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

ESTATE OF TODD W. SHULTZ, WAYNE L. SHULTZ, JR., Individually and as the Administrator of the Estate of Todd W. Shultz, and GAIL M. SHULTZ,	:	1:14-cv-2402
Plaintiffs,	:	Hon. John E. Jones III
v.	:	
GREGORY T. HADFIELD, JAMES A. MILLER, THOMAS H. HYERS, THOMAS L. KEARNEY, III, SPRINGETTSBURY TOWNSHIP, PENNSYLVANIA, and YORK COUNTY, PENNSYLVANIA,	:	
Defendants.	:	

MEMORANDUM & ORDER

September 8, 2015

Presently pending before the Court are two motions to dismiss for failure to state a claim filed by Defendants Thomas L. Kearney, III and York County, (Doc. 12), and by Defendants Gregory T. Hadfield, James A. Miller, Thomas H. Hyers, and Springettsbury Township. (Doc. 19). For the reasons that follow, the Court shall grant in part and deny in part the said motions, as more specifically set forth herein.

I. PROCEDURAL HISTORY

On December 18, 2014, Plaintiffs filed a Complaint, asserting a cause of action pursuant to 42 U.S.C. § 1983. (Doc. 1). Therein, Plaintiffs assert the following claims: in Count I, a Section 1983 claim for excessive use of force in violation of the Fourth Amendment against Defendants Hadfield and Miller; in Count II, a Section 1983 claim for denial of medical care in violation of the Fourteenth Amendment against Defendants Hadfield and Miller; in Count III, a Section 1983 supervisory liability claim against Defendants Hyers and Kearney; in Count IV, a Section 1983 claim for municipal liability against Defendant Springettsbury Township and Defendant York County; in Count V, a survival action under Pennsylvania state law against all Defendants; and in Count VI, a wrongful death claim under state law against all Defendants.

Defendants Thomas L. Kearney, III and York County, (hereafter "County Defendants"), filed a motion to dismiss for failure to state a claim, along with a brief in support of the motion, on January 21, 2015. (Docs. 12, 13). Plaintiffs filed their brief in opposition on February 4, 2015. (Doc. 14). No reply was filed within the appropriate time period. On February 23, 2015, Defendants Gregory T. Hadfield, James A. Miller, Thomas H. Hyers, and Springettsbury Township, (hereafter "Township Defendants"), filed a motion to dismiss, as well. (Doc. 19).

They filed a brief in support on March 9, 2015. (Doc. 22). Plaintiffs filed a brief in opposition to that motion on March 23, 2015. (Doc. 23). A reply was not filed within the appropriate time period for this motion, either.

The two motions have thus been briefed and are now ripe for our review.[1]

II. FACTUAL SUMMARY

For the purpose of these motions to dismiss, the following facts are derived from the Complaint and are assumed to be true.

Plaintiff, Estate of Todd W. Shultz, is the Estate of the decedent, Todd W. Shultz. Plaintiff Wayne L. Shultz, Jr. is the brother of the decedent and is the Administrator of the Estate of Todd W. Shultz. Wayne Shultz currently resides in York, Pennsylvania. Plaintiff Gail M. Shultz is the mother of the decedent and also currently resides in York. (Doc. 1, ¶¶ 4-6)

Defendant Gregory T. Hadfield was employed by the Springettsbury Township Police Department at all relevant times as a police officer, with the rank of corporal. Defendant James A. Miller was also employed at all relevant times as a police officer with the Township Police Department. Defendant Thomas H. Hyers was employed as Chief of Police of the Township Police Department. (*Id.*,

[1] We note that the Township Defendants filed a Praecipe to Request Oral Argument. (Doc. 29). However, the motions have been comprehensively briefed and we are well-equipped to resolve the motions based on those briefs and without oral argument.

¶¶ 7-9). Defendant Thomas L. Kearney, III, was at all relevant times the elected District Attorney and employed by York County, Pennsylvania. (*Id.*, ¶ 10). Defendant Springettsbury Township, Pennsylvania, (hereafter "Township"), is located at 1501 Mount Zion Road in York, PA. The Township owns and operates the Township Police Department. During all relevant times, the Township employed the Defendant police officers. (*Id.*, ¶ 11).

Defendant York County (hereafter "County") is a County in Pennsylvania. Plaintiffs allege that Defendant Kearney was a policymaker for the County, who set Township and County policy, and who acted pursuant to those policies and customs adopted by the County. (*Id.*, ¶ 12).

On December 29, 2012, police officers from the Springettsbury Township Police Department responded to a call that a retail theft had occurred at a Kmart in the Township. The following sequence of events was captured on video and audio by the motor vehicle recorder unit, ("MVR"), of a police vehicle.[2]

[2] Plaintiffs have submitted this patrol video as an exhibit to their Complaint and have thus incorporated any facts that it reveals into their pleading. This Court is thus permitted to consider the contents of the video and its accompanying audio in ruling on the Defendants' pending Rule 12 motions. *See, e.g.*, *Mitchell v. Fuentes*, 2013 U.S. Dist. LEXIS 72216, *22-23 n.13 (D.N.J. May 22, 2013) (court permitted to consider patrol car dash camera video in ruling on motion to dismiss when incorporated by reference into plaintiff's complaint); *see also Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006) (court may consider "documents that are attached or submitted with the complaint . . . and any matters incorporated by reference or integral to the claim").

Upon arrival at the store, the police officers encountered Todd Shultz, and, according to the officers, attempted to take him into custody; Shultz ignored their commands and refused to be put into handcuffs. (*Id.*, ¶¶ 13-15).

The officers further claim that when Shultz attempted to leave the store, they deployed TASERS on him that either failed or were not effective. The officers continued to attempt to take Shultz into custody; outside the store, a TASER deployment brought him to the ground. However, even while on the ground, Shultz continued to refuse to submit to handcuffing. (*Id.*, ¶¶ 16-20).

Shultz produced a butter knife and began to make slow swiping motions at the officers when they approached. (*Id.*, ¶ 21). Officers repeatedly told him to drop the knife but he refused to do so. Defendant Miller struck Shultz several times with a baton, but this too failed to bring Shultz into submission. Shultz then rose to his feet, produced a kitchen table knife and a pair of scissors, and walked towards Defendants Hadfield and Miller. Due to obesity and poor physical condition, Shultz moved slowly during this encounter. (*Id.*, ¶¶ 22-25).

Officers Hadfield and Miller placed Shultz at gunpoint and repeatedly ordered Shultz to drop the knives and scissors. When Shultz apparently failed to comply with their commands, Officers Hadfield and Miller fired four (4) bullets into the front of Shultz's body, which caused serious but non-fatal injuries. (*Id.*, ¶¶

26-27). Two additional bullets struck Shultz's abdomen and groin and one of his fingers, causing skin and bone injuries; these injuries were non-fatal, as well. (*Id.*, ¶¶ 28-29).

After this first volley of four to six bullets, Shultz stopped walking, and turned to the right, away from Officers Hadfield and Miller, and stood there. (*Id.*, ¶ 30). Officers Hadfield and Miller continued to command Shultz to drop the knives and scissors, but he apparently failed to do so. Instead, Shultz just stood there, likely in shock from his injuries as a result of the first set of bullets that had been fired into his body. (*Id.*, ¶¶ 31-32). Even though Plaintiffs allege that Shultz at this point had turned away from the officers and was "just standing there," when Shultz still failed to drop the knives and scissors, Officers Hadfield and Miller fired eleven (11) more bullets into Shultz's side and back, causing fatal injuries. (*Id.*, ¶ 33).

Plaintiffs allege that it is clear from where the table knife landed at the crime scene, and from Shultz's actions, that at some point during the second round of bullets, Shultz dropped the table knife. (*Id.*, ¶ 34). However, Officers Hadfield and Miller continued to shoot bullets at Shultz until he fell to the ground. Ultimately, Officers Hadfield and Miller struck Shultz with seventeen (17) bullets, out of the twenty (20) .40 caliber rounds of ammunition they fired in total. (*Id.*, ¶¶ 35-36).

After the shooting ended, Defendants failed to render any medical aid to Shultz. After at least two minutes passed, Officer Hadfield checked for a pulse. Even though numerous Township police were present at the scene, no police officer provided any emergency medical care to Shultz. "Instead, for over five minutes, Township officers left Shultz to bleed to death" until the ambulance arrived. (*Id.*, ¶¶ 53-56).

Shultz was pronounced dead at 7:40 p.m. on December 29, 2012.[3] A forensic pathologist performed an autopsy soon thereafter, and determined that Shultz died from the multiple gunshot wounds. (*Id.*, ¶¶ 39-41).

III. STANDARD OF REVIEW

In considering a motion to dismiss pursuant to Rule 12(b)(6), courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings, Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)). In resolving a motion to dismiss pursuant to Rule 12(b)(6), a court generally should consider only the allegations in the

[3] The Complaint appears to have a typo, in that it states that Shultz was pronounced dead on December 29, 2014, when the incident in question happened on December 29, 2012.

complaint, as well as "documents that are attached to or submitted with the complaint, . . . and any matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, [and] items appearing in the record of the case." *Buck v. Hampton Twp. Sch. Dist.*, 452 F.3d 256, 260 (3d Cir. 2006).

A Rule 12(b)(6) motion tests the sufficiency of the complaint against the pleading requirements of Rule 8(a). Rule 8(a)(2) requires that a complaint contain a short and plain statement of the claim showing that the pleader is entitled to relief, "in order to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While a complaint attacked by a Rule 12(b)(6) motion to dismiss need not contain detailed factual allegations, it must contain "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). To survive a motion to dismiss, a civil plaintiff must allege facts that 'raise a right to relief above the speculative level . . . ." *Victaulic Co. v. Tieman*, 499 F.3d 227, 235 (3d Cir. 2007) (quoting *Twombly*, 550 U.S. at 555). Accordingly, to satisfy the plausibility standard, the complaint must indicate that defendant's liability is more than "a sheer possibility." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts

that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557).

Under the two-pronged approach articulated in *Twombly* and later formalized in *Iqbal*, a district court must first identify all factual allegations that constitute nothing more than "legal conclusions" or "naked assertions." *Twombly*, 550 U.S. at 555, 557. Such allegations are "not entitled to the assumption of truth" and must be disregarded for purposes of resolving a 12(b)(6) motion to dismiss. *Iqbal*, 556 U.S. at 679. Next, the district court must identify "the 'nub' of the . . . complaint – the well-pleaded, nonconclusory factual allegation[s]." *Id.* Taking these allegations as true, the district judge must then determine whether the complaint states a plausible claim for relief. *See id.*

However, "a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits." *Phillips*, 515 F.3d at 231 (citing *Twombly*, 550 U.S. at 556-57). Rule 8 "does not impose a probability requirement at the pleading stage, but instead simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element." *Id.* at 234.

IV. DISCUSSION

The Defendants seek various forms of relief in their two motions to dismiss the Plaintiffs' Complaint. The Township Defendants contend that the squad car MVR unequivocally shows that the use of force against Shultz was objectively reasonable under the circumstances and thus the excessive use of force claim brought pursuant to § 1983 should fail. The Township Defendants also assert that the MVR shows the denial of medical care claim should fail as a matter of law. Defendants Kearney and Hyers assert that the § 1983 supervisory liability claim alleged against them must be dismissed because the use of force was objectively reasonable and thus there was no constitutional violation, because Defendant Hyers had no authority to clear Defendants Hadfield and Miller, and because Kearney is not a policymaker for York County and moreover has no authority to supervise Township employees. Defendants Springettsbury Township and York County contend that Plaintiffs have failed to adequately state a *Monell* claim against them. Finally, the County Defendants argue they are immune from the state law claims set forth in Counts V and VI, and that the individual Plaintiffs lack standing to pursue the wrongful death claim alleged in Count VI. We address each of these arguments *seriatim*.

A. Fourth Amendment Excessive Use of Force Claim

Count I of Plaintiffs' Complaint alleges an excessive use of force claim under the Fourth Amendment, brought pursuant to 42 U.S.C. § 1983. Defendants argue this claim should be dismissed at this very early juncture because they believe the squad car's MVR provides the best possible evidence that the Officers' use of force was objectively reasonable under the circumstances, although they notably cite to no case law in support of such early dismissal of an excessive force claim. They argue that the MVR shows that Shultz was armed and repeatedly failed to submit to arrest, despite the Officers' deployment of various non-lethal forms of force. (Doc. 19, pgs. 2-3).

The reasonableness of use of force in this type of claim is generally an issue for the jury. *Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004).[4] We find it premature to make a decision on the merits on the excessive use of force claim, especially given the parties' mutual efforts to characterize what happened in the video according to their biased view of the facts, despite the video's supposed objectivity. *See Williams v. Papi*, 30 F.Supp.3d 306, 312 (M.D. Pa. 2014) ("But,

[4] "To put the matter more directly, since we lack a clearly defined rule for declaring when conduct is unreasonable in a specific context, we rely on the consensus required by a jury decision to help ensure that the ultimate legal judgment of 'reasonableness' is itself reasonable and widely shared." *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999). The circuit court in *Abraham* does acknowledge that defendants can still win on summary judgment without going to trial, but only if the district court is able to conclude, "after resolving all factual disputes in favor of plaintiff, that the officer's use of force was objectively reasonable under the circumstances." *Id.*

even if, following discovery, the reasonableness of Defendant's use of force is settled before the case reaches the jury, it is surely premature to expect the Court to make such a resolution at the motion to dismiss stage . . ."). For example, the Township Defendants seek to characterize Shultz's movements after being shot with the first volley of bullets as "advancing" (albeit in a sideways manner) upon the officers and toward the entrance of Kmart. They argue this required further use of deadly force–specifically, the eleven additional bullets that struck Shultz in his back and side. Plaintiffs dispute this characterization, and instead argue that the photos of the crime scene and MVR show that after the first four-six bullets were fired into him, Shultz stopped walking, turned away from Officers Hadfield and Miller, and just stood there. Plaintiffs acknowledge some additional movement in their brief, but argue that Shultz's additional movement was not a threatening "advance" but his body stumbling sideways while he was being shot by the Officers. Especially given our duty to view all facts and make all inferences in favor of Plaintiffs at this stage, it would be improper to decide the merits when the material facts regarding the threat Shultz posed to others before and during the second volley of bullets are in dispute.[5]

[5] The Township Defendants cite to *Williams v. City of Scranton*, 566 Fed.Appx. 129 (3d Cir. 2014), in support of their argument that the Court should decide the merits of the instant matter at the motion to dismiss stage. There, however, the circuit court affirmed the district court's grant of *summary judgment* in favor of defendants on the plaintiff's excessive use of

If the parties so desired, they could have moved for summary judgment in order for the Court to review the MVR as well as other evidence submitted to the Court. However, they failed to do so. We do not wish to import the summary judgment framework into our task to decide the motions to dismiss filed in the instant matter.

Returning to our central task at this stage, we find that Plaintiffs have adequately stated a claim for excessive use of force against Officers Hadfield and Miller. In order to state an excessive use of force claim under the Fourth Amendment, a plaintiff must allege facts showing that a seizure occurred and that it was unreasonable. *Curley v. Klem*, 298 F.3d 271, 279 (3d Cir. 2002). "There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) . Thus, given that Plaintiffs do not contest the reasonableness of the first six bullets fired into the front of Shultz's body, the only issue in the instant matter is whether Officers Hadfield and Miller's actions in shooting 11 additional bullets into Shultz were reasonable.

As Plaintiffs note, the case law is clear that even where an officer is initially justified in using deadly force, he does not gain a license to continue using such

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force claim. Thus, the citation to *Williams* is not persuasive.

force after the "threat justifying the force has vanished." *Lamont v. New Jersey*, 637 F.3d 177, 184 (3d Cir. 2011). In considering the reasonableness of an officer's use of force, the factfinder evaluates "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of officers or others, and whether he actively is resisting arrest . . ." *Rivas*, 365 F.3d at 198. We also note that precedent cautions us that we must judge reasonableness "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004) (quoting *Graham v. Connor*, 490 U.S. 386 (1989)).

Plaintiffs allege that after the first 4 to 6 shots, Shultz stopped walking, turned away from Defendants Hadfield and Miller, and simply stood there. Plaintiffs allege that even though Shultz did not drop the weapons, he was likely in a state of shock as a result of the first set of bullets that had been fired into his body. Plaintiffs additionally allege that at some point during the second round of bullets, Shultz dropped the table knife. Taking the facts as alleged to be true, we find that Plaintiffs have adequately alleged that after Shultz had been shot the first six times, he was no longer a threat to the safety of officers or civilians. We find the allegation plausible that Shultz was not "advancing" toward Kmart in a threatening manner but was in a state of shock and stumbling sideways toward the

Kmart entrance; further, it is inappropriate at this stage to decide this critical disputed factual issue. We thus find that Plaintiffs have stated a claim for excessive use of force against Defendants Hadfield and Miller.

B. Denial of Medical Care Claim

In Count II of the Complaint, Plaintiffs set forth a claim for denial of medical care in violation of the Fourteenth Amendment against Defendants Hadfield and Miller. In their motion, the Township Defendants argue that the video and audio recording of their encounter with Shultz show that Plaintiffs cannot establish this claim as a matter of law.

In order to state a claim under § 1983 for failure to provide medical care to a person in custody, a plaintiff must allege facts showing that the officers were deliberately indifferent to the person's serious medical needs. *Groman v. Twp. of Manalapan*, 47 F.3d 628 (3d Cir. 1995) (internal citation omitted). Deliberate indifference requires evidence that "the officers knew of the arrestee's need for medical care and either (i) intentionally refused to provide such care, (ii) delayed medical care for non-medical reasons, or (iii) denied a reasonable request for treatment." *Sonnier v. Field*, 2007 WL 576655, at * 8 (W.D. Pa. Feb. 21, 2007) (citing *Durmer v. O'Carroll*, 991 F.2d 64, 68 (3d Cir. 1993)). A medical need qualifies as serious when it is "so obvious that a lay person would easily recognize

the necessity for a doctor's attention." *Monmouth County Correctional Institutional Inmates v. Lanzaro*, 834 F.2d 326, 347 (3d Cir. 1987).

In the matter *sub judice*, there is no dispute that Schultz had a serious medical need once he had been shot. The question then is whether Plaintiffs have stated facts that adequately allege deliberate indifference on the part of Defendants Hadfield and Miller. Because Plaintiffs have submitted the MVR with their Complaint, we also consult this evidence to determine whether Plaintiffs have stated a plausible claim for relief; we underscore that our standard of review is appropriately the motion to dismiss standard, not the summary judgment one.

Plaintiffs assert in their Complaint that after Defendants Hadfield and Miller fired the first 4-6 bullets into Shultz's body, they knew he was suffering from a serious medical condition. Plaintiffs then allege essentially two theories of the claim. First, Plaintiffs allege that the Defendants should have both stopped firing bullets at Shultz and waited for an opportunity to provide Shultz with the necessary medical care; and that instead, Defendants Hadfield and Miller fired at least eleven (11) more bullets into Shultz's body, causing him to suffer fatal injuries. Second, Plaintiffs allege that after the shooting ended, the Defendants failed to render any medical aid to Shultz; that Defendant Hadfield did not check for a pulse for at least two minutes; that despite numerous Township police officers' arrival on the scene,

no Township officer provided Shultz with any emergency care; and that instead, for over five minutes, Township officers left Shultz to bleed to death on the ground until the ambulance arrived.

We will first consider the latter theory– the officers' alleged failure to provide any medical aid after the shooting had ended. We first note that the length of time it took the ambulance to arrive at the scene is immaterial to the merits of this claim. *See Sonnier v. Field*, No. 2:05-cv-14, 2007 WL 576655 (W.D. Pa. Feb. 21, 2007). Defendants argue, and Plaintiffs do not appear to contest, that within 10 seconds of the last shot being fired, the officers began screaming for an ambulance. This is a notable factor weighing against an ultimate finding of deliberate indifference. However, we find the allegations that no officer checked for a pulse for at least two minutes and that no Township police officers, including Defendants Hadfield and Miller, provided any emergency care on the scene after Shultz had been shot numerous times to plausibly show either intentional refusal to provide such care or delay for non-medical reasons. *See Estate of Booker v. Gomez*, 745 F.3d 405, 434 (10th Cir. 2014) (finding that a "reasonable officer . . . would have known that failure to check [plaintiff's] vital signs, perform CPR, or seek medical care for three minutes when he was limp and unconscious as a result of the Defendants' use of force could violate the Constitution."). Cognizant that we are at

this very early juncture in the case at bar, we find these facts to adequately allege deliberate indifference such that the motion to dismiss has been overcome.

Thus, we shall deny the Township Defendants' motion to dismiss the denial of medical care claim.[6]

C. Supervisory Liability Claims

1. Defendant Hyers

Next, we turn to the supervisory liability claim brought pursuant to 42 U.S.C. § 1983 against Defendant Hyers, the chief of police for the Township Police Department at all relevant times.

Supervisory officials cannot be held responsible under § 1983 for the constitutional violations of their subordinates on the theory of *respondeat superior*–they must personally play an "affirmative part" in the misconduct. *Chinchello v. Fenton*, 805 F.2d 126, 133 (3d Cir. 1986). A supervisor may be held personally liable under § 1983 if "he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations." *A.M. ex rel. J.M.K. v. Luzerne*

[6] Because we have already found that this claim will survive the motion to dismiss, we will not address Plaintiffs' alternative theory of the claim that the officers' failure to stop shooting at Shultz after the first 4-6 bullets hit his body creates a claim for denial of medical care. We further note that neither party cites to any case law with regard to that somewhat creative facet of the claim of denial of medical care.

County Juvenile Detention Center, 372 F.3d 572 (3d Cir. 2004) (internal citation omitted). Here, Plaintiffs appear to ground their supervisory liability claim against Defendant Hyers solely on the last theory of liability described above–that he had knowledge of and acquiesced in Defendants Hadfield and Miller's constitutional violations.

Plaintiffs allege that prior to December 2012, Defendant Hyers knew that several police officers of his police department, including Defendant Hadfield, had used excessive force against persons while acting in their capacity as police officers, (Doc. 1, ¶ 60); that despite having such notice, Defendant Hyers took no action to protect the public from Defendants Hadfield and Miller or from the unlawful use of force policies and practices they implemented, (*Id.*, ¶ 62); that Defendant Hyers knowingly permitted officers who had been improperly trained or who had exhibited poor judgment to continue to have contact with the public, thereby permitting them to offend again, (*Id.*, ¶ 63); that Defendant Hadfield was never disciplined for his previous unlawful use of force, (*Id.*, ¶ 66); and that as a result of this failure to supervise as outlined above, Defendants Hadfield and Miller were permitted to engage in, and did engage in, the alleged excessive use of force in the matter *sub judice*. (*Id.*, ¶ 67).

Specifically, Plaintiffs point to two prior excessive force cases before this

Court involving the Defendant Township and County and Township police officers: *Landis v. Moyer, et al.* and *Williams v. Moyer, et al.*[7] (*Id.*, ¶¶ 61, 64). *Williams* involved Defendant Hadfield as a defendant. The Defendant Township ultimately settled those cases for a total of $500,000, (*Id.*, ¶ 61), although we note that Plaintiffs do not allege Defendants admitted liability.[8] Regardless, Plaintiffs allege that Defendant Hadfield was never disciplined or punished for his allegedly unlawful conduct in that case, and that this failure to supervise led to his unlawful use of force against Shultz.

With regard to the use of force against Shultz, Plaintiffs further allege that Defendant Hyers ignored the best available evidence to him–the MVR video and autopsy report–and cleared Defendants Hadfield and Miller of any wrongdoing. (*Id.*, ¶ 73).

Defendants contend that Plaintiffs have alleged what amounts to a *Monell* claim dressed up as a supervisory liability claim against Defendant Hyers, in that Plaintiffs have failed to allege any conduct by Defendant Hyers that caused a constitutional injury to Shultz. As discussed in detail above, it is indeed crucial for

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[7] *See Landis v. Moyer, et al.*, No. 13-cv-673 (M.D. Pa.); *Williams v. Moyer, et al.*, No. 13-cv-675, 2015 WL 2339063 (M.D. Pa. May 13, 2015).

[8] This was a partial settlement agreement, pursuant to which only the Township was dismissed as a party.

a plaintiff to allege a supervisor's personal involvement in the constitutional injury in some way. However, we find that Plaintiffs have adequately alleged that Defendant Hyers had knowledge of and acquiesced in Defendant Hadfield and Millers' alleged excessive use of force. Taking the facts as alleged as true, Defendant Hyers knew that Defendant Hadfield had a prior pattern of aggressive and possibly unlawful behavior that warranted additional training or supervision. The two previous excessive force cases put Hyers on notice that at least Hadfield needed additional training on use of force. Although those cases settled prior to a decision on the merits, the expensive settlements do indicate, making all inferences in Plaintiffs' favor as we must, that the Defendant Township in those cases was not confident in the legal justification for Defendant Hadfield's actions. Plaintiffs allege that even though Defendant Hyers conducted an internal affairs investigation after the filing of those two previous cases, Defendant Hadfield was never disciplined or retrained. We conclude that these allegations of Defendant Hyer's actions can reasonably be construed as a message of approval of Defendant Hadfield's conduct. We thus find that Plaintiffs have stated a supervisory liability claim against Defendant Hyers. *See also Zion v. Nassan,* 727 F.Supp.2d 388 (W.D. Pa. 2010) (denying motion to dismiss a supervisory liability claim on the grounds that the complaint alleged that the supervisory defendants were aware of trooper's

prior pattern of aggressive and violent behavior).

We further note Defendants' argument that this claim should fail because Defendants Hadfield and Miller's actions were objectively reasonable. As we previously discussed, because we are not deciding the merits of the underlying excessive force claim at this very early stage in proceedings, we need not address this argument.

2. Defendant Kearney

Plaintiffs also assert a claim for supervisory liability against Defendant Kearney, who was the district attorney for York County at all relevant times. Plaintiffs allege that Defendant Kearney, together with Defendant Hyers, set the use of force policy in the Township and County. Plaintiffs additionally argue that Defendant Kearney is personally liable in the instant matter on essentially the same theory as they allege against Defendant Hyers–that Defendant Kearney was on notice of the Township police officers' past excessive use of force violations, including those of Defendant Hadfield, and that despite such notice, took no action to protect the public, thereby permitting the officers to offend again. In addition to the same facts being alleged as those against Defendant Hyers, Plaintiffs additionally assert that Defendant Kearney ignored the best evidence of the Defendant Hadfield and Miller's excessive use of force against Shultz–the MVR

video and autopsy report–and issued a press release clearing the officers of any criminal wrongdoing. (*Id.*, ¶ 75). The press release, attached to the Complaint, concludes that the actions of the officers in using deadly force against Shultz were reasonable. (*Id.*, ¶ 76).

The County Defendants argue in their motion to dismiss that Defendant Kearney has no authority over the Township police department to hire, fire, discipline, or train police officers employed by the police department, and thus Count III of Plaintiffs' Complaint should be dismissed as it applies to Kearney.[9] Plaintiffs respond that the district attorney is the chief law enforcement officer in the county "who almost single handedly sets the county's use of force policy."

Neither party cites to any case law for or against the proposition that a district attorney has supervisory authority over local police officers. Plaintiffs do cite to the Commonwealth's Attorney's Act of 1850, 71 P.S. §732-206(a), which states, "the district attorney shall be the chief law enforcement officer for the county in which he is elected." However, this statute does not appear to discuss the district attorney's supervisory authority vis a vis local law enforcement officers.

After conducting an independent review of case law in which courts have

[9] The County Defendants somewhat disingenously note in their brief that the claims against Defendant Kearney in the above referenced *Landis* and *Williams* cases were dismissed. However, those cases involved First Amendment retaliation claims alleged against Defendant Kearney, not claims for supervisory liability.

been confronted with supervisory liability claims brought against local prosecutors for failure to train police officers, we conclude that we must dismiss Defendant Kearney from this suit. In *Wilkinson v. Ellis*, 484 F.Supp. 1072 (E.D. Pa. 1980), the plaintiff brought a civil rights action against Philadelphia police officers and others who allegedly had assaulted him, falsely arrested him, and maliciously prosecuted him. The plaintiff also asserted claims against the police commissioner and city district attorney for failure to supervise the defendant police officers. There, the court held that the claim for supervisory liability as alleged against the police commissioner was sufficient to withstand the motion to dismiss, but that those same facts as alleged in the supervisory liability claim against the district attorney failed to state a claim. *Id.* at 1087. The court reasoned that even if it were to assume that the district attorney was aware of all that was alleged regarding patterns of police abuse, he nevertheless had "no direct supervisory authority over the police." *Id.* Thus, the § 1983 suit based on failure to supervise was "untenable." *Id.*

Similarly, in *Laughman v. Com. of Pa.*, 2006 WL 709222, at *5-6 (M.D. Pa. Mar. 17, 2006), the court concluded that the county district attorney's office had no supervisory authority over state police employees, and thus dismissed the § 1983 supervisory liability claims against the district attorney's office.

We are likewise persuaded by the analysis of other district courts in similar cases. Plaintiffs have alleged no facts showing that Defendant Kearney possessed any manner of supervisory authority over Township police officers, nor have Plaintiffs offered any case law in support of this position. Courts resolving *Monell* claims and claims for supervisory liability consistently refer to an "employee's" constitutional violation or that of a "subordinate." *See Chinchello*, 805 F.2d at 133; *A.M. ex rel. J.M.K.*, 372 F.3d at 586. We have no reason to find that Township police officers are the "subordinates" of Defendant Kearney. Much of Plaintiffs' argument for supervisory liability against Defendant Kearney rests on the influence and power of the district attorney to investigate a police officer's use of force and to decide whether to prosecute the officer for criminal wrongdoing. We do not disagree that a district attorney's decision to prosecute, or not to prosecute, a police officer would indeed send a message to the local police department about appropriate forms of use of force. That Defendant Kearney may or may not have conducted a flawed *post hoc* evaluation of this incident, or that he possessed a modicum of influence does not equate to supervisory authority.

We thus conclude that Plaintiffs have failed to state a claim for supervisory liability against Defendant Kearney. He shall be dismissed from Count III of the Complaint.

D. Municipal Liability Claims

In Count IV of the Complaint, Plaintiffs allege municipal liability claims against the Defendant Township and the Defendant County.

A local governing body may incur liability under § 1983 only where its policy or custom causes the constitutional violation at issue. *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 694 (1978). Government action rises to the level of a policy "when a decisionmaker posses[ing] final authority to establish municipal policy with respect to the action issues a final proclamation, policy or edict." *Natale v. Camden County Correctional Facility*, 318 F.3d 575, 584 (3d Cir. 2003) (internal citations omitted). A custom is a course of conduct that is not a formal policy, but that is "so widespread as to have the force of law." *Id.* (internal citation omitted). A plaintiff can establish a custom by "proof of knowledge and acquiescence." *Fletcher v. O'Donnell*, 867 F.2d 791, 794 (3d Cir. 1989).

A local government's failure to train employees regarding their duties to avoid violating citizens' constitutional rights may rise to the level of a "policy" in violation of § 1983; however, this theory of municipal liability is the "most tenuous." *Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011). In order to state a claim against a local government under this theory, a municipality's failure to train

its employees on a particular duty must amount to "deliberate indifference to the rights of persons with whom the [untrained employees] come into contact." *Id.* (quoting *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989)). The "deliberate indifference" standard is a high bar for a plaintiff to meet. A plaintiff must show that municipal policymakers were on notice, actual or constructive, that a "particular omission in their training program causes [municipal] employees to violate citizens' constitutional rights," and that policymakers still chose to retain the training program. *Id.* at 1360. Generally, this requires showing a "pattern of similar constitutional violations by untrained employees." *Id.*

Plaintiffs have alleged that Defendants Hyers and Kearney collaboratively set the use of force policy in the Township and County. To reiterate, Plaintiffs allege that through Defendants Hyers and Kearney, the Defendant Township and Defendant County were on notice of prior instances of Township police officers, including Defendant Hadfield, using unlawful excessive force, and that they failed to take any action to prevent future violations. Specifically, Plaintiffs point to the previous cases of *Williams* and *Landis*, in which Township police officers, including Defendant Hadfield, were accused of using excessive force. Plaintiffs allege that in response to those lawsuits, the Defendant County and Township conducted only sham investigations and did not discipline the accused officers

beyond cautioning them to not use profanity.

First, based on our aforementioned dismissal of the supervisory liability claim alleged against Defendant Kearney, we shall also dismiss the *Monell* claim alleged against Defendant County. This is because Plaintiffs hinge the County's liability on Defendant Kearney's alleged status as the policymaker for the County with regard to use of force policy and his failure to supervise the Township police officers. But as we have already concluded, Defendant Kearney had no authority to supervise the Township police officers, and thus the County cannot be held liable via his actions, either. Moreover, we note somewhat parenthetically that very few of the factual allegations contained in Count IV specifically mention Defendant County; the allegations focus almost solely on the Defendant Township's failure to properly train its police officers.

Although we will dismiss Defendant County from this claim, we will consider the County's arguments as they pertain to whether a *Monell* claim has been stated against the Defendant Township inasmuch as the Township Defendants' briefing regarding this claim is quite cursory. Defendant County contends that Plaintiffs have failed to state a claim because the two past matters (*Williams* and *Landis*) involving Township police officers were not sufficiently similar to the matter *sub judice* to constitute a pattern of similar constitutional

violations. Defendant County attempts to distinguish the instant matter from the earlier ones by noting that the incident with Shultz involved the use of deadly force against an armed perpetrator, whereas the earlier instances of police misconduct did not.

Although it is indeed true that *Williams* and *Landis* did not involve the specific type of excessive force allegedly used against Shultz, those cases were nonetheless excessive force cases. Notably, one of the previous cases also involved Defendant Hadfield. The Defendant County cites to no case law to buttress its narrow view of what constitutes a "similar" violation. Taking the facts as alleged to be true, it can be argued that Defendants were on notice that Township police officers were using excessive force by virtue of the multiple lawsuits and the resulting significant settlement amounts.

In conclusion, the facts as alleged adequately show that the Defendant Township was on notice of previous incidents allegedly involving excessive force, failed to take appropriate action such as disciplining or retraining the officers on use of force, and that Shultz's death resulted. At this early juncture, we cannot help but conclude the Plaintiffs have sufficiently pled facts to show that the Township was deliberately indifferent to the Township police officers' unconstitutional behavior, in particular that of Defendant Hadfield, or to show that there was a

custom of tolerating excessive use of force by Township police officers. Thus, we shall deny the Defendant Township's motion to dismiss the *Monell* claim against it.[10]

E. Survival and Wrongful Death Claims

In Counts V and VI of the Complaint, Plaintiffs allege state law survival and wrongful death claims against all Defendants.

As an initial matter, we shall dismiss what is cast as a separate survival action claim alleged in Count V. The Pennsylvania Survival Statute does not provide for an independent cause of action–it is simply a "vehicle for a decedent's estate to press causes of action that the decedent would have had, had he lived." *See Heckensweiler v. McLaughlin*, 517 F.Supp.2d 707, 719 (E.D. Pa. 2007) (dismissing plaintiffs' survival action claims against all defendants).

Next, the County Defendants argue they are immune from these state law claims under the Pennsylvania Political Subdivision Tort Claims Act, ("Tort Claims Act").[11]

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[10] Plaintiffs also appear to assert a *Monell* claim based on the failure to train Township police officers on the 21 Foot Rule. Since we have already found that the *Monell* claim against the Defendant Township will survive the motion to dismiss, and because no party discusses the 21 Foot Rule in their briefs, we will not further belabor our Memorandum with analysis of this claim at this juncture.

[11] The Township Defendants' sole argument against Plaintiffs' state law claims is that they should fail because they are not "tethered to a viable cause of action." (Doc. 22, p. 29). Because we have already concluded that Plaintiffs' § 1983 claim shall survive this stage of

The Tort Claims Act provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

42 Pa. Cons. Stat. § 8541. There are eight exceptions to this immunity, but Plaintiffs do not contend that any are applicable in the matter *sub judice*, nor do they appear to us to apply. Under the Tort Claims Act, a "local agency" is defined as "[a] government unit other than the Commonwealth government." *Id.* at § 8501. An employee of a local agency is generally immune from damages for actions taken in his official capacity to the same extent as the local agency is immune. *Id.* at § 8545. However, an employee of an agency may lose that immunity when a court finds that his action causes an injury and that his action "constituted a crime, actual fraud, actual malice, or willful misconduct." *Id.* at § 8550. In this context, "willful misconduct" has the same meaning as the term "intentional tort." *See Heckensweiler*, 517 F.Supp.2d at 719 (citing *Delate v. Kolle*, 667 A.2d 1218, 1221 (1995)). More specifically, willful conduct in this context means "the actor desired to bring about the result that followed or at least was aware that it was substantially certain to follow, so that such desire can be implied . . ." *Bright v. Westmoreland*

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proceedings, the Township Defendants' argument in this regard is easily rejected.

County, 443 F.3d 276, 287 (3d Cir. 2006)(quoting state law).

Plaintiffs concede that Defendant County is a local agency and is immune from suit from the state law claims in the matter *sub judice*. (Doc. 14, p. 13). Thus, we shall dismiss the County from Count VI of the Complaint.[12] Although the Township Defendants did not brief this argument and Plaintiffs did not specifically concede the Township's immunity, we additionally find the Defendant Township to be immune from suit from the state law claims brought in the matter *sub judice*. The Defendant Township, as a local government unit, is also a local agency under Pennsylvania law and is thus generally immune from suit under state law. *See Heckensweiler*, 517 F.Supp.2d at 719 (noting that a township is generally immune from suit under state law). As discussed above, there are certain enumerated exceptions to this immunity, but they only apply when the injury at issue was caused by "negligent acts" of the local agency or its employee acting within the scope of his official duties, and only when the negligent acts fall into one of the following categories: vehicle liability; care, custody, or control of personal property; real property; trees, traffic controls, and street lighting; utility service facilities; streets; sidewalks; and the care, custody, or control of animals. 42 Pa. Con. Stat. § 8542. Plaintiffs' allegations in their Complaint against the Defendant

[12] As discussed earlier, we will also dismiss Count V from the Complaint.

Township, all based on the excessive use of force against Shultz by its police officers, do not fall within any of the aforesaid categories. Therefore, we shall dismiss Defendant Township from Count VI, as well.

Defendant Kearney, as an agent of the County, generally shares the same immunity as the County. However, Plaintiffs maintain that Defendant Kearney is not immune from suit on the survival and wrongful death claims because he engaged in "willful misconduct," one of the exceptions to immunity outlined above. Plaintiffs argue that Defendant Kearney's deliberate issuance of the three press releases "for the sole purpose of providing blind support for colleagues and protection of his employment" is "evidence" that his failure to supervise law enforcement officers is the result of willful misconduct. (Doc. 14, p. 14). The County Defendants argue that Defendant Kearney is a municipal employee and is entitled to immunity, but do not address Plaintiffs' specific argument that Defendant Kearney engaged in willful misconduct.

First, we have already found that Defendant Kearney has no authority to supervise Township police officers; thus, Plaintiffs' theory of willful misconduct is fundamentally untenable. Second, as stated earlier, engaging in willful misconduct is equivalent to committing an intentional tort. We see no allegation in the Complaint that could be construed to allege that Defendant Kearney committed an

intentional tort. Defendant Kearney is alleged to be liable in the instant matter for failing to properly supervise and discipline Township police officers with regard to how they used force against suspects. Such failure to supervise does not constitute an intentional tort. Once again, the *post hoc* issuance of a press release clearing officers of any criminal wrongdoing hardly constitutes an intentional tort against Shultz, either.[13] Thus, we shall find Defendant Kearney immune from suit from state law claims and dismiss the wrongful death claim as alleged against him in Count VI.

For similar reasons, then, we are compelled to find Defendant Hyers immune from suit on the state law claims alleged in the Complaint, as well.[14] Defendant Hyers is an employee of the Defendant Township and thus generally shares the same immunity as the Township. Plaintiffs have not alleged facts which would show that Defendant Hyers has engaged in willful misconduct or an intentional tort. He too is accused only of a failure to supervise and appropriately discipline Township police officers with regard to use of force. Finding him

[13] *See Buclary v. Borough of Northampton*, 1991 WL 133851, at *12 (E.D. Pa. July 17, 1991), for a circumstance in which a plaintiff's allegations were indeed sufficient to state a defamation claim under the "willful misconduct" exception to immunity. There, the plaintiff had alleged that the "[d]efendants intentionally, maliciously, and recklessly caused . . . malicious, false, defamatory, slanderous, and libelous statements to be published and circulated.." *Id.*

[14] Although the parties did not specifically raise the issue of whether Defendant Hyers is entitled to immunity, our analysis regarding the County Defendants compels us to reach the same conclusion pertaining to the wrongful death claim alleged against him.

immune, we shall also dismiss Defendant Hyers from Count VI of the Complaint.

F. STANDING

The County Defendants additionally raise the argument that individual Plaintiffs do not have standing to assert the wrongful death claim. Although we have already found both the County Defendants, as well as the Township and Defendant Hyers, immune from the wrongful death claim, the claim still stands against Defendants Hadfield and Miller. Thus, we shall address the issue of individual Plaintiffs' standing to bring this particular claim.

The County Defendants argue in their brief that a wrongful death action may only be brought by the personal representative[15] of the decedent,[16] citing to 42 Pa. Con. Stat. § 8301 and Pennsylvania Rule of Civil Procedure 2202. Plaintiffs cite to the same law and argue that no action for wrongful death was brought within six months of Shultz's death, and thus they as individuals may bring the action.

Under Pennsylvania's Wrongful Death Act, a cause of action for wrongful death may be pursued "if no recovery for the same damages claimed in the wrongful death action was obtained by the injured individual during his lifetime . .

[15] The term "personal representative" is defined under Pennsylvania law as "the executor or administrator of the estate of a decedent duly qualified by law to bring actions within this Commonwealth." Pa. R. Civ. P. 2201.

[16] "Decedent," to be clear, refers to Todd Shultz.

." 42 Pa. Con. Stat. § 8301(a). The only intended beneficiaries of damages recovered under a wrongful death action are the spouse, children, or parents of the decedent. *Id.* at § 8301(b). However, under the Pennsylvania Rules of Civil Procedure, a wrongful death claim "shall be brought only by the personal representative of the decedent for the benefit of those persons entitled by law to recover damages for such wrongful death" but "[i]f no action for wrongful death has been brought within six months after the death of the decedent, the action may be brought by the personal representative or by any person entitled by law to recover damages in such action as trustee ad litem on behalf of all persons entitled to share in the damages." Pa. R. Civ. P. 2202(a)-(b).

First, regardless of the passage of six months, Wayne Shultz, Jr., as the brother of the decedent –not the spouse, child, or parent– cannot bring this action in his individual capacity, as he is not a person "entitled by law to recover damages" in a wrongful death action.

Regarding Plaintiffs' argument that Wayne Shultz and Gail Shultz may also sue in their individual capacities because no wrongful death action was filed within six months of after the death of the decedent, we find the case of *Estate of Mathews v. Millcreek*, 2000 WL 1479060, 45 Pa. D. & C. 4th 376 (Erie County Ct. C.P. 2000), to be most directly on point. There, the court addressed whether the

mother of the decedent could be a proper plaintiff in addition to the administrator of the decedent's estate. The court acknowledged that Rule 2202 "does not specifically state whether a suit by a personal representative that is filed after the six-month period bars all claims by other parties under 2202(b) or whether they may bring actions on their own accord." *Id.* at 379. The court found, however, that under Rule 2202(b), only one person is entitled to bring suit, either the personal representative or a person entitled to recover damages under law. *Id.* There, the court held that because the personal representative had already brought a wrongful death suit, any such action was precluded from being brought by decedent's mother as a plaintiff. *Id.; see also Sedia v. Diggs*, 42 Pa. D.&C.3d 307, 310 (Bucks County Ct. C.P. 1986).

In the matter *sub judice*, we see no reason to depart from the logic and reasoning of Pennsylvania courts in their analysis of Rule 2202. Rule 2202(b) does indeed state who may bring a wrongful death action in the disjunctive: the personal representative "or" any person entitled to recover damages in such an action as trustee ad litem. Here, Wayne Shultz, Jr. has brought suit as the personal representative of decedent's estate. Thus, Plaintiffs Wayne Shultz, Jr. and Gail M. Shultz may not also bring a wrongful death action in their own right. Wayne Shultz, the brother of the decedent, is only permitted to bring this action as the

administrator of Todd Shultz's estate, but only for the benefit of the decedent's spouse, children, or parents. Gail Shultz, then, as the decedent's mother, remains a beneficiary to any potential recovery on this claim. As the brother of decedent, Wayne Shultz is not a possible beneficiary.

Accordingly, we shall dismiss individual Plaintiffs Wayne Shultz, Jr. and Gail Shultz as plaintiffs in the wrongful death action alleged in Count VI. *See also Estate of Kelly ex rel. Gafni v. Multiethnic Behavioral Health, Inc, Civ.* No. 08-3700, 2009 WL 2902350 (E.D.Pa. Sept. 9, 2009)(citing to aforementioned Pennsylvania case law in support of holding that potential beneficiaries, the decedent's father and brother, were not allowed permissive intervention in a wrongful death action brought by the administrator of decedent's estate).

V. CONCLUSION

For all the reasons stated herein, we shall grant in part and deny in part the motions. The County Defendants' motion to dismiss is granted to the extent that we shall dismiss Defendant Kearney from Count III of the Complaint and Defendant County from Count IV. Their motion is also granted to the extent we find the County Defendants immune from suit from the state law claims, and thus they are dismissed from Counts V and VI. We also dismiss Count V as it fails to allege an independent cause of action. Finally, their motion is granted to the extent

we shall dismiss Wayne Shultz, Jr. and Gail Shultz as individual Plaintiffs from Count VI. We also find Defendant Hyers and Defendant Township immune from suit on the wrongful death claim and thus they are dismissed from Count VI, as well. Consequently, the Township Defendants' motion to dismiss is granted to the extent that we shall dismiss Defendant Hyers and Defendant Township from the state law claims. The motions are otherwise denied.

We are mindful of our Circuit's mandate in *Fletcher v. Harlee Corp. v. Pote Concrete Contractors, Inc.*, 482 F.3d 247, 251-52 (3d Cir. 2007), that district courts must offer leave to amend, "irrespective of whether it is requested," when dismissing claims at the Rule 12(b)(6) stage, "unless doing so would be inequitable or futile." *Id.* Thus, we will offer leave to amend with respect to the supervisory liability claim alleged against Defendant Kearney and the *Monell* claim alleged against Defendant York County, although we find it unlikely such amendment will be successful based on the facts as currently alleged in the Complaint.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. The County Defendants' Motion to Dismiss, (Doc. 12), is **GRANTED** to the following extent:

    A. Defendant Thomas Kearney is **DISMISSED WITHOUT PREJUDICE** from Count III.

B. Defendant York County is **DISMISSED WITHOUT PREJUDICE** from Count IV.

C. Count V is **DISMISSED WITH PREJUDICE**.

D. York County and Thomas Kearney are **DISMISSED WITH PREJUDICE** from Count VI of the Complaint.

E. Plaintiffs Wayne L. Shultz and Gail M. Shultz are **DISMISSED WITHOUT PREJUDICE** from Count VI, to the extent they allege the wrongful death claim in their individual capacities.

F. The Motion is otherwise **DENIED**.

2. The Township Defendants' Motion to Dismiss, (Doc. 19), is **GRANTED** to the following extent:

A. Defendant Springettsbury Township and Defendant Thomas Hyers are **DISMISSED WITH PREJUDICE** from Count VI of the Complaint.

B. The Motion is otherwise **DENIED**.

3. Plaintiffs are **GRANTED** leave to amend their pleading within twenty (20) days of the date of this Order to the extent there are facts which, if true, support the Plaintiffs' supervisory liability claim against

Defendant Kearney or their *Monell* claim against Defendant York County. If Plaintiffs do not file an amended pleading in that time, the above dismissal of those claims will be deemed prejudicial.

s/ John E. Jones III
John E. Jones III
United States District Judge