

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

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MEGAN GUNTER, Administratrix  
of the Estate of Albert  
Gunter, Decedent, et al.,

Civil No. 07-4839 (NLH/KMW)

Plaintiffs,

**OPINION**

v.

THE TOWNSHIP OF LUMBERTON, et  
al.,

Defendants.

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**HILLMAN, District Judge**

This matter comes before the Court by way of Plaintiff's motion [Doc. No. 89] for reconsideration of the Court's November 7, 2011 Amended Order granting in part and denying in part Defendants' motion [Doc. No. 73] for summary judgment. Also before the Court is a motion [Doc. No. 88] by Defendants Township of Lumberton, Douglas W. Lemyre, Robert J. Slocum, Paul M. Craig, Ronald J. Sanna, and Bryan H. Norcross similarly seeking reconsideration of the Court's November 7, 2011 Amended Order and also seeking summary judgment with respect to newly raised issues in this case outlined in a hearing on November 1, 2011.

The Court has considered the parties' submissions, and decides this matter pursuant to Federal Rule of Civil Procedure 78. For the reasons expressed below, Plaintiff's motion for reconsideration is denied, and Defendants' motion for reconsideration and summary judgment is granted.

**I. JURISDICTION**

In this action, Plaintiff brought federal constitutional claims pursuant to 42 U.S.C. § 1983, as well as claims under New Jersey state law. This Court has jurisdiction over Plaintiff's federal claims under 28 U.S.C. § 1331, and may exercise supplemental jurisdiction over Plaintiff's related state law claims pursuant to 28 U.S.C. § 1367.

## II. BACKGROUND

### A. Background Presented on Defendants' Original Motion for Summary Judgment

In this case, Plaintiff Megan Gunter, daughter of the decedent, Albert Gunter, and administratrix of his estate, brought suit against Defendants, the Township of Lumberton, Douglas W. Lemyre, Sergeant Robert J. Slocum, Corporal Paul M. Craig, Patrolman Ronald J. Sanna, and Patrolman Bryan H. Norcross. Plaintiff originally alleged violations of Albert Gunter's (or, "the Decedent") federal constitutional rights, as well as a claim under New Jersey's Wrongful Death Act, N.J.S.A. § 2A:31-1 *et seq.* Plaintiff's claims arise out of the events which occurred in the early morning hours of November 10, 2006 and ended tragically with death of Albert Gunter.

As presented in the parties' briefing on Defendants' original motion for summary judgment, the record reveals that on or around the late evening hours of November 9, 2006, Albert Gunter was in the garage of the home of his nephew, Larry Gunter, Jr., making loud noises, and that Albert Gunter refused to stop despite Larry's request. Earlier that same day, Albert was disruptive and had engaged in a minor physical altercation with Larry, which led to Albert tumbling down a couple of stairs. After Albert Gunter refused Larry's request to quiet down, Larry called for emergency services to assist in removing his uncle from his home. During his 9-1-1 call, Larry explained that

Albert was out of control, loud, and intoxicated, and had an outstanding warrant.

While traveling to Larry's home, police officers were advised that, according to the caller, Albert had an outstanding warrant.<sup>1</sup> Around 1:30 a.m., on the morning of November 10th, Patrolman Norcross arrived at Larry's home, joined soon thereafter by Sergeant Slocum and Patrolman Lemyre.<sup>2</sup> According to Norcross, Larry informed him that Albert had been drinking alcohol, had a history of drug use, and had an outstanding warrant. Larry asked the officers to remove his uncle from the premises. The officers heard Albert yelling, banging, and making loud grunting noises in the garage. Patrolmen Norcross and Lemyre ordered Albert to step away from the interior garage door so that they could enter the garage from inside Larry's home. Sergeant Slocum remained with Larry while Norcross and Lemyre went into the garage with Albert. Slocum told Larry that no matter what he heard in the garage, he was not to enter. Upon arrival, Corporal Craig and Patrolman Sanna also entered the garage.

By the officers' accounts, Albert appeared erratic,

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<sup>1</sup>According to Defendants, Albert Gunter's warrants were for driving while suspended and for an outstanding charge of violating N.J.S.A. § 2C:29-2(a)(1) (resisting arrest).

<sup>2</sup>Lemyre was a patrolman with the Lumberton Police Department at the time of the incident at issue. Due to a reduction in force in 2010, however, Lemyre's position was eliminated.

agitated, and to be sweating profusely. Norcross and Lemyre instructed Albert to sit down on a weight bench in the room. Albert sat for awhile but continued to rise up from the seat despite the officers' orders. Albert rambled incoherently from topic to topic and made exaggerated body and hand motions. During his interaction with the officers, he positioned himself in a "three-point stance" like in football, flailed his arms up and down, and paced as he spoke. (Defs.' Summ. J. Mot. [Doc. No. 73], Exs. I, at 30; AA, at 35.) In an effort to notice any contraband or potential weapons, the officers looked around the garage. They noticed empty beer cans, drug paraphernalia,<sup>3</sup> and drug residue, along with lumber, tools, weights, and other potentially dangerous objects. In response, Albert attempted to focus the officers' attention on him, asking, "What are you looking at?", "Don't look at that, look at me," "Talk to me," and "Don't you want to talk to me?" (Defs.' Summ. J. Mot. [Doc. No. 73], Ex. Y, at 24.) Corporal Craig moved toward the exterior garage door and, and concerned about Albert's behavior, hid his handcuffs behind his back.

Patrolman Lemyre returned inside Larry's home and informed Sergeant Slocum that they intended to take Albert into custody.

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<sup>3</sup> According to the Burlington County Forensic Science Laboratory Certified Laboratory Report, the paraphernalia identified by the officers in Albert Gunter's presence in the garage tested positive for cocaine and marijuana.

According to Lemyre, he asked Larry if Albert had been drinking or using narcotics; Larry confirmed that Albert had been imbibing beer and may have smoked crack cocaine. Thereafter, Lemyre and Slocum entered the garage. Lemyre approached Albert and advised him that he was under arrest. Albert objected, repeating "no, no, no" and saying "You're not going to do this to me."<sup>4</sup> (Defs.' Summ. J. Mot. [Doc. No. 73], Exs. W, at 96; AA, at 36.) Albert then physically resisted by pulling away from and pushing Lemyre, and flexing his muscles and disallowing the officers to place his hands behind his back. Lemyre and Gunter engaged in a physical altercation, with Lemyre delivering several punches and a knee to Gunter's body. Corporal Craig and Patrolman Sanna tried to intercede and take Gunter to the ground. Patrolman Norcross also engaged Gunter by grabbing his left arm and executing a leg sweep and arm drag to take him to the ground. The officers and Gunter fell to the floor. Gunter flailed his arms and legs, punching and kicking at the officers. To subdue Gunter, Craig struck him with his fist about three times in the face, but Albert responded by saying, "Yeah, hit me again." (Defs.' Summ. J. Mot. [Doc. No. 73], Ex. AA, at 36.) Craig punched him again. The strikes appeared to have no effect on Gunter.

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<sup>4</sup>In his statement given to the Burlington County Prosecutor's Office on November 10, 2006, Larry Gunter recalled that during the arrest he heard Albert Gunter yelling at the officers, "I'm not going, you're not gonna take me alive[.]" (Defs.' Summ. J. Mot. [Doc. No. 73], Ex. HH, at 184.)

Gunter continued to resist arrest, disregard orders, and brawl with the officers. He attempted to push himself off the ground with the officers on top of him and, on a couple occasions, tossed Craig off of him. Norcross and Slocum tried to secure Gunter's legs and feet but failed. With Gunter resisting while on his hands and knees, Craig struck Gunter's left leg and side with his knee, but Gunter did not relent. Lemyre employed pepper spray against Gunter, but to no avail. Due to the discharge of pepper spray, one of the officers eventually opened the exterior garage door. Gunter tossed Craig off of him and told the officers, "If I'm gonna die, you're all gonna die." (Defs.' Summ. J. Mot. [Doc. No. 73], Ex. AA, at 37.)

Lemyre, Sanna, and Craig each attempted to restrain Gunter and keep him on the ground, but Gunter continued to resist. Craig discharged pepper spray directly into Gunter's face, but again it did not phase him. The officers rolled him onto his stomach, and Craig, with Lemyre's assistance, handcuffed Gunter's left wrist. Sanna secured Gunter's right wrist with a handcuff. Eventually, in spite of Gunter's resistance, the officers managed to handcuff his hands together. Gunter continued to flail and kick at the officers, and tried to maneuver his knees underneath him so that he could get up. Norcross attempted to lay across Gunter's legs, but could not do it. Craig struck Gunter's leg with his fist, but Gunter continued to resist. Sanna tried to

push Gunter back to the ground and sprayed him with pepper spray.

The officers attempted to secure Gunter's legs together, but he repeatedly snapped the flex cuffs they used. Gunter resisted the officers' attempts to subdue him, angrily swore at them, and smeared his face in blood that accumulated on the floor. Lemyre, however, had moved Gunter's head to ensure that he could breathe.

From his vehicle Sanna retrieved three more sets of handcuffs with the intent to connect Gunter's belt to the flex cuffs restraining his legs. At one point, the officers also tried to use a white leather belt on the floor to inhibit Gunter's legs. Sanna delivered several blows with his fist to Gunter's right leg to try to control it. After several attempts, the officers finally were able to secure Gunter's hands and legs. Overall, the process of arresting Gunter endured approximately twelve minutes. During the fray, the officers noticed a bleeding laceration on Gunter's forehead. Officer Lemyre called for emergency services. After Gunter had been restrained, Lemyre checked on Gunter's respiration and ensured that he could breathe. The officers retrieved medical supplies from their vehicles to treat Gunter's cut. Gunter continued to threaten and insult the officers.

As the officers treated Gunter's wound, he no longer struggled, and gasped a few breaths. The officers then noticed that Gunter ceased to move. They checked his pulse and observed

that Gunter had stopped breathing. The officers removed the restraints and attempted, unsuccessfully, to revive Gunter.

During their depositions and statements, Larry and his wife, Theresa Gunter (collectively, "the Gunters"), attested to certain facts that were omitted by the officers or differed from their testimony and reports. For example, the Gunters recalled that during the altercation between Albert and the officers, Albert yelled for Larry and Theresa. Also, after the exterior garage door had been opened, the Gunters went outside so they could view the altercation inside the garage. Larry saw Albert restrained on the ground, conscious, and with blood underneath his head. Theresa also noticed that Larry was bleeding, moaning, and having difficulty breathing. When Larry and Theresa, a professional nurse, each stepped forward to check on Albert, both were told by officers to step back and not get involved, or risk arrest. Theresa asked the officers to call for an ambulance. According to Larry, at the end of the altercation, once the officers had hogtied Albert, they left him on the floor for approximately ten or fifteen minutes before checking on him or calling for emergency services. Larry asserts that once the officers finally checked him, the officers learned that Albert Gunter did not have a pulse and was unresponsive and then contacted the paramedics.

Paramedics arrived at the scene and escorted Albert to the hospital. Despite attempts to revive him, Gunter was pronounced

dead around 2:26 a.m. Following his death, a coroner documented between fifteen to twenty contusions, bruises, and abrasions on his body. On his amended certificate of death, the immediate cause of Albert Gunter's death reads, "EXCITED DELIRIUM DUE TO COCAINE," and a contributing cause is listed as "STRUGGLE DUE TO COCAINE TOXICITY." (Defs.' Summ. J. Mot. [Doc. No. 73], Ex. C.)

### **B. Relevant Procedural History**

Plaintiff's complaint originally alleged five counts, the following three of which are relevant here:<sup>5</sup> (1) a Monell claim pursuant to 42 U.S.C. § 1983 against the Township of Lumberton for failure to adequately train and supervise its officers under ("Count One" or "Monell Claim"); (2) a claim for excessive force pursuant to 42 U.S.C. § 1983 against the five Defendant Lumberton police officers ("Count Three" or "Excessive Force Claim"); and (3) a claim for wrongful death under New Jersey state law ("Count Four" or "Wrongful Death Claim"). (See Pl.'s Br. in Supp. of

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<sup>5</sup>Count Two of Plaintiff's original complaint was alleged against the County of Burlington and the Burlington County Police Academy. (Pl.'s Compl. [Doc. No. 1] ¶¶ 36-46.) Plaintiff stipulated to the dismissal with prejudice of these Defendants on December 18, 2008. (See Stipulation of Dismissal [Doc. No. 37] 1.) Accordingly, the Court does not address the claims alleged in Count Two of the complaint.

Count Five of the original complaint alleged a claim on behalf of Larry Gunter against all Defendants for emotional distress. (Pl.'s Compl. [Doc. No. 1] ¶¶ 59-60.) The parties stipulated to the dismissal with prejudice of this claim on November 20, 2008. (See Stipulation and Order [Doc. No. 36] 1-2.) Accordingly, the Court also does not address the claims alleged in Count Five of the complaint.

Reconsideration [Doc. No. 89] 1; see also Pl.'s Compl. [Doc. No. 1] ¶¶ 25-35, 47-56, 57-58.)

On November 1, 2011, the Court conducted a hearing in this matter in relation to a September 30, 2011 Order which originally denied Defendants' motion [Doc. No. 73] for summary judgment. At the November 1, 2011 hearing, the Court clarified the denial of summary judgment with respect to certain claims.

(1) Excessive Force Claim

At the November 1, 2011 hearing, the Court amended the September 30, 2011 Order and granted summary judgment with respect to Count Three - Plaintiff's Excessive Force Claim finding that "as it relate[d] to the use of excessive force, at least up until the point that ... Mr. Gunter was restrained, ... there [were] no material issues of fact on that aspect of plaintiffs' claim." (Hearing Tr. [Doc. No. 90] 4:18-22, Nov. 1, 2011; see also id. at 17:17-20.) The Court did not find "any evidence to suggest that the officers were unreasonable in initiating -- or responding to [Albert Gunter's] resisting arrest with some reasonable force to restrain him, including the use of leg restraints when he continued to kick after being handcuffed." (Id. at 7:23-8:2.) The Court confirmed these findings in its November 7, 2011 Order. (See Order [Doc. No. 87] 2, Nov. 7, 2011.)

However, the Court expressed concerns at the November 1,

2011 hearing "about the material issues of fact as to when [Mr. Gunter] was finally restrained, how ... the officers responded after that event." (Id. at 9:15-17.) The Court framed the issue as follows, was Albert Gunter:

left on the floor to die for 15 minutes while he was breathing, and [Defendants] refused a reasonable request to help from someone who is trained in medicine ... or, after having restrained him, [did Defendants] immediately call[] the EMTs, and [thus Mr. Gunter's] death ... is simply an unfortunate, unintended, and tragic consequence of a violent struggle?

(Id. at 12:3-10.) The Court concluded that these "two very different scenarios, ... meant that there was a material issue of fact that needed to be resolved" relating to whether or not there was a "constitutionally unreasonable deprivation of medical attention" after Mr. Gunter was restrained. (Id. at 12:11-13, 16:19-24.) Accordingly, the Court invited the parties to file motions for reconsideration or renewed motions for summary judgment to argue whether such a claim relating to an unreasonable deprivation of medical care was properly preserved by Plaintiff throughout the course of this litigation and if so, whether such a claim could survive summary judgment. (Id. at 11:15-22.)

Thus, summary judgment was granted in favor of the five Defendant police officers on Plaintiff's Excessive Force Claim as alleged in Count Three and this claim was dismissed with prejudice to the extent Plaintiff alleged that the force used by

the Defendant officers were excessive up to the point where Mr. Gunter was restrained. However, the Court left open the issue of whether the Defendant officers acted unreasonably with regard to ensuring that Mr. Gunter received prompt medical care after he was restrained, and whether Plaintiff properly preserved that claim.

(2) Monell Claim

Defendants' original motion also sought summary judgment on Count One - Plaintiff's Monell Claim. Plaintiff did not oppose summary judgment against Defendant the Township of Lumberton on that claim. (Pl.'s Rule 56.1 Statement [Doc. No. 76-1] 2; see also Pl.'s Br. in Supp. of Reconsideration [Doc. No. 89] 2.) At the November 1, 2011, the Court therefore also granted summary judgment in favor of Defendant the Township of Lumberton on Plaintiff's Monell Claim under Count One. (Hearing Tr. 17:21-23, 18:8-9.) However, the grant of summary judgment in favor of Defendant the Township of Lumberton was inadvertently omitted from the Court's November 7, 2011 Amended Order. An order consistent with this Opinion will amend the November 7, 2011 Amended Order to properly reflect that summary judgment was entered in favor of Defendant the Township of Lumberton on Plaintiff's Monell Claim which was dismissed with prejudice.

(3) Wrongful Death Claim & Punitive Damages

The Court's November 7, 2011 Order also denied summary

judgment with respect to Plaintiff's Wrongful Death Claim as alleged in Count Four. (Order [Doc. No. 87] 2, Nov. 7, 2011.) The Court noted at the November 1, 2011 hearing that there was potentially a "material issue of fact as to whether or not there had been [a] promise of continuing financial support for the plaintiff[]." (Hearing Tr. 17:24-25.)

In the original motion for summary judgment, Defendants also sought summary judgment to the extent Plaintiff sought punitive damages on all of her remaining claims. Specifically, Defendants requested that all punitive damage claims against all Defendants be dismissed. Plaintiff's did not oppose the dismissal of all punitive damage claims in this case. (See generally Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. [Doc. No. 76-2] 1-23.) Accordingly as set forth at the November 1, 2011 hearing, the Court's November 7, 2011 Order also granted summary judgment in favor of Defendants with respect to all claims for punitive damages by Plaintiff finding that Plaintiff failed to oppose the punitive damages issue on summary judgment and therefore the issue was waived. (Order [Doc. No. 87] 3, Nov. 7, 2011.)

### **III. DISCUSSION**

In the present motions, both parties seek reconsideration of various aspects of the Court's November 7, 2011 Amended Order. Defendants also seek summary judgment on the potential claim that

there was an unreasonable deprivation of medical care to Mr. Gunter after reasonable force was used to restrain him.

**A. Motions for Reconsideration**

In this district, motions for reconsideration are governed by Local Civil Rule 7.1(i), which provides in relevant part, that "[a] motion for reconsideration shall be served and filed within 14 days after the entry of the order or judgment on the original motion by the Judge or Magistrate Judge." L. Civ. R. 7.1(i). Rule 7.1(i) further provides that the party moving for reconsideration must submit a "brief setting forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked[.]" L. Civ. R. 7.1(i). A motion for reconsideration under Rule 7.1(i) is "'an extremely limited procedural vehicle,' and requests pursuant to th[is] rule[] are to be granted 'sparingly.'" Langan Eng'g & Envtl. Servs., Inc. v. Greenwich Ins. Co., No. 07-2983, 2008 WL 4330048, at \*1 (D.N.J. Sept. 17, 2008) (citing P. Schoenfeld Asset Mgmt. LLC v. Cendant Corp., 161 F. Supp. 2d 349, 353 (D.N.J. 1992)).

The purpose of a motion for reconsideration "'is to correct manifest errors of law or fact or to present newly discovered evidence.'" Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citation omitted). In seeking reconsideration, the moving party bears a heavy burden and the motion can only be granted if the party "shows at least

one of the following grounds: (1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion for summary judgment; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." Id.

However, reconsideration is not appropriate where the motion only raises a party's disagreement with the Court's initial decision. Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 163 (D.N.J. 1988); see also Schiano v. MBNA Corp., No. 05-CV-1771, 2006 WL 3831225, \*2 (D.N.J. Dec. 28, 2006) ("Mere disagreement with the Court will not suffice to show that the Court overlooked relevant facts or controlling law, ..., and should be dealt with through the normal appellate process[.]") (citations omitted); United States v. Compaction Sys. Corp., 88 F. Supp. 2d 339, 345 (D.N.J. 1999) ("Mere disagreement with a court's decision normally should be raised through the appellate process and is inappropriate on a motion for [reconsideration]."). Accordingly, "courts in this District routinely deny motions for reconsideration that simply re-argue the original motion." Altana Pharma AG v. Teva Pharm. USA, Inc., No. 04-2355, 2009 WL 5818836, at \*1 (D.N.J. Dec. 1, 2009).

#### **B. Motion for Summary Judgment**

Summary judgment is appropriate where the Court is satisfied that "the pleadings, depositions, answers to interrogatories,

and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (citing FED. R. CIV. P. 56).

An issue is "genuine" if it is supported by evidence such that a reasonable jury could return a verdict in the nonmoving party's favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if, under the governing substantive law, a dispute about the fact might affect the outcome of the suit. Id. "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the nonmoving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" Marino v. Indus. Crating Co., 358 F.3d 241, 247 (3d Cir. 2004) (citing Anderson, 477 U.S. at 255).

Initially, the moving party bears the burden of demonstrating the absence of a genuine issue of material fact. Celotex, 477 U.S. at 323 ("[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which

it believes demonstrate the absence of a genuine issue of material fact." (citation omitted); see also Singletary v. Pa. Dept. of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001) ("Although the initial burden is on the summary judgment movant to show the absence of a genuine issue of material fact, 'the burden on the moving party may be discharged by "showing" -- that is, pointing out to the district court -- that there is an absence of evidence to support the nonmoving party's case' when the nonmoving party bears the ultimate burden of proof.") (citing Celotex, 477 U.S. at 325).

Once the moving party has met this burden, the nonmoving party must identify, by affidavits or otherwise, specific facts showing that there is a genuine issue for trial. Celotex, 477 U.S. at 324. Thus, to withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict those offered by the moving party. Anderson, 477 U.S. at 256-57. A party opposing summary judgment must do more than just rest upon mere allegations, general denials, or vague statements. Saldana v. Kmart Corp., 260 F.3d 228, 232 (3d Cir. 2001).

#### **IV. ANALYSIS**

##### **A. Plaintiff's Motion for Reconsideration**

In the present motion, Plaintiff seeks reconsideration of

the grant of summary judgment in favor of the Defendant officers on Plaintiff's Excessive Force Claim as alleged in Count Three with regard to the force used up to the point when Albert Gunter was physically restrained. Plaintiff contends that reconsideration is necessary to correct a clear error of law and prevent manifest injustice. (Pl.'s Br. in Supp. of Reconsideration [Doc. No. 89] 3.) Plaintiff also seeks reconsideration of the Court's grant of summary judgment with respect to all of Plaintiff's claims for punitive damages including those made against the individual officer Defendants. (Id. at 6.) Plaintiff argues that this claim for punitive damages against the individual officer Defendants was addressed in response to the original summary judgment motion on the Excessive Force Claim and was not abandoned. (Id.) As set forth below, Plaintiff has not satisfied her burden to demonstrate that reconsideration is warranted on either issue.

(1) Excessive Force Claim

In granting summary judgment in Defendants' favor on the Excessive Force Claim, the Court previously found as a matter of law based on the parties' submissions and the record at that time, that the Lumberton police officer Defendants did not act in a manner that was objectively unreasonable, and did not use excessive force, when dealing with Albert Gunter. As a threshold matter, the officers' initial seizure of the Decedent was

reasonable, and was not seriously disputed on the motion for summary judgment. The Defendant officers went to Larry Gunter's home to confront the Decedent in response to Larry's 9-1-1 call seeking assistance. Larry Gunter requested emergency services to have his uncle, who had been acting unruly and inappropriately, removed from his home. The officers responded to that call and, in the process, learned that the Decedent had an outstanding warrant and could be intoxicated. Upon arrival at Larry Gunter's home, the officers interacted with the Decedent and found his actions and demeanor to be unusual, erratic, and, at times, aggressive. Among other things, the Decedent entered a "three-point stance" and made exaggerated body and arm motions. On occasion, the Decedent ignored police orders, such as to sit and remain on the weight bench. Furthermore, the officers observed, *inter alia*, drug paraphernalia in the garage, in the Decedent's immediate presence. They had reason to believe that the Decedent, given his strange behavior, was intoxicated or under the influence of a controlled dangerous substance. Based on Larry Gunter's request to have his uncle removed from the home, their knowledge of an outstanding warrant, and their own firsthand observations, the officers had a sufficient basis to take Albert Gunter into custody.

As for the physical force employed by the officers, Plaintiff presented no credible facts, evidence, or arguments to

countervail, as a matter of law, the reasonableness of the Defendant officers' actions under the circumstances or to otherwise establish a constitutional violation. The officers informed Albert Gunter that he was under arrest. Immediately, Gunter -- who stood at least six feet tall, weighed about 210 pounds, and was described by officers as muscular and strong -- initiated the melee by resisting arrest and refusing to allow the officers to take him into custody. The officers grabbed at and struck Gunter in their efforts to subdue him and to defend themselves against his attacks. They testified that throughout their interactions with him, and until he was completely restrained, Gunter continued to resist arrest, to toss them off of his person, and to flail and strike the officers with his arms and legs. Even while on the ground, Gunter continued to fight the police. Using their hands and knees, the officers struck Gunter's face, body, and legs, and during the course of the struggle, they discharged pepper spray into Gunter's face three times, all in their attempts to quell his relentless resistance. However, those strikes, intended as both defense for the officers and to gain Gunter's compliance, did not seem to affect Gunter, who continued to struggle. Once the officers had him on the ground and cuffed, Gunter still cursed at them and struggled, kicking at the officers and snapping several pairs of flex cuffs applied to his feet. The officers' endeavor to subdue and arrest

the Decedent endured for approximately twelve minutes and rendered the officers physically exhausted.

In the end, all of those actions taken by the officers occurred in light of Gunter's persistent resistance and refusal to allow the officers to arrest him. The number and severity of blows sustained by Gunter correspond proportionately to the duration and threat of his active resistance to the officers and the fact that, while under the ostensible influence of narcotics, he physically battled them from the moment they attempted to arrest him until they finally could encumber his hands and legs completely with restraints. The fact that Gunter suffered some injuries and died, tragically, does not evince the use of excessive force. See Cyrus v. Town of Mukwonago, 624 F.3d 856, 864 (7th Cir. 2010) ("[A] plaintiff cannot ask a jury to infer that an officer used excessive force based solely on the fact that an injury occurred. The plaintiff must instead identify the specific conduct of the officer that is alleged to be excessive and unreasonable; the fact of an injury while in police custody is not enough.").

In short, Albert Gunter presented a dangerous threat to the officers' safety and well-being and actively resisted arrest; therefore, the officers acted reasonably when they employed physical force to subdue him. See Bornstad v. Honey Brook Twp., 211 F. App'x 118, 122-125 (3d Cir. 2007) (affirming summary

judgment in favor of defendant-officers on excessive force claim where decedent, "an imposing, intoxicated suspect," physically resisted arrest and died following skirmish with officers who employed pepper spray and force to subdue him particularly because the struggle escalated to the point where restraints employed were appropriate, and suspect himself was the cause of the escalation). Plaintiff thus failed to demonstrate that Defendants violated Albert Gunter's Fourth Amendment right to be free of excessive force on Defendants' motion for summary judgment.

In seeking reconsideration of this determination, Plaintiff relies primarily on Cruz v. City of Laramie, 239 F.3d 1183 (6th Cir. 2001). According to Plaintiff, Cruz demonstrates that the use of a "hog-tie" restraint on an individual with "diminished capacity" violates the individual's Fourth Amendment rights to be free from excessive force. (Pl.'s Br. in Supp. of Reconsideration [Doc. No. 89] 3-5.) Plaintiff alleges that, as in Cruz, it was clear to the Defendant officers that Albert Gunter was in a state of "diminished capacity" and that therefore, the use of a "hog-tie" restraint constituted excessive force. (Id. at 5-6.) However, a thorough review of Plaintiff's motion with regard to the excessive force issue demonstrates that Plaintiff fails to meet the burden to warrant reconsideration here.

To the extent Plaintiff relies on Cruz, Cruz is decision from the Sixth Circuit Court of Appeals which is not binding precedent on this Court, and is distinguishable from the present case. Moreover, Plaintiff does not offer a sufficient explanation for failing to present this 2001 case to the Court in response to Defendants' original motion for summary judgment which was brought in 2011. Additionally, Plaintiff does not point to any facts or circumstances that were not previously considered by the Court in granting summary judgment on the Excessive Force Claim. While Plaintiff calls the Court's attention to certain facts related to whether Mr. Gunter was intoxicated at the time of the November 2006 incident, the Court previously took into account the fact that Mr. Gunter was intoxicated and potentially under the influence of drugs, and that the Defendant officers were aware of these facts at the time they attempted to place Mr. Gunter under arrest. Taking those facts into consideration, the Court already found that the Defendant officers did not use excessive force in their efforts to restrain Mr. Gunter based on his continuously escalating, aggressive attempts to resist arrest which included – kicking, flailing his arms and legs, yelling at the officers, and breaking several pairs of flex cuffs, even after being sprayed with pepper spray multiple times.

It appears to the Court that with respect to this claim,

Plaintiff is merely raising her disagreement with the Court's initial decision. However, Plaintiff's disagreement with the original decision granting summary judgment on the Excessive Force Claim is insufficient to show that the Court overlooked relevant facts or controlling law warranting reconsideration. Cf. Schiano, 2006 WL 3831225, \*2. Because Plaintiff has failed to sufficiently articulate relevant facts or controlling decisions which were presented to the Court on the original motion but overlooked, because Plaintiff simply disagrees with the entry of summary judgment in favor of Defendants on the Excessive Force Claim, and because Plaintiff merely attempts to reargue<sup>6</sup> that the officers use of force was excessive, her motion for reconsideration on this issue must be denied. Altana Pharma AG, 2009 WL 5818836, at \*1.

(2) Punitive Damages

Plaintiff also seeks reconsideration of that part of the Court's November 7, 2011 Amended Order which granted summary judgment in favor of all Defendants and dismissed Plaintiff's claims for punitive damages against all Defendants. Plaintiff claims that the failure to properly and fully address this issue

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<sup>6</sup>For example, in response to Defendants' original summary judgment motion, Plaintiff argued that "there are facts from which a jury could infer that it was not reasonable for officers to strike, mace, and hog-tie [Albert Gunter] when he was on the ground that preclude granting summary judgment on Plaintiff's Excessive claim." (Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. [Doc. No. 76-2] 20.)

should be excepted based on "excusable neglect" and contends that all four of the relevant factors the Court must consider "fit squarely within the present case." (Pl.'s Br. in Supp. of Reconsideration [Doc. No. 89] 6.) Specifically, Plaintiff asserts that Defendants will not be prejudice by any delay on Plaintiff's part. Additionally, Plaintiff contends the claim for punitive damages against the individual Defendant officers was not abandoned on the original motion for summary judgment. (Id.)

In this regard, Plaintiff's motion again fails to satisfy the burden for reconsideration. Despite Plaintiff's assertion in the present motion, Plaintiff's opposition to Defendants' original summary judgment motion does not sufficiently address the issue of punitive damages in any substantive manner. To the extent Plaintiff argued that summary judgment should not be granted on the Excessive Force Claim, that argument alone is not adequate to counter Defendants' independent legal argument that Plaintiff was not entitled to punitive damages from any Defendant. With respect to the individual officers, Defendants argued that Plaintiff failed to establish any facts supporting the "malicious or evil intent or callous disregard" requirement necessary to support a punitive damage award under Section 1983. (Defs.' Summ. J. Mot. 38.) In opposing the motion for summary judgment, Plaintiff did not adequately address this issue either

directly or indirectly.<sup>7</sup> Accordingly, the Court properly dismissed Plaintiff's punitive damage claims, and Plaintiff fails to provide an adequate basis for reconsideration.

As set forth above, Plaintiff's motion [Doc. No. 89] will therefore be denied in its entirety.

**B. Defendants' Motion for Reconsideration and Summary Judgment as to Newly Raised Issues**

Defendants' motion [Doc. No. 88] seeks reconsideration of two issues. First, Defendants seek reconsideration to the extent the November 7, 2011 Amended Order inadvertently omitted the grant of summary judgment in favor of Defendant the Township of Lumberton on Count One of Plaintiff's complaint alleging a Monell Claim. As set forth supra, Plaintiff did not oppose summary judgment as to this claim and the Court granted summary judgment on the Monell Claim at the November 1, 2011 hearing. Accordingly, Defendants' motion for reconsideration is granted with respect to this issue.

Second, Defendants argue that reconsideration is warranted on the denial of summary judgment as to Plaintiff's Wrongful Death Claim. Defendant argues that in light of the Court's finding that Defendants did not use excessive force in restraining Albert Gunter, Plaintiff cannot, as a matter of law,

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<sup>7</sup>The only mention of the term damages in Plaintiff's opposition was made in reference to her Wrongful Death Claim, not the issue of punitive damages. (Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. [Doc. No. 76-2] 20.)

establish the required elements of a claim for wrongful death:

(1) a wrongful act by Defendants causing the death and (2) that Albert Gunter would have been able to maintain an action for damages if he had survived. (Defs.' Br. in Supp. of Reconsideration and Summ. J. [Doc. No. 88-1] 20.)

Pursuant to New Jersey's Wrongful Death Act,

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

N.J.S.A. § 2A:31-1. "To assert a cause of action for wrongful death, Plaintiffs must assert (1) that Plaintiff's death was caused by a wrongful act, and (2) that Plaintiff would have been able to maintain an action for damages had he survived." Davis v. Twp. of Paulsboro, 2005 U.S. Dist. LEXIS 9881, at \*57 (D.N.J. May 24, 2005) (citing Miller v. Estate of Sperling, 766 A.2d 738, 741 (N.J. 2001)).

Plaintiff does not offer an adequate, substantive argument in opposition to Defendants' motion for reconsideration on the issue of the Wrongful Death Claim. Plaintiff appears to simply rely on her continuing assertion that Defendants use of force in restraining Albert Gunter was excessive. (See, e.g., Pl.'s

Response Br. in Opp'n to Defs.' Mot. for Summ. J. [Doc. No. 76-2] 22-23) (asserting that "Plaintiff has addressed the 'wrongful act, neglect or default' in plaintiff's response regarding defendants' use of excessive force and will rely upon the argument set forth above."). However, as set forth supra, the Court has already ruled against Plaintiff on that issue.

As the complaint makes clear, Plaintiff's Wrongful Death Claim is premised solely on the use of force by Defendants which Plaintiff alleges lead to Mr. Gunter's death. Plaintiff's primary allegation in support of the Wrongful Death Claim is that "[w]hile tackling Albert Gunter, striking, and spraying him with mace, Defendant[s] ... caused Albert Gunter's death." (Pl.'s Compl. [Doc. No. 1] ¶ 58.) Having already determined that Defendants' did not use excessive force in restraining Albert Gunter, the Court now finds, based on the allegations of the complaint and the record at this time, that Plaintiff cannot, as a matter of law, demonstrate a wrongful act on the part Defendants which lead to Mr. Gunter's death. Similarly, where the Court has already concluded that Defendants did not use excessive force, it is also clear that Plaintiff cannot, as a matter of law, demonstrate that had Albert Gunter survived, he would have been able to maintain an action for damages on an excessive force claim. Accordingly, Plaintiff cannot satisfy the requirements of the New Jersey Wrongful Death Act.

In this circumstance, reconsideration is warranted to correct a clear error of law because Plaintiff cannot establish the required elements of a claim for wrongful death under New Jersey law. As a result, the Court grants summary judgment in favor of Defendants on this claim and dismisses the claim with prejudice at this time.<sup>8</sup>

Having resolved the two issues Defendants raised on their motion for reconsideration, the Court now turns to the sole remaining issue in this case - whether Defendants are entitled to summary judgment on a claim for an unconstitutional deprivation of medical care to Albert Gunter. As noted at the November 1, 2011 hearing, the Court concluded that there was a material issue of fact with regard to whether there was an unconstitutional deprivation of medical care by Defendants after the point at which Albert Gunter was restrained. The Court specifically asked the parties to demonstrate the time line of events in the early morning hours of November 10, 2006 in order to determine whether Defendants acted promptly in response to Mr. Gunter's medical needs or whether they delayed providing, and calling for, necessary care. Defendants initially challenge whether such a

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<sup>8</sup>To the extent the Court previously noted at the November 1, 2011 hearing that there was a "material issue of fact as to whether or not there had been [a] promise of continuing financial support for the plaintiff[]", (see Hearing Tr. 17:24-25), that fact is no longer relevant to the Court's analysis because Plaintiff cannot establish the required elements of a Wrongful Death Claim as set forth supra.

claim was adequately plead in Plaintiff's complaint and preserved throughout the course of this litigation. However, the Court will assume for purposes of this motion that Plaintiff did adequately preserve such a claim. Even making this assumption in Plaintiff's favor that a deliberate indifference claim for failing to provide prompt medical care was preserved, the record demonstrates that there is no longer a genuine issue of material fact with regard to the time line of events on November 10, 2006 and Defendants are entitled to summary judgment on this issue.

As the Third Circuit has recognized, "an arrestee in the custody of government officials, ... [is] required to be given medical care for his wounds." Jennings v. Fetterman, 197 F. App'x 162, 165 (3d Cir. 2006) (citing Monmouth County Corr. Institutional Inmates v. Lanzaro, 834 F.2d 326, 346 n. 31 (3d Cir. 1987)). Therefore, "[d]enial or delay of such care can constitute 'deliberate indifference to a serious medical need,' as proscribed by the Eighth and Fourteenth Amendments." Jennings, 197 F. App'x at 165 (citing Monmouth, 834 F.2d at 346-47). Deliberate indifference can be demonstrated in a number of ways including: (1) where the denial of reasonable requests for medical treatment exposes plaintiff to undue suffering or the threat of tangible residual injury; (2) where defendants had knowledge of the need for medical care and intentionally refused to provide that care; (3) where necessary medical treatment is

delayed for non-medical reasons; (4) where government officials erect arbitrary and burdensome procedures that cause interminable delays and outright denials of medical care to suffering inmates; and (5) where government authorities prevent an inmate from receiving recommended treatment for serious medical needs or deny access to physician capable of evaluating the need for such treatment. Monmouth, 834 F.2d at 346-47 (citations omitted).

In seeking summary judgment on this claim, Defendants have presented evidence demonstrating the following time line of events.<sup>9</sup> Larry Gunter's original call to 9-1-1 occurred at 1:29 a.m. on November 10, 2006. The first officer arrived on the scene one minute later at 1:30 a.m. The last officer, Officer Sanna, arrived on the scene at 1:40 a.m., eleven minutes after

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<sup>9</sup>In support of this time line, Defendants submitted the Certification of Acting Chief of Police for Lumberton Township Anthony DiLoreto to aid the Court's interpretation of true and accurate copies of the computer aided dispatch incident and defibrillator reports for November 10, 2006. Chief DiLoreto has certified that "[t]hese reports were created independently by the Burlington County Central Communication or automatically by the defibrillator machine and cannot be altered or adjusted by third parties" and are therefore represent reliable, independent verification for the time line set forth herein. (DiLoreto Certification [Doc. No. 88-3] ¶¶ 5-6.) Thus, all of the information used to establish the specific time line comes from Chief DiLoreto's Certification and the reports attached thereto unless otherwise stated.

Although Chief DiLoreto's Certification uses the date of November 11, 2006, this appears to be a minor typographical error in his certification as the parties do not dispute that the events in question occurred on November 10, 2006. Moreover, the reports submitted by Chief DiLoreto indicate that the events, including Larry Gunter's initial 9-1-1 call happened on November 10, 2006.

the initial 9-1-1 call was placed. At that time, after speaking with Larry Gunter and his wife Theresa, the Defendant officers went into the garage to speak to Albert Gunter and ultimately to take him into custody. The parties agree that a struggle ensued between Mr. Gunter and the Defendant officers which lasted approximately twelve minutes until Mr. Gunter was restrained. (See Defs.' Br. in Supp. of Mot. for Both Summ. J. on Newly Raised Issues and Reconsideration [Doc. No. 88-1] 12; see also Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. on Newly Raised Issues [Doc. No. 102] 4.) Therefore, the record reflects that the struggle commenced sometime after the last officer arrived at approximately 1:40 a.m. and lasted until approximately 1:52 a.m. when the officers were finally able to restrain Mr. Gunter.

At some point during the initial course of this approximate twelve minute struggle to subdue Mr. Gunter, who was actively and aggressively resisting arrest, one of the Defendants executed a leg sweep. As a result, all of the individuals, including Albert Gunter, lost their balance and fell, at which time Mr. Gunter suffered a laceration on his head and began to bleed. After Mr. Gunter suffered this laceration, he still continued to struggle and resist arrest. At this point, while the other officers continued their efforts restrain Mr. Gunter, officer Lemyre recognized that Mr. Gunter was bleeding and thereafter called for

medical assistance (apparently referred to as calling for a "squad") at approximately 1:43 a.m. After the initial call for medical assistance by Officer Lemyre, a Lumberton basic life support ambulance<sup>10</sup> was dispatched one minute later at approximately 1:44 a.m. to respond to the laceration Mr. Gunter suffered during the struggle.

As noted above, Officer Lemyre made the initial call for medical assistance and the basic life support ambulance was dispatched while the struggle to restrain Mr. Gunter continued - a struggle that lasted approximately nine more minutes after the initial call was made at 1:43 a.m. - until sometime around 1:52 a.m. At that time, when the officers were finally able to restrain Mr. Gunter and the active struggled had concluded, the officers began treating the laceration on Mr. Gunter's head. (Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. [Doc. No. 76-2] 13.) Shortly thereafter, Mr. Gunter took a few gasping breaths. (Id.) One of the officers then observed that Mr. Gunter was motionless and proceeded to check for pulse and concluded that Mr. Gunter had stopped breathing. (Id.)

At this point the officers took several steps within just a

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<sup>10</sup>According to Chief DiLoreto's Certification, a basic life support ambulance is the typical medical service dispatched for basic/non-life threatening injuries such as cuts and abrasions. (DiLoreto Certification [Doc. No. 88-3] ¶ 12.) This is different than an advanced life support ambulance which signifies a more serious medical need and results in a response from both paramedic units and EMTs. (Id.)

few moments to provide Mr. Gunter with necessary medical treatment. First, because the basic life support ambulance had not yet arrived to treat Mr. Gunter's laceration and because Mr. Gunter was no longer breathing, Officer Craig made a second request for medical assistance at 1:53 a.m. Officer Craig's call requested that dispatch "go to Mt. Holly" - meaning that "the officers were attempting to secure medical assistance through mutual aid from an adjacent municipality" - and also requested paramedics on the scene reflecting the need for more advanced life support at that time. (See DiLoreto Certification [Doc. No. 88-3] ¶¶ 14-15.) This second call for more advanced medical care came within approximately one minute of the time Mr. Gunter was restrained and the officers noticed he was not breathing. Second, approximately two minutes later, Defendants activated the defibrillator at 1:55 a.m.<sup>11</sup>

During this time, Defendants had removed the restraints from Mr. Gunter and continued CPR and breathing exercises. (See Defs.' Br. in Supp. of Mot. for Both Summ. J. on Newly Raised Issues and Reconsideration [Doc. No. 88-1] 12; see also Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. on Newly Raised Issues [Doc. No. 102] 13.) The "Heart Start" defibrillator

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<sup>11</sup>Chief DiLoreto explained that although the defibrillator report states a time of 2:55 a.m. that is because the machine is not adjusted for daylight savings time thus the true time of the report is 1:55 a.m. (DiLoreto Certification [Doc. No. 88-3] ¶ 16 n.1.)

report further indicates that Mr. Gunter had an estimated "collapse" time of 1:55 a.m., that the machine was activated at 1:55 a.m. and that it was in use until it was deactivated at 2:05 a.m. In the meantime, the basic life support ambulance arrived on the scene at 1:58 a.m. Subsequently, a paramedic unit was dispatched at 1:59 a.m., in route to the scene at 2:01 a.m., and arrived by 2:05 a.m.

Based on the substantial evidence presented to the Court regarding the time line of events on November 10, 2006, the Court finds that Defendants have discharged their burden as the party seeking summary judgment on a deliberate indifference claim by pointing out the absence of evidence to support Plaintiff's claim that there was any delay in responding to Mr. Gunter's medical needs. See Singletary, 266 F.3d at 192 n.2. Chief DiLoreto's Certification and the attached dispatch and defibrillator reports clearly indicate that despite Plaintiff's contention that the officers stood-by for fifteen minutes before even calling for paramedics, the first call for medical attention regarding the laceration on Mr. Gunter's head was made at 1:43 a.m., just three minutes after the last officer arrived on the scene, in the middle of the struggle itself, and just fourteen minutes from the time Larry Gunter placed the original 9-1-1 call.<sup>12</sup>

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<sup>12</sup>The Court originally framed the issue regarding medical care as follows, was Albert Gunter:

Importantly, the total time span of the incidents in question- from Larry Gunter's 9-1-1 call at 1:29 a.m. to the arrival of the second ambulance at 2:05 a.m.- constitutes a period of only thirty-six minutes. During that time, the officers responded to Mr. Gunter's medical needs as they arose - first for the head laceration with the call for medical assistance at approximately 1:43 a.m.- and second for advanced life support medical assistance when Mr. Gunter became unresponsive at the conclusion of the twelve minute struggled where he resisted arrest.

In response, Plaintiff does not offer sufficient evidence to raise a genuine issue of material fact on this issue. Specifically, Plaintiff only controverts Defendants' evidence as presented in Chief DiLoreto's Certification and the attached reports by vaguely asserting that "[t]he record is not clear on the timing of the call for the EMT and the actual administration of medical care to the decedent." (Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. on Newly Raised Issues [Doc. No. 102]

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left on the floor to die for 15 minutes while he was breathing, and [Defendants] refused a reasonable request to help from someone who is trained in medicine ... or, after having restrained him, [did Defendants] immediately call[] the EMTs, and [thus Mr. Gunter's] death ... is simply an unfortunate, unintended, and tragic consequence of a violent struggle?

(Hearing Trans. at 12:3-10.) The uncontroverted evidence presented by Defendants demonstrates that Defendants responded immediately and promptly in response to Mr. Gunter's need for medical care and thus resolves the issue for the Court.

4.) Plaintiff also alleges without any factual support that it "is a question of material fact ... When did the defendants notice the decedent was non[] responsive and when were the EMTS called?" (Id. at 5.) Rather than identifying specific facts and affirmative evidence for the Court that contradict those offered by the Defendants regarding the time line of that evening as is required in opposing a motion for summary judgment, see Anderson, 477 U.S. at 256-57, Plaintiff simply relies on a string of cases to argue the deliberate indifference standard and summarily concludes that "[t]he defendant officers viewed Mr. Gunter in significant physical distress, yet delayed in providing medical care for several minutes." (Pl.'s Response Br. in Opp'n to Defs.' Mot. for Summ. J. on Newly Raised Issues [Doc. No. 102]

7.) Such arguments amount to the type of "mere allegations, general denials, or vague statements" which are insufficient to withstand a motion for summary judgment. See Saldana, 260 F.3d at 232.

Cases alleging excessive force by police officers that result in the death of a suspect represent difficult cases. On the one hand, the Plaintiff has lost a loved one and the circumstances here are even more tragic given the fact that the initial call for police assistance was from a relative. At all times in an encounter - from beginning to end - officers must use only that force which is necessary, to never retaliate, and to be

prepared to shift from enforcer to protector when the circumstances abruptly change. On the other hand, police officers who face dangerous situations and act throughout in an objectively reasonable way must be afforded the immunity from a trial the law allows.

On the uncontroverted facts presented here, no reasonable juror could conclude that the Defendants were deliberately indifferent to Mr. Gunter's condition. On the contrary, the only reasonable conclusion is that they did the best they could under difficult circumstances and as soon as they were able. Accordingly, to the extent Plaintiff alleged a claim regarding an unconstitutional deprivation of medical care, the Court finds that summary judgment must be granted in favor of Defendants on this claim.

#### **V. CONCLUSION**

For the foregoing reasons, Plaintiff's motion for reconsideration [Doc. No. 89] is denied, and Defendants' motion for reconsideration and summary judgment on newly raised issues [Doc. No. 88] is granted. All of Plaintiff's remaining claims are dismissed with prejudice. An Order consistent with this Opinion will be entered.

Date: June 29, 2012  
At Camden, New Jersey

/s/ Noel L. Hillman  
NOEL L. HILLMAN, U.S.D.J.

**NOT PRECEDENTIAL**

**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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No. 12-3146

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MEGAN GUNTER, Administratrix of the Estate of Albert Gunter, Decedent;  
LARRY GUNTER, JR.

v.

THE TOWNSHIP OF LUMBERTON; BURLINGTON COUNTY;  
BURLINGTON COUNTY POLICE ACADEMY; DOUGLAS W. LEMYRE, Ptl.;  
ROBERT J. SLOCUM, Sgt.; PAUL M. CRAIG, Cpl.; RONALD J. SANNA, Ptl.;  
BRIAN H. NORCROSS, Ptl.

Megan Gunter,

Appellant

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY  
(D.C. No. 1-07-cv-04839)  
District Judge: Noel L. Hillman

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Submitted Under Third Circuit LAR 34.1(a)  
July 12, 2013

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Before: GREENAWAY, JR., SHWARTZ, and BARRY, Circuit Judges.

(Filed: July 31, 2013)

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OPINION

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SHWARTZ, Circuit Judge.

This case arises from the unfortunate death of Albert Gunter while he was in police custody. Appellant Megan Gunter, the decedent's daughter, brought suit against the arresting officers and related municipal entities as administratrix of Albert Gunter's estate. Appellant now appeals the District Court's grant of summary judgment in favor of Defendants as to her deprivation of medical care claim and the District Court's disposition of the motions for reconsideration as to the excessive force and wrongful death claims.<sup>1</sup> We will affirm.

## I.

As we write primarily for the benefit of the parties, we recite only the essential facts and procedural history. Just after midnight on November 10, 2006, Lumberton police officers responded to a 911 call from Larry Gunter, who reported that his uncle, Albert Gunter, had been drinking, was locked in the garage of Larry Gunter's home, was "a little out of control," and there was a warrant for his arrest. App. 278-81. Patrolman Brian Norcross was the first to arrive at the Gunter home, followed by Sergeant Robert Slocum, Patrolman Douglas Lemyre, Corporal Paul Craig, and Patrolman Ronald Sanna (collectively, the "police officers"). Larry Gunter informed Norcross that Albert Gunter had been drinking alcohol and smoking narcotics all night, and that he wanted Albert

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<sup>1</sup> Larry Gunter was a co-plaintiff, but he does not join the appeal. Burlington County and Burlington County Police Academy were dismissed from the action by stipulation and are not parties to this appeal. Appellant also asserted a Monell claim against the officers' employer, the Township of Lumberton, New Jersey, but she conceded that claim at the summary judgment stage and does not raise it here.

Gunter removed from his house. Upon approaching the garage, the officers heard Albert Gunter yelling, grunting, and making banging noises.

The police officers entered the garage and observed what appeared to be drug paraphernalia. They told Albert Gunter he was under arrest and attempted to place him in handcuffs, but he refused to place his hands behind his back. The officers used a "leg sweep" to force Albert Gunter to the ground, but he continued to resist and struck several of the police officers. App. 341-42. The police officers eventually sprayed him with pepper spray three times and handcuffed him. Albert Gunter continued to kick the police officers and so they attempted to secure his legs with flex cuffs, but he twice broke through them. The police officers then placed a belt around his legs, but he continued to kick, so they further restrained him by attaching his cuffed hands to the belt with three connected sets of handcuffs.<sup>2</sup> At some time during the altercation, Albert Gunter sustained a laceration over his right eye, and the police officers summoned paramedics. While he was restrained, he was placed face down on the ground. When the police officers observed that Albert Gunter was not breathing, they performed CPR, connected an automatic defibrillator, and requested an advanced life support paramedic team. The paramedics arrived and transported Albert Gunter to Virtua Hospital, where he was pronounced dead. An autopsy concluded that the cause of death was "[e]xcited delirium due to cocaine" and "[s]truggle due to cocaine toxicity." App. 167.

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<sup>2</sup> As described below, the parties dispute whether this restraint constituted a "hog-tie" or a "hobble tie."

Appellant asserted claims against the police officers under 42 U.S.C. § 1983 for excessive force and deprivation of medical care, and a claim under the New Jersey Wrongful Death Act, N.J. Stat. Ann. § 2A:31-1.

The District Court initially denied the police officers' motion for summary judgment on all claims. After a subsequent hearing, the District Court granted summary judgment in favor of the police officers on the excessive force claim but denied summary judgment on the wrongful death and deprivation of medical care claims. Appellant and the police officers moved for reconsideration. Thereafter, the District Court issued an order, from which Appellant now appeals, that: (1) denied Appellant's motion for reconsideration of the District Court's grant of summary judgment in favor of the police officers on Appellant's excessive force claim and for punitive damages; (2) granted the police officers' motion for reconsideration of the order denying summary judgment as to Appellant's wrongful death claim, and granted summary judgment to the police officers on that claim; and (3) granted the police officers' motion for summary judgment on the issue of deprivation of medical care.

## II.

The District Court exercised jurisdiction over Appellant's federal claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over Appellant's state law claim pursuant to 28 U.S.C. § 1367. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

This appeal requires us to review an order that resolves motions for reconsideration and a motion for summary judgment. We generally review a District

Court's rulings on motions for reconsideration for an abuse of discretion. Long v. Atl. City Police Dep't, 670 F.3d 436, 446-47 (3d Cir. 2012). To the extent that a district court's ruling on a motion for reconsideration involves an issue of law, we review the underlying legal determination de novo.<sup>3</sup> Burtch v. Milberg Factors, 662 F.3d 212, 220 (3d Cir. 2011); see also Long, 670 F.3d at 446 n.20 (explaining that our plenary review of legal determinations "stems from the understanding that an appeal from a denial of a Motion for Reconsideration brings up the underlying judgment for review") (internal quotation marks omitted).

With respect to the review of the portion of the order granting summary judgment, we will review it de novo, Fed. Kemper Ins. Co. v. Rauscher, 807 F.2d 345, 348 (3d Cir. 1986), applying the same standard as the District Court, Slagle v. Cnty. of Clarion, 435 F.3d 262, 263 (3d Cir. 2006). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We draw all reasonable factual inferences in favor of the party opposing summary judgment. Pastore v. Bell Tel. Co. of Pa., 24 F.3d 508, 511-12 (3d Cir. 1994).

### III.

#### A. Excessive Force

The Fourth Amendment's protection against unreasonable searches and seizures guarantees freedom from the use of excessive force during an arrest. Graham v. Connor,

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<sup>3</sup> If the ruling on the motion for reconsideration involved factual findings, we would review those findings for clear error. Burtch, 662 F.3d at 220; Max Seafood Café ex rel Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 673 (3d Cir. 1999).

490 U.S. 386, 394 (1989). Courts apply an objective reasonableness standard when reviewing the force used to effect a seizure, and carefully balance “the nature and quality of the intrusion on the individual’s Fourth Amendment interests against the countervailing governmental interests at stake.” *Id.* at 396-97 (internal quotation marks omitted). Because officers are often called upon “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,” *id.* at 397, we must evaluate the arrest “from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight,” *id.* at 396; see also Carswell v. Borough of Homestead, 381 F.3d 235, 240 (3d Cir. 2004).

Under Graham and its totality of the circumstances test, the factors courts consider are “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he actively is resisting arrest or attempting to evade arrest by flight.” Kopec v. Tate, 361 F.3d 772, 776-77 (3d Cir. 2004) (citing Graham, 490 U.S. at 396). Other factors we have considered include “the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.” *Id.* at 777.

Appellant argues that the police officers’ use of a sweeping kick to force Albert Gunter to the ground constituted excessive force. We disagree. The undisputed facts indicate Albert Gunter made wild arm motions, spoke angrily, and refused to comply with the officers’ efforts to place him in handcuffs to effectuate the arrest.

Appellant also contends that administering pepper spray three times constituted excessive force. The record indicates that the officers only applied pepper spray in the first instance when Albert Gunter resisted arrest, and that they administered it additional times because it appeared to have no effect in subduing Albert Gunter as he continued to strike and resist the officers.<sup>4</sup>

Appellant also contends that the police officers applied excessive force in subduing and restraining Albert Gunter, and that this application of force led to his death. Appellant urges that Albert Gunter was hog-tied and that this restraint was objectively unreasonable in light of some cases indicating a danger to arrestees placed in this position. See Cruz v. City of Laramie, 239 F.3d 1183, 1188-89 (10th Cir. 2001) (collecting cases describing evidence of the danger of the hog-tie restraint). We reject that contention for two reasons. First, Appellant adduces no evidence that Albert Gunter was placed in a hog-tie position, as defined by Cruz. See id. at 1186 (distinguishing hog-tying, where the distance between the handcuffs and ankle cuffs is less than twelve inches, from hobble tying, where the distance is greater and the danger to arrestees is significantly less). Moreover, while the length of time that Albert Gunter was placed face down on the ground is disputed, there is no indication in the record that his death was caused by positional asphyxia, which is the cause of death associated with hog-tying. Id. at 1188-89.

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<sup>4</sup> The record indicates that Albert Gunter's resistance "escalate[d]" after the pepper spray was administered, App. 345, and Larry Gunter told the police that he heard Albert Gunter stating to the police officers, "I'm not going, you're not going to take me alive . . . ." App. 417.

Second, we cannot say that the use of restraints was objectively unreasonable in light of Albert Gunter's extreme resistance, as detailed in the uncontroverted record. The police officers have adduced evidence that Albert Gunter repeatedly kicked the officers after his hands were restrained and that they applied the restraints only after he twice broke flex cuffs applied to his legs and continued to kick at the officers even after his legs were tied together. Cf. Mayard v. Hopwood, 105 F.3d 1226, 1228 (8th Cir. 1997) (holding use of hobble tie objectively reasonable when arrestee resisted being placed in a police car).

In short, the record demonstrates that Albert Gunter posed an immediate danger to the arresting officers, and that he actively and forcefully resisted arrest. The officers responded incrementally to Albert Gunter's violent resistance in their application of force, administration of pepper spray, and use of restraints. The District Court correctly held that, under these circumstances, the officers' conduct was objectively reasonable.

#### **B. Wrongful Death**

Appellant appeals from the District Court's grant of the police officer's motion to reconsider its decision denying summary judgment on Appellant's claim under the New Jersey Wrongful Death Act, N.J. Stat. Ann. § 2A:31-1.<sup>5</sup>

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<sup>5</sup> The Wrongful Death Act provides, in relevant part:

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the

The District Court twice denied the police officers' motion for summary judgment on the wrongful death claim. On reconsideration, however, the District Court found that the only wrongful act that Appellant alleged caused Albert Gunter's death was the purported use of excessive force, and that Appellant could not establish the "wrongful act" element of a wrongful death claim because the District Court found the police did not use excessive force, and therefore summary judgment for the police officers was warranted.

On appeal, Appellant argues only that we should reverse the District Court's decision on the wrongful death claim because the police officers used excessive force, thereby committing a wrongful act. Because we will uphold the District Court's decision that the police officers did not use excessive force, and that is the only ground on which Appellant seeks to reverse the District Court's decision on the wrongful death claim, Appellant has not demonstrated a genuine dispute of material fact that precludes the entry of summary judgment. We therefore will affirm the decision granting summary judgment to the police officers on Appellant's Wrongful Death Act claim.

**C. Deprivation of Medical Care**

Appellant also appeals the District Court's decision granting summary judgment on the claim of deprivation of medical care, claiming there are disputed material facts

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person injured and although the death was caused under circumstances amounting in law to a crime.

N.J. Stat. Ann. § 2A:31-1.

concerning whether the police officers failed to promptly provide medical assistance to Albert Gunter.

Deprivation of medical care to arrestees violates their Fourteenth Amendment right to due process if it constitutes deliberate indifference to medical needs. See City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (holding that the Due Process Clause confers arrestees a right to prompt medical treatment); Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003) (evaluating a Fourteenth Amendment claim for inadequate medical care under the deliberate indifference standard); Groman v. Twp. of Manalapan, 47 F.3d 628, 636-37 (3d Cir. 1995) (applying the deliberate indifference test to an arrestee's claim). To demonstrate deliberate indifference to medical needs, a plaintiff must show "(i) a serious medical need, and (ii) acts or omissions by prison officials that indicate deliberate indifference to that need." Natale, 318 F.3d at 582. We have held that "[d]eliberate indifference is a 'subjective standard of liability consistent with recklessness as that term is defined in criminal law.'" Id. (quoting Nicini v. Morra, 212 F.3d 798, 811 (3d Cir. 2000)). Appellant must therefore show that the police officers knew of the risk to Albert Gunter and disregarded it. Id.; Singletary v. Pa. Dep't of Corr., 266 F.3d 186, 192 n.2 (3d Cir. 2001).

The record demonstrates that the police officers provided prompt medical care to Albert Gunter and that they sought emergency medical assistance both after he sustained the cut on his head and after they discovered that he was unresponsive. It is undisputed that Larry Gunter called the police at 1:29 a.m., and the first officer arrived just one minute later, with other officers arriving over the next ten minutes. The dispatch report

shows officers first called for paramedics at 1:43 a.m. Ten minutes later, the police officers called for advanced life support assistance. Just two minutes later, the officers attached the defibrillator to Albert Gunter and attempted to revive him.

Appellant's reliance on Larry Gunter's deposition testimony does not undermine the District Court's decision. Larry Gunter testified that the officers struggled to control Albert Gunter for ten to fifteen minutes, while the garage door was closed and his view was obstructed, and that after the officers opened the garage door, they waited an additional ten to fifteen minutes before calling for medical assistance. This account is inconsistent with the objective evidence recorded by the defibrillator and the dispatch service, and no reasonable jury could believe it.<sup>6</sup> As the Supreme Court has stated, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007). The District Court therefore correctly declined to rely on those statements and properly found Appellant failed to adduce facts showing the police officers were deliberately indifferent to Albert Gunter's medical needs.

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<sup>6</sup> Larry Gunter's account is also contradicted by the testimony of every other witness, including Larry Gunter's wife, who testified that, as soon as the officers realized Albert Gunter was not breathing, "[t]hey got the stuff off his hands real fast" and "[t]ipped him over and started CPR immediately." App. 646.

**IV.**

For the foregoing reasons, we will affirm the decision of the District Court granting summary judgment to the police officers.<sup>7</sup>

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<sup>7</sup> Because we will affirm the District Court's decision on summary judgment as to all claims, we need not reach the Court's decision concerning punitive damages.

## CIVIL RIGHTS - WRONGFUL DEATH

46-7-7268 *Gunter v. The Township of Lumberton*, U.S. Dist. Ct. (Hillman, U.S.D.J.) (39 pp.) Plaintiff, daughter of decedent Albert Gunter and administratrix of his estate, brought suit against defendants, the township of Lumberton, Douglas Lemyre, Sgt. Robert Slocum, Cpl. Paul Craig, Patrolmen Ronald Sanna and Bryan Norcross. Plaintiff's claims arise out of events that ended with Gunter's death. Plaintiff's complaint asserts (1) a *Monell* claim pursuant to 42 U.S.C. § 1983 against the township for failure to adequately train and supervise its officers; (2) a claim for excessive force pursuant to § 1983 against the Lumberton police officers; and (3) a claim for wrongful death under New Jersey state law. Defendants argue reconsideration is warranted as to the denial of summary judgment on plaintiff's wrongful-death claim. The court now finds that plaintiff cannot, as a matter of law, demonstrate a wrongful act on the part of defendants that led to Gunter's death. Further, where the court concluded defendants did not use excessive force, plaintiff cannot, as a matter of law, demonstrate that had Gunter survived, he would have been able to maintain an action for damages on an excessive-force claim. Reconsideration is warranted to correct a clear error of law where plaintiff cannot establish the elements of a claim for wrongful death under New Jersey law. The court grants summary judgment in favor of defendants on the wrongful-death claim and dismisses it with prejudice. Plaintiff's motion for reconsideration is denied. To the extent plaintiff alleged a claim regarding an unconstitutional deprivation of medical care, summary judgment is granted in favor of defendants. Plaintiff's remaining claims are dismissed with prejudice. [Filed June 29, 2012.]