S/J Motion at 16, in discovery the Plaintiffs did not identify any evidence underpinning the assault and battery, false imprisonment and IIED claims against them, *see* State Defendants' SMF ¶¶ 86-91; Plaintiffs' Response to Interrogatories and Request for Production of Documents Propounded [by] State of Maine Defendants Colonel Michael R. Sperry and Trooper Mark A. Sperrey, attached as Exh. 5 to Plaintiffs' Opposing SMF/State, ¶¶ 19-21. While the Plaintiffs purport to deny these paragraphs of the State Defendants' SMF, their responsive point (that they lodged objections to those discovery requests) does not effectively controvert the underlying statements, *see* Plaintiffs' Opposing SMF/State ¶¶ 86-91. On that basis, I recommend that summary judgment (continued…)

Tragically, those efforts failed. However, that failure is not reflective of reckless or callous indifference to Levier's federally protected rights or conduct so outrageous that malice can be implied.

IV. Conclusion

For the foregoing reasons, I **GRANT** the Town Defendants' Motion To Strike Additional Facts, **GRANT** in part and **DENY** in part the Plaintiffs' Motion To Strike, the Town Defendants' Motion To Strike Opposing Facts and the State Defendants' Motion To Strike, and recommend that the Defendants' motions for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 20th day of November, 2003.

_____
David M. Cohen
United States Magistrate Judge

Plaintiff
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be granted the MSP as to the assault and battery, false imprisonment and IIED claims.

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