SALVE CHIPOLA III Plaintiff, vs. TOWNSHIP OF MANTUA; DOUGLAS HERNER; KYLE RIEPEN; and JOHN DOES 1-20; Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY Docket Number GLO-L-0216-21 Civil Action **ORDER** DISMISSING SECOND AMENDED COMPLAIN

This matter having come before the Court by way of notice on behalf of Defendants Township of Mantua, Mantua Township Police Officer Douglas Herner, and Mantua Township Police Officer Kyle Riepen, represented by A. Michael Barker, Esquire of Barker, Gelfand, James & Sarvas, P.C., and the court having considered the arguments of the parties and for good cause shown;

IT IS, on this 31st day of August 2021; ORDERED and ADJUDGED that:

Defendants', Motion to Dismiss Second Amended Complaint is hereby **GRANTED**.

The Complaint in this matter is and hereby shall be dismissed with prejudice.

/s/ Samuel J. Ragonese

The Honorable Judge Samuel J Ragonese

For the reasons stated in the attached memo.

SALVE CHIPOLA III, Plaintiff, vs. TOWNSHIP OF MANTUA; DOUGLAS HERNER; KYLE RIEPEN; and JOHN DOES 1-20, Defendants,	:	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION – CIVIL PART** **GLOUCESTER COUNTY** **DOCKET NO.: L-216-21** **DEFENDANT'S MOTION TO DISMISS SECOND AMENDED COMPLAINT**

RELIEF REQUESTED

DEFENDANTS, Township of Mantua, Douglas Herner, and Kyle Riepen represented by A. Michael Barker, Esq., move to dismiss Plaintiff's Second Amended Complaint.

PLAINTIFF, Salve Chipola III, represented by Peter Kober, Esq., opposes the Motion.

FACTUAL BASIS

1. This matter arises out of a traffic stop of Plaintiff Salve Chipola III on March 15, 2019 in the Township of Mantua.
2. The traffic stop occurred after Plaintiff was observed at a local Wawa by the police department of Defendant Township of Mantua.
3. Defendant Kyle Riepen instructed Plaintiff to leave the Wawa parking lot and Plaintiff complied.
4. Defendant Douglas Herner subsequently pulled Plaintiff over as Plaintiff was driving on Route 45 for a license plate obstruction.
5. Defendants Herner and Riepen were present during the traffic stop of Plaintiff.
6. Defendant Riepen was accompanied by a canine unit which performed an exterior sniff on Plaintiff's vehicle.
7. The canine unit alerted Defendant Officers while conducting an exterior sniff.
8. On March 25, 2021, Defendants filed a Motion to Dismiss the Complaint.
9. On June 17, 2021, the Court dismissed Counts II and III, with prejudice; and, dismissed the remaining claims without prejudice, providing Plaintiff thirty (30) days to file an amended Complaint as to Counts I, IV, V, and VI.
10. On June 25, 2021, Plaintiff filed an Amended Complaint.
11. On June 29, 2021, Defendants forwarded Plaintiff's Counsel a letter explaining that Plaintiff had entered into a settlement agreement with Mantua Township on April 22,

2019, releasing Defendants from any liability with respect to the challenged motor vehicle stop on March 15, 2019.

12. The settlement agreement released "Mantua Township and/or their employees . . . from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries known and unknown, both to person and property, which have resulted or may in the future develop from" the March 15, 2019 incident, "as a result of damages to his vehicle" after Plaintiff was stopped by Defendants.
13. On July 12, 2021, Defendants filed a Second Amended Complaint.

LEGAL ARGUMENT

Defendants' (Township of Mantua, Douglas Herner, and Kyle Riepen) Argument

Defendants Mantua Township, Police Officer Douglas Herner, and Police Officer Kyle Riepen move to dismiss all claims alleged against them in Plaintiff's Second Amended Complaint ("SAC"), pursuant to N.J. Ct. R. 4:6-2(e).

By entering into the settlement agreement, Plaintiff relinquished all rights to pursue claims of any kind which resulted from the incident which occurred on March 15, 2019. Plaintiff's Second Amended Complaint should be dismissed in its entirety, with prejudice, based on the release agreement and the Court should impose reasonable sanctions pursuant to R. 1:4-8 for Plaintiff knowingly pursuing claims which Plaintiff previously settled.

Counts I and IV – Prolonged Investigative Detention

Plaintiff's SAC continues to rely on Rodriguez v. United States, 575 U.S. 348 (2015). However, Rodriguez applies only to instances when the traffic stop was based solely on the observation of a traffic related offense.

Summarily stated, the U.S. Supreme Court and the New Jersey Supreme Court have held that a canine sniff of the exterior of a vehicle during the time it takes to complete the "mission" of the traffic related offense does not violate a person's civil rights. A detention based only on a traffic violation may be extended to conduct a canine sniff if the officers acquire reasonable suspicion of a separate crime during the course of the traffic related "mission."

In the instant case, Plaintiff was not stopped by the Defendant Officers based solely on a traffic violation. Based on Plaintiff's SAC, the CAD report referred to in the SAC, and attached as an exhibit to the SAC, the Defendant Officers observed Plaintiff coming and going from his vehicle in a Wawa parking lot for an hour and associating with multiple individuals during that time. In addition, the CAD report reveals the defendant officers had "intel" that suggested Plaintiff had sold illegal substances to juveniles on previous occasions. The SAC alleges the Defendant Officers asked Plaintiff questions about his conduct in the Wawa parking lot. Based on the facts as alleged by Plaintiff, it is evident the Defendant Officers initiated the canine sniff because they had reasonable suspicion Plaintiff was in possession of illegal substances. The SAC does not allege the Defendant police officers did not have reasonable suspicion; rather, the SAC relies on

the factual allegation that during the traffic stop there was nothing the officers observed to support a reasonable suspicion to use the canine for a sniff of the exterior of the vehicle.

Plaintiff continues to ignore the "whole picture" and focuses on the allegation that, at the time of the stop, the officers did not observe anything in the vehicle or smell anything coming from the vehicle that would amount to reasonable suspicion (SAC, paras. 42-43); but that is precisely the "divide and conquer" analysis the Supreme Court has instructed the lower courts to avoid. See State v. Nelson, 237 N.J. 540, 555 (2019) (quoting District of Columbia v. Wesby, 138 S. Ct. 577, 588 (2018)). Based on the totality of the circumstances established by the factual allegations of the SAC, the Defendant Officers had reasonable suspicion that Plaintiff was in possession of illegal substances; and the time it took to conduct the exterior canine sniff based on that suspicion was reasonable.

Alternatively, even if the stop was premised only on the traffic violation, the SAC still does not allege any facts to suggest the canine sniff extended or prolonged the time of the mission related to the traffic stop. The SAC lacks any facts regarding when the exterior canine sniff was conducted in relation to the issuance of the traffic citation and lacks any facts regarding how long the exterior sniff lasted in relation to the issuance of the traffic citation. The SAC does allege the canine unit accompanied Officer Riepen, so that is a factual allegation which stands alone, without contradiction, to establish the Defendant police officers did not need to wait for a canine unit to arrive sometime later. The SAC only vaguely alleges the exterior sniff extended the time of the investigative detention, which is inadequate to plausibly establish a civil rights violation.

Qualified Immunity

The factual allegations in the Plaintiff's SAC, taken in the light most favorable to the Plaintiff, do not establish what Plaintiff sought to show, but rather establish the opposite, i.e., that the challenged police conduct violated no statutory or constitutional right, for the following reasons. (1) Based on conduct at the Wawa and previous intelligence available to the Defendant Officers, there was reasonable suspicion to conduct an exterior canine sniff of Plaintiff's vehicle, whether or not it would have taken longer than the mission of issuing a traffic citation; (2) even if the observation of a traffic violation was the sole reason for the initial stop (which it indisputably was not) , there is no factual allegation the canine sniff prolonged the "mission" of issuing the traffic citation. The factual allegations in Plaintiff's SAC are insufficient to establish the challenged police conduct was a violation of clearly established law. Moreover, the Plaintiff has no supporting legal authority to establish he had a clear right not to be stopped as he alleged. So, there was no civil rights violations, none at all.

Even assuming, per arguendo, that what the Defendant Officers knew and observed was not enough to establish reasonable suspicion, it was enough to establish a reasonable, mistaken belief that there was reasonable suspicion; and, the Officers' conduct, certainly could not be interpreted as an arbitrary abuse of their power. At the very most, if the Defendant Officers did make a reasonable mistake in judgment, such a mistake may be enough to have evidence excluded in a criminal proceeding; but, it is certainly not a mistake for which any law enforcement officer

should face personal civil liability. The Defendant Officers should be entitled to qualified immunity.

Count VI – "Monell" Claim

Assuming, *per arguendo*, Plaintiff can establish Defendants Herner and Riepen violated Plaintiff's civil rights, Plaintiff must establish that Defendant Mantua Township was the moving force behind the civil rights violation. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). "The court's holding and reasoning in Monell have created a two-path track to municipal liability under §1983, depending on whether the allegations are based upon a municipal policy or custom." Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996); see also Andrews v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990) (articulating the distinctions between municipal policy versus municipal custom as sources of liability).

Plaintiff's SAC only alleges that the Mantua Township Police Department had a policy which "provided that the officer could prolong the investigative detention arising out of a traffic stop if he had any reasonable suspicion to justify further investigation." (SAC, para. 85). Plaintiff does not allege a "Monell" claim based on a custom, pattern, practice; thus, the only question is whether such a policy, if true, was facially unconstitutional and the moving force behind the alleged civil rights violations.

The SAC argues that "the policy had to provide that the investigative detention could only be extended if the officers acquired reasonable suspicion during the mission to justify further investigation." (SAC, para. 88)(emphasis provided). Plaintiff has no basis for making the legal assertion that the reasonable suspicion must be acquired during the traffic stop. As articulated earlier, the New Jersey Supreme Court has held that "an officer may not conduct a canine sniff in a manner that prolongs a traffic stop beyond the time required to complete the stop's mission, unless he possesses reasonable and articulable suspicion to do so. [...] Thus, if an officer has articulable reasonable suspicion independent from the reason for the traffic stop that a suspect possesses narcotics, the officer may continue a detention to administer a canine sniff. State v. Dunbar, 229 N.J. 521, 539- 540 (2017).

There is no authority that suggests, nor would it even make any sense to believe, that a police officer must ignore everything they knew and observed prior to the traffic stop. The fact that nothing may have been observed during the traffic stop to enhance the reasonable suspicion does not negate whatever reasonable suspicion may have been acquired prior to the stop. This Court correctly noted, in its opinion granting the original Motion to Dismiss, "[a]nalyzing the totality of the circumstances of Plaintiff's allegations, justification for pulling Plaintiff over appears to stem from Defendant Officers' surveillance of Plaintiff, which would be sufficient reasonable suspicion to conduct an exterior sniff." (Opinion at p. 11).

The alleged Mantua policy is entirely consistent with the New Jersey Constitution. The allegation that the policy should have included the words "during the mission," has no support anywhere in the law. Accordingly, Plaintiff's "Monell" claim against Mantua should be dismissed.

Count V – Common Law Negligence

Plaintiff alleges general common law negligence against Defendant Herner and Riepen, and common law vicarious liability against Mantua Township.

Defendants Herner and Riepen had reasonable suspicion to conduct the exterior canine sniff of the vehicle. Defendants' conduct was employed in the good faith execution of the law. Accordingly, Plaintiff's common law negligence claims against Herner and Riepen should be dismissed.

As for the vicarious liability claim against Mantua Township, N.J.S.A. 59:2-2(b) provides that "[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." Since neither Herner nor Riepen are liable for negligence, vicarious liability cannot be imposed on Mantua Township. Thus, the vicarious liability claim should be dismissed. N. J.S.A. 59:2-2(b).

Plaintiff's (Salve Chipola III) Argument

Counts I and IV

To succeed under the Civil Rights Act, "plaintiffs must.... 'show that the right is substantive, not procedural.'" Harz v. Borough of Spring Lake, 234 N.J. 317 (2018). "[A] substantive right is 'a right that can be protected or enforced by law; a right of substance rather than form.'" Id. "Certain substantive rights are readily familiar to us:.... [including] the right to be free from unreasonable seizures, U.S. Const. amend. IV." Id. (listing substantive rights).

Here, the substantive right in issue is the right of an operator of a motor vehicle who is stopped for a traffic violation to be protected from a prolonged investigative detention beyond the time reasonably required to complete the mission of issuing a ticket, when the time of the stop is extended in order to perform impermissible unrelated check(s).

In the instant case, the initial inquiry is whether Rodriguez and Dunbar apply at all. Here, Officer Herner told Chipola at the scene that the bottom portion of his license plate was obscured, and that was the reason for the stop. (SAC Paragraph 26). The CAD activity detail confirms that a traffic stop was conducted. (SAC Paragraph 29 and Exhibit 1). There can be no doubt that Rodriguez applies, and that Dunbar applies under its more expansive sweep.

Secondly, the initial inquiry is whether Rodriguez and Dunbar apply at all because for Rodriguez and Dunbar to apply, the time required to complete the stop must have been extended beyond the reasonable time to complete the mission (the issuance of a traffic ticket). To state grounds for this line of attack, Movants' Brief [LCV20211785022] contends: "....[T]he SAC still does not allege any facts to suggest the canine sniff extended or prolonged the time of the mission related to the traffic stop." Movants' Brief [LCV20211785022] at 14.

Movants' Brief chooses to ignore the contents of the SAC. First, the SAC alleges that at the point where Chipola told the officer there was nothing in his car, the stop had reached its "Rodriguez" moment, which means that the reasonable time for the officer to complete the mission (writing a traffic ticket) had expired, whether or not the officer had actually done so (written a traffic

ticket). (SAC Paragraph 44). United States v. Garner, 961 F.3d 264, 270 (3d Cir. 2020). From this moment on, the stop was being extended beyond the time required to complete the mission. Accordingly, the SAC states that beyond this moment when the time required to complete the mission expired, the officers extended the time for the stop. (SAC Paragraph 46). The canine sniff further extended the time to complete the stop while the dog was gotten ready (SAC Paragraph 51), and while the dog sniffed (SAC Paragraph 52).

Rodriguez requires nothing more. Rodriguez instructs: "Authority for the seizure thus ends when tasks tied to the traffic infraction are – or reasonably should have been – completed." Rodriguez v. United States, supra, 575 U.S. 348, 135 S.Ct. at 1614. "The seizure remains lawful only so long as unrelated inquiries do not measurably extend the duration of the stop." Rodriguez v. United States, supra, 575 U.S 348, 135 S.Ct. at 1615.

Since the allegations of the SAC allege that the officers extended the time required to complete the stop (in order to do a dog sniff) beyond the time reasonably required to complete the mission, SAC Paragraphs 1 and 4 state a cause of action.

Further, under State v. Pineiro, 181 N.J. 13 (2004), the previous intelligence regarding Plaintiff was not enough to make the extension of Plaintiff's traffic stop permissible. The fact pattern in Pineiro is similar to the instant case. Here, in the instant case, officers had previous intelligence on Chipola that he was a suspected drug dealer. But unlike the surveillance in Pineiro, the surveillance performed on Chipola at Wawa turned up nothing suspicious. The surveillance at Wawa did not observe any packages change hands between Chipola and the other persons who were present. (SAC Paragraph 14). Moreover, the surveillance at Wawa did not observe any money change hands between the persons who were present and Chipola. (SAC Paragraph 15). So, unlike Pineiro, all the officer had to rely upon when he extended Chipola's traffic stop beyond the time required to complete the mission (write a traffic ticket) to do unrelated check(s) (the dog sniff) was the previous intelligence that Chipola was suspected of being a drug dealer.

In addition to jurisprudence concerning the concept of "the reasonable suspicion ordinarily required to justify detaining an individual," there has developed jurisprudence concerning the required origin of the particularized and objective basis for suspecting criminal activity which the officer must articulate to do unrelated check(s) (including a dog sniff) which extend the time of the stop beyond the time required to complete the mission. See State v. Dunbar, 229 N.J. 521; see also United States v. Clark, 902 F.3d 404, 406-08 (3d Cir. 2018).

Here, the SAC contains the factual contention that as the officer questioned Chipola, "[t]here was nothing visible suggesting illegal drug possession in the interior of Plaintiff's car." (SAC Paragraph 42). Further, "[t]here was no odor of alcohol nor of illegal drugs in the interior of and/or in the vicinity of Plaintiff's car." (SAC Paragraph 43). Moreover, Movants' Brief [LCV20211785022] seems to agree that Dunbar and Clark do state the law. Movants' Brief contains the following correct statement of the law: "A detention based only on a traffic violation may be extended to conduct a canine sniff if the officers acquire reasonable suspicion of a separate crime during the course of the traffic related "mission." Movants' Brief [LCV20211785022] at 11-12.

Movants' brief does not claim any reasonable suspicion acquired by the officer during the mission, only reasonable suspicion acquired by the officer before the mission. That will not do. Reasonable suspicion acquired before the mission will not support an extension of a traffic stop beyond the time required to complete the mission (of writing a traffic ticket) to do an unrelated check (a dog sniff), as per Dunbar and Clark. For that reason, Counts I and IV for illegal duration of detention do state a cause of action.

Qualified Immunity

In the instant case, it would have been clear to a reasonable officer that his alleged conduct (extending the time to complete the stop beyond the time reasonably required to complete the mission to do unrelated check(s)) was objectively unreasonable in the situation he confronted. The officer(s) had one stand-alone factor to rely upon to justify extending the time to complete the stop. The one stand-alone factor was the known prior intelligence which related the car occupant to a history of drug dealing. The surveillance performed on Chipola by the officer at Wawa had turned up nothing suspicious. Under the totality of these circumstances, the officer was clearly on notice that he could not extend the stop relying on stand-alone known prior intelligence linking the car occupant to a history of drug dealing, under the authority of State v. Pineiro, supra, 181 N.J. 13, 853 A.2d at 894-95.

Indeed, it would have been clear to a reasonable officer that his alleged conduct was objectively unreasonable in the situation he confronted, even if the stand-alone reason for suspicion was the suspect had prior known convictions or arrests, rather than a history of alleged drug dealing. Under the totality of those circumstances, the officer would have likewise been clearly on notice that he could not extend the stop relying on stand-alone known prior convictions or arrests of the car occupant, under the authority of United States v. Green, supra, 897 F.3d at 187 (citing United States v. Mathurin, supra, 561 F.3d at 177) (citing United States v. Ten Thousand Seven Hundred Dollars & No Cents in U.S. Currency, 258 F.3d at 233).

Moreover, it would have been clear to a reasonable officer that his alleged conduct was objectively unreasonable in the following respect: the stand-alone knowledge which he had to justify extending the stop was acquired before the mission, not during the mission. The officer(s) were clearly on notice that to extend the stop beyond the time reasonably required to complete the mission, reasonable suspicion acquired during the mission was required, under the authority of United States v. Clark, supra, 902 F.3d at 410; State v. Dunbar, supra, 229 N.J. 521, 163 A.3d at 882.

Were the court to accept the individual defendants' contentions regarding qualified immunity, then it would follow that anyone known to the officer to have had prior convictions, arrests, or even to have been the subject of prior intelligence alleging he was a drug dealer could be stopped by an officer with impunity. This notion is clearly intolerable in a free society, and its intolerable nature is clearly established by law.

"Monell" Claim

Defendant, Township of Mantua, contends that somehow "Plaintiff has no basis for making the legal assertion that the reasonable suspicion must be acquired during the traffic stop." Movants' Brief (LCV20211785022) at 22. Defendant Township further contends that the policy it had on March 15, 2019 complied with the law.

Contrary to Defendant, Township of Mantua's contention, it has already been shown that for an officer to extend a traffic stop beyond the time reasonably required to complete the mission for the purpose of doing unrelated check(s), the officer must have acquired reasonable suspicion during the mission, rather than before the mission.

For this reason, any policy allowing the contrary would be illegal, and Count VI states a cause of action.

Negligence Claim – Count V

Good faith qualified immunity under N.J.S.A. 59:3-3 is judged according to "the same standards of objective reasonableness that are used in federal civil rights cases." N.E. v. State, Dep't of Children and Families, 449 N.J. Super. 379, 158 A.3d 44, 59 (App. Div. 2017), certif. den. 231 N.J. 214 (2017) (citing Fielder v. Stonack, 141 N.J. 101, 131-32 (1995)).

Contrary to the individual defendants' contention, it has already been shown, see, III, supra, at 14-16, that the individual officers are not entitled to qualified immunity under the standard used in federal civil rights cases.

For this reason, N.J.S.A. 59:3-3 qualified immunity would not apply to the individual defendants, vicarious liability of the Township would apply, and Count V states a cause of action.

Recovery of Damages After Signing the Release

The release states, in pertinent part: "the undersigned hereby releases and forever discharges Mantua Township and/or their employees, his/her heirs, executors, administrators, agents and assigns, and all other persons, forms or corporation liable or, who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries known and unknown, both to person and property, which have resulted or may in the future develop from and accident/incident which occurred on or about the 15th day of March, 2019, **as a result of damages to his vehicle** after he was stopped at Rt. 45 & Mount Holly Royal Road, Mantua Township, New Jersey on the above date of loss." (emphasis added).

The release plainly states on its face that the release is only releasing claims arising as a result of damages to his vehicle. For that reason, claims for emotional distress as a result of an alleged violation of his constitutional rights by reason of the conduct of the officer(s) are clearly not released. Since those types of claims were not released, the cause of action should go forward.

ANALYSIS

Relevant Governing Law

Motion to Dismiss for Failure to State a Claim

New Jersey Court Rules provide that a court can dismiss a claim for failure to state a cause of action. R. 4:6-2(e). A pleading is adequate if "a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). The court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Ibid. Rule 4:6-2 states:

> If, on a motion to dismiss . . . matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

However, the "court may consider documents referenced in the complaint without converting a motion to dismiss into one for summary judgment." LT Propco, LLC v. Westland Garden State Plaza L.P., 2010 N.J. Super. Unpub. LEXIS 3116 (App. Div. Dec. 28, 2010). On motions to dismiss, the court will "consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.' It is the existence of the fundament of a cause of action in those documents that is pivotal." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004), cert. denied, 543 U.S. 918 (2004) (internal citation omitted)). "[I]f the complaint states no basis of relief and discovery would not provide one, dismissal is the appropriate remedy." Id. at 166.

Court's Analysis

Release

As a preliminary matter, the Court must address whether the April 22, 2019 Release agreement releases Defendants from any liability with respect to the challenged motor vehicle stop on March 15, 2019.

Defendants contend this agreement prevents Plaintiff from bringing claims of any kind resulting from the March 15, 2019 incident. Plaintiff contends that the agreement only releases claims arising as a result of damages to Plaintiff's vehicle, therefore, claims of emotional distress resulting from an alleged violation of constitutional rights are not released.

In New Jersey, settlement agreements are favored, as the agreements allow the parties to reach an amicable solution of the matter by themselves. See Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008). "An agreement to settle a lawsuit is a contract which, like all other contracts, may be freely entered into, and which a court, absent demonstration of 'fraud or other compelling circumstance' shall honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. 118, 124 (App. Div. 1983) (quoting Honeywell v. Bubb, 130 N.J. Super.

130, 136 (App. Div. 1974)). As a result, New Jersey courts may choose to enforce a settlement agreement when it is voluntarily agreed to by the parties. Cap. City Prods. Co., Inc. v. Louriero, 332 N.J. Super. 449, 508 (App. Div. 2000). In fact, courts "strain to give effect to the terms of a settlement wherever possible." Jennings v. Reed, 381 N.J. Super. 217, 227 (App. Div. 2005) (quoting Dep't. of Public Advocate v. N.J. Board of Public Util., 206 N.J. Super. 523, 528 (App. Div. 1985).

The settlement agreement released "Mantua Township and/or their employees . . . from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries known and unknown, both to person and property, which have resulted or may in the future develop from" the March 15, 2019 incident, "as a result of damages to his vehicle" after Plaintiff was stopped by Defendants.

The effectiveness of the language "as a result of damages to his vehicle" is at issue between the parties. As noted by Plaintiff, the allegations in the Second Amended Complaint appear to stem from Plaintiff's allegations of his constitutional rights being violated. Plaintiff's remaining claims seek damages for the emotional distress suffered by Plaintiff for a prolonged investigative detention. These claims do not appear to be stemming from the damages to Plaintiff's vehicle from the incident at issue, rather, the remaining claims are based on the emotional distress suffered by Plaintiff for allegedly being subject to an investigative detention for a prolonged period of time in violation of Plaintiff's constitutional rights. However, to the extent each of the Counts of Plaintiff's complaint requests compensatory and punitive damages relating to "property damage to his car", they were clearly released. The Court dismisses all such property damages alleged in the Second Amended Complaint, noting they have also been removed by Plaintiff

But given the restricted language of the Release, the Court will find the inferences in favor of the Plaintiff that his constitutional claims were not dismissed.

Plaintiff's Second Amended Complaint

Counts I and IV – "Prolonged Investigation"

Counts I and IV allege a prolonged investigative detention. Plaintiff acknowledges there was a surveillance detail before Plaintiff was stopped by Defendants. However, Plaintiff's Amended Complaint alleges that, after being pulled over by Defendants, Plaintiff was told by Defendant Herner that "the bottom of Plaintiff's license plate was obscured by the frame" to the point where the Defendant Officers "couldn't see all of the bottom of the words 'GARDEN STATE.'" Further, the Second Amended Complaint alleges that the "search of the interior of Plaintiff's car by the officer extended the officers' mission by an additional 45 minutes."

The Second Amended Complaint alleges the mission of the Defendant Officers was in relation to Plaintiff's license plate being obstructed and that the search of Plaintiff's vehicle prolonged this mission. Plaintiff alleges that the Defendant Officers must have acquired reasonable suspicion ***during*** the mission to justify further investigation. However, Plaintiff alleges that the Defendant Officers reasonable suspicion was acquired before the traffic stop as a result of the surveillance conducted by the Defendant Officers. Stated another way, Plaintiff alleges that "no reasonable

suspicion had been acquired during the mission for an extension of the time for a traffic stop . . . to justify further investigation." Therefore, Plaintiff argues the Amended Complaint sufficiently alleges a cause of action to survive a motion to dismiss for failure to state a claim. Plaintiff argues Counts I and IV must survive Defendants' Motion as the Amended Complaint includes allegations that there was a legitimate traffic stop based on Plaintiff's obstructed license plate, as opposed to the prior surveillance, and that no reasonable suspicion had been acquired during the actual traffic stop.

Nowhere in the complaints filed by the Plaintiff does he identify the prescribed period for the license plate stop. The only reference supplied is at paragraph 79 - "The search of the interior of the Plaintiff's car by the officers extended the officers' mission by an additional 45 minutes." He makes no specific allegation that the car was ONLY stopped for the license plate obstruction and that the issuance of a summons should have taken 5 minutes, 10, 15 or any other amount of time. He does not identify how far Plaintiff operated his car down the street from the Wawa in the same town and adjacent to the same highway. He gives no indication of how much time elapsed from being pulled over to the canine unit's arrival which is critical. As the Plaintiff seeks to allege an interruption of his constitutional right to be protected from a prolonged detention, it is incumbent upon him to at least plead sufficient facts at this stage. Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (quoting P & J Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1981). On motions to dismiss, the court will "consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.' It is the existence of the fundament of a cause of action in those documents that is pivotal." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004), cert. denied, 543 U.S. 918 (2004) (internal citation omitted)). "[I]f the complaint states no basis of relief and discovery would not provide one, dismissal is the appropriate remedy." Id. at 166.

Although the court must accept "all well-pleaded facts as true," it "need not credit a complaint's 'bald assertions' or 'legal conclusions.'" In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). Plaintiff argues that Defendants had no right to investigate him by conducting the dog sniff as they had not acquired additional reasonable suspicion during the stop. However, a review of the case law cited by both parties leads to the conclusion that though typically reasonable suspicion may not be within the officer's grasp when a vehicle is first stopped, "During an otherwise lawful traffic stop, a police officer may inquire into maters unrelated to the justification of the traffic stop." State v. Dunbar, 229 N.J. 521, 533 citing Arizona v. Johnson, 555 U.S. 333 (2009). Here, it is evident that the Officers had reasonable suspicion just a few minutes before when they observed Plaintiff sitting on the curb at the Wawa. Though the Plaintiff denies he had been drinking in the parking lot, he advised the police of people who had been drinking. Plaintiff was thirty miles from his home and had been identified as having been involved in selling alcohol, marijuana and pills to local juveniles. Different people were coming over to his vehicle in the one hour he was observed. None of these facts "stand alone" but were in play in the observations of Plaintiff at the Wawa. Plaintiff complains reasonable suspicion had to be acquired during the stop. This Court cannot find that there is a "during the stop" limitation such that the suspicious actions of the Plaintiff at the Wawa should

be ignored. Clearly, the officers had witnessed enough conduct at the Wawa. Instead of proscribing the time when suspicion arises, the Court said, "The reasonableness of [a] detention is not limited to investigating the circumstances of a traffic stop." Citing Johnson at 333 and State v. Dickey, 152 N.J. 468, 479 (1998). Plaintiff chides the officers' position and says that reasonable suspicion acquired before the mission "will not do." The Court disagrees and finds the substantially contemporaneous surveillance should be considered.

The use of the canine following this reasonable suspicion and the dog's sniff alerting to the presence of narcotics satisfied the probable cause standard for the search that followed. This Court will therefore dismiss Counts I and IV with prejudice.

Count V - Negligence Claims

Plaintiff pleads simply that both Officers Herner and Riepen were "negligent", and they acted in bad faith thus their employer Mantua Township is liable vicariously. The Second Amended Complaint then asserts Plaintiff "suffered emotional distress." However, Defendants are public employees and a public entity. N.J.S.A. 59:9–2 is applicable and requires – no damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided however that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3600." Claims for emotional distress-including depression, stress and anxiety- have been determined to be subjective in nature so that even if permanent they did not meet the statutory criteria for a recovery. Srebnik v. State, 44 N.J. Super. 344 (App. Div. 1991). Plaintiff has not pled the emotional distress he suffers is both permanent and substantial which is required. Collins v. Union County Jail,150 N.J. 407 (1997).

Finally, this Court has determined that there was reasonable suspicion for the stop of the Plaintiff's car and Plaintiff's temporary detention by reason of his conduct at the Wawa. The officers' stop of the vehicle for the reason of its tag being obscured was also within the law. There can be no underlying predicate liability. For all of these reasons the Plaintiff's Fifth Count is dismissed with prejudice.

Count VI – "Monell" Claim

In Count VI of the Amended Complaint, Plaintiff alleges the Township of Mantua is liable under Monell "for the establishment of a policy which, when executed, caused a deprivation of or interference with a substantive right."

Under 42 USC § 1983, a local government cannot be held vicariously liable for the actions of its employees under a theory of *respondeat superior* or solely because it employs a tortfeasor. Monell v. Dep't of Soc. Servs., 436 US 658, 690-91 (1978); Sanford v. Stiles, 456 F.3d 298, 314 (3d Cir. 2006). "To state a claim under §1983, a plaintiff [...] must show that the alleged deprivation [of a Constitutional right] was committed by a person acting under color of state law." Barna v. City of Perth Amboy, 42 F.3d 809, 815 (3d Cir. 1994), quoting, West v. Atkins,

487 U.S. 42, 48 (1988). If a plaintiff can establish a constitutional deprivation, a plaintiff must then establish that the deprivation resulted from an official policy or custom. Monell at 694.

Here, as discussed above, the Court is dismissing Plaintiff's Complaint, therefore, the first prong of a Monell claim is not met as there is no constitutional deprivation. Therefore, the Court need not go further into analyzing whether Plaintiff's alleged constitutional deprivation resulting from an official policy or custom. As such, Count VI of Plaintiff's Second Amended Complaint must be dismissed in its entirety.

/s/ Samuel J. Ragonese
SAMUEL J. RAGONESE, J.S.C.

SALVE CHIPOLA III Plaintiff, vs. TOWNSHIP OF MANTUA; DOUGLAS HERNER; KYLE RIEPEN; and JOHN DOES 1-20; Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION GLOUCESTER COUNTY Docket Number GLO-L-0216-21 Civil Action **ORDER**

This matter having come before the Court by way of notice on behalf of Defendants Township of Mantua, Mantua Township Police Officer Douglas Herner, and Mantua Township Police Officer Kyle Riepen, represented by A. Michael Barker, Esquire of Barker, Gelfand, James & Sarvas, P.C., and the court having considered the arguments of the parties and for good cause shown;

IT IS, on this 17th day of June 2021; ORDERED and ADJUDGED that:

Defendants', Motion to Dismiss is hereby **GRANTED** in accordance with the Memorandum of Decision attached hereto.

The Complaint in this matter is and hereby shall be dismissed. ~~XXXXXXXXXXXXXXX~~ Counts II and III are dismissed with prejudice. Counts I, IV, V and VI are dismissed without prejudice affording Plainitff the opportunity to amend within 30 days.

Samuel J. Ragonese

The Honorable Judge Samuel J Ragonese

SALVE CHIPOLA III,	:	
	:	**SUPERIOR COURT OF NEW JERSEY**
Plaintiff,	:	**LAW DIVISION – CIVIL PART**
	:	**GLOUCESTER COUNTY**
vs.	:	**DOCKET NO.: L-216-21**
	:	
TOWNSHIP OF MANTUA; DOUGLAS HERNER; KYLE RIEPEN; and JOHN DOES 1-20,	:	**MEMORANDUM OF DECISION**
	:	**DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM**
	:	
Defendants,	:	
	:	
	:	
	:	

RELIEF REQUESTED

DEFENDANTS, Township of Mantua, Douglas Herner, and Kyle Riepen, represented by A. Michael Barker, Esquire, move to dismiss Plaintiff's Complaint.

PLAINTIFF, Salve Chipola III, represented by Peter Kober, Esquire, opposes the Motion.

FACTUAL BASIS

1. This matter arises out of a traffic stop of Plaintiff Salve Chipola III on March 15, 2019 in the Township of Mantua.
2. The traffic stop occurred after Plaintiff was observed at a local Wawa by the police department of Defendant Township of Mantua.
3. Defendant Kyle Riepen instructed Plaintiff to leave the Wawa parking lot and Plaintiff complied.
4. Defendant Douglas Herner subsequently pulled Plaintiff over as Plaintiff was driving on Route 45 for a license plate obstruction.
5. Defendants Douglas Herner and Kyle Riepen were present during the traffic stop of Plaintiff.
6. Defendant Riepen was accompanied by a canine unit which performed an exterior sniff on Plaintiff's vehicle.
7. The canine unit alerted Defendant Officers while conducting an exterior sniff.

LEGAL ARGUMENT

Defendants' (Township of Mantua, Douglas Herner and Kyle Riepen) Argument

Counts I and IV for a Prolonged Investigative Detention Should be Dismissed

Plaintiff's Complaint relies on Rodriguez v. United States, 575 U.S. 348 (2015). However, Rodriguez applies only to instances wherein the traffic stop was based solely on the observation of a traffic related offense. Under those circumstances, "a traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket." Rodriguez at 354-355, quoting, Illinois v. Caballes, 543 U. S. 405, 407 (2005).

Here, Plaintiff was not stopped by the Defendant Officers based solely on a traffic violation. The Defendant Officers initiated the canine sniff because they had reasonable suspicion, based on the facts as alleged by Plaintiff, that Plaintiff was in possession of illegal substances. Based on the totality of the circumstances, the Defendant Officers had reasonable suspicion that Plaintiff was in possession of illegal substances; and the time it took to conduct the exterior canine sniff based on that suspicion was reasonable. Alternatively, even if the stop was premised only on the traffic violation, the Complaint does not allege any facts to suggest the canine sniff extended or prolonged the time of the mission related to the traffic stop.

Counts II and III for an Unlawful Warrantless Search Should be Dismissed

"'[P]robable cause is an absolute defense'" to NJCRA claims. Cruz v. Camden Cty. Police Dep't, No. A-1276-19T3, 2-21 N.J. Super. LEXIS 3, at *12, (emphasis added), quoting, Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000). "[A] law enforcement officer can defend such a claim 'by establishing either that he or she acted with probable cause, or, even if probable cause did not exist, that a reasonable police officer could have believed in its existence.'" Id. at *12, quoting, Morillo v. Torres, 222 N.J. 104, 118-19 (2015) (quoting, Kirk v. City of Newark, 109 N.J. 173, 184 (1988)).

"[A] dog's positive alert while sniffing the exterior of the car provides an officer with the probable cause necessary to search the car without a warrant." United States v. Johnson, 742 F. App'x 616, 622 (3d Cir. 2018)5, quoting, United States v. Pierce, 622 F.3d 209, 213 (3d Cir. 2010) (citations omitted).

Additionally, "[w]hile New Jersey courts have not directly addressed this issue, federal courts have held that 'a trained narcotics dog's instinctive action of jumping into the car does not violate the Fourth Amendment.'" State v. Cadavid, No. A-3510- 11T4, 2015 N.J. Super. Unpub. LEXIS 1107, at *11-12 (Super. Ct. App. Div. May 13, 2015) (quoting, Pierce at 213-14). "However, this rule is limited to those instances where 'the police did not encourage or facilitate the dog's jump.'" Id. at 12, quoting, United States v. Sharp, 689 F.3d 616, 620 (6th Cir.), cert. denied, 184 L. Ed. 2d 514 (2012).

Neither the entry of the canine into the vehicle nor the officers' entry into the vehicle constitute an unconstitutional search of the vehicle. Counts II and III of the Complaint should be dismissed.

In the Alternative, Defendants Herner and Riepen are Entitled to Qualified Immunity

"The doctrine of qualified immunity serves to 'shield government officials performing discretionary functions generally … 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.'" Marinaccio v. Matthew Cangialosi & Dunellen Police Dep't, No. A-2149-18T4, 2020 N.J. Super. Unpub. LEXIS 1464, at *13 (App. Div. July 21, 2020)10, quoting, Morillo v. Torres, 222 N.J. 104, 116 (2015)

(alteration in original) (quoting, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). "The issue of qualified immunity is one that ordinarily should be decided well before trial, and summary judgment is an appropriate vehicle for deciding that threshold question." Id. at *15, citing, Morillo at 119.

"The dispositive point in determining whether a right is clearly established is whether a reasonable officer in the same situation clearly would understand that his actions were unlawful." Morillo at 118. "In other words, 'existing precedent must have placed the statutory or constitutional question' confronted by the official 'beyond debate.'" Id., quoting, Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 (2014).

The factual allegations in the Plaintiff's Complaint, taken in the light most favorable to the Plaintiff, do not establish what Plaintiff sought to show, but rather establish the opposite, i.e., that the challenged police conduct violated no statutory or constitutional right, for the following reasons. (1) Based on conduct at the Wawa, there was reasonable suspicion to conduct an exterior canine sniff of Plaintiff's vehicle, whether or not it would have taken longer than the mission of issuing a traffic citation; (2) even if the observation of a traffic violation was the sole reason for the initial stop (which it indisputably was not), there is no factual allegation the canine sniff prolonged the "mission" of issuing the traffic citation; and (3) once the canine indicated a positive alert, there was probable cause to conduct an interior search. The factual allegations in Plaintiff's Complaint are insufficient to establish the challenged police conduct was a violation of clearly established law. Moreover, the Plaintiff has no supporting legal authority to establish he had a clear right not to be stopped as he alleged. So, there was no civil rights violations at all.

Count IV – New Jersey Civil Rights Act "Monell" Claim Against Mantua Township

Under 42 USC §1983 (and the NJCRA), a local government cannot be held vicariously liable for the actions of its employees under a theory of *respondeat superior* or solely because it employs a tortfeasor. Monell v. Dep't of Soc. Servs., 436 US 658, 690-91 (1978); Sanford v. Stiles, 456 F.3d 298, 314 (3d Cir. 2006). "To state a claim under §1983, a plaintiff [...] must show that the alleged deprivation [of a Constitutional right] was committed by a person acting under color of state law." Barna v. City of Perth Amboy, 42 F.3d 809, 815 (3d Cir. 1994), quoting, West v. Atkins, 487 U.S. 42, 48 (1988). If a plaintiff can establish a constitutional deprivation, a plaintiff must then establish that the deprivation resulted from an official policy or custom. Monell at 694; see also, Hernandez v. Hudson Cty., No. A-1683-18T4, 2020 N.J. Super. Unpub. LEXIS 1405, at *24 (App. Div. July 15, 2020).

Assuming, per arguendo, Plaintiff can establish Defendants Herner and Riepen violated Plaintiff's civil rights, Plaintiff must establish that Defendant Mantua Township was the moving force behind the civil rights violation. Monell, supra., 436 U.S. at 694. Plaintiff's Complaint only alleges that the Mantua Township Police Department had a policy which "provided that the officer could prolong the investigative detention if he had any reasonable suspicion to justify further investigation." Here, the question is whether such a policy, if true, was facially unconstitutional and the moving force behind the alleged civil rights violations. The alleged Mantua policy is entirely consistent with the New Jersey Constitution. Accordingly, Plaintiff's "Monell" claim against Mantua should be dismissed.

Count V – Plaintiff's Common Law Negligence Claim Against all Defendants Should be Dismissed

Plaintiff alleges general common law negligence against Defendant Herner and Riepen, and common law vicarious liability against Mantua Township.

"[O]rdinary negligence is an insufficient basis for holding liable a public employee involved in the execution of the law under N.J.S.A. 59:3-3." B.F. v. Div. of Youth & Family Servs., 296 N.J. Super. 372, 386 (App. Div. 1997), citing, Fielder v. Stonack, 141 N.J. 101, 123-25 (1995). "[T]he 'good faith' of a

public employee under N.J.S.A. 59:3-3 was to be judged in relation to whether his act violated N.J.S.A. 59:3-14 in that it involved "crime, actual fraud, actual malice or willful misconduct." Id., citing, Hayes v. Mercy Cnty, 217 N.J. Super. 614, 623 (App. Div.), certif. denied, 108 N.J. 643 (1987); Brayshaw v. Gelber, 232 N.J. Super. 99, 110 (App.Div.1989).

As for the vicarious liability claim against Mantua Township, N.J.S.A. 59:2-2(b) provides that "[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." Since neither Herner nor Riepen are liable for negligence, vicarious liability cannot be imposed on Mantua Township. Thus, the vicarious liability claim should be dismissed. N.J.S.A. 59:2-2(b).

Plaintiff's (Salve Chipola III) Argument

Counts I and IV

"In the context of traffic stops, the Supreme Court has made clear that 'the tolerable duration of the stop is determined by the seizure's mission - to address the traffic violation that warranted the stop and attend to related safety concerns.'" Yoc-Us v. Attorney Gen. United States, 932 F.3d 98, 104 (3d Cir. 2019) (citing Rodriguez v. United States, 575 U.S. 348, 354, 135 S. Ct. 1609, 1614 (2015)); United States v. Clark, 902 F.3d 404, 410 (3d Cir. 2018) (citing Rodriguez v. United States, supra, 575 U.S. at 354, 135 S. Ct. at 1614).

But an officer's authority to seize the occupants of a vehicle "ends when tasks tied to the mission are, or reasonably should have been, completed." United States v. Clark, supra, 902 F.3d at 410 (citing Rodriquez v. United States, supra, 575 U.S. at 354, 135 S.Ct. at 1614). "On scene investigation into other crimes, however, detours from [the] mission." Rodriguez v. United States, supra, 575 U.S. 348, 135 S.Ct. at 1616.

"To prolong a stop beyond [the time reasonably required to complete the mission of issuing a ticket for the violation], the officer must have acquired reasonable suspicion during the mission to justify further investigation." Yoc-Us v. Attorney Gen. United States, supra, 932 F.3d at 104 (quoting United States v. Clark, supra, 902 F.3d at 410) (citing Rodriguez v. United States, supra, 575 U.S. 348, 135 S. Ct. at 1615) (emphasis added); accord, State v. Kerns, No. A-4731-17 (Unpublished) (App. Div.) (Decided December 30, 2020) (slip op. at 12-13) (citing State v. Dickey, 152 N.J. 468, 479-80 (1998)). "Absent [ ] new suspicions, police intrusions unrelated to the traffic-mission are temporally circumscribed." State v. Kerns, supra, (slip op. at 13). Kerns specified what type of new suspicions there must be: "The additional inquiries - [those that broaden the inquiry and satisfy the officer's suspicions] - ....are grounded in the new suspicions aroused by, or while conducting, the lawful traffic-related or safety-related inquiries. State v. Kerns, supra, (slip op. at 12-13).

In the instant case, the complaint states that as Officer Herner questioned Plaintiff, "[t]here was nothing visible suggesting illegal drug possession in the interior of Plaintiff's car." Further, "[t]here was no odor of alcohol nor of illegal drugs in the interior of and/or in the vicinity of Plaintiff's car." The complaint does not specifically state whether or not odor of air freshener was present. The complaint does not specifically state that Plaintiff's answers to Officer Herner's questions aroused any new suspicion on Officer Herner's part, but Officer Herner does not allege that Plaintiff's answers aroused a new suspicion on his part.

Under the facts and circumstances which confronted Officer Herner as pled in the Complaint, a cause of action for prolonged investigative detention is stated in Counts I and IV.

Alternatively, Counts I and IV allege sufficient facts to state that the canine sniff extended the mission, and these Counts should not be dismissed on this basis. In the instant case, the complaint states that after the investigative questioning was finished, "Officers Herner and Riepen extended the time for investigative detention." Further, "....having the canine unit do an exterior sniff of Plaintiff's car involved an extension of the time for the investigative detention while the dog was gotten ready for the exterior sniff." The complaint goes on to say that "[t]here was a further extension of the time for the investigative detention at the scene while the dog conducted the exterior sniff of Plaintiff's car." The complaint does not specifically allege the amount of time which transpired, but these facts can be gotten through discovery. Based on the foregoing, a cause of action for prolonged investigative detention is stated in Counts I and IV.

Count II

The rule that "a trained narcotics dog's instinctive action of jumping into the car does not violate the Fourth Amendment," United States v. Pierce, 622 F.3d 209, 213-14 (3d Cir. 2010), "is limited to those instances where the police did not encourage or facilitate the dog's jump." State v. Cadavid, 2015 N.J. Super. Unpub. LEXIS 1107* (App. Div. May 13, 2015) (citing United States v. Pierce, 622 F.3d at 214).

Courts are to view the complaint with liberality, Banco Popular No. America v. Gandi, supra, 184 N.J. 161, 876 A.2d at 255, and "discovery is intended to lead to facts supporting or opposing an asserted legal theory...." Camden County Energy Recovery Assocs. v. N.J. Dep't of Envtl Prot., supra, 320 N.J. Super. 59, 726 A.2d at 970.

Here, the Complaint states that "[d]uring the course of the exterior sniff of Plaintiff's car, the dog jumped inside Plaintiff's car." The complaint does not specifically allege that one or more of the individual defendants encouraged, assisted, facilitated or otherwise intentionally acted so the dog would get in the car, but these facts can be gotten through discovery. As such, a cause of action for warrantless search is stated in Count II.

Count III

"Pursuant to.... New Jersey Constitution, Article I, Paragraph 7, 'police officers must obtain a warrant before searching a person's property, unless the search falls within one of the recognized exceptions to the warrant requirement.'" State v. Levett, No. A-5229-17 (Unpublished) (App. Div.) (Decided March 20, 2019). Here, the asserted exception is probable cause. "Probable cause, or an officer's 'well-grounded suspicion that a crime has been or is being committed,' State v. Nishina, 175 N.J. 502, 515 (2003), 'requires nothing more than a practical, common-sense decision whether, given all of the circumstances, there is a fair probability' that a crime has been committed." State v. Levett, supra, (quoting State v. Johnson, 171 N.J. 192, 214) (2002)).

Where a canine sniff alert occurs, part of the totality-of-the-circumstances equation is "the reliability of a drug-detection dog." Florida v. Harris, 568 U.S. 237, 133 S.Ct. at 1056 (2013). "The.... measure of a dog's reliability.... comes.... in controlled testing environments." Florida v. Harris, supra, 568 U.S. 237, 133 S.Ct. at 1057. "[E]vidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason to trust his alert. If a bona fide organization has certified a dog after testing his reliability in a controlled setting, a court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search. The same is true, even in the absence of formal certification, if the dog has recently and successfully completed a training program that evaluated his proficiency in locating drugs." Florida v. Harris, supra, 568 U.S. 237, 133 S.Ct. at 1057. The question - similar to every inquiry into probable cause - is whether all the facts surrounding a dog's alert, viewed

through the lens of commons sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." Florida v. Harris, supra, 568 U.S. 237, 133 S.Ct. at 1058.

Here, the Complaint states that "Defendants, Officers Herner and Riepen, did not have probable cause to search the interior of Plaintiff's car." The Complaint does not specifically make any allegations concerning any of the Harris factors to be considered by the determiner of the facts when assessing the totality of the circumstances, i.e. the reliability of the dog and circumstances surrounding the particular alert, but these facts can be obtained through discovery. Based on the foregoing, a cause of action for warrantless search is stated in Count III.

Qualified Immunity on Counts I and IV

Plaintiff can identify a right which was infringed upon by the individual defendants. The right may be described as the right of a vehicle occupant who is detained, to not be detained longer than the reasonable time required to complete the mission of issuing a ticket for a violation, unless the officer acquires reasonable suspicion during the mission to justify further investigation. The right was clearly established prior to March 19, 2019. See, United States v. Clark, supra, 902 F.3d at 410; State v. Dickey, supra, 152 N.J. at 479-80.

Qualified Immunity on Counts II and III

"[T]he 'reasonable official' test includes a factual as well as a legal component: '....the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause.... will often require examination of the information possessed by the searching officials.... The relevant question.... is the objective (albeit fact-specific) question whether a reasonable officer could have believed [the officer's] warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed.'" Good v. Dauphin County Social Services, 891 F.2d 1087, 1092 (3d Cir. 1989) (quoting Anderson v. Creighton, 483 U.S. 635, 641, 107 S.Ct. 3034 (1987)).

In the instant case, the information the searching officers possessed, and their actions at the scene, have yet to be developed by a factual record. Based on the foregoing, it is premature at this point in the litigation to allow the individual defendants to avail themselves of the doctrine of qualified immunity applied to Counts II and III.

Count VI: "Monell" Claim

In the instant case, the complaint alleges that prior to March 19, 2019, Mantua Township established a policy for prolonging an investigative detention arising out of a legal traffic stop, and the policy was constitutionally deficient in that it failed "to provide that the investigative detention could only be extended if the officers acquired reasonable suspicion during the mission to justify further investigation.

The policy in question could be constitutionally deficient if it failed to conform with the requirements of Yoc-Us v. Attorney Gen. United States, supra, 932 F.3d at 104, and State v. Kerns, supra, (slip op. at 12-13) and the cases cited therein.

The only reason cited in Movants' brief for the dismissal of Count VI is that "[t]he alleged Mantua policy is entirely consistent with the New Jersey Constitution." Since it has been shown otherwise, a Monell cause of action for a policy pertaining to prolonged investigative detention is stated in Count VI.

Count V

"In determining whether an [officer] has established qualified immunity under N.J.S.A. 59:3- 3, the court applies the same standards of objective reasonableness that are used in federal civil rights cases." N.E. for J.V. v. State Dep't of Children & Families, 449 N.J. Super. 379, 158 A.3d 44, 59 (App. Div.), certif. den. 231 N.J. 214 (2017). "A court must examine whether the actor's allegedly wrongful conduct was objectively reasonable in light of the facts known to him or her at the time." N.E. for J.V. v. State Dep't of Children & Families, supra, 449 N.J. Super. 379, 158 A.3d at 59. If the actor's conduct violated a clearly established constitutional or statutory right, objective reasonableness will be defeated. See, N.E. for J.V. v. State Dep't of Children & Families, supra, 449 N.J. Super. 379, 158 A.3d at 59.

In the instant case, Plaintiff has identified a clearly established constitutional right in Counts I and IV which the officers infringed upon, thereby defeating objectively reasonable good faith qualified immunity as a defense to Count V. Further, in the instant case, in analyzing Counts II and III, the information the searching officers possessed, and their actions at the scene, have yet to be developed by a factual record. Based on the foregoing, it is premature at this point in the litigation to allow the individual defendants to avail themselves of the doctrine of objectively reasonable good faith qualified immunity as a defense to Count V.

Defendants' (Township of Mantua, Douglas Herner and Kyle Riepen) Reply

There Was Reasonable Suspicion to Conduct the Exterior Canine Sniff Based on the Totality of the Circumstances

Plaintiff wants to ignore the totality of the circumstances and frame the event as nothing more than a traffic stop. As Plaintiff's Complaint articulates, Plaintiff was under surveillance by the Defendants for some time prior to the traffic stop. Moreover, Plaintiff pled guilty to improper display/unclear plates. Thus, even if the exterior canine sniff extended the time of the stop, it is of no consequence because Defendants had reasonable suspicion to conduct the canine sniff based on the totality of the circumstances and not based solely on their observations during the traffic stop.

Defendant Officers Probable Cause to Search Interior of Vehicle

First, as already stated, probable cause was not established solely by the canine alert. The canine alert in addition to all that was observed by the Defendant Officers prior to the canine alert was enough to establish probable cause.

Based on Plaintiff's standard, all a Plaintiff needs to do in order to drag a public entity through a year or more of civil litigation is allege the seizure or search was without probable cause and we will figure out whether that allegation has any merit through the discovery process. However, that is inconsistent with N.J.Ct.R. 1:4-8(a)(3). In this case, Plaintiff's Complaint only alleges the canine alerted positive to narcotics. Plaintiff does not allege the alert was unreliable or that the canine was cued by the officer. Certainly, the pleading standard is not so lax that a Plaintiff can make any conclusory allegation without a single reason as to why that allegation has merit and just hope that something turns up in discovery. Moreover, Florida v. Harris is not inconsistent with the cases from the Third Circuit and New Jersey Appellate Division cited by Defendants in the initial brief.

ANALYSIS

Relevant Governing Law

When deciding a motion to dismiss pursuant to R. 4:6-2(e), the court must confine its inquiry "'to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim.'" Rieder v. State Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987) (quoting P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1981)). On a motion to dismiss, the plaintiff's role is "not to prove the case but only to make allegations which, if proven, would constitute a valid cause of action." Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001). If the complaint's facts suggest a viable cause of action and such cause of action may be articulated by an amendment, the complaint should not be dismissed. Printing Mart v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989). The determination as to whether to dismiss a complaint is approached with great caution and such motions are granted only in the rarest of instances. Id. at 771-72. A reviewing court must search the Complaint in depth and with liberality, affording the plaintiff every reasonable inference. Id. at 746. Such an examination "should be one that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

The proper analytical approach to such motions requires the motion judge to (1) accept as true all factual assertions in the complaint, (2) accord to the nonmoving party every reasonable inference from those facts, and (3) examine the complaint "in depth and with liberality to ascertain whether the fundament of cause of action may be gleaned even from an obscure statement of claim." Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008) (quoting Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)).

On motions to dismiss, the court will "consider 'allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim.' It is the existence of the fundament of a cause of action in those documents that is pivotal." Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005) (quoting Lum v. Bank of Am., 361 F.3d 217, 222 n.3 (3d Cir. 2004), cert. denied, 543 U.S. 918 (2004) (internal citation omitted)). "[I]f the complaint states no basis of relief and discovery would not provide one, dismissal is the appropriate remedy." Id. at 166.

Although the court must accept "all well-pleaded facts as true," it "need not credit a complaint's 'bald assertions' or 'legal conclusions.'" In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1429 (3d Cir. 1997). As noted in Nostrame v. Santiago,

> New Jersey is a "fact" rather than a "notice" pleading jurisdiction, which means that a plaintiff must allege facts to support his or her claim rather than merely reciting the elements of a cause of action. A plaintiff cannot simply assert that any essential facts that the court may find lacking can be dredged up in discovery.

[420 N.J. Super. 427, 436 (App. Div. 2011), *modified and aff'd*, 213 N.J. 109 (2013).]

The court may dismiss a complaint for failure to state a claim upon which relief may be granted "if [the complaint] fails 'to articulate a legal basis entitling plaintiff to relief.'" Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 112 (App. Div. 2009) (quoting Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2004), cert. denied, 185 N.J. 297 (2005) (internal citations omitted)).

Court's Analysis of the Counts of the Complaint

Counts I and IV

Counts I and IV of Plaintiff's Complaint both allege a CRA claim for prolonged investigative detention against Defendant Officers Herner and Riepen. Count I is focused on the exterior sniff of Plaintiff's car by the canine unit, while Count IV is focused on the interior search of Plaintiff's car following the exterior sniff. The parties address these Counts in the same argument, so the Court will summarize the arguments accordingly.

Defendant Officers argue that the Complaint "only vaguely alleges the exterior sniff extended the time of the investigative detention, which is inadequate to plausibly establish a civil rights violation." Defendants argue that Plaintiff's claims fail because (1) the officers had the requisite reasonable suspicion to detain Plaintiff for the time it took to conduct the exterior canine sniff and (2) once the canine alerted to a positive detection of illegal substances, the officers had probable cause to search the vehicle. Defendants argue that Plaintiff's Complaint fails to state a claim in Counts I and IV because it is premised on the mistaken fact that the "mission" of the officers was a traffic stop rather than an investigation into other possible unlawful conduct based on an hour-long surveillance effort prior to Plaintiff departing Wawa.

Plaintiff contends that "[t]here was nothing visible suggesting illegal drug possession in the interior of Plaintiff's car" and that "[t]here was no odor of alcohol nor of illegal drugs in the interior of and/or in the vicinity of Plaintiff's car." Plaintiff acknowledges his Complaint fails to "state that any of Plaintiff's answers to Officer Herner's questions did not arouse any new suspicion on Officer Herner's part and argues Officer Herner does not allege that Plaintiff's answers aroused a new suspicion on his part." Further, Plaintiff's brief asserts that the Complaint "does not specifically allege the amount of time which transpired, but these facts can be gotten through discovery." See Pl. Brief at 5.

"A dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment." Illinois v. Caballes, 543 U.S. 405, 410 (2005). "[A] seizure that is lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution." Id. at 407 (citing United States v. Jacobson, 466 U.S. 109, 124 (1984)). "A seizure that is *justified solely by the interest in issuing a warning ticket* to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Id. (emphasis added). "[T]he tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission' – to address the traffic violation that warranted the stop." Rodriguez v. United States, 575 U.S. 348, 354 (2015) (citing Caballes, 543 U.S. at 407). "Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose." Id. (internal quotations omitted). "Authority for the seizure thus ends when the tasks tied to the traffic infraction are – or reasonably should have been completed." Id. "The seizure remains lawful only so long as [unrelated] inquiries do not measurably extend the duration of the stop." Id. (quoting Arizona v. Johnson, 555 U.S. 323 (2009)).

The Supreme Court of the United States expanded on this notion when it granted certiorari in Rodriguez on the question of "whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff." [1] Rodriguez, at 353. The Court held that "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified *only by a police-observed traffic*

[1] The question of whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation was remanded to the Eight Circuit.

violation, therefore, 'become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. Id. at 350-51 (quoting Illinois v. Caballes, 543 U.S. at 407) (emphasis added).

In Rodriguez, a Nebraska police officer observed the Rodriguez's vehicle veer onto the shoulder of a state highway "for one or two seconds and then jerk back onto the road." Id. at 351. Nebraska law prohibited driving on highway shoulders, therefore, on that basis, the police officer pulled Rodriguez over at 12:06 a.m. Id. The officer was a K-9 officer; therefore, his police dog was in his patrol car at the time of the stop. Id. The officer conducted the ordinary inquiries incident to a traffic stop, such as gathering Rodriguez's license, registration, and proof of insurance. Id. The officer conducted a records check of Rodriguez, returned to the vehicle, and then asked the passenger of the vehicle for his license and questioned the passenger about what the two individuals were doing and where they were going that night. Id. The officer then returned to his vehicle and conducted a records check on the passenger of the vehicle and called for a second officer. Id. At this time, the officer began writing a warning ticket to Rodriguez for driving on the shoulder of the road. Id. By 12:27 or 12:28 a.m., the officer had finished explaining the warning to Rodriguez and had returned both Rodriguez's and the passenger's documents obtained earlier in the stop. Id. at 352. The officer later testified that, at that point, he "got all the reason[s] for the stop out of the way[,] . . . took care of all the business." Id.

Despite this testimony, the officer asked for permission to conduct an exterior sniff of the vehicle with his police dog, to which Rodriguez did not consent. Id. The officer then instructed Rodriguez to turn off and exit the vehicle, to which Rodriguez complied. Id. At 12:33 a.m., a deputy sheriff arrived, and the officer retrieved his police dog to conduct an exterior sniff. Id. During the exterior sniff, the police dog alerted to the presence of drugs. Id. About "seven or eight minutes had elapsed from the time [the officer] issued the written warning until the dog indicated the presence of drugs." Id. A further search of the vehicle revealed a large bag of methamphetamine. Id. Rodriguez was indicted and moved to suppress the evidence seized on the grounds, among others, that the officer prolonged the traffic stop without reasonable suspicion to conduct the exterior sniff. Id.

In reaching its holding, the Court noted that the critical question is "not whether the dog sniff occurs before or after the officer issues a ticket. . . but whether conducting the sniff prolongs – i.e., adds time to – the stop." Id. at 357. The Court noted that "[a]n officer . . . may conduct certain unrelated checks during an otherwise lawful traffic stop. . . [but] he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." Id. at 355.

The New Jersey Supreme Court has adopted the federal standard for canine sniffs. State v. Dunbar, 229 N.J. 521, 538 (2017). "The federal standard, which focuses upon whether the canine sniff unreasonably prolongs a traffic stop beyond its lawful purpose, is a functional approach consistent with [New Jersey] caselaw." Id. at 539. The New Jersey Supreme Court has "endorse[d] the federal determination that a canine sniff is *sui generis* and does not transform an otherwise lawful seizure into a search that triggers constitutional protections." Id. (further citations omitted). Further, the court "adopt[ed] the federal standard for determining the manner in which an officer may conduct a canine sniff during an otherwise lawful traffic stop." Id. at 539.

As to Count I, Plaintiff's Complaint urges that there was nothing visible suggesting illegal drug possession in the interior of Plaintiff's car and that there was no odor of alcohol nor of illegal drugs in the interior of and/or in the vicinity of Plaintiff's car. See Pl. Complaint at 34-35. Plaintiff asserts that at that point, the investigative detention of Plaintiff and his car had reached its Rodriguez moment. Id. at 36. Further, Plaintiff asserts that despite the dog accompanying Defendant Riepen to the scene, an extension

of the time of the investigative detention occurred both while the dog was being prepared for the exterior sniff and during the exterior sniff. See Pl. Complaint at 43-44. Plaintiff argues that because the Rodriguez moment had already been reached, Defendant Officers needed to acquire additional reasonable suspicion during the mission of addressing the traffic violation that warranted the stop. The Complaint appears to build that reasonable suspicion in identifying Plaintiff's home address as approximately 30 plus miles distant from the Wawa where he was first observed. Plaintiff pleads he "met up with some of his friends", "sat on the curb by his car" and "talked to each other." Though he denied drinking, he told Officer Herner "who had been drinking" prior to the officers' direction for the group to disperse. Pl. Complaint at 31. Plaintiff alleges that no new reasonable suspicion had been acquired during the mission, but these additional facts can fairly be said to create suspicion in a reasonable person's mind. These facts were in addition to what was observed through the surveillance of Plaintiff at Wawa.

According to Plaintiff's Complaint, Defendants were conducting surveillance of Plaintiff for approximately one hour before Plaintiff was legally pulled over by Defendant Officers. During the investigative stop, Defendant Officers questioned Plaintiff about what was observed during the surveillance, admitting the stop was in relation to the surveillance and not just a traffic violation and generating the additional information that there was no clear purpose in Plaintiff sitting on the curb with others who had been drinking.

The factual circumstances laid out by Plaintiff himself indicate that this case is factually dissimilar from what occurred in Rodriguez, and therefore, the Rodriguez holding, and rationale does not squarely fit with the matter presented here. Unlike in Rodriguez, where Rodriguez was pulled over by the police officer for a mere traffic violation, Plaintiff in this matter was pulled over following an hour-long surveillance of Plaintiff and his friends. Nothing presented here suggests factual circumstances that would lead the Court to conclude that Defendant Officers pulled Plaintiff over for a mere traffic violation, even when affording Plaintiff every reasonable inference.

The analytical approach of Malik, 398 N.J Super. at 494 (App. Div. 2008), leads the Court to conclude that Count I of Plaintiff's Complaint fails to articulate a legal basis entitling Plaintiff to relief. Count I of the Complaint fails to allege sufficient facts to support Plaintiff's claim. To make up for this deficiency, Plaintiff argues such facts can be "gotten through discovery." See Pl. Brief at 5. However, "[a] plaintiff cannot simply assert that any essential facts that the court may find lacking can be dredged up in discovery." Nostrame v. Santiago, at 436.

Based on the allegations in Count I of Plaintiff's Complaint, it appears Defendant Officers legally pulled Plaintiff over based on the surveillance Defendants were conducting of Plaintiff prior to the traffic stop. Plaintiff's position is that Defendants' "mission" was a traffic stop, however, the facts in Plaintiff's Complaint suggest Defendants were conducting an hour-long investigation and surveillance that concluded with Plaintiff being pulled over by Defendant Officers. Based on Plaintiff's allegations, Defendant Officers pulled over and questioned Plaintiff in relation to the surveillance, as Plaintiff did not allege any other motive for the traffic stop. Analyzing the totality of the circumstances of Plaintiff's allegations, justification for pulling Plaintiff over appears to stem from Defendant Officers' surveillance of Plaintiff, which would be sufficient reasonable suspicion to conduct an exterior sniff.

Even affording Plaintiff every reasonable inference from the factual assertions within the Complaint, the Complaint still lacks sufficient factual support for the Court to find a viable cause of action. The Court's analysis, while conducted with liberality, is not one where the Court reads factual assumptions into the allegations presented to assist a plaintiff in articulating a legal basis for relief. Here, Plaintiff's Complaint alleges that Plaintiff and his friends were surveilled while in the Wawa parking lot, that they were

instructed to leave Wawa, Plaintiff was then pulled over by the surveilling officers, and was questioned about what was observed during the surveillance. The Court cannot read into the Complaint its own factual circumstances as to why Plaintiff was pulled over by Defendant Officers. The Complaint fails to include any indication that Defendant Officers discussed a traffic-violation of any kind as the reason for pulling Plaintiff's car over. The Court must afford Plaintiff every reasonable inference from the facts asserted, however, this does not permit the Court to infer new factual circumstances not even suggested by the Complaint. The Court cannot simply allow a plaintiff to plead that police officers prolonged a traffic stop without any factual basis to inform the Court as to why the plaintiff was initially pulled over and how the stop was prolonged. Further, the Court cannot allow a plaintiff to merely recite the elements of a cause of action and then claim that the factual circumstances that would support that cause of action can be "gotten through discovery."

Therefore, because Plaintiff's Complaint lacks sufficient facts regarding Defendant Officers alleged mission and any suggestion as to the timeframe of the traffic stop, the Court is compelled to dismiss Count I of Plaintiff's Complaint without prejudice, affording Plaintiff the opportunity to amend Count I of the Complaint within thirty (30) days.

As to Count IV, Plaintiff's Complaint urges that "[t]he search of the interior of Plaintiff's car by the officers extended the officers' mission by an additional 45 minutes." See Pl. Complaint at 79. Similar to Count I, Plaintiff argues that the Rodriguez moment had been reached by this time and additional reasonable suspicion was required. Id. at 80. As noted above, Plaintiff's Complaint fails to allege sufficient facts to support the claim of a prolonged investigative stop. In Count IV, Plaintiff does allege that the interior search of Plaintiff's car extended the stop, however, Plaintiff again fails to provide sufficient facts regarding Defendants Officers alleged mission. Based on the allegations set forth in the Complaint, Plaintiff admits the traffic stop was related to the surveillance and the canine had alerted. Count IV must also fail as currently pled. This is because if reasonable suspicion existed to conduct an exterior sniff of Plaintiff's car, then Defendant Officers also had probable cause to justify an interior search of the vehicle as Plaintiff effectively concedes probable cause by alleging that the exterior sniff resulted in a positive alert for an illegal substance in paragraph 66 of the Complaint.

Therefore, the Court is compelled to dismiss Count IV of Plaintiff's Complaint without prejudice, with an opportunity to amend Count IV within thirty (30) days.

Count II

Count II of Plaintiff's Complaint for a warrantless search alleges that "[d]uring the course of the exterior sniff of Plaintiff's car, the dog jumped inside Plaintiff's car." Further, the Complaint alleges that "[o]nce the dog was inside Plaintiff's car, a warrantless search of Plaintiff's car occurred."

Defendants agree with the complaint pleading that Plaintiff was not stopped by Defendant officers solely based on a traffic violation. Rather "[i]t is evident that Defendant Officers initiated the canine sniff because they had reasonable suspicion, based on the facts as alleged by Plaintiff, that Plaintiff was in possession of illegal substances" based on the surveillance of Plaintiff prior to the traffic stop.

It has been consistently held that an exterior sniff of a car during a lawful traffic stop does not amount to a "search" under the Fourth Amendment. See United States v. Pierce, 622 F.3d 209, 213 (3d. Cir. 2010) (citing Illinois v. Caballes, 543 U.S. 405, 410 (2005)) (further citations omitted). While New Jersey courts have not directly addressed this issue, federal courts have held that a trained narcotics dog's instinctive action of jumping into the car does not violated the Fourth Amendment. State v. Cadavid, 2015 N.J. Super. Unpub. LEXIS 1107 (App. Div. May 13, 2015) (citing Pierce, 622 F.3d 209, 213-14). However,

the rule has been limited to situations where "the police did not encourage or facilitate the dog's jump." Id. (further citations omitted). While a trained narcotics dog's instinctive action of jumping into a vehicle is not itself enough to violate the Fourth Amendment, it may be sufficient if the officer had encouraged or facilitated the dog's jump into the vehicle. See Cadavid, at 11-12 (quoting Pierce, at 213-14). The term instinctive "implies the dog enters the car without assistance, facilitation, or other intentional act by its handler. Pierce, at 214.

Here, the Complaint alleges the police dog jumped inside Plaintiff's car which constituted an unlawful search. Additionally, as noted by Plaintiff, the Complaint "does not specifically allege that one or more of the individual defendants encouraged, assisted, facilitated or otherwise intentionally acted so the dog would get in the car, but these facts can be gotten through discovery." See Pl. Brief at 6-7. The Complaint does not indicate whether the dog jumped inside Plaintiff's car before or after making the positive alert during the exterior sniff. Plaintiff acknowledges that "[d]uring the course of the exterior sniff of Plaintiff's car, the dog's sniff was positive for an illegal substance in the area of the front tire." See Pl. Complaint at 66.

Even when accepting as true all factual assertions in the Complaint, affording Plaintiff as the nonmoving party every reasonable inference from those facts, and examining the Complaint in depth and with liberality, the Court is compelled to dismiss Count II of Plaintiff's Complaint. Plaintiff's Complaint effectively pleads Defendant Officers had probable cause by virtue of the dog's positive exterior alert, while lacking sufficient allegations to allow Count II of the Complaint to survive. Nothing in Plaintiff's Complaint suggests the dog's jump into Plaintiff's car or the dog's positive alert was the result of being encouraged or facilitated by the Defendant Officers, therefore, probable cause must be found a matter of law.

As such, because Plaintiff's Complaint effectively concedes probable cause and lacks sufficient allegations regarding the dog's entry into Plaintiff's vehicle, the Court is compelled to dismiss Count II of Plaintiff's Complaint with prejudice.

Count III

As to Count III the parties rely on Florida v. Harris, 568 U.S. 237, 133 S.Ct. 1050 (2013) for the "totality of the circumstances" analysis to be applied by the Court. Plaintiff argues that looking at the totality of the circumstances as presented here shows nothing was observed changing hands at the Wawa. Plaintiff also asserts that the case law provided by Defendants must give way to Harris under the Supremacy Clause of the United States Constitution.

Defendants argue that Harris does not diminish a positive canine alert that establishes probable cause for an interior search. Further, Defendants argue that reasonable suspicion exists here based on all of the observations by Defendants. Defendants point to the surveillance of Plaintiff at the Wawa for an hour followed by activity observed by Defendant Herner, leading to the traffic stop justified by Plaintiff's unclear license plates.

Here, the Plaintiff's arguments concerning his activity at Wawa are not the central focus. It is not disputed that he was at the Wawa parking area for an hour. Even giving the Plaintiff the benefit of the inferences in his favor and accepting his argument that there were no hand exchanges with others who came to his vehicle, it is of no moment as he was not stopped. It is the point in time when his vehicle is stopped on the road-his being seized- that probable cause must be determined. It is comprised of the unclear license plates-admitted to by the Plaintiff. Concurrent in time the canine alert established probable cause for the suspected possession of drugs and supported the search of his car. The Court must consider "whether all

the facts surrounding the dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." Harris, 133 S.Ct. at 1058.

Count III of Plaintiff's Complaint alleges that the Defendant Officers did not have probable cause. However, in Count III Plaintiff also asserts that "[d]uring the course of the exterior sniff of Plaintiff's car, the dog's sniff was positive for an illegal substance in the area of the front right tire." See Pl. Complaint at 66. Plaintiff acknowledges this fact but argues it doesn't support probable cause in Count III as "Defendants, Officers HERNER and RIEPEN, did not have probable cause to search the interior of Plaintiff's car." See Pl. Complaint at 71.

Also, as noted by Plaintiff, the Complaint "does not specifically make any allegations concerning any of the Harris factors to be considered by the determiner of the facts when assessing the totality of the circumstances, i.e., the reliability of the dog and circumstances surrounding the particular alert . . ." See Pl. Brief at 10.

Here, even when accepting as true all factual assertions in the Complaint, affording Plaintiff as the nonmoving party every reasonable inference from those facts, and examining the Complaint in depth and with liberality, the Court is compelled to dismiss Count III of Plaintiff's Complaint because Plaintiff himself pleads Defendant Officers had probable cause by virtue of the dog's alert. Plaintiff's Complaint lacks sufficient Harris factors to establish a viable cause of action for an illegal search against the Defendant Officers. As in Harris the adequacy of the canine was not challenged and probable cause must be found as a matter of law.

Therefore, because Plaintiff's Complaint effectively concedes probable cause, the Court is compelled to dismiss Count III Plaintiff's Complaint with prejudice.

Count V

Count V of Plaintiff's Complaint alleges common law negligence against Defendant Officers and common law vicarious liability against Defendant Mantua. At this time, given the Court's analysis and dismissal of the other allegations made by Plaintiff, Count V of Plaintiff's Complaint must also be dismissed without prejudice with the possibility to amend within thirty (30) days.

Count VI

Count VI of Plaintiff's Complaint alleges a Monell claim for prolonged investigative detention against Defendant Township of Mantua ("Defendant Mantua").

Plaintiff's Monell claim against Defendant Mantua is that the Township established a policy for prolonging an investigative detention arising out of a legal traffic stop and that the policy allowed an officer to prolong the investigative detention if the officer had *any* reasonable suspicion to justify further investigation. Further, Plaintiff alleges that both Defendant Officers implemented the policy, and that such implementation deprived Plaintiff of, or interfered with, his substantive right to leave the scene after the Defendant Officers had completed their mission, absent any reasonable suspicion *during* the mission under the New Jersey Constitution.

Defendant Mantua properly notes that assuming, *per arguendo*, Plaintiff establishes a civil rights violation by Defendant Officers, that Plaintiff must then establish execution of Defendant Mantua's alleged policy caused Plaintiff's injury. Defendant Mantua argues the constitutionality of the alleged policy, however, does not concede a civil rights violation occurred.

Defendant Mantua argues that Plaintiff's Complaint only alleges that the Mantua Township Police Department had a policy which "provided that the officer could prolong the investigative detention if he had any reasonable suspicion to justify further investigation." Defendant Mantua asserts that Plaintiff does not allege a Monell claim based on a custom, pattern, or practice and therefore the only question is whether such a policy, if true, was facially unconstitutional and the moving force behind the alleged civil rights violations. Defendant Mantua argues the alleged policy is entirely consistent with the New Jersey Constitution and therefore, Plaintiff's Monell claim should be dismissed.

Plaintiff contends that the Mantua policy is not entirely consistent with the New Jersey Constitution and could be constitutionally deficient if it failed to conform with the requirements set forth in cited case law. Further, Plaintiff asserts that Defendant Mantua's argument is only that the alleged policy is consistent with the New Jersey Constitution.

If a plaintiff can establish a constitutional deprivation, a plaintiff must then establish that the deprivation resulted from an official policy or custom. Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978). As applied here, this would require Plaintiff to first establish misconduct by Defendant Officers amounting to a constitutional deprivation. If Plaintiff establishes such a constitutional deprivation, then Plaintiff would need to establish the deprivation resulted from the alleged official policy of Defendant Mantua.

As a threshold matter, one must first establish a constitutional deprivation in order to proceed with a Monell claim. In this case, Plaintiff alleges his constitutional rights were deprived by Defendant Officers. However, as discussed above, the Court is dismissing Plaintiff's constitutional claims in Counts I-IV that would have the potential of satisfying the first prong of a Monell claim. Plaintiff has been afforded thirty (30) days to amend the Complaint in a limited manner. At this time, it would be improper and unnecessary for the Court to analyze the alleged policy because Plaintiff has no surviving constitutional deprivation claims. However, if Plaintiff sufficiently amends the Complaint as discussed above, Plaintiff may be able to properly state a Monell claim. Count VI is dismissed without prejudice with the opportunity to amend within thirty (30) days.

Conclusion

The crafted wording of the complaint should not be designed so strategically to prevent the statement of a discernible claim. Given the in-depth analysis of the entirety of Plaintiff's Complaint the Court must grant Defendants' Motion. However, as discussed above, only Counts II and III are to be dismissed with prejudice. Counts I, IV, V, and VI are dismissed without prejudice, affording Plaintiff the opportunity to amend within thirty (30) days from the date of this decision.