IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY-CAMDEN VICINAGE

Susan Remillard, Individually and as Executor of the Estate of Jason Remillard; Elizabeth Killian, Individually and as Mother of the Son of Jason Remillard; Jason Remillard, Jr., an Infant, By His Mother, Plaintiffs v. Egg Harbor City; James McGeary, Individually and as Egg Harbor Mayor; Mark Emmer, Individually and as Egg Harbor Safety Director; Sgt. Charles Baldwin, Individually and as Egg Harbor Police Officer; Cpl. Charles Baldi, Individually and as Egg Harbor Police Officer; John Doe #11-20, Individuals and Municipal Corporations, Defendants.	Docket Number 03-cv-3123 (JBS) Civil Action

BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON BEHALF OF DEFENDANTS

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PRELIMINARY STATEMENT

Before the Court is Defendants' Motion for Summary Judgment on all remaining claims.[1] Plaintiffs filed 42 U.S.C. §1983, 1986 and 1988 claims against the Defendants, the City of Egg Harbor City ("the City"), Mayor James E. McGeary ("Mayor McGeary"), Public Safety Director Mark Emmer ("Director Emmer"), Sergeant Charles Baldwin ("Sergeant Baldwin"), and Corporal Charles Baldi ("Corporal Baldi") (sometimes collectively referred to herein as the "Municipal Defendants" or "Defendants"), alleging a violation of Jason Remillard's rights under the Fourth Amendment of the United States Constitution when he was stopped and, then, fatally shot. [See, Defendants' Statement of Facts, ¶35].

On March 11, 2002, Corporal Baldi, along with Sergeant Baldwin, initiated a stop of a reported stolen vehicle. Jason Remillard, a person known to Corporal Baldi as a violent, combative person and a drug user, emerged from the driver's door and, instead of stopping for police inquiry, ran. Corporal Baldi gave chase through alleyways and back yards in the midnight darkness. Remillard did not stop as commanded by Corporal Baldi and, instead, ran into a dark alleyway between two homes. Remillard

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[1] Currently pending before this Court is Defendants' Motion for Partial Summary Judgment seeking an order dismissing the claims made by Elizabeth Killian, individually and as the mother of the infant child, Jason Remillard, Jr., as well as any claims made by Jason Remillard, Jr.

ignored Corporal Baldi's demand to get to the ground and, instead, moved his hands toward his waist, and out of Corporal Baldi's sight, as if to grab something. Corporal Baldi, fearing for his safety, fatally shot Remillard with one shot. The Municipal Defendants assert that Corporal Baldi's actions were reasonable under the circumstances presented to him on March 11, 2002. As such, Corporal Baldi is entitled to the defense of qualified immunity to shield him from liability in this matter. Furthermore, discovery revealed that the claims of supervisory liability and a failure to train against the City, Mayor McGeary, Director Emmer and Sergeant Baldwin must also fail.

STATEMENT OF FACTS

The undisputed, material facts are set forth in the attached Statement of Material Facts and Exhibits and are incorporated herein by reference as if set forth in full.

LEGAL ARGUMENT

I. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Although the moving party always bears the initial burden of showing that no genuine issue of material fact exists, the non-moving party may not rest upon the mere allegations or denials of its pleadings in order to show the existence of a genuine issue. Fed. R. Civ. P. 56(c). The non-moving party must do more than rely only "upon bare assertions, conclusory allegations or

suspicions." Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985), cert. denied, 474 U.S. 1010 (1985). Once the moving party has met its burden of establishing the absence of a genuine issue of material fact, the non-moving party must do more than simply show that there is some metaphysical doubt as to material facts. Matushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). If the non-movant's evidence is merely "colorable" or is "not significantly probative," the court may grant summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986).

When determining summary judgment based on qualified immunity, the Third Circuit stated:

> Where a defendant asserts a qualified immunity defense in a motion for summary judgment, the plaintiff bears the initial burden of showing that the defendant's conduct violated some clearly established statutory or constitutional right. Only if the plaintiff carries this initial burden must the defendant then demonstrate that no genuine issue of material fact remains as to the objective reasonableness of the defendant's belief in the lawfulness of his actions. This procedure eliminates the needless expenditure of money and time by one who justifiably asserts a qualified immunity defense from suit.

Carswell v. Borough of Homestead, 381 F.3d 235, 241-242 (3d Cir. 2004). Whether the facts alleged support a claim for violation of clearly established law is a "purely legal" question for the Court. Johnson v. Jones, 515 U.S. 304, 313 (1995).

II. CORPORAL BALDI IS ENTITLED TO SUMMARY JUDGMENT.

Remillard's §1983 claim is for damages stemming from an alleged Fourth Amendment violation. Remillard's complaint alleges Corporal Baldi's actions on the night of March 11, 2002 violated his Fourth Amendment right to be free from an unlawful seizure and excessive force. Corporal Baldi asserts, however, that his actions were reasonable and seeks protection under the doctrine of qualified immunity, which holds that officers performing discretionary functions are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Neuburger v. Thompson, 2005 U.S. App. LEXIS 173, 4-11 (3d Cir. 2005). In order to evaluate a claim for qualified immunity, this Court must first decide whether a constitutional violation by Corporal Baldi occurred. Bloxson v. Borough of Wilkinsburg, 2004 U.S.App. LEXIS 20835 (3d Cir. 2004). If no constitutional right was violated, there is no necessity for further inquiries concerning qualified immunity. However, if a violation could be made out, this Court must then decide whether the violated right was clearly established. Saucier v. Katz, 533 U.S. 194, 201 (2001). For a constitutional right to be clearly established, its contours must be sufficiently clear so that a reasonable

official would understand that what he was doing violates that right. Hope v. Pelzer, 536 U.S. 730, 739 (2002).

In other words, the question is whether it would have been clear to a reasonable officer that his conduct was unlawful in the situation he confronted. If it would not have been clear, then qualified immunity is appropriate. Carswell v. Borough of Homestead, 381 F.3d 235, 243 (3d Cir. 2004). The inquiry does not stop here, however, for even if the wrongfulness of an officer's conduct would have been clear, it must then be determined whether the officer made a reasonable mistake. Id. "We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face everyday. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." Id. at 244, citing Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992). Thus, where an officer's conduct, even if mistaken, was reasonable under the circumstances, and where there is at least some significant authority that lends support of the police action, qualified immunity is appropriate. Carswell, supra at 243 (citations omitted).

A. There was No Violation of Remillard's Fourth Amendment Rights.

Remillard's Fourth Amendment claim alleges that Corporal Baldi unreasonably seized Remillard during a stop and unreasonably applied

excessive force in apprehending him. Both the vehicle stop and Corporal Baldi's use of force constitute seizures for the purpose of the Fourth Amendment. See, Whren v. United States, 517 U.S. 806, 809-10 (1996) (noting that the temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of the Fourth Amendment"); Abraham v. Raso, 183 F.3d 279, 288 (3d Cir. 1999) (stating that there can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment); see also, Tennessee v. Garner, 471 U.S. 1, 7 (1985).

The constitutional question in this case is governed by the principles enunciated in Graham v. Connor, 490 U.S. 386 (1989). Graham establishes that claims of excessive force are to be judged under the Fourth Amendment's "objective reasonableness" standard. Id. at 388. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." Brosseau v. Haugen, 125 S. Ct. 596, 598 (2004).

(1) The vehicle stop of Remillard, the driver of an alleged stolen Jeep, was not an unlawful seizure as contemplated by the Fourth Amendment.

There is no Fourth Amendment violation when an officer acts with probable cause. "The right of people to be secure ... against unreasonable search and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." See, U.S. Const. Amend. IV; Herman v. City of Millville, 66 Fed. Appx. 363, 366 (3d Cir. 2003). Probable cause exists if at the time of the arrest "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing an offense." Beck v. Ohio, 379 U.S. 89, 91 (1964), see also State v. Waltz, 61 N.J. 83, 87 (1972) (describing probable cause as a "well-grounded" suspicion that a crime has been or is being committed).

In the present case, both Corporal Baldi and Sergeant Baldwin acted reasonably and with probable cause when they initiated the stop of the reportedly stolen white Jeep. It is undisputed that on March 11, 2002, sometime after 12:00 midnight, Charles Watson, the record owner of the white Jeep in question, reported to Egg Harbor City that two males had stolen his vehicle. Moments after Watson reported the Jeep stolen to Egg Harbor City, Watson then confirmed with the Galloway Township Police

Department that his vehicle was, in fact, stolen. [See, Defendants' Statement of Facts, ¶9]. While on patrol, Sergeant Baldwin and Corporal Baldi responded to the radio communication from police dispatch advising that a white Jeep was taken or stolen. First, Sergeant Baldwin and Corporal Baldi interviewed Mr. Watson regarding the circumstances surrounding the theft of his vehicle. Both Sergeant Baldwin and Corporal Baldi searched the area for the vehicle without success. Then, upon identifying the vehicle in question on Fifth Terrace in Egg Harbor City, Sergeant Baldwin, with Corporal Baldi behind him in a separate patrol car, initiated a stop of the vehicle because it matched the description of the vehicle reported stolen out of Galloway Township. [See, Defendants' Statement of Facts, ¶10].[2] Clearly, Sergeant Baldwin and Corporal Baldi had probable cause to believe a crime had taken place, and the ensuing vehicle stop to inquire as to the ownership of the vehicle was reasonable and appropriate under the circumstances. See, Bloxson v. Borough of Wilkinsburg, 2004 U.S. App. LEXIS 20835, at *8 (3d Cir. 2004); see also, Defendants' Statement of Facts, ¶11.

It was at the moment of the police stop that Remillard chose to flee the vehicle on foot rather than submit to police inquiry. [See, Defendants'

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[2] It was not determined until several days after the Remillard shooting that the owner of the Jeep falsely reported the vehicle stolen in order to avenge a drug exchange gone badly. [See, Defendants' Statement of Facts, ¶10, fn3].

Statement of Facts, ¶10]. Sergeant Baldwin instructed Corporal Baldi to pursue Remillard (Corporal Baldi did so in his patrol vehicle), and Sergeant Baldwin remained with the passenger by the alleged stolen vehicle. [See, Defendants' Statement of Facts, ¶10]. These actions by Sergeant Baldwin and Corporal Baldi did not violate any rule, regulation, or standard of conduct. [See, Defendants' Statement of Facts, ¶11]. See also, United States v. Moorefield, 111 F.3d 10, 13 (3d Cir. 1997) (finding a police officer's order to a passenger to remain in the car during a traffic stop to be constitutional).

Sergeant Baldwin and Corporal Baldi acted reasonably and with probable cause when they stopped what had been reported to be a stolen vehicle, when Corporal Baldi pursued Remillard in his patrol car, and when Sergeant Baldwin remained at the vehicle with the passenger. Sergeant Baldwin and Corporal Baldi are entitled to summary judgment dismissing the constitutional claims against them for their actions related to the initial vehicle stop and subsequent pursuit of Remillard because no constitutional violation occurred.

(2) Corporal Baldi's Split-Second Decision to Fire at Remillard was a Reasonable Response Under the Circumstances Presented to Him on March 11, 2002 and, Thus, Did Not Violate Remillard's Fourth Amendment Rights.

Excessive force allegations are properly scrutinized under a Fourth Amendment objective reasonableness standard. See, Graham v. Connor,

490 U.S. 386, 388, (1989). In assessing the reasonableness of deadly force, the Court must consider the circumstances of the case, including "whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Id. at 396. The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene and under the same circumstances, rather than with the 20/20 vision of hindsight. Id. Additional factors in assessing the reasonableness of an officer's use of deadly force can include whether the person subject to the police action is known to be violent or dangerous, whether the police action takes place in the context of effecting an arrest, or whether the suspect may be armed. Sharrar v. Felsing, 128 F.3d 810, 822 (3d Cir.1997) (holding that the question of whether the officer's actions were objectively reasonable is for a court to decide).

A review of the relevant facts and the undisputed evidence related to the use of deadly force by Corporal Baldi on March 11, 2002 reveals the following:

- Prior to his encounter with Remillard on March 11, 2002, Corporal Baldi had knowledge of Remillard's propensity for violence against police officers. Corporal Baldi was aware of an incident involving Remillard that occurred outside the Egg Harbor City Municipal Court where Remillard became combative and punched then-Sergeant Peterson and Officer Cantz of the Egg

Harbor City Police Department, causing Sergeant Peterson and Officer Cantz to sustain injuries. [See, Defendants' Statement of Facts, ¶8] ;

- Specifically, Corporal Baldi had knowledge of an incident that occurred in August 2000, wherein Remillard was in Court and pled guilty to two motor vehicle offenses, but became verbally abusive in the courtroom and was told to leave the courtroom by the Municipal Court Judge. Outside the courtroom, and having been escorted out of the courtroom by Officer Cantz of the Egg Harbor City Police Department, Remillard began cursing and was very combative. Sergeant Peterson heard the ruckus from his position inside the courtroom and came to assist Officer Cantz. Peterson advised Remillard he was under arrest for disorderly conduct and causing a dangerous situation, but as the officers placed their hand on Remillard's arm to arrest him, Remillard cursed and swung his closed fists at the officers – striking Peterson in the face and head, causing Peterson's glasses to break and causing facial contusions to Peterson and an arm injury to Cantz. On August 3, 2000, Remillard pled guilty to the charge of aggravated assault on two police officers, and remained in juvenile detention until November 21, 2001. [See, Defendants' Statement of Facts, ¶¶7(d) and 8];

- Prior to his encounter with Remillard on March 11, 2002, Corporal Baldi knew that Remillard was previously involved in another police stop at which point he was arrested for brandishing a hammer. [See, Defendants' Statement of Facts, ¶¶7(b) and 8];

- Prior to his encounter with Remillard on March 11, 2002, Corporal Baldi had knowledge that Remillard had a drug problem. [See, Defendants' Statement of Facts, ¶8];

- Prior to his encounter with Remillard on March 11, 2002, Corporal Baldi had knowledge that Remillard had previously been arrested for narcotics. [See, Defendants' Statement of Facts, ¶¶7(c) and 8

- When the car in which Remillard was driving was pulled over by Corporal Baldi and Sergeant Baldwin, Remillard exited the vehicle

and ran, eluding arrest. [See, Defendants' Statement of Facts, ¶10];

- Remillard continued to resist arrest, and Corporal Baldi chased Remillard by vehicle and then on foot, which pursuit covered over 100 yards. [See, Defendants' Statement of Facts, ¶12];

- Remillard ignored the shouted order to "Stop, Police" and, instead of surrendering, Remillard ran into a dark alleyway to avoid being apprehended. [See, Defendants' Statement of Facts, ¶12];

- The alleyway was dark and was only lit by the streetlight coming into the space between the buildings from the far side of Philadelphia Avenue. In addition, Corporal Baldi did not have a flashlight on his person at the time he pursued Remillard into the dark alleyway. [See, Defendants' Statement of Facts, ¶¶12 and 14];

- Despite Corporal Baldi's command to "get on the ground," Remillard failed and refused to do so. [See, Defendants' Statement of Facts, ¶13];

- Instead of getting on the ground, Corporal Baldi perceived Remillard to have turned and to have moved his hands about his waist. Corporal Baldi could no longer see Remillard's hands. In addition, at no time did Remillard's body move toward the ground when he lowered his hands from above his head on the wall, nor did Remillard's hips dip down or his knees bend as if he was complying with the order to get on the ground. [See, Defendants' Statement of Facts, ¶13];

- Corporal Baldi was positioned approximately between 25 to 50 feet or so from Remillard at the time Remillard turned toward him and failed to comply with the order to get to the ground. [See, Defendants' Statement of Facts, ¶¶ 13 and 14];

- At that moment when Corporal Baldi could no longer see Remillard's hands, while Remillard continued to ignore the order to get to the ground, Corporal Baldi believed his life was in danger and fatally shot Remillard. [See, Defendants' Statement of Facts, ¶14];

- At the time of the shooting, Corporal Baldi did not see any place that he could have used for cover. He was "wide open" in the yard. [See, Defendants' Statement of Facts, ¶16];

- Although after the shooting it was determined that Remillard was unarmed, Corporal Baldi did not know that at the time and there is no evidence to the contrary. [See, Defendants' Statement of Facts, ¶21];

- At the scene and during the investigation by the Atlantic County Prosecutor's Office, the police found numerous small, blue-tinted zip-lock bags containing a white rock substance were recovered from the scene in Egg Harbor City. In addition, one blue tinted zip-lock bag containing a white rock substance was recovered from the jacket pocket of Remillard during the autopsy. An investigating officer of the Atlantic County Prosecutor's Office recovered numerous small blue tinted zip-lock bags from the person of Remillard. [See, Defendants' Statement of Facts, ¶21].

- In addition, two Motorola cell phones belonging to Remillard were found on the grass between 249 and 251 Philadelphia Avenue, next to where Remillard's body was found lying on the ground. [See, Defendants' Statement of Facts, ¶21].

Given the circumstances perceived by Corporal Baldi at the time of the shooting, there was reasonable cause for Corporal Baldi to believe his life was in peril, and his firing at Remillard was a proper response to protect his own life. [See, Defendants' Statement of Facts, ¶¶14 and 37; see also, Defendants' Exhibit "9", Williams Deposition, T59:11 – T60:10]. Remillard's extended resistance to arrest, his flight on foot despite verbal orders to stop, his failure to get to the ground despite verbal orders to do so, his obvious disregard for police authority, his appearing to have reached for something

by his waist that might have been a weapon – coupled with the darkness in the alleyway at the time and the prior knowledge of Remillard's propensity for violence against police officers – gave the objectively reasonable officer reason to believe Remillard's actions posed an immediate threat, so the use of deadly force was objectively reasonable and necessary to alleviate that danger. See, Bloxson v. Borough of Wilkinsburg, supra, 2004 U.S. App. 20835, at *9 (where the suspect refused to follow the officers' orders throughout their encounter, and where it appeared to the officers that the suspect was attempting to pick up a gun that fell to the ground, despite the officers' orders to cease, a reasonable officer could have believed that the suspect became an immediate danger to the officers and that the use of deadly force, even if mistaken as to the whether the suspect posed an actual threat to the officers, was reasonable under the circumstances). See also, Ridgeway v. City of Woolwich Twp. Police Dept., 924 F.Supp. 653, 658 (D.N.J. 1996) (given the fact that the suspect had a total willingness to commit dangerous acts against police officers and apparent disregard for innocent bystanders, it was reasonable for the officer to believe the suspect would be willing to use a weapon to cause the officer harm, and the officer's belief in the necessity of deadly force to apprehend the suspect was reasonable); Carswell v. Borough of Homestead, supra, 381 F.3d at 243 (under the following circumstances – the officer was aware that the suspect

had violated an order of protection four times in the past several hours, that the suspect had escaped from an armed policeman, and that the suspect ignored orders to stop and was being chased by several officers – a reasonable officer could believe that firing at the suspect was a proper response, despite it later being determined that the suspect was unarmed).

Plaintiffs cite to no rule of law, nor any policy, procedure or custom that Corporal Baldi violated during the vehicle stop and pursuit of Remillard, including Corporal Baldi's use of deadly force. [See, Defendants' Statement of Facts, ¶¶11 and 31]. While it appears that Plaintiffs' expert initially had a two-fold criticism of Corporal Baldi's actions – one, for giving Remillard the order to get to the ground despite Remillard's hands having been on the side of the residence and, two, for not taking cover – in fact, Plaintiffs' expert admits that the decisions to order Remillard to the ground and whether to take cover were within Corporal Baldi's discretion. [See, Defendants' Statement of Facts, ¶16; see also, Defendants' Exhibit "9", Williams Deposition, T42:23 – T43:3; T43:9-10; T43:10-13].

Since Corporal Baldi acted reasonably under the circumstances, he therefore did not violate the Fourth Amendment, and there is no need to proceed to the second step of the qualified immunity analysis.

B. Plaintiffs' Best Argument – that Corporal Baldi was Mistaken When He Used Deadly Force – Entitles Corporal Baldi to Qualified Immunity.

The doctrine of qualified immunity aims to exclude "the plainly incompetent" and "those who knowingly violate the law" while accommodating reasonably "mistaken judgments." Hunter v. Bryant, 502 U.S. 224, 229 (1991) (citation and internal quotation marks omitted). The concern of the qualified immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. Saucier v. Katz, 533 U.S. 194, 205 (U.S., 2001). If an official could have reasonably believed that his or her actions were lawful, the official receives immunity even, if in fact, the actions were not lawful. Forbes v. Twp. of Lower Merion, 313 F.3d 144, 148 (3d Cir. 2002). Qualified immunity shields an officer from suit when he or she makes a decision that, even if constitutionally deficient, reasonably misapprehends either the law or the facts governing the circumstances he or she confronted. Saucier v. Katz, 533 U.S., at 206 (qualified immunity operates "to protect officers from the sometimes 'hazy border between excessive and acceptable force'"); Carswell v. Borough of Homestead, supra, 381 F.3d at 243 (although the officer was mistaken regarding whether the suspect was armed, under the circumstances, a reasonable officer could have believed that firing at the suspect was a proper response – a reasonable officer would not be expected

to take the risk of being assaulted by a fleeing man who could grapple with the officer).

Even if Corporal Baldi was mistaken in his assessment of the level of harm he encountered in the alleyway on March 11, 2002, officers can have reasonable but mistaken beliefs as to the facts establishing the existence of probable cause or use of deadly force. Carswell, supra at 243. The reasonableness of the officer's belief as to the appropriate level of force is to be judged from the perspective of a reasonable officer on the scene, not from hindsight. Id. at 205; Graham v. Connor, 490 U.S. 386, 396 (1989). "If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed." Saucier, 533 U.S. at 205; Kam Wan Hung v. Evanko, 115 Fed. Appx. 553, 555 (3d Cir. 2004). In those situations courts *will not* hold that such officers have violated the Constitution. Saucier v. Katz, 533 U.S. 194, 206 (2001); Carswell v. Borough of Homestead, supra, 381 F.3d at 244 (even if the officer's use of deadly force was in error, it was such as a reasonable officer could have made, and judgment in favor of the officer was affirmed).

It is uncontroverted that Remillard's movements and failure to obey police instructions gave Corporal Baldi cause to believe that, under the circumstances, Remillard posed a threat of serious physical harm to him. It

is equally uncontroverted that Corporal Baldi fired his gun only when he thought his own life was threatened. Under those circumstances, Corporal Baldi's use of deadly force was *not* a constitutional violation. Graham v. Connor, supra, 490 U.S. at 396.

Plaintiffs' expert has opined that Corporal Baldi was negligent in creating a situation where the danger of mistaken perception by Corporal Baldi increased jeopardy. [See, Defendants' Exhibit "9", Williams Deposition, T16:23-25; T17:1-18]. However, there can be no constitutional violation for a negligent deprivation of a liberty interest. Grazier v. City of Philadelphia, 2001 U.S. Dist. LEXIS 15876 (E.D. Pa., 2001). Nor is any right guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts. Young v. Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985).

Plaintiffs acknowledge that given the circumstances of that evening, Corporal Baldi could have been mistaken in believing that Remillard had a weapon and put his life in immediate danger. Plaintiffs contend that Corporal Baldi exercised poor judgment in firing at Remillard. [See, Defendants' Statement of Facts, ¶20; see also, Defendants' Exhibit "9", Williams Deposition, T37:12-25; T38:1-11]. Plaintiffs' best argument is that Corporal Baldi's exercise of judgment was erroneous; however, that does not rise to a level of a constitutional violation under the Fourth Amendment.

Grazier v. City of Philadelphia, 2001 U.S. Dist. LEXIS 15876 (E.D. Pa., 2001) (the constitutional right to be free from unreasonable seizure has never been equated by the Supreme Court with the right to be free from a negligently executed stop or arrest; see also, Young v. City of Killeen, 775 F.2d 1349, 1353 (5th Cir. 1985) (the Court rejects the negligent deprivation of a liberty interest as a constitutional violation).

If this Court finds that Corporal Baldi had a reasonable, but mistaken beliefs that the facts warranted his conduct, he is entitled to qualified immunity. Saucier, supra, 533 U.S. at 205; Carswell, supra, 381 F.3d at 244. Remillard's actions under the circumstances presented here were sufficient to cause an *objectively reasonably* police officer to be in fear of imminent bodily harm. [See, Defendants' Exhibit "9", Williams Deposition, T37:25-T38:1-11; T48:23-25; T49:1; T56:11-25]. Indeed, Remillard's extended resistance to arrest, his flight on foot despite verbal orders to stop, his failure to get to the ground despite verbal orders to do so, his obvious disregard for police authority, his appearing to have reached for something by his waist that might have been a weapon – coupled with the darkness in the alleyway at the time and Corporal Baldi's knowledge of Remillard's propensity for violence against police officers – gave Corporal Baldi sufficient reason to believe Remillard's actions posed an immediate threat. So, Corporal Baldi is entitled to qualified immunity for his use of deadly force.

There is nothing which can be said to have placed Corporal Baldi on "clear notice" that, in light of the circumstances he faced at the time of the shooting, his actions were unlawful. Moreover, based on 20/20 hindsight, Plaintiffs argue Corporal Baldi was mistaken in his belief that Remillard posed an immediate threat to his life. This argument, however, further supports the conclusion that Corporal Baldi is entitled to qualified immunity for his actions based on Saucier, supra and Carswell, supra.

III. SERGEANT BALDWIN IS ENTITLED TO SUMMARY JUDGMENT.

A. Sergeant Baldwin is Entitled to Summary Judgment for His Actions Related to the Initial Vehicle Stop and Subsequent Pursuit of Remillard Because No Constitutional Violation Occurred as a Result of the Vehicle Stop and Pursuit.

As set forth at length in Point II A(1) herein, supra, Sergeant Baldwin and Corporal Baldi had probable cause to believe a crime had taken place, and the ensuing vehicle stop to inquire as to the ownership of the vehicle was reasonable and appropriate under the circumstances. See, Bloxson v. Borough of Wilkinsburg, 2004 U.S. App. LEXIS 20835 (3d Cir. 2004). In addition, Sergeant Baldwin's actions in remaining with the passenger and instructing Corporal Baldi to pursue the fleeing Remillard were reasonable and did not violate any rule, regulation, or standard of conduct. [See, Defendants' Statement of Facts, ¶11]. See also, United States v. Moorefield,

111 F.3d 10, 13 (3d Cir. 1997) (finding an order to a passenger to remain in the car during a traffic stop to be reasonable).

B. Sergeant Baldwin Cannot be Held Liable for Corporal Baldi's Use of Force.

Plaintiffs argue that Corporal Baldi violated Remillard's Fourteenth Amendment substantive due process rights. To impose supervisory liability on Sergeant Baldwin, Plaintiffs must prove that Sergeant Baldwin acted with deliberate indifference to the rights of Remillard. See, Carter v. Philadelphia, 181 F.3d 339, 357 (3d Cir. 1999), citing City of Canton v. Harris, 489 U.S. 378, 388 (1989).[3] Plaintiffs here must identify specific acts or omissions of Sergeant Baldwin, as Corporal Baldi's supervisor, that evidence deliberate indifference and persuade this Court that there is a "relationship between the identified deficiency and the ultimate injury." Maslow v. Evans, 2004 U.S. Dist. LEXIS 11937, *9 (E.D. Pa. 2004), citing Brown v. Muhlenberg Township, 269 F.3d 205, 216 (3d Cir. 2001). This causal relationship can be established by demonstrating that a supervisor's inadequate supervision in such areas as "monitoring adherence to performance standards" or "responding to unacceptable performance through individual discipline" is

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[3] The Supreme Court has adopted a more stringent "shocks the conscience" standard when assessing substantive due process violations under §1983 where, under certain circumstances, a police officer is required to make spilt-second decisions in haste, under pressure and in circumstances that are often tense, uncertain and rapidly evolving. See, County of Sacramento v. Lewis, 523 U.S. 833, 853-54 (1998). Under either the "deliberate indifference" or "shocks the conscience" standard, Plaintiffs have no evidence to support a substantive due process deprivation.

the moving force behind the subordinate's constitutional tort. Maslow v. Evans, supra at *9, quoting City of Canton v. Harris, supra, 489 U.S. at 389.

The Third Circuit has ruled that a plaintiff asserting a failure to supervise claim cannot simply identify a specific supervisory practice that the supervisor failed to employ. Rather, a plaintiff must also allege both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents, and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval. Maslow v. Evans, supra at *10, citing C.H. v. Olivia, 226 F.3d 198, 201 (3d Cir. 2000)(en banc); see also, Montgomery v. DeSimone, 159 F.3d 120, 126-27 (3d Cir. 1998). The standard, therefore, requires actual knowledge and acquiescence.

Plaintiffs here can present no evidence that Sergeant Baldwin possessed contemporaneous knowledge of the circumstances faced by Corporal Baldi or Corporal Baldi's conduct in pursuing and shooting Remillard. Nor can Plaintiffs present any evidence that Sergeant Baldwin had any knowledge of any incidents of Corporal Baldi's use of deadly force prior to the March 11, 2002 incident. Indeed, the record reveals that there were no fatal shootings by *any* Egg Harbor City police officer from 1999

through 2003.[4] So, Plaintiffs are unable to show that Sergeant Baldwin either tacitly approved Corporal Baldi's conduct or that Sergeant Baldwin was deliberately indifferent to Remillard's rights. Therefore, summary judgment should be entered in favor of Sergeant Baldwin.

IV. PLAINTIFFS' HAVE NO EVIDENCE TO IMPOSE §1983 LIABILITY UPON THE CITY OR ITS MAYOR AND PUBLIC SAFETY DIRECTOR FOR FAILURE TO TRAIN.

A. There is No §1983 Liability For Egg Harbor City Based on a Claim of Failure to Train

Under 42 U.S.C. §1983, municipal defendants cannot be held liable under a theory of *respondeat superior*; municipal liability only arises when a constitutional deprivation results from an official custom or policy. Montgomery v. DeSimone, 159F.3d 120, 126-127 (3d Cir. 1998). Naming the City as a defendant requires Plaintiffs to prove an official policy or custom was the cause of the constitutional violation pursuant to Monell v. Dept. of Social Services, 436 U.S. 658, 690-91 (1978).

The Supreme Court clarified the holding of Monell in Oklahoma City v. Tuttle, 471 U.S. 808, 823-824 (1985), when it held that a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident includes proof that it was

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[4] Plaintiffs requested and were provided in discovery all records from 1999 through 2003 pertaining to the Egg Harbor City Police Department's use of force, including deadly force.

caused by an existing unconstitutional policy, which policy can be attributed to a municipal policy maker. Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality can a city be held liable for such a failure under §1983. City of Canton, supra, 489 U.S. at 389.

Because municipal customs of failing to train employees do not violate federal law in and of themselves, Plaintiffs can only establish municipal liability for a constitutional violation by proving that the municipal action or omission was with deliberate indifference as to its known or obvious consequences. Deliberate indifference cannot be established by "presenting evidence of the shortcomings of an individual" or by "showing, without more, that better training would have enabled the officer to avoid the injury-causing conduct." Simmons v. City of Philadelphia, 947 F.2d 1042, 1060-61 (3d Cir.), cert. denied, 503 U.S. 985 (1992). A showing of simple or even heightened negligence will not suffice. See, e.g., Linden v. Spagnola, 2002 U.S. Dist. LEXIS 14573 (D.N.J. 2002)(a plaintiff's failure to train claim did not survive because officers in fact received training at the police academy and the police department had a written use of force protocol, and the plaintiff failed to submit evidence as to which portions of that training he believed to be deficient,

or provide any evidence about what modifications would have prevented plaintiff's injury).

To survive summary judgment on a failure to train theory, Plaintiffs are here required to present competent evidence that the training of Egg Harbor City police officers was *so inadequate* and the resulting conduct *so probable*, that the City acted with deliberate indifference to the constitutional deprivation of its citizens' rights. City of Canton v. Harris, 489 U.S. 378, 387-91 (1989); Padilla v. Township of Cherry Hill, 2004 U.S. App. LEXIS 20763 (3d Cir 2004); or, the municipality's training policies must shock the conscience. Canon v. City of Philadelphia, 86 F.Supp.2d 460, 475-76 (E.D.Pa. 2000). In order to establish municipal liability in this context, Plaintiffs are required to demonstrate that municipal policymakers were aware of, and consciously disregarded, a pattern of constitutional violations which would have put them on notice of the need for more training and supervision. Under either the "deliberate indifference" or "shocks the conscience" standard, Plaintiffs have no evidence to support the claim that Egg Harbor City police officer training is actionable under §1983.

The record in this case reflects that the City adheres to a more rigorous training program for its police officers than most law enforcement agencies nationwide. [See, Defendants' Statement of Facts, ¶¶26, 28, 32

and 34]. It is undisputed that each officer on the Egg Harbor City Police Department attended a Police Academy that provided extensive, formal instruction on various aspects of police work, including firearms training and the use of force. [See, Statement of Facts, ¶¶24, 26, 28, 29, 30 and 32]. It is undisputed that all Egg Harbor City police officers, including Corporal Baldi, attend annual in-service training (generally a three-day program) offered at the Canale Training Center, located in Atlantic County, which training includes FATS (Firearms Training System) training for use of judgment, Simunition Training for use of judgment, training using videos that show actual officer-involved confrontations, classroom instruction on the use of force law, policy instruction, firearms safety, unarmed defensive tactics, daylight and reduced light firing training, and written tests to measure the officer's level of understanding for lawful use of force. [See, Defendants' Statement of Facts, ¶¶24, 26, 28, 29, 30, and 32].

In addition to the annual in-service training program, all City officers are required to be re-qualified in firearms safety and usage twice a year. [See, Defendants' Statement of Facts, ¶¶27, 28, and 29]. For all relevant times herein, Corporal Baldi successfully completed his firearms safety,

usage and simunition training. [See, Defendants' Statement of Facts, ¶30].[5]

Plaintiffs' claim that more or better training may have caused a different outcome is insufficient to establish that the City acted with deliberate indifference to the rights of its citizens. See, Simmons v. City of Philadelphia, supra, 947 F.2d at 1060-61.

Plaintiffs submit no evidence of any deliberate departure from any police policy, standard or rule related to training officers, nor have they presented evidence that a municipal policy practice or custom was the moving force behind the alleged constitutional violation. Moreover, Plaintiffs have presented no evidence the City was put on notice of a need for more training or supervision related to use of force. Thus, Plaintiffs cannot prove municipal liability, and summary judgment is appropriate dismissing Plaintiffs' claims against the City.

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[5] While Plaintiffs' expert admits he is not an expert on the use of firearms [see, Statement of Facts, ¶36; see also, Defendants' Exhibit "9", Williams Deposition, T70:8-15], as a purported expert on police training, he was unable to define or explain the term "Simunition Training." Simunition Training is state-of-the-art judgmental training technology, where officers are given certain scenarios and are required to make judgments whether to shoot or not. This type of training is used by federal law enforcement agencies and academies, as well as elite military counter-terrorist and hostage-rescue teams. [See, Defendants' Exhibit "21"]. Therefore, Williams' assertion in his report that the City failed to provide such judgmental training is specious.

B. There Can Be No §1983 Liability Imposed Upon Mayor McGeary or Director Emmer as a Result of Supervisory Liability for Alleged Inadequate Policies or Training.

Plaintiffs also assert claims under § 1983 against Defendant Mayor McGeary and Director Emmer, both individually and in their official capacities. [See, Defendants' Statement of Facts, ¶35]. As supervisors responsible for policymaking for the City's police department, Mayor McGeary and Director Emmer can be liable under §1983 only if it is shown that each, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm." A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004) (quoting Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989)). Given the insufficiency of the evidence in the record to support Plaintiffs' claim that the City's police policies and procedures were inadequate and the police training inferior, neither Mayor McGeary nor Director Emmer can be liable under §1983.

Alternatively, Mayor McGeary and Director Emmer can be personally liable under §1983 only if each "participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations." A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center, supra, 372 F.3d at 586, citing Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995). Given

that the record in this case is devoid of any competent, admissible evidence of a violation of Remillard's rights by any City police officer, and given that there is no evidence that Corporal Baldi's actions had, in the past, violated any citizens' constitutional rights, there is nothing to support a claim that either Mayor McGeary or Director Emmer acquiesced in a deprivation of any right of its citizens. Accordingly, Defendants Mayor McGeary and Director Emmer are entitled to summary judgment.

V. FOR PLAINTIFFS' STATE LAW CLAIMS, DEFENDANTS ARE ENTITLED TO IMMUNITY PURSUANT TO THE NEW JERSEY TORT CLAIMS ACT.

Plaintiffs' Complaint seeks to hold the Municipal Defendants liable under state law. This Court has supplemental jurisdiction over these state law claims under 28 USC §1367. See, Garvin v. City of Phila., 354 F.3d 215, 219 (3d Cir. 2003). Since the Municipal Defendants are entitled to immunity pursuant to the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. ("the NJTCA"), summary judgment in favor of the Municipal Defendants is appropriate.

The New Jersey Legislature provided that immunity for public entities is the rule and liability is the exception. See, N.J.S.A. 59:2-1(b)[6]; Tice v. Cramer, 133 N.J. 347 (1993); Fluehr v. City of Cape May, 159 N.J. 532

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6 The "1972 Task Force Comment" to this statutory section explains the analysis a court should use. First, decide whether immunity applies and, if not, then decide should liability attach.

(1999); Garrison v. Township of Middletown, 154 N.J. 282, 286, (1998); Collins v. Union County Jail, 150 N.J. 407, 413 (1997); Bombace v. City of Newark, 125 N.J. 361, 372, (1991). Thus, in the case before this Court, liability of the Municipal Defendants must rest upon the specific provisions of Title 59, and in order to impose liability, this Court must first find that the immunity provisions of the NJTCA do not preclude Plaintiffs' suit.

A. Corporal Baldi is Immune from Liability as a Result of His Actions on March 11, 2002.

Plaintiffs' alleged state tort claims against Corporal Baldi must be dismissed in accord with the NJTCA, N.J.S.A. 59:1-1 to 12-3. Specifically, N.J.S.A. 59:3-3 provides, in pertinent part:

> A public employee is not liable if he acts in good faith in the execution or enforcement of any law.

"The same standard of objective reasonableness that applies in Section 1983 actions also governs questions of good faith arising under the Tort Claims Act." DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 166 (2005)(the "reasonableness" inquiry in an excessive force case is an objective one – the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation); Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000); Jimenez v. New Jersey, 245 F. Supp. 2d 584, 588 (D.N.J. 2003).

The relevant facts and circumstances establishing objective reasonableness for the §1983 liability analysis also establishes objective reasonableness for the NJTCA liability analysis and provides the reason to conclude Corporal Baldi did not act with willful misconduct.[7]

B. Sergeant Baldwin is Immune for Liability as a Result of His Actions on March 11, 2002.

Plaintiffs' alleged state tort claims against Sergeant Baldwin must also be dismissed in accord with N.J.S.A. 59:3-3. There is no allegation or evidence that Sergeant Baldwin acted with willful misconduct. Sergeant Baldwin is, therefore, entitled to summary judgment on the state law claims.

C. Mayor McGeary and Director Emmer are Immune from Liability under the NJTCA.

Any attempt by Plaintiffs to assert vicarious willful misconduct liability against either Mayor McGeary or Director Emmer, based on any alleged willful misconduct of either Sergeant Baldwin or Corporal Baldi, must fail as a matter of law. See, Egan v. Erie R.R. Co., 29 N.J. 243, 254-55 (1959);

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7 For purposes of the NJTCA, willful misconduct is much more than negligence or a mistake. It is the commission of a forbidden act with actual knowledge that it is forbidden. Kollar v. Lozier, 286 N.J.Super. 462, 470-71 (App. Div. 1996). To show willful misconduct by any public employee, Plaintiffs must submit proof that with reckless indifference to the consequences, either Corporal Baldi, Sergeant Baldwin, Mayor McGeary or Director Emmer consciously and intentionally did some wrongful act or omitted to discharge some duty which produced Plaintiffs' injuries. Alston v. City of Camden, 168 N.J. 170, 184 (2001). Based on the analysis set forth in Points II, III and IV herein, supra, Corporal Baldi, Sergeant Baldwin, Mayor McGeary and Director Emmer are entitled to summary judgment dismissing Plaintiffs' state law claims against them.

McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970); Fiedler v. Stonack, 141 N.J. 101, 123 (1995). Mayor McGeary and Director Emmer can only be held responsible for their own acts against Plaintiffs. See, DelaCruz v. Borough of Hillsdale, 365 N.J. Super. 127, 152 (App.Div. 2004), aff'd in part and rev'd in part, 183 N.J. 149 (2005). Plaintiffs' obvious failure to set forth a factual basis to support a claim for willful misconduct on the part of Mayor McGeary or Director Emmer precludes recovery under state law.

D. The City is Immune from Liability as a Result of the Actions of any of its Employees.

N.J.S.A. 59:2-2(b) provides, in pertinent part:

> A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.

Thus, because there can be no liability on the part of any City employee in this matter, the City is also shielded from liability.

CONCLUSION

In light of the foregoing, Defendants' Motion for Summary Judgment should be granted.

Respectfully submitted,

BARKER, DOUGLASS & SCOTT
A Professional Corporation

s/ A. Michael Barker

By: _____
A. Michael Barker, Esquire

DATED: June 10, 2005