No. _____

IN THE

Supreme Court of the United States

GEORGE PONIK, RALPH SCIANNI, BAYONNE POLICE DEPARTMENT, CITY OF BAYONNE, JOHN DOE POLICE OFFICERS 1-10, JOHN DOE 1-10, individually and/or in their official capacities, jointly, severally, and/or in the alternative,

Petitioners,

– v. –

JAMIE WILLIAMS, individually, and as Administratrix ad Prosquendum for the ESTATE OF PETER LEE WILLIAMS, deceased, and MAUREEN WILLIAMS, individually,

Respondents.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Louis Cappelli, Jr.
Counsel of Record
Courtney M. Knight
Mark R. Peck
FLORIO PERRUCCI STEINHARDT CAPPELLI TIPTON & TAYLOR, LLC
1010 Kings Highway South, Bldg 2
Cherry Hill, NJ 08034
(856) 853-5530
lcappelli@floriolaw.com

QUESTION PRESENTED

1. May a Court refuse to engage in the requisite two step qualified immunity analysis, based solely on a decision that the more general liability question of excessive force should be left to a jury because a reasonable jury could find the defendant officer's action represented use of force that was not objectively reasonable under the circumstances?

PROCEEDINGS IN OTHER COURTS

1. Williams, et als. v. Ponik, et als.
   2:15-cv-01050-JMV-JBC
   U.S. District Court for the District of New Jersey
   Judgment entered: 1/11/2019

2. Williams, et als. v. Ponik, et als
   Case No. 19-1159
   U.S. Court of Appeals for the Third Circuit
   Decided: 8/24/2020; Petition for Rehearing
   Denied: 9/23/20

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Statutes:

Cases:

PETITION FOR WRIT OF CERTIORARI

George Ponik, Ralph Scianni, Bayonne Police Department, and the City of Bayonne respectfully petition this Court for a writ of certiorari to review the judgment of the Third Circuit of the United States Court of Appeals.

OPINIONS BELOW

On January 11, 2019, the District Court granted Petitioners' Motion for Summary Judgment. See Appendix, Exh. C. On August 24, 2020, the Third Circuit affirmed the District Court's Order in part and reversed in part, remanding the matter for a jury to determine whether Officer Ponik's use of force was excessive, and as a consequence also held that the determination of Officer Ponik's qualified immunity was premature until a jury decided the reasonable force issue. See Appendix, Exh. A.

On September 8, 2020, Petitioner filed a Petition for rehearing with the Third Circuit, which was denied on September 23, 2020. See Appendix, Exh. B.

JURISDICTION

The court of appeals entered its judgment on August 24, 2020, and denied Petitioners' petition for rehearing on September 23, 2020. Pet. App. 1 to 18. The time to file this petition was extended to February 20, 2021, by the Court's March 19, 2020 Order. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. IV, states:

> The right of the people to be secure in their persons, houses, papers,and effects, against unreasonable searches and seizures, shall not be

> violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress …

STATEMENT OF THE CASE

The United States Supreme Court has held that Courts of Appeal are "required by our precedents" to conduct the qualified immunity analysis, including whether clearly established law barred the defendant officer's actions. City of Escondido, Cal., 139 S. Ct. at 503–04. The Court has further stressed the importance of resolving immunity questions at the earliest possible litigation stage because qualified immunity is not a mere defense to liability but an immunity from suit. Hunter v. Bryant, 502 U.S. 224, 227 (1991); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

In Saucier v. Katz, 533 U.S. 194 (2001), the Court attempted to set a "proper sequence" for courts to consider the requisites of a qualified immunity defense. Id. at 200. The order of inquiry was defined as follows:

1) Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?
2) If so, was that constitutional right clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted?

Id. at 202. The Court held that these two questions required distinct analysis. Id. at 203-207.

In this case, the District Court entered Summary Judgment for the Petitioners, in part after finding that Petitioners were entitled to qualified immunity. The Third Circuit then reviewed on appeal, and in issuing its decision did not define the constitutional right at issue and held that a decision on qualified immunity would be premature because a jury question of whether the amount of force used by Officer Ponik was reasonable remained.

This avoidance of the qualified immunity analysis, while illustrative of a pattern among some of the circuits, is contrary to This Honorable Court's clear precedent and demonstrative of the disparate evaluation and application of immunity across the Nation.

1. The Underlying Incident.

This matter arose from a June 10, 2014, incident in which Officer Ponik of the Bayonne Police Department responded to a twelve-person fight in an apartment vestibule. There were between twenty and thirty people present in total. Officer Ponik shouted for the fighting to stop and then deployed OC spray into the air. People dispersed and no arrests were made.

Respondents' decedent, Peter Williams, was involved in the fight and present in the area where OC spray was deployed. Notably, video evidence showed Williams was not directly hit by the spray and that he showed no signs of distress while in the vestibule following the use of spray. After exiting the vestibule area, Williams

collapsed. He thereafter passed away and the autopsy stated that his death was of natural causes: severe coronary disease with contributory causes of cocaine use and mild obesity.

2. The Third Circuit Decision.

After holding that a reasonable jury could find Officer Ponik's use of force excessive, the Third Circuit continued by stating that as a material factual dispute existed as to whether Officer Ponik used excessive force, a decision on qualified immunity would be premature. The Third Circuit relied solely upon Curley v. Klem, in justifying this delayed legal determination. 298 F.3d 271, 278 (3d Cir. 2002). However, this reliance was both a misapplication of the holding in Curley, and an oversight of Curley's conflict with prior and later Supreme Court precedent, including the Saucier v. Katz case that Curley proports to apply. 533 U.S. 194 (2009).

First, while Curley does stand for the proposition that "the existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue," the Third Circuit misconstrues the need for a jury to determine disputed facts and the question of reasonableness of an officer's use of force. Curley, 298 F.3d at 278 (emphasis added). The District Court had found no material facts in dispute, and despite the reversal in-part, the Third Circuit failed to identify any specific material facts that must be determined by the jury. In fact, the appellate opinion clearly states the relevant facts, but then holds a reasonable jury could find the objective reasonableness factors weighed in plaintiff's favor.

This is a comment on who should weigh the factors, not a determination that material facts remain at issue. That mistaken distinction between finding facts and

weighing facts, compounded injury to defendants once the Court turned to the qualified immunity analysis and decided that the entire analysis could be avoided because there were unresolved disputes of historical fact relevant to the immunity analysis, when in reality, no disputes of fact were identified. The Court relies upon Curley's application of the Saucier analytical framework, to support its avoidance of the qualified immunity analysis.

In Curley, the Third Circuit noted that the question of reasonableness of the officers' beliefs or actions should only be left to a jury when relevant factual issues are in dispute, otherwise reasonableness is not a jury question. Id. at 278-79. Accordingly, the District Court properly granted summary judgment, and the Third Circuit erred in its review.

REASONS FOR GRANTING THE WRIT

A. The Opinion of the Court of Appeals Contradicts the Supreme Court's Qualified Immunity Jurisprudence, in that it Failed to Analyze Qualified Immunity so as to Improperly Delay the Determination Until Trial.

As early as 1991, the Supreme Court had expressly rebuked attempts to delay qualified immunity determinations based on alleged disputes of material fact. In Hunter, the Ninth Circuit found that the reasonableness of an officer's actions was a question for the trier of fact, and that summary judgment would therefore be inappropriate unless there was only one reasonable conclusion a jury could reach. Hunter v. Bryant, 502 U.S. 224, 227-228 (1991). The Supreme Court held that statement of law to be incorrect because it places the question of immunity in the hands of the jury, when immunity should be decided by the court long before trial.

Id. at 228. The Ninth Circuit's statement of law was further incorrect because the Court failed to ask whether the defendants "acted reasonably under settled law in the circumstances". Id. Yet similar attempts to delay this legal determination until after the defendant is forced to proceed through trial continue to be commonplace, though disproportionately made throughout the nation.

Following the disproportionate application of qualified immunity, the Supreme Court attempted to set a "proper sequence" for courts to consider the requisites of a qualified immunity defense. Saucier v. Katz, 533 U.S. 194, 200 (2001). The order of inquiry was defined as follows:

1) Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?

2) If so, was that constitutional right clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted?

Id. at 202. At the same time, the Supreme Court discussed whether a court could eliminate the separate immunity inquiry of whether a constitutional violation could be found based on the allegations, when already addressing the primary issue of objective reasonableness in an excessive force case, but ultimately held that the two questions required distinct analysis. Id. at 203-207.

The Supreme Court thereafter modified the Saucier ruling to relax the strict order of analysis operations, but notably did not alter any part of its holding regarding the impact of disputed material facts. See Pearson v. Callahan, 555 U.S. 223 (2009). In Pearson the Court held that district and appellate court judges, "should be permitted

to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in their particular case at hand." Id. at 236. Specifically, Pearson was responding to several courts that found the strict ordered two step inquiry of Saucier "uncomfortable" when the constitutional violation depends on undeveloped facts. Id. at 239. By allowing courts to analyze the second prong, whether the right at issue was clearly established, before finding that there was a constitutional violation, this updated process avoided any inappropriate delay in ruling on the question of qualified immunity.

Nothing in Pearson changed a court's obligation to complete the immunity analysis, nor did it in anyway ratify decisions of lower courts to delay the immunity analysis until after the jury engages in fact-finding, rather, Pearson merely relaxed the order in which the two prongs could be addressed. It was clear that the immunity analysis must be addressed regardless of issues with the first prong. City of Escondido, Cal., 139 S. Ct. 500 at 503–04 (2019).

Since then, the Supreme Court has further affirmed the necessity of analyzing both prongs, in either order, before qualified immunity can be denied and a defendant can be forced to trial. Specifically, the necessity of evaluating the "clearly established right" prong has been discussed when such analysis has been skipped because of questions relevant to violation itself:

> It does not suffice for a court simply to state that an officer may not use unreasonable and excessive force, deny qualified immunity, and then remit the case for a trial on the question of reasonableness; an officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it.

> That is a necessary part of the qualified-immunity standard, and it is a part of the standard that the Court of Appeals here failed to implement in a correct way.

Kisela v. Hughes, 138 S. Ct. 1148, 1153 (2018) (internal citations omitted).

In the present matter the Court of Appeals held that the District Court's grant of qualified immunity was premature because a reasonable jury could find Officer Ponik's use of force excessive, which they considered a material fact dispute. This directly conflicts with Supreme Court precedent which makes it clear that the immunity analysis, including the second prong, must be addressed regardless of issues with the first prong. City of Escondido, Cal., 139 S. Ct. 500 at 503–04 (2019).

1. The Third Circuit's decision conflicted with Supreme Court precedent and its own prior case law when it reversed the District Court's qualified immunity ruling without completing the full analysis.

The Supreme Court has held that Courts of Appeals are "required by our precedents" to conduct the qualified immunity analysis including whether clearly established law barred the defendant officer's actions. City of Escondido, Cal., 139 S. Ct. at 503–04. The Court has further stressed the importance of resolving immunity questions at the earliest possible litigation stage because qualified immunity is not a mere defense to liability but an immunity from suit. Hunter v. Bryant, 502 U.S. 224, 227 (1991); Mitchell v. Forsyth, 472 U.S. 511, 526 (1985); Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

The Third Circuit has previously acknowledged that even if a constitutional violation cannot be determined absent additional fact finding, the second prong of the immunity analysis must still be addressed, holding that "while issues of fact may preclude a definitive finding on the question of whether the plaintiff's rights have

been violated, the court must nonetheless decide whether the right at issue was clearly established. Failure to do so is error." Spady v. Bethlehem Area Sch. Dist., 800 F.3d 633, 637 (3d Cir. 2015) quoting Sherwood v. Mulvihill, 113 F.3d 396, 399 (3d Cir.1997).

Nevertheless, in reviewing the present matter, the Third Circuit stated, "[b]ut a decision on qualified immunity would be premature because 'there are unresolved disputes of historical fact relevant to the immunity analysis.' For these reasons, material factual disputes exist as to whether Officer Ponik used excessive force." See Pet. App. at __ (August 24, 2020 Opinion at 6-7 at Exhibit A, quoting Curley v. Klem, 298 F.3d 271, 278 (3d Cir. 2002) ("Curley I")). However, the Court did not identify what reasons it was referring to, nor any material factual disputes that would prevent it from deciding the objective reasonableness of Officer Ponik's force, or from defining the specific right at issue and determining whether it was clearly established.

The Third Circuit relied solely on Curley I for the proposition that the qualified immunity analysis could be delayed until after a jury completes its factual findings, as the actual intent upon remand was not made clear. However, the Court recognized in Curley II, that qualified immunity is an objective question to be decided by the court as a matter of law. Curley v. Klem, 499 F.3d 199, 211 (3d Cir. 2007) ("Curley II"). In Curley I, the Court was responding to the then requirement that it must first decide whether a constitutional violation had actually occurred, before moving onto the second prong, which asks whether the right as issue was clearly established at the time of the violation. Curley v. Klem, 298 F.3d 271, 277 (3d Cir. 2002). However,

this strict structure of inquiry defined in Saucier was overruled by Pearson, as addressed above. Santini v. Fuentes, 795 F.3d 410, 418 (3d Cir. 2015).

In Spady, the Third Circuit clarified that Curley I was decided upon the now overruled rigid order of analysis originally outlined under Saucier, which required the issue of constitutional violation to be determined first and led to the Court delaying analysis as to the second prong of the qualified immunity analysis. Spady, 800 F.3d at 637. However, since Pearson, "the court may not deny a summary judgment motion premised on qualified immunity without deciding that the right in question was clearly established at the time of the alleged wrongdoing." Id.

The Third Circuit has previously recognized the Supreme Court's precedent and the development of qualified immunity jurisprudence. However, in the present case, the Third Circuit overturned the District Court's grant of qualified immunity, relying upon outdated intra-circuit law, while flatly refusing to engage in the analysis clearly required by the Supreme Court precedent.

2. Had the Court engaged in the complete qualified immunity analysis it would have found that no clearly established right was implicated in the plaintiffs' allegations, that Officer Ponik is therefore entitled to qualified immunity, and that the District Court's order of summary judgment must be affirmed.

While the Third Circuit decided that a reasonable jury could weigh the objective reasonableness factors in favor of the Appellants, such possibility is not dispositive for qualified immunity. See Saucier, 533 U.S. at 203-207. Even if a defendant officer's conduct represents a technical violation of the constitutional right, he or she may still be entitled to qualified immunity if a reasonable officer might not

have known for certain that the conduct in the situation confronted was unlawful. Ziglar v. Abbasi, 137 S. Ct. 1843, 1866–67 (2017). Even if a constitutional violation could not be determined absent fact-finding by a jury, Appellee would still be entitled to qualified immunity under the second prong of the Saucier analysis.

Despite it being the plaintiff's burden to show that defendant's conduct violated a clearly established right, the Appellants have not identified any cases that would suggest the particular conduct here would violate a clearly established right. Spady, 800 F.3d at 637, quoting Sherwood, 113 F.3d at 399. Further, the District Court completed its own inquiry into the cases most factually similar to the present matter, and identified multiple cases in which courts found "an officer's deployment of pepper spray into a rowdy crowd [did] not run afoul of the Constitution". See Bramlett v. Champaign Police Dep't, No. 05-2200, 2006 WL 2710634, at *4 (C.D. Ill. Sept. 20, 2006); and see Redd v. City of Evansville, Ind., No. 12-00070, 2014 WL 2439701, at *7-8 (S.D. Ind. May 30, 2014).

In order to avoid Appellee's qualified immunity, the plaintiff must identify at least a case, if not a body of relevant case law, where officers acting under similar circumstances were held to have violated the Fourth Amendment, so as to place the lawfulness of the action beyond debate. City of Escondido, Cal., 139 S. Ct. at 503–04. No such case has been identified that would demonstrate a clear prohibition of use of pepper spray in the air over a group of people engaged in a violent altercation in order to prevent injury to anyone involved and restore the peace.

Accordingly, had the Court of Appeals properly analyzed the second prong of the qualified immunity analysis, as required by law, it would be clear that the plaintiff could not show that the right complained to have been violated was clearly established. Therefore, Officer Ponik is entitled to qualified immunity, and the District Court's summary judgment order should be affirmed.

B. The Procedural Treatment of Qualified Immunity Varies Greatly and Inconsistently Among the Courts of Appeals.

1. Many Courts of Appeals routinely delay qualified immunity determinations until trial, citing fact issues, and failing to reach the second prong of analysis.

A number of the circuit courts have reasoned that material fact disputes prevent them from reaching the legal question of qualified immunity until after facts are found by the jury. See Willingham v. Crooke, 412 F.3d 553, 560 (4th Cir. 2005); Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002); Peterson v. City of Plymouth, 60 F.3d 469, 475 (8th Cir. 1995). The Supreme Court has previously addressed this error in Saucier v. Katz, 533 U.S. 194 (2001):

> The approach the Court of Appeals adopted—to deny summary judgment any time a material issue of fact remains on the excessive force claim—could undermine the goal of qualified immunity to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982). If the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate. See Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

Id. at 202.

The Second Circuit relies on what it acknowledges as its own developed procedure, (i.e. unsupported by Supreme Court law), that allows a jury to resolve disputed factual issues relevant to qualified immunity via special interrogatories, before the Court makes the determination of whether qualified immunity attaches to the defendant. Jones v. Treubig, 963 F.3d 214, 224–25 (2d Cir. 2020); Stephenson v. Doe, 332 F.3d 68, 81 (2d Cir. 2003); Warren v. Dwyer, 906 F.2d 70, 76 (2d Cir. 1990). Notably relying on its own precedent, on an issue which has more recently been addressed by the Supreme Court in Saucier, Pearson, etc., the Jones Court notes that on a motion for judgment as a matter of law they should consider the evidence in the light most favorable to the party against whom the motion was made, however, rather than doing so, it relies upon the lack of an express jury finding as to the question of reasonableness of the officer's belief in resistance to deny qualified immunity. Jones, 963 at 234.

The Fifth Circuit has described Plaintiff's burden to overcome a summary judgment motion for qualified immunity as being required to "rebut the defense by establishing a genuine fact issue as to whether the official's allegedly wrongful conduct violated clearly established law." Shepherd on behalf of Estate of Shepherd v. City of Shreveport, 920 F.3d 278, 285 (5th Cir. 2019) (quoting Brown v. Callahan, 623 F.3d 249, 253 (5th Cir. 2010)). This is a misstatement of the law in that issues of fact have no bearing on clearly established prong of the qualified immunity analysis. This oversimplification attempts to merge the two prongs of the analysis into a single inquiry that can be entirely resolved by an issue of fact. However, the Fifth Circuit

has also highlighted that Courts have discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first, the very mechanism which allows Courts to grant qualified immunity based solely on the second prong. Kitchen v. Dallas County, Tex., 759 F.3d 468 (5th Cir. 2014).

The Ninth Circuit has strayed the furthest from the Supreme Court's direction, holding that where disputed factual issues remain, qualified immunity is "transformed from a doctrine providing immunity from suit to one providing a defense at trial." Morales v. Fry, 873 F.3d 817, 823 (9th Cir. 2017). In so holding that it is appropriate for the question to be delayed until after jury factfinding, they relied upon the third circuit's outdated Curley opinion, as well as similarly outdated cases from the D.C., fourth, eighth, second, first, eleventh, and sixth circuits. Curley v. Klem, 499 F.3d 199, 211 (3d Cir. 2007); Pitt v. Dist. of Columbia, 491 F.3d 494, 509–10 (D.C. Cir. 2007); Willingham v. Crooke, 412 F.3d 553, 560 (4th Cir. 2005); Littrell v. Franklin, 388 F.3d 578, 584 (8th Cir. 2004); Kerman v. City of New York, 374 F.3d 93, 109 (2d Cir. 2004); Acevedo-Garcia v. Monroig, 351 F.3d 547, 563 (1st Cir. 2003); Johnson v. Breeden, 280 F.3d 1308, 1318 (11th Cir. 2002); Pouillon v. City of Owosso, 206 F.3d 711, 718 (6th Cir. 2000); and Warlick v. Cross, 969 F.2d 303, 305 (7th Cir. 1992).

The Eleventh Circuit had previously explained when the issue of qualified immunity should proceed to trial:

> Even at the summary judgment stage, not all defendants entitled to the protection of the qualified immunity defense will get it. The ones who should be given that protection at the summary judgment stage are those who establish that there is no genuine issue of material fact

> preventing them from being entitled to qualified immunity. And that will include defendants in a case where there is some dispute about the facts, but even viewing the evidence most favorably to the plaintiff the law applicable to that set of facts was not already clearly enough settled to make the defendants' conduct clearly unlawful. But if the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial.

Johnson v. Breeden, 280 F.3d 1308, 1317 (11th Cir. 2002). This explanation, like that of Fifth Circuit in Shepherd, expressly and improperly links issues of fact with the purely legal determination of whether the complained of action violated clearly settled law. In a more recent review, the Eleventh Circuit reached the conclusion that Plaintiffs need not demonstrate that the law underlying his claim was clearly established if brought under the Eighth Amendment, but does if brought under the Fourteenth Amendment. Patel v. Lanier Cty. Georgia, 969 F.3d 1173, 1186 (11th Cir. 2020).

2. Other Courts of Appeals avoid delaying the qualified immunity analysis by either always evaluating the legal question in the second prong regardless of fact issues or by analyzing the facts in the light most favorable to the Plaintiff so that no fact issues can interrupt the proper analysis.

Of the lower Courts that properly reach the legal question of the second prong in the qualified immunity analysis, the Fourth Circuit has laid out the proper review most clearly, recognizing that a defendant is entitled to qualify immunity if either the facts do not make out a violation of a constitutional right, or the law was not clearly established at the time of the defendant's actions, which allows for a determination of qualified immunity even if factual issues remain. Cantley v. W.

Virginia Reg'l Jail & Corr. Facility Auth., 771 F.3d 201, 205 (4th Cir. 2014). See also Estate of Armstrong ex rel. Armstrong v. Vill. of Pinehurst, 810 F.3d 892, 898 (4th Cir. 2016) ("[The] case survives summary judgment, however, only if we answer both questions in the affirmative".)

This is an essential distinction, because previously courts were called to complete the analysis of the first prong before they were permitted to address the second, a demand many circuits used to support a decisional delay, but since Pearson it has been clarified that even if the first prong cannot be determined, defendants may still be entitled to summary judgment solely upon the legal determination of the second "clearly established law" prong. Pearson, 555 U.S. at 236.

The Tenth Circuit explained their approach in a similar fashion, that incorporates the Supreme Court developments in Saucier and Pearson:

> When the defendant has moved for summary judgment based on qualified immunity, we still view the facts in the light most favorable to the non-moving party and resolve all factual disputes and reasonable inferences in its favor. *See id.* Unlike most affirmative defenses, however, the plaintiff would bear the ultimate burden of persuasion at trial to overcome qualified immunity by showing a violation of clearly established federal law. Thus, at summary judgment, we must grant qualified immunity unless the plaintiff can show (1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct. See Saucier v. Katz, 533 U.S. 194, 201–02, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (asking whether "a violation could be made out on a favorable view of the parties' submissions"), *overruled in part on other grounds by* Pearson v. Callahan, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009); *see also* *412 Riggins v. Goodman, 572 F.3d 1101, 1107 (10th Cir.2009) ("[T]he Supreme Court has held that qualified immunity is proper when the record plainly demonstrates no constitutional right has been violated, or that the allegations do not offend clearly established law.").

Estate of Booker v. Gomez, 745 F.3d 405, 411–12 (10th Cir. 2014). This description demonstrates that a plaintiff must show both that a reasonable jury could find a constitutional right was violated, and that the right was clearly established at the time of defendant's conduct. Plaintiff's failure to prove either must result in qualified immunity.

Similarly, in Gray v. Cummings, the First Circuit noted that a reasonable jury could find the defendant officer's use of force excessive, but noted that "this conclusion does not end our inquiry. Cummings has invoked the defense of qualified immunity". 917 F.3d 1, 9 (1st Cir. 2019). The Court went on to analyze the clearly established prong of the qualified immunity analysis, and whether the plaintiff had met his burden regarding such a showing, ultimately finding he did not and that the officer was entitled to qualified immunity. Id. at 13.

Other circuits ensure that the second prong of the qualified immunity analysis is reached through avoiding factual issues by relying upon the general summary judgment standard calling the court to consider the facts in the light most favorable to the non-moving party. The DC Circuit recognizes that it is called to review the facts in the light most favorable to the nonmoving party only when there is a genuine dispute as to those facts and a reasonable jury could believe the nonmoving party's version. Lash v. Lemke, 786 F.3d 1, 6 (D.C. Cir. 2015) citing Scott v. Harris, 550 U.S. 372, 378 (2007); Tolan v. Cotton, 134 S.Ct. 1861, 1866 (2014). Meanwhile, the Seventh Circuit actually incorporates this factual deference to plaintiff into their description of the qualified immunity analysis: "In assessing qualified immunity, we

ask two questions: (1) whether the facts, taken in the light most favorable to the plaintiff, show that the defendants violated a constitutional right; and (2) whether that constitutional right was clearly established at the time of the alleged violation." Edwards v. Jolliff-Blake, 907 F.3d 1052, 1060 (7th Cir. 2018), quoting Betker v. Gomez, 692 F.3d 854, 860 (7th Cir. 2012) (internal quotations omitted).

The Eighth Circuit likewise defines the qualified immunity analysis as "the purely legal question" whether the evidence viewed in the light most favorable to plaintiff shows the defendant violated her clearly established rights. See Kelsay v. Ernst, 933 F.3d 975, 979 (8th Cir. 2019), cert. denied, 140 S. Ct. 2760 (2020), reh'g denied, No. 19-682, 2020 WL 4429718 (U.S. Aug. 3, 2020); Shannon v. Koehler, 616 F.3d 855, 861 (8th Cir. 2010). Under this structure the analysis is just that, a purely legal determination for the Court to make at the earliest possible juncture, in keeping with Supreme Court precedent,

The Sixth Circuit avoids issues of fact during qualified immunity analysis, by taking the general summary judgment rule that the Court consider the facts in the light most favorable to the non-moving party to a more extreme level, holding that, "to bring an interlocutory appeal of a qualified immunity ruling, the defendant must be willing to concede the plaintiff's version of the facts for purposes of the appeal." Ouza v. City of Dearborn Heights, Michigan, 969 F.3d 265, 276–77 (6th Cir. 2020), (citing Jefferson v. Lewis, 594 F.3d 454, 459 (6th Cir. 2010)). This is an extreme view, as usually the non-movant is called to present sufficient evidence of their factual allegations and cannot rest on theory alone. See Commissioners of Cty. of Johnson,

Kansas, 864 F.3d 1154, 1199 (10th Cir. 2017) (Stating "mere allegations aren't enough" and that plaintiff's version of the facts must be sufficiently grounded in the record.) However, under this treatment, continuing issues of fact alone would be insufficient to prevent a full qualified immunity analysis, because the question asked is whether the plaintiff's version of facts demonstrates of violation of clearly established rights. Id. at 277-78, (quoting Vakilian v. Shaw, 335 F.3d 509, 515 (6th Cir. 2003)). This methodology still ensures that both prongs of the qualified immunity analysis are reached and that immunity is properly applied before trial, where appropriate.

C. This is an Ideal Case for a Clarification on the Procedural Analysis of Qualified Immunity to Ensure Just Application Between the Lower Courts, Without Requiring Fact-Based Analysis of a Constitutional Right.

In 2017, the Court explained that, in the preceding five years, it had issued a number of opinions reversing federal courts in qualified immunity cases, which was "necessary both because qualified immunity is important to society as a whole, and because as an immunity from suit, qualified immunity is effectively lost if a case is erroneously permitted to go to trial." White v. Pauly, 137 S. Ct. 548, 551 (2017) (per curiam) (internal quotations omitted). Qualified immunity was designed to ensure that public officials are able to perform their duties without being called to predict the future course of constitutional law before they act. See Ashcroft v. al-Kidd, 563 U.S. 731, 746- 47 (2011); Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982); Pierson v. Ray, 386 U.S. 547, 555 (1967). However, the current variable treatment of qualified immunity leaves public officials again with uncertainty, because while they can rely on the prior established constitutional law, the inconsistent application of the

immunity itself leaves them under continued threat of extensive litigation and being called to trial.

The Supreme Court should grant review to provide much-needed guidance to lower courts in their application of the qualified immunity analysis, and to ensure consistent and just outcomes for parties regardless of their geography. As demonstrated hereinabove, qualified immunity jurisprudence remains a point of confusion among the lower courts. Many Circuits are forcing public officers to proceed fully through litigation and trial before they will fully analyze the legal question of whether immunity attaches, while others follow the Supreme Court's past direction more closely and analyze both prongs at the earliest possible juncture, as either prong could result in the attachment of qualified immunity and protection from further litigation and trial.

The Supreme Court should reaffirm that the qualified immunity analysis must be fully completed at the time such motion is first made, and expressly overrule any lower court decision, which allows for the second prong of the analysis to be avoided because of a mere dispute of fact. This is necessary to preserve qualified immunity's very design as an immunity to trial, rather than a typical defense.

Specifically in this case, it is clear that had the Third Circuit properly reached the second prong of qualified immunity analysis, the District Court's grant of summary judgment would have been affirmed. Indeed, the Third Circuit did not even define the applicable constitutional right, discuss relevant case law, or delve into whether the right was clearly established. The Court of Appeals merely stated that

factual issues existed and forewent the entire qualified immunity analysis remanding the matter to trial.

This case in particular, dealing primarily with the procedural treatment of the immunity rather than fact-specific analysis of constitutional rights, is ripe for the Court's review to reaffirm the prior precedent, which encourages, but now must expressly demand that the full qualified immunity analysis be completed at the earliest possible stage so that the lower courts will be guided to a consistent and timely application of the immunity.

CONCLUSION

For the foregoing reasons, George Ponik, Ralph Scianni, Bayonne Police Department, and the City of Bayonne respectfully request that this Court issue a writ of certiorari to review the judgment of the Third Circuit of the United States Court of Appeals.

DATED this 19th day of February, 2021.

Respectfully submitted,

Louis Cappelli, Jr.
Counsel of Record
Courtney M. Knight
Mark R. Peck
FLORIO PERRUCCI STEINHARDT CAPPELLI TIPTON & TAYLOR, LLC
1010 Kings Highway South, Bldg 2
Cherry Hill, NJ 08034
(856) 853-5530
lcappelli@floriolaw.com

APPENDIX A

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1159

JAMIE WILLIAMS, Individually and as Administratrix
ad Prosequendum of Estate of Peter Lee Williams,
deceased; MAUREEN WILLIAMS,
Appellants

v.

GEORGE PONIK; BAYONNE POLICE DEPARTMENT;
CITY OF BAYONNE; JOHYN DOE POLICE OFFICERS 1-10;
JOHN DOE 1-10, individually and/or in their official capacities,
jointly, severally and/or in the alternative
RALPH SCIANNI, Bayonne Police Department

Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 2-15-cv-01050)
District Judge: Hon. John M. Vazquez

Submitted under Third Circuit L.A.R. 34.1(a)
November 21, 2019

Before: CHAGARES, MATEY, and FUENTES, *Circuit Judges*.

(Opinion filed: August 24, 2020)

OPINION[*]

---

[*] This disposition is not an opinion of the full Court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

FUENTES, *Circuit Judge*.

Appellants Jamie Williams and Maureen Williams appeal the District Court's grant of summary judgment to Appellees City of Bayonne (the "City"), Bayonne Police Department (the "BPD"), George Ponik ("Officer Ponik"), and Chief of Police Ralph Scianni ("Chief Scianni," and collectively, "Appellees") on their claim for excessive force under 42 U.S.C. § 1983 and the New Jersey Civil Rights Act (the "NJCRA") following the death of Peter Lee Williams ("Peter Williams"). For the reasons that follow, we will affirm in part and reverse in part and remand for further proceedings.

I.

In June 2014, Officer Ponik from the BPD responded to an incident at an apartment building in Bayonne, New Jersey. Upon arrival, he observed an altercation involving 20-30 people, approximately 12 of whom were fighting inside an apartment vestibule, including Peter Williams and his daughter Maureen Williams. Officer Ponik testified that he entered the vestibule and shouted "Stop it. Stop it. Everybody stop."[1] Seconds later, he deployed pepper spray into the air. The altercation stopped, and the individuals exited.

After exiting the vestibule, Peter Williams collapsed. Officer Ponik and other officers attended to him until an ambulance arrived. Sadly, Peter Williams passed away at the hospital. The final autopsy report stated that the manner of death was "natural,"

[1] App. 100.

and the cause of death was severe coronary disease with contributory causes of cocaine use and mild obesity.[2]

Appellants filed a thirteen-count Complaint in the District Court, alleging that Officer Ponik's actions violated their rights under federal and state law. Appellants later filed an Amended Complaint, substituting Chief Scianni as the correct BPD Chief of Police at the time of the incident and dismissed their third and sixth causes of action.

Following discovery, Appellees filed a motion for summary judgment. The District Court granted the motion and dismissed the Amended Complaint with prejudice, finding, *inter alia*, that (i) no genuine issue of material of fact existed as to the reasonableness of Officer Ponik's use of force; (ii) there was no *Monell*[3] liability as to the City and Chief Scianni for failure to train BPD officers on pepper spray; (iii) Appellants failed to present authority to support their assertion that Officer Ponik falsely imprisoned Peter and Maureen Williams; and (iv) because no constitutional violation occurred, Appellees were shielded from liability for the state law tort claims.[4] This timely appeal followed.

---

[2] App. 278 (capitalization altered).
[3] *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978).
[4] As part of its ruling, the District Court dismissed with prejudice the § 1983 claims and New Jersey state law claims as to the BPD, finding that it is an administrative arm of the City. App. 11-12; 21; s*ee Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 25 n.4 (3d Cir. 1997) ("As in past cases, we treat the municipality and its police department as a single entity for purposes of section 1983 liability."). Appellants do not dispute the dismissals as to the BPD.

II.

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and supplemental jurisdiction pursuant to 28 U.S.C. § 1367. We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review of the District Court's decision granting summary judgment is plenary, and we apply the same standard as the District Court.[5] Summary judgment is only appropriate if no genuine dispute of material fact exists, and the moving party is entitled to judgment as a matter of law.[6] Genuine issues of material fact exist if, when the evidence is viewed in the light most favorable to the nonmoving party, a reasonable jury could return a verdict for that party.[7]

III.

Appellants raise a number of arguments on appeal, including that (i) Officer Ponik's use of pepper spray was excessive force; (ii) the City is liable under *Monell* for failure to train its officers; (iii) Officer Ponik falsely imprisoned Peter and Maureen Williams; and (iv) Appellees committed various state law torts. Upon its finding that Officer Ponik's use of force was objectively reasonable, the District Court dismissed the remainder of Appellants' claims. We will discuss each issue in turn.

[5] *Halsey v. Pfeifer*, 750 F.3d 273, 287 (3d Cir. 2014).
[6] Fed. R. Civ. P. 56(a).
[7] *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986).

A.

Appellants first argue that a reasonable jury could conclude that Officer Ponik's deployment of pepper spray constituted excessive force under federal and state law.[8] We agree.

To make out a claim for excessive force under the Fourth Amendment, "a plaintiff must show that a seizure occurred and that it was unreasonable under the circumstances."[9] In evaluating an excessive force claim, we must determine the objective reasonableness of the officer's conduct.[10] The proper calculation of reasonableness "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[11] We have held that the issue of reasonableness is ordinarily one for the jury.[12]

---

[8] *See* 42 U.S.C. § 1983 and N.J.S.A. § 10:6-2. The language of the NJCRA and § 1983 are comparable, and neither party argues that the state analogue requires a different analysis. *See Perez v. Zagami, LLC*, 94 A.3d 869, 875 (N.J. 2014) (noting that the NJCRA was intended to be analogous to § 1983).

[9] *Lamont v. New Jersey*, 637 F.3d 177, 182-83 (3d Cir. 2011).

[10] *Couden v. Duffy*, 446 F.3d 483, 496 (3d Cir. 2006).

[11] *Graham v. Connor*, 490 U.S. 386, 396 (1989); *see also Sharrar v. Felsing*, 128 F.3d 810, 822 (3d Cir. 1997) (providing additional factors, including "the possibility that the persons subject to the police action are themselves violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time").

[12] *See Rivas v. City of Passaic*, 365 F.3d 181, 198 (3d Cir. 2004) (citing *Abraham v. Raso*, 183 F.3d 279, 290 (3d Cir. 1999)).

Construing all facts and inferences for the nonmoving party, a reasonable jury could find that any of the objective reasonableness factors weigh in Appellants' favor. As to the severity of the crime, Officer Ponik observed approximately a dozen people fighting inside the small vestibule of an apartment building. It is undisputed that Maureen Williams was involved in the fight, but Peter Williams was trying to break up the fight and was not acting aggressively. Maureen and Peter Williams were never arrested, and indeed, no other arrests were made. As to the imminent threat factor, while Officer Ponik testified at his deposition that he had a generic, non-specific "fear of my safety and for everybody else," a reasonable jury could still find that he was not in imminent harm.[13] To that end, Officer Ponik testified that he was only "slightly pushed," and that was "just because the crowd was moving."[14] It is undisputed that Peter Williams did not possess a weapon. Indeed, Officer Ponik admitted that he did not see any weapons upon entering the vestibule, and no weapons were ever found. Finally, Officer Ponik admitted that no one was hostile, aggressive or resisting arrest.[15]

In the alternative, Appellees assert that they are entitled to qualified immunity. But a decision on qualified immunity would be premature because "there are unresolved

[13] App. 100.
[14] App. 106.
[15] *See Santini v. Fuentes*, 795 F.3d 410, 419-20 (3d Cir. 2015) (vacating summary judgment order even where appellant admitted resisting arrest before being pepper sprayed because the severity of the crime and imminent harm factors weighed in his favor, and his resistance was not violent).

disputes of historical fact relevant to the immunity analysis."[16] For these reasons, material factual disputes exist as to whether Officer Ponik used excessive force. The existence of those disputes compels us to find that the District Court's grant of summary judgment was inappropriate, as was the dismissal of Appellants' contingent state law tort claims.

B.

Appellants next argue that the City and Chief Scianni are liable under *Monell* for (i) developing and maintaining policies or customs exhibiting deliberate indifference to constitutional rights, or (ii) failing to train police officers in the use of pepper spray following citizen complaints. We disagree.

To find a municipality liable under § 1983, a plaintiff must prove the existence of a policy or custom that resulted in a constitutional violation.[17] Liability "must be founded upon evidence that the government unit itself supported a violation of constitutional rights."[18] A plaintiff can show the existence of a policy when a decisionmaker with final authority "issues an official proclamation, policy, or edict."[19] Custom may be established by showing that a "course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually

[16] *Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002) ("[T]he existence of disputed, historical facts material to the objective reasonableness of an officer's conduct will give rise to a jury issue").
[17] *Monell*, 436 U.S. at 694-95.
[18] *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990).
[19] *Id.*

to constitute law."[20] A plaintiff must also "demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged."[21]

Appellants first contend that the evidence shows a pattern of inappropriate conduct regarding the use of pepper spray by BPD officers. Appellants argue that even after receiving six complaints of improper use of pepper spray, the City made no changes to its procedures, amounting to deliberate indifference.

Evidence that a municipality "knew about and acquiesced in a custom tolerating the tacit use of excessive force by its police officers" could be sufficient to preclude summary judgment on *Monell* liability.[22] However, Appellants have failed to connect the past complaints to the present action.[23] Officer Ponik has no prior complaints of excessive force against him. Likewise, the record shows that he has only utilized pepper spray one other time in his eighteen-year career. And the prior complaints Appellants point to involved different circumstances than the one at hand, as some complainants admitted to resisting arrest and striking officers before pepper spray was deployed.

---

[20] *Id.*
[21] *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397, 404 (1997) (emphasis in original).
[22] *Beck v. City of Pittsburgh*, 89 F.3d 966, 976 (3d Cir. 1996).
[23] *Id.* at 973-76 (concluding that appellant "presented sufficient evidence from which a reasonable jury could have inferred that [the municipality] knew about and acquiesced in a custom tolerating the tacit use of excessive force by its police officers" where appellant demonstrated that the issue was more than "mere isolated events or mere statistics of the number of complaints." Appellant offered in evidence "a series of actual written civilian complaints of similar nature . . . containing specific information pertaining to the use of excessive force and verbal abuse by [the same officer]." Appellant also showed that the municipality received an increasing number of excessive force complaints in the years surrounding the incident at issue, ranging from 34-77 complaints per year, and the officer involved in the incident had five complaints against him).

Appellants also contend that even without a pattern of conduct, the need for officer training on pepper spray is so obvious that the failure to train amounts to deliberate indifference. To make out a claim under a failure to train or supervise theory, the plaintiff must show that "the failure amounts to 'deliberate indifference' to the rights of persons with whom those employees will come into contact."[24]

The record shows that Officer Ponik, and all BPD officers, attended the police academy before becoming officers. There, they were trained on the use of force under the New Jersey Attorney General guidelines. Officer Ponik also testified that he was trained in the use of pepper spray at the academy. Additionally, the BPD conducts mandatory bi-annual training that includes instruction on use of force and pepper spray. The BPD also has an extensive internal procedure on the use of pepper spray, which Officer Ponik testified he was familiar with. Based on the record, we cannot say that the City or Chief Scianni acted with deliberate indifference by failing to further train their officers on the use of pepper spray. Accordingly, we will affirm the grant of summary judgment as to Appellants' *Monell* claims.

C.

Finally, Appellants assert that a reasonable jury could find that Officer Ponik caused Peter and Maureen Williams to be unlawfully detained. We disagree.

[24] *Thomas v. Cumberland Cnty.*, 749 F.3d 217, 222-25 (3d Cir. 2014) (explaining that deliberate indifference can be demonstrated by showing a "pattern of violations" which "puts municipal decisionmakers on notice that a new program is necessary," or a single incident where the risk of injury was a "highly predictable consequence" of the failure to train (internal citation omitted)).

Appellants assert claims for "False Arrest/False Imprisonment" under § 1983 and state law.[25] A claim based on false arrest requires an arrest made without probable cause.[26] "[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest."[27] While the Supreme Court has suggested that a claim for false imprisonment can be sustained without a false arrest in the event of a prolonged detention, it held that a detention of three days "does not and could not amount to such a deprivation."[28]

Here, the parties rely on video surveillance of the vestibule on the day of the incident, although they present different accounts of what happened on the video. Appellants assert that Officer Ponik blocked the only exit from the vestibule for a few seconds after deploying pepper spray. Appellees respond that Officer Ponik was not blocking the door, and even if he was, no one was trying to escape in the seconds following the pepper spray deployment. We have reviewed the video surveillance and note that it is of poor quality, grainy, and choppy. It is difficult to ascertain with any degree of certainty whether Officer Ponik did in fact block the door after deploying pepper spray, or whether anyone tried to escape during that time.

Nevertheless, it is clear that Appellants were not arrested in connection with this incident. Therefore, Appellants' federal and state law claims for false arrest must fail. As to false imprisonment, even accepting Appellants' version of events, Appellants have

---

[25] App. 55.
[26] *Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3d Cir. 1988).
[27] *Groman v. Twp. of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995).
[28] *Baker v. McCollan*, 443 U.S. 137, 145 (1979).

presented no authority to support their claim that such a temporary detention amounts to false imprisonment.[29] Accordingly, Appellants' false imprisonment claims also fail.

IV.

For the foregoing reasons, as to Appellants' claim of excessive force and related state law and loss of consortium claims, summary judgment will be vacated and the matter will be remanded for further proceedings consistent with this opinion. We will affirm the District Court's grant of summary judgment as to the *Monell* claim and the false arrest/false imprisonment claims.

[29] *See id.*

APPENDIX B

Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JAMIE WILLIAMS, *individually, and as administratrix ad prosequendum for the* ESTATE OF PETER LEE WILLIAMS, DECEASED, and MAUREEN WILLIAMS, *individually*, *Plaintiffs*, v. GEORGE PONIK, RALPH SCIANNI, CITY OF BAYONNE, BAYONNE POLICE DEPARTMENT, JOHN DOE POLICE OFFICER 1-10, *individually, and in their official capacities,* *Defendants*.	Civil Action No. 15-1050 (JMV) (JBC) **OPINION**

John Michael Vazquez, U.S.D.J.

This case arises out of Bayonne Police Officer George Ponik's use of pepper spray in a crowded vestibule and the subsequent death of Peter Lee Williams, who was present at the scene. Plaintiff Jamie Williams, Peter's wife, both individually and as administratrix ad prosequendum for the estate of her husband, brings this action with Maureen Williams, their daughter, against Officer Ponik, the City of Bayonne, the Bayonne Police Department ("BPD"), former BPD Chief Ralph Scianni, and Bayonne Police Officers John Does 1-10, both in their individual and official capacities. Three motions are currently pending: (1) Defendants' motion for summary judgment pursuant to Federal Rule of Civil Procedure 56, D.E. 59; (2) Defendants' motion in limine pursuant to Federal Rule of Evidence 702, D.E. 61; and (3) Plaintiffs' motion in limine pursuant to Federal

Rule of Evidence 702, D.E. 70. The Court reviewed all submissions,[1] and considered the motions without oral argument pursuant to Fed. R. Civ. P. 78(b) and L. Civ. R. 78.1(b). For the reasons that follow, Defendants' motion for summary judgment is granted, and both Plaintiffs' and Defendants' motions in limine are denied as moot.

I. BACKGROUND[2]

Peter Lee Williams died on June 10, 2014, at the age of 51. FAC ¶ 1. Plaintiff Jamie Williams is his wife and surviving heir at law. *Id.* She was appointed administratrix ad prosequendum of his estate on June 24, 2014. *Id.* ¶ 2. Plaintiff Maureen Williams is the daughter of the Peter and Jamie. *Id.* ¶ 3.

At the time of the incident, described further below, Defendant George Ponik was a police officer in the BPD, having been on the force for over eighteen years. Def. SOMF ¶ 41. Prior to BPD, Ponik graduated from the Morris County Police Academy, where he completed training in the New Jersey Attorney General Use of Force Guidelines including the use of Oleoresin Capsicum ("OC") spray (or "pepper spray"). *Id.* ¶¶ 44, 45. Since joining the BPD, Ponik has completed bi-annual classroom training sessions, led by a captain or lieutenant from the Planning and Training Unit, on the use of force and weapons, including pepper spray. *Id.* ¶¶ 46-49. The weapon-specific sessions consisted of several hours each. *Id.* ¶ 49. He has not had any other internal affairs complaints for excessive force, false arrest, or false imprisonment outside of the

---

[1] Defendants' brief in support of their motion for summary judgment is referred to as "Def. Br.," D.E. 60; Plaintiffs' opposition is referred to as "Pl. Opp'n," D.E. 69-20; and Defendants' reply is referred to as "Def. Reply," D.E. 78.

[2] The Court cites to Plaintiffs' First Amended Complaint ("FAC"), D.E. 26, and Defendants' statement of material facts ("Def. SOMF"), D.E. 60-1, to the extent that the facts are not in dispute. The Court also cites to Plaintiffs' response and supplemental statement of facts ("Pl. RESP and Supp. SOMF"), D.E. 69-21, and Defendants' response to Plaintiff's supplemental statement of facts ("Def. Supp. RESP"), D.E. 78-1, when necessary.

present incident. *Id.* ¶¶ 55-57. Ponik only used force three other times from July1, 2011 to June 30, 2014, including pepper spray during a June 10, 2014 incident. *Id.* ¶¶ 55-57.

At the time of the incident, Defendant Sciannai was the Chief of Police of the BPD. *Id.* ¶ 58. He was not present at the time of the incident. *Id.* However, under his direction, the BPD maintained a pepper spray use policy, entitled "Use of Oleoresin Capsicum Spray" (the "BPD Policy"). *Id.* ¶ 51. Under this BPD Policy, use of pepper spray is preferred over physical use of force as a means to reduce the risk of injury to civilians and police in confrontation and arrest situations. *Id.* ¶ 51. The BPD Policy states that the purpose of pepper spray use is "to direct, disorient, disperse, and/or temporarily disable an actor or actors." *Id.* ¶ 52.

On June 10, 2013, at approximately 4:23 PM, a physical altercation took place between Plaintiff Maureen Williams and another high school female in the vestibule at 403 Avenue C, Bayonne, New Jersey. Def. SOMF ¶ 1. Peter was present during the altercation. *Id.* ¶ 2. Defendant Ponik arrived on scene, in a police uniform consisting of shorts and a collared shirt, in response to "multiple calls of a large fight." *Id.* ¶¶ 4, 9; Pl. RESP ¶ 9. Upon arriving, Officer Ponik observed approximately 20-30 people engaged in several altercations, including approximately a dozen individuals actively fighting inside the vestibule. Def. SOMF ¶ 5.

There is a video recording of the incident but no audio. *See* D.E. 59-2. Moreover, the images are choppy and not fluid. *Id.* The Court reviewed the video. The following times are taken from the video (not the time of day), which is over sixteen minutes long, and are approximates due to the choppy nature of the images.

The video image is from inside the vestibule facing the street. *Id.* There are two doors (which both open to create a larger entrance) to the entranceway, with the door on the right open when the video begins. *Id.* All participants appear to be, as Plaintiffs' claim, high-school age with

the exception of two: a man with a hat (identified as the Peter, D.E. 60-3 at 2) and a man with a beard. D.E. 59-2. At 1:38 on the video recorder, two females enter the vestibule followed, in rather quick succession, by another female (identified as Maureen Williams, D.E. 60-3 at 2), then a male with a hat (identified as Peter, D.E. 60-3 at 2), a female, two additional males, a female, then another female, then another male (who appears to be holding a phone as if taking a picture or video). D.E. 59-2.

At 1:55 there is some touching or grabbing by the occupants, but there is also some activity occurring at the bottom left of the screen out of the camera's view. *Id.* At 1:58, one of the males (not Peter), wearing a backpack, appears to usher a female out of the doors. *Id.* At 2:00, one of the females appears to be yelling or speaking loudly. *Id.* At 2:02, one of the males with a backpack appears to close the door that was originally open. *Id.* Three additional males then enter, at least one of which who was not previously inside - the male with the beard. *Id.* At 2:20, there appears to be some pushing by Peter and one of the males with a backpack puts his hands up (not in an aggressive fashion but more akin to disengaging). *Id.* There then appears to be shoving and pushing among several males and females, including Peter. *Id.*

At 2:36, Officer Ponik can be seen outside the vestibule, with at least one door partially open. *Id.* At 2:41, Ponik enters the vestibule in what appears to be a police uniform polo shirt with a police insignia. *Id.* Upon entering the vestibule, Officer Ponik attests that he shouted commands such as, "Stop it. Stop it. Everybody stop." Def. SOMF ¶ 10. On the video, Officer Ponik appears to say something upon entering. D.E. 59-2. At 2:44, Officer Ponik sprays what is later identified as pepper spray from a can. *Id.* Officer Ponik claims that this was a two-second burst, Def. SOMF ¶ 11, which appears accurate. Officer Ponik sprays over the occupants' heads, although the spray may have directly hit the man with the beard, who is at the left of the screen

(not the Peter or Maureen). D.E. 59-2. When Ponik uses the spray, Peter is at the right of the screen and it does not appear that the spray went over his head. *Id.* Peter was not directly hit by the spray. *Id.*

After releasing the pepper spray, Ponik walks further into the vestibule, out of the doorway, and the occupants start to leave immediately. *Id.* Peter shows no signs of distress at this time. *Id.* One younger male with a backpack does not leave immediately and bends over a few times. *Id.* It is not clear from the video whether the male is in distress or whether he is bending over to pick up items that had fallen to the floor. At 4:19, the male with the beard leaves the vestibule (he later reenters at 4:52 followed by another male) and the male with the beard does not appear to be in distress. *Id.*

At 4:45, a different police officer in uniform enters the vestibule. *Id.* At this point, the doors to the vestibule are shut. *Id.* It appears that at least two officers are standing outside the door with another person who, based on other evidence, appears to be Peter. *Id.* All officers appear to be in uniform. *Id.* At 5:22, a person outside the vestibule on the street appears to fall to the ground – again, based on later evidence, this appears to be Peter. *Id.* Several officers come to the Peter attention once he falls. *Id.*

At 5:42, one officer kneels over Peter. *Id.* This officer for the most part remains kneeled over Peter until a stretcher later arrives. *Id.* The officer may be administering some type of aid to Peter although it is not entirely clear. *Id.* At 7:29, the officer who originally knelt over the Peter goes to both knees. *Id.* Again, the officer may be administering some type of aid but it is not entirely clear. *Id.* At 7:59, an additional officer kneels over Peter and may also be administering some type of aid although it is not clear. *Id.* There may also be a third officer assisting Peter but the camera's vantage point is somewhat blocked by another officer. *Id.* At 8:35, a third (or

possibly fourth) officer kneels over Peter and is apparently attending to him. *Id.* At 9:40, a stretcher arrives. *Id.* At 10:40, Peter is placed on the stretcher, secured, and wheeled away. *Id.*

According to Officer Ponik's incident report, he did not wait for backup to enter the vestibule because he is not required to do so; Ponik entered the vestibule in order to stop the ongoing fight and to prevent any further serious injuries. Ponik testified that based on his observation of the amount of people at the scene, and their lack of response to his verbal commands, his best course of action was to use pepper spray, not physical force. Def. SOMF ¶¶ 14, 15. Ponik later indicated that the two second burst, aimed above the heads of individuals, is consistent with the training he received, as it was not a "full tactical deployment" whereby he would have used the spray directly into the eyes, brow, or forehead of individuals. *Id.* ¶¶ 17-19. Maureen Williams stated that she did not know Ponik was present in the vestibule until after he deployed the pepper spray. *Id.* ¶ 16.

As noted, after Ponik used the spray, the individuals in the vestibule exited onto the sidewalk in front of 403 Avenue C. *Id.* ¶ 23. As indicated by Officer Ponik's report, Peter then began telling Ponik and Sergeant Donovan that his daughter was involved in the incident. *Id.* ¶ 25. Peter then fell to the ground, striking the back of his head on the sidewalk. *Id.* ¶ 27. The officers present attended to Peter and dispatched an ambulance. *Id.* ¶ 28. Ponik and Donovan checked Peter's pulse, then Donovan began chest compression while Ponik retrieved a defibrillator unit from his patrol vehicle. *Id.* ¶ 29. Ponik placed defibrillator pads on Peter's chest but did not administer a shock because the police detected Peter's pulse. *Id.* ¶ 30. Donovan continued chest compressions until an ambulance arrived. *Id.* ¶ 31. Peter later died at the hospital. *Id.* ¶ 32.

The Final Autopsy Report for Peter Lee Williams stated that the manner of death was "natural," and identified the cause of death as severe coronary disease due to atherosclerotic and

hypertensive cardiovascular disease, with cocaine use and mild obesity as contributory causes. *Id.* ¶ 34. The parties dispute whether the pepper spray was a contributing factor to Peter Lee Williams' death. *Id.* ¶ 36; Pl. RESP ¶ 36.[3]

II. PROCEDURAL HISTORY

Plaintiffs filed their Complaint on February 9, 2015, alleging thirteen causes of action: (I) a 42 U.S.C. § 1983 ("Section 1983") excessive force claim against all Defendants; (II) Section 1983 false arrest and false imprisonment claim against all Defendants; (III) a Section 1983 conspiracy claim against all Defendants; (IV) a Section 1983 *Monell* liability claim against Bayonne, BPD, and BPD Chief Drew Niecrasz in his official capacity; (V) a New Jersey Civil Rights Act ("NJCRA") claim against all Defendants; (VI) an assault and battery claim against Ponik; (VII) a false arrest and imprisonment claim against all Defendants; (VIII) a negligence claim against all Defendants; (IX) a gross negligence claim against all Defendants; (X) a wrongful death claim against all Defendants; (XI) a personal injury and survival action claim on behalf of the Peter as to all Defendants; (XII) an intentional infliction of emotional distress ("IIED") and negligent infliction of emotional distress ("NIED") claim against all Defendants; and (XIII) a loss of consortium claim against all Defendants. D.E. 1. Defendants answered on April 28, 2015. D.E. 7. Plaintiffs moved to strike a number of Defendants' affirmative defenses. D.E. 9. On December

[3] Defendants further note that the Hudson County Prosecutor's office reviewed the incident, determined that a criminal review of Ponik's use of force was unwarranted, and referred the matter to the BPD for administrative review. *Id.* ¶¶ 37, 38. The BPD Internal Affairs Unit similarly reviewed the incident and concluded that Officer Ponik's use of force in deploying pepper spray was "legal, just, and proper within the use of force guidelines and department procedure." *Id.* ¶ 39. Defendants, however, have not explained the legal basis for the Court to consider the findings of the prosecutor's office or internal affairs. As a result, the Court does not consider them for purposes of the current motion.

10, 2015, Judge Cecchi granted the motion in part, striking Defendants' statute of limitations and laches affirmative defenses, and denied the remainder of the motion. D.E. 20, 21.

Plaintiffs filed an Amended Complaint on February 19, 2016, alleging the same thirteen causes of action, but (1) substituting Ralph Scianni for Drew Niecrasz (as the correct BPD Chief of Police at the time of the incident), and (2) changing Plaintiff Maureen Williams's legal designation from minor to adult (as she had since reached the age of majority). D.E. 26. Defendants answered the Amended Complaint on May 26, 2015. D.E. 34. Judge Clark ordered that fact discovery be completed by July 31, 2017 and expert discovery by December 31, 2017. D.E. 47, 54. The current motions followed discovery.

III. SUMMARY JUDGMENT STANDARD

A moving party is entitled to summary judgment where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact in dispute is material when it "might affect the outcome of the suit under the governing law" and is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Disputes over irrelevant or unnecessary facts will not preclude granting a motion for summary judgment. *Id.* "In considering a motion for summary judgment, a district court may not make credibility determinations or engage in any weighing of the evidence; instead, the nonmoving party's evidence 'is to be believed and all justifiable inferences are to be drawn in his favor.'" *Marino v. Indus. Crating Co.*, 358 F.3d 241, 247 (3d Cir. 2004) (quoting *Anderson*, 477 U.S. at 255)). In other words, a court's role in deciding a motion for summary judgment is not to evaluate the evidence and decide the truth of the matter but rather "to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

A party moving for summary judgment has the initial burden of showing the basis for its motion and must demonstrate that there is an absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). After the moving party adequately supports its motion, the burden shifts to the nonmoving party to "go beyond the pleadings and by [his] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal quotation marks omitted). To withstand a properly supported motion for summary judgment, the nonmoving party must identify specific facts and affirmative evidence that contradict the moving party. *Anderson*, 477 U.S. at 250. "[I]f the non-movant's evidence is merely 'colorable' or is 'not significantly probative,' the court may grant summary judgment." *Messa v. Omaha Prop. & Cas. Ins. Co.*, 122 F. Supp. 2d 523, 528 (D.N.J. 2000) (quoting *Anderson*, 477 U.S. at 249-50)).

Ultimately, there is "no genuine issue as to any material fact" if a party "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp.*, 477 U.S. at 322. "If reasonable minds could differ as to the import of the evidence," however, summary judgment is not appropriate. *See Anderson*, 477 U.S. at 250-51.

IV. ANALYSIS

At the outset, Plaintiffs agreed to dismiss their third and sixth causes of action: conspiracy as to all Defendants (Count III), and assault and battery as to Ponik (Count VI). Pl. Opp'n at 29. The Court therefore dismisses Counts III and VI with prejudice.

Next, Defendants argue that BPD must be dismissed as an arm of the municipality. Def. Br. at 30. In their brief, Plaintiffs do not oppose this assertion. Plaintiffs sued both the BPD and City. TAC ¶¶ 6-7. Administrative arms of a municipality such as police departments and the municipality itself are treated as a single entity for purposes of § 1983. *Bonenberger v. Plymouth*

Twp., 132 F.3d 20, 29 n.4 (3d Cir. 1997) ("As in past cases, we treat the municipality and its police department as a single entity for purposes of section 1983 liability."). Therefore, "[p]olice departments cannot be sued alongside municipalities [under Section 1983] because a police department is merely an administrative arm of the municipality itself." *Hernandez v. Borough of Palisades Park Police Dep't*, 58 F. App'x 909, 912 (3d Cir. 2003).

Additionally, "[i]n New Jersey, a municipal police department is not an entity separate from the municipality," because a municipal police department is "'an executive and enforcement function of municipal government.'" *Gaines v. Gloucester City Police Dep't*, No. 08-3879, 2010 WL 760511, at *8 (D.N.J. Mar. 3, 2010) (quoting N.J.S.A. § 40A:14-118). Therefore, police departments also cannot be sued alongside municipalities for claims brought pursuant to New Jersey state law. *Castoran v. Pollak*, No. 14-2531, 2017 WL 4805202, at *7 (D.N.J. Oct. 25, 2017) ("Because the [Police] Department is not an entity separate from the municipality, it cannot be sued in conjunction with the municipality, *irrespective of the nature of the plaintiff's claims*.") (internal quotations and citations omitted) (emphasis added); *see also Gains*, 2010 WL 760511 (dismissing all claims against the Gloucester City Police Department as an arm of the defendant municipality, including state law claims such as excessive force, negligent supervision, and false imprisonment).

Because Defendant BPD is an administrative arm of the Defendant City, the Court dismisses with prejudice Plaintiffs' Section 1983 claims (Counts I-IV and XIII) as to BPD. Similarly, the Court dismisses with prejudice the remainder of Plaintiffs' New Jersey state law claims (Counts V and VII-XII) as to BPD.

A. Section 1983/NJCRA Claims

Plaintiffs bring claims under Section 1983 (Counts I-IV, XIII) to remedy alleged violations of the United States Constitution, and claims under the NJCRA (Count V) to remedy alleged violations of the New Jersey Constitution. FAC ¶¶ 13-49, 84-87, 50-54. Plaintiffs' NJCRA claims mirror their Section 1983 claims. *See Id.* Moreover, the NJCRA is interpreted analogously to Section 1983. *Coles v. Carlini*, 162 F. Supp. 3d 380, 404 (D.N.J. 2015) ("[C]ourts have repeatedly construed the NJCRA in terms nearly identical to its federal counterpart: Section 1983."). Both parties recognize this. Def. Br. at 18; Pl. Opp'n at 24. Therefore, the Court's 1983 analysis is also applicable to the NJCRA claims.

Section 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

Section 1983 does not provide substantive rights; rather, Section 1983 provides a vehicle for vindicating violations of other federal rights. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989). In order to state a claim under Section 1983, a plaintiff must demonstrate that "(1) a person deprived him of a federal right; and (2) the person who deprived him of that right acted under color of state or territorial law." *Burt v. CFG Health Sys.*, No. 15-2279, 2015 WL 1646849, at *2 (D.N.J. Apr. 14, 2015). Plaintiff brings four claims under Section 1983: (1) excessive force in violation of the Fourth Amendment (Count I); (2) false arrest and false imprisonment in violation of the Fourth Amendment (Count II); (3) *Monell* liability for unlawful municipal polices or customs in

violation of the Fourteenth Amendment (Count IV); and (4) loss of consortium in violation of the Fourteenth Amendment (Count XIII). FAC ¶¶ 13-49, 84-87; Pl. Opp'n at 2-21, 28-29.

1. Excessive Force as to Officer Ponik (Count I)

Plaintiffs first bring an excessive force claim in violation of the Fourth Amendment, applied to the states via the Fourteenth Amendment, for Ponik's use of pepper spray during the June 10, 2014 incident. TAC ¶¶ 13-25. Defendants argue that the Court should dismiss this claim because Ponik's conduct was reasonable and, therefore, constitutional. Def. Br. at 4. Defendants also argue that Ponik is entitled to qualified immunity. Def. Br. at 7-9.

"[O]fficers are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was 'clearly established at the time.'" *D.C. v. Wesby*, 138 S. Ct. 577, 589 (2018) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). "[L]ower courts have discretion to decide which of the two prongs of qualified-immunity analysis to tackle first." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)).

"The Fourth Amendment, which protects persons from 'unreasonable searches and seizures' prohibits false arrest, false imprisonment, illegal search and seizure, and the use of excessive force.'" *Roman v. City of Newark*, No. 16-1110, 2017 WL 436251, at *3 (D.N.J. Jan. 31, 2017) (quoting U.S. Const. amend. IV). Reasonableness under the Fourth Amendment "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 618 (1988) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). "Thus, the permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment

interests against its promotion of legitimate governmental interests." *Id.* at 619 (quotation marks and citation omitted).

"The use of excessive force is itself an unlawful 'seizure' under the Fourth Amendment." *Couden v. Duffy*, 446 F. 3d 483, 496 (3d Cir. 2006). In assessing the validity of an excessive force claim, a court must determine the objective reasonableness of the alleged conduct. *Id.* A court should pay "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Groman v. Twp. of Manalapan*, 47 F.3d 628, 634 (3d Cir. 1995) (quoting *Graham*, 490 U.S. at 396). Courts may also consider the following:

> [T]he possibility that the persons subject to the police action are violent or dangerous, the duration of the action, whether the action takes place in the context of effecting an arrest, the possibility that the suspect may be armed, and the number of persons with whom the police officers must contend at one time.

Kopec v. Tate, 361 F.3d 772, 777 (3d Cir. 2004).

The parties provide little by way of authority as to excessive force vis-à-vis pepper spray. Therefore, the Court conducted its own inquiry. Courts have found an officer's deployment of pepper spray into a rowdy crowd to not run afoul of the Constitution. *See Bramlett v. Champaign Police Dep't*, No. 05-2200, 2006 WL 2710634, at *4 (C.D. Ill. Sept. 20, 2006) (finding that an officer's use of pepper spray into a crowd of 10 to 15 people on a porch where members of the crowd were fighting was reasonable); *Redd v. City of Evansville, Ind.*, No. 12-00070, 2014 WL 2439701, at *7-8 (S.D. Ind. May 30, 2014) (finding no constitutional violation when a police officer, without warning, deployed pepper spray into a crowd of at least six people in a parking lot

where a fight had broken out between two members of the crowd).[4] Other courts have found an officer's use of pepper spray to be potentially excessive when the officer was not trained to use pepper spray, *see Rudolph v. Clifton Heights Police Dep't*, No. 07-01570, 2008 WL 2669290, at *4 (E.D. Pa. July 7, 2008) (finding that a police officer's deployment of pepper spray into a crowd was unreasonable because the officer was not trained in the use of pepper spray), or when the persons sprayed were non-violent protesters, *see Forest Defense v. County of Humboldt*, 276 F.3d 1125 (9th Cir. 2002) (finding a police officer's use of pepper spray on non-violent environmental protestor's eyes and faces during a peaceful protest to constitute excessive force); *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1266 (C.D. Ill. 1996) (denying police officer's motion for summary judgment on plaintiff's excessive force claim when the officer used pepper spray on a crowd of non-violent protesters).

The Court notes that both sides rely heavily on the Attorney General Guidelines on the Use of Force ("AG Guidelines") and the BPD Policy. While these rules may be helpful to the Court in its reasonableness inquiry, they are not dispositive as to the constitutional question. The Court's inquiry is whether Defendants' conduct complied with the Constitution – not with the AG Guidelines or BPD Policy. *See Wade v. Colaner*, No. 06-3715, 2009 WL 1738490, at *4 (D.N.J. June 17, 2009) ("Defendants cannot contend that the protections of the Fourth Amendment are somehow subordinate to the Attorney General's guidelines on the use of force[.]"). Therefore, the Court considers these rules in its analysis but recognizes that they are not dispositive of the constitutional issue.

[4] The Court notes that the Southern District of Indiana did not perform a Fourth Amendment analysis in *Redd*, but instead relied on Due Process considerations. *Redd*, 2014 WL 2439701, at *7-8.

Plaintiffs argue that Ponik's conduct was unreasonable because Defendant he was never in danger, as no one was resisting arrest, no one physically struck him, and no one yelled at him. Pl. Opp'n at 6-7. Plaintiffs' focus on Ponik's *own* safety as a justification of his conduct misconstrues the issue before this Court. The issue before this Court is whether Ponik acted reasonably in carrying out his police duties, which, unquestionably involve keeping the *public* safe, not just himself. *See, e.g., Policemen's Benev. Ass'n of New Jersey, Local 318 v. Washington Twp.*, 850 F.2d 133, 136 (3d Cir. 1988) ("Important *public* safety concerns are associated with a police officer's duties.") (emphasis added); *State v. Rodriguez*, 383 N.J. Super. 663, 669 (App. Div. 2006) ("[R]eporting to accident scenes and attending to the safety of the *public* are important parts of any police officer's duties.") (emphasis added); *Wilson v. Podeia*, No. 12-1228, 2013 WL 10054352, at *5 (N.J. Super. Ct. App. Div. Jan. 6, 2015) ("[A] community-caretaking function[] [is] a long recognized essential aspect of a police officer's duties.").

Here, Defendant Ponik came upon a fracas occurring in a narrowly enclosed area involving numerous persons – an obvious threat to public safety and public order. *See* D.E. 59-2. Plaintiffs admit that individuals were fighting within the vestibule, even if "only with their hands, not with weapons." Pl. Opp'n at 9. Of course, persons can inflict serious injury to one another without the aid of implements. Fists alone can inflict serious damage. Further, police officers are not required to wait to take action until weapons (of any sort) are drawn. Here, the Court is not necessarily referring to traditional weapons such as guns or knives, but instead to any object that can be used to injure another. Certain participants in the fracas certainly had access to other objects, such as a phone or the contents of the backpacks. Police officers are not only encouraged – but expected – to intervene before weapons are drawn in order to protect the public and restore order. If Defendant Ponik had not acted swiftly, and someone was seriously injured, Plaintiffs would be arguing he

was derelict in duties for failing to act in a timely manner. Ponik therefore justifiably took action to protect the public and restore order.

Plaintiffs also argue that Ponik's conduct was unreasonable because he deployed the pepper spray at a range closer than three feet. Pl. Opp'n at 9. Plaintiffs cite to the BPD Policy for support, but acknowledge that it refers to a three-foot minimum distance when "target areas include the mouth, eyes, nose, and forehead." *Id.* Here, Defendant Ponik did not spray Peter or Maureen Williams directly on any body part. *See* D.E. 59-2. Plaintiffs concede that Defendant Ponik sprayed it "into the air above the combatants." Pl. Opp'n at 9. Remarkably, Plaintiffs argue that Ponik is now somehow at fault because he did *not* in fact aim the pepper spray directly at their mouth, eyes, nose, or forehead. *Id.* at 9-10. The Court cannot comprehend how taking a less severe action weighs in favor of Plaintiffs' excessive force claim.

Plaintiffs further argue that Defendant Ponik's conduct was unreasonable because he "failed to give appropriate verbal warnings before deploying pepper spray," citing to the BPD Policy for support. *Id.* at 11. Ponik claims that he did in fact yell "Stop it. Stop it. Everybody Stop," before deploying the spray. *Id.*; *see also* D.E. 59-2. The recording does appear to reflect that Ponik's said something before using the spray, but given the lack of audio, the Court is unable to determine what was said. D.E. 59-2. Plaintiffs appear to agree that Ponik said something, Pl. Opp'n at 11, but argue that the purported command was insufficient because Ponik did not identify himself as a police officer or specifically warn that he was going to deploy pepper spray. Yet, the BPD Policy, on which Plaintiffs rely, does not require such warnings in all matters. Instead, the BPD Policy states that an officer "shall, *when practical*, give a verbal warning" before deployment, clarifying that "[n]othing in this procedure shall mandate that an officer give a verbal warning

prior to the application of O.C. Spray if such prior notice would expose the Officer, actor *or another person* to additional danger." Pl. Opp'n at 11 (quoting the BPD Policy) (emphasis added).

More importantly, Plaintiffs fail to cite authority that such warnings were constitutionally required in the circumstances presented. As noted, the Court must view the reasonableness of Ponik's conduct here in light of the facts and circumstances he confronted. As explained above, Ponik came upon a fracas in a tight corridor, where any delay could have resulted injuries to the parties involved or observing. In addition, the facts and circumstances reveal that there was a real danger of escalation if Ponik did not take immediate action. In addition, and again as noted, Ponik did not aim the spray at any person (much less someone's face), instead attempting to spray over the crowd, with a burst of limited duration. Thus, Officer Ponik's use of the spray – regardless of what he actually said when he entered the vestibule – was reasonable under the circumstances.

Plaintiffs further argue that Defendant Ponik's conduct was unreasonable because no arrests were made. Pl. Opp'n at 12. Of course, just because Ponik did not arrest anyone does not mean that he lacked probable cause to charge. At a minimum, Ponik had probable cause to arrest certain individuals within the vestibule for assault under N.J.S.A. 2C:12-1 ("Attempts to cause . . . bodily injury to another"). The fact that Defendant Ponik broke up the situation and decided not to charge individuals does not equate to him having a lack of probable cause to file charges. He had probable cause that crimes were being committed and acted reasonably in stopping them. He also undoubtedly faced a situation in which he had to restore order in a small, enclosed area among a group of individuals, some who were acting in an aggressive manner.

Overall, after viewing the video, the Court concludes that there is no genuine issue of material fact as to Ponik's use of force. *Scott v. Harris*, 550 U.S. 372, 380-81 (2007) (ruling, after viewing a video recording of an incident, that no genuine issue of material fact existed despite the

parties' offering different views). The vestibule was a small, confined area. Ponik witnessed numerous individuals in the vestibule and many were involved improper conduct, whether it be described as scuffling, pushing, fighting, striking, or shoving. Although at the time no one had drawn a weapon, the reasonable risk that additional objects were available to do damage was obvious in light of backpacks and other objects that the persons had. There was also a real risk of escalation. The physical risk to those involved or present was clear. Defendant Ponik was duty-bound to restore order and clear the vestibule in a constitutionally feasible manner, and he did so.

Defendant Ponik acted reasonably in deploying pepper spray to carry out his police duties of restoring order and clearing the vestibule. Defendant Ponik was trained in the use of pepper spray. Def. SOMF ¶¶ 44-49. Further, this is not a situation where Offer Ponik sprayed non-violent protesters in an open area. As, explained above, this was a fracas in a tightly confined corridor. The Court finds *Bramlett* to be persuasive, as it is most akin to the current situation. Defendant Ponik did not aim the spray at any person specifically – much less anyone's eyes, nose, or forehead. He did not hit Peter directly with the spray. Instead, Ponik deployed a two-second burst into the air, and then moved so that all individuals could exit the vestibule. Therefore, Defendant Ponik acted reasonably in using the pepper spray.[5]

The facts do not indicate that Defendant Ponik used excessive force. Thus, he did not violate Plaintiffs' constitutional rights. Defendant Ponik is entitled to qualified immunity. The Court grants summary judgment to Defendant Ponik on Plaintiffs' Section 1983 excessive force claim.

---

[5] In their opposition, Plaintiffs also argue a "slip of the finger" theory of liability. Pl. Opp'n at 21-22. This theory is inapposite. There is no evidence suggesting that Ponik's discharge of the pepper spray was accidental.

2. Excessive Force as to the Remaining Defendants (Remainder of Count I)

Plaintiffs also assert excessive force claims against Chief Scianni, and John Doe Police Officers 1-10. FAC ¶ 22. When more than one officer is sued on a Fourth Amendment excessive force claim, the district court must evaluate each officer's liability separately. *See Kaucher v. Cty. of Bucks*, 455 F.3d 418, n.7 (3d Cir. 2006) ("In order to prevail on a [Section] 1983 claim against multiple defendants, a plaintiff must show that *each* individual defendant violated his constitutional rights." (emphasis added) (quoting *Estate of Smith v. Marasco*, 430 F.3d 140, 151 (3d Cir. 2005))). It is clear that only Ponik deployed pepper spray in the vestibule. *See* D.E. 59-2. Therefore, alleged constitutional violations against Chief Scianni and John Doe Police Officers 1-10 must be based on either a failure to intervene or supervisory liability. However, because there was no underlying constitutional violation by Ponik, these claims also fail. See *Samoles v. Lacey Twp.*, No. 12-3066, 2014 WL 2602251, at *14 (D.N.J. June 11, 2014) ("In sum, Plaintiffs' § 1983 claims for failure to intervene and supervisory liability necessarily must be dismissed because there is no predicate constitutional violation."). The Court therefore grants summary judgment to the remainder of Defendants[6] on Plaintiffs' excessive force claims under Section 1983 and the NJCRA.

3. *Monell* Liability as to the City and Chief Scianni (Count IV)

Plaintiff brings *Monell* liability claims against the City and Chief Scianni for failure to train BPD officers on the use of pepper spray. TAC ¶¶ 39-49. Defendants argue that pre-employment training on pepper spray during the police academy, and BPD mandatory bi-annual trainings on

[6] The Court notes that Plaintiffs allege Count I (excessive force under Section 1983) and Count V (violations of NJCRA) against "All Defendants." *See* FAC Count I, Count V. However, Defendant BPD is not liable as an arm of the municipality (as explained above), and Defendant City can only be held liable under a theory of *Monell* liability (as discussed below), see *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978).

pepper spray in accordance with New Jersey Attorney General requirements, sufficiently defeat this claim. Def. Br. at 16. Plaintiffs respond that regardless of the trainings, citizens have filed at least six complaints against officers for improperly using pepper spray between August 2010 and February 2014, constituting a pattern of unremedied wrongful conduct. Pl. Opp'n at 18-19. Defendants reply that these complaints do not indicate wrongful use of pepper spray, as some complainants admit to resisting arrest and striking an officer before use of the spray. Def. Reply at 5.

"A local government may be sued under § 1983 only for acts implementing an official policy, practice or custom." *Losch v. Borough of Parkesburg, Pa.*, 736 F.2d 903, 910 (3d Cir. 1984). This type of municipal liability claim is generally referred to as a "*Monell* claim," based on *Monell v. Department of Social Services*, 436 U.S. 658, 690-91 (1978). *See, e.g., Mann v. Palmerton Area Sch. Dist.*, 872 F.3d 165, 174 (3d Cir. 2017). The *Monell* Doctrine provides "that liability may not be proven under the respondeat superior doctrine, but must be founded upon evidence that the government unit *itself* supported a violation of constitutional rights." *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir. 1990) (emphasis added). Yet, when a plaintiff "has not adduced sufficient evidence to establish a dispute of material fact that her constitutional rights were violated, summary judgment is likewise appropriate on her claim against the city for municipal liability under *Monell v. Dep't of Social Servs*." *Graham-Smith v. Wilkes-Barre Police Dep't*, 739 F. App'x 727, 733 (3d Cir. 2018).

Here, as explained above, Plaintiffs have not adduced sufficient evidence to establish a genuine dispute of material fact that their constitutional rights were violated by Ponik's use of pepper spray (or any other conduct attributable to Defendants, as discussed below). Therefore,

Defendants are entitled to summary judgment on Plaintiffs' *Monell* liability claim for failure to train BPD officers on the use of pepper spray (Count IV).

The Court also notes that even assuming, *arguendo*, Ponik's use of pepper spray constituted excessive force, this was still his first excessive force complaint. Def. SOMF ¶ 55. One excessive force complaint does not establish a pattern of constitutional violations typically required for *Monell* liability. *See Anderson v. City of Philadelphia*, No. 16-5717, 2017 WL 550587, at *6 (E.D. Pa. Feb. 10, 2017) ("Even if we took [defendant]'s past incident of misconduct into consideration, two instances of inappropriate conduct do not establish a custom under *Monell*.") (internal citations omitted). Similarly, Plaintiff's "single-incident" failure to train theory (where no pattern of constitutional violations is required), Pl. Opp'n at 20, is unpersuasive. It is true that in some instances, "the need for training can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights even without a pattern of constitutional violations." *Thomas v. Cumberland Cty.*, 749 F.3d 217, 223 (3d Cir. 2014) (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 390 n. 10 (1989)). However, such "single-incident" claims are extremely difficult to establish, and here BPD officers were required to complete training in the use of pepper spray before joining the force, and twice each year while on the force. Def. SOMF ¶¶ 44-49. Therefore, both of these arguments are unpersuasive.

Plaintiffs' strongest argument for *Monell* liability (again assuming, *arguendo*, that Ponik's conduct amounted to excessive force) seems to be the six prior complaints filed against BPD officers for improper use of pepper spray over the four years preceding the incident. Pl. Opp'n at 18-19. Evidence showing that a municipality "knew about and acquiesced in a custom tolerating the tacit use of excessive force by its police officers" is sufficient to preclude a municipality from being granted summary judgment on *Monell* liability. *Beck v. City of Pittsburgh*, 89 F.3d 966, 976

(3d Cir. 1996). Citizen complaints can aid in establishing a custom even when a police officer is exonerated, as the complaints nevertheless put the municipality on notice of the conduct. *Worrall v. City of Atl. City*, No. 11-3750, 2013 WL 4500583, at *5 (D.N.J. Aug. 20, 2013). However, the amount of necessary evidence a Plaintiff must present is not subject to precise calculation. *See Katzenmoyer v. Camden Police Dep't*, No. 08-1995, 2012 WL 6691746, at *4 (D.N.J. Dec. 21, 2012) ("Since the *Beck* decision, trial courts in this circuit have grappled with the issue of what type of evidence a plaintiff must adduce in support of a *Monell* municipal liability claim under Section 1983 in order to survive summary judgment.").

Courts in this district have recognized that "statistical evidence alone, isolated and without further context, generally may not justify a finding that a municipal policy or custom authorizes or condones the unconstitutional acts of police officers." *Id.* (quoting *Merman*, 824 F. Supp. 2d at 591) (internal quotations omitted). If a plaintiff wishes to rely on excessive force complaints, "she must show why those prior incidents were wrongly decided and how the misconduct in those cases is similar to that involved in the present action." *Id.* (citing *Franks v. Cape May County*, No. 07-6005, 2010 WL 3614193 at *12 (D.N.J. Sept.8, 2010)). "One way to do this would be to show, as was done in the *Beck* case, that the officer whom a plaintiff accuses of using excessive force has been the subject of multiple similar complaints in the past." *Id.* (referring to *Beck*, where the Third Circuit found that five similar excessive force complaints against defendant officer in less than four years is sufficient to preclude summary judgment on *Monell* liability); *see also Garcia v. City of Newark*, No. 08-1725, 2011 WL 689616 at 3-5 (D.N.J. Feb.16, 2011) (denying defendant municipality's motion for summary judgment on *Monell* liability when plaintiff presented evidence that the six individual defendants together accounted for more than 55 complaints for excessive force and false arrest in the 11 years prior to the incidents at issue). "Alternatively, when such

evidence against the particular officer is not available," courts require more complaints over a shorter time period. *Katzenmoyer*, 2012 WL 6691746, at *5 (referencing *Merman v. City of Camden*, 824 F. Supp. 2d 581, 591 (D.N.J. 2010), where the district court found that a sample of 40 similar excessive force complaints against different officers over six years was sufficient to preclude a grant of summary judgment on *Monell* liability to defendant municipality).

Here, as explained above, Defendant Ponik has had no prior complaints of excessive force lodged against him. Def. SOMF ¶ 55. Therefore, this case is distinguishable from *Beck*, where the five complaints in four years were all filed against the defendant officer. The Court could not find any decisions in which the evidence presented here – six similar complaints of excessive force for the improper use of pepper spray by different officers over a four-year period – is sufficient to overcome summary judgment on a *Monell* claim. Plaintiffs did not cite any such authority. However, in light of the Court's ruling that no constitutional violation occurred, causation would nevertheless fail.

Regarding causation, "a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights." *Bd. of Cty. Comm'rs of Bryan Cty., Okl. v. Brown*, 520 U.S. 397, 404 (1997). Here, the causal link is broken because Ponik did act unconstitutionally. For the foregoing reasons, the Court grants summary judgment to Defendants on Plaintiffs' *Monell* liability claim.

4. False Arrest/Imprisonment (Count II)

As to Plaintiffs' false arrest and false imprisonment claims, Defendants argue that the Court should dismiss the claims because Plaintiffs were neither arrested nor detained. Def. Br. at 10. Plaintiffs respond Defendant Ponik restrained Peter and Maureen Williams in the vestibule against

their will. Pl. Opp'n at 27. Of note, Plaintiffs previously argued that the excessive force claims should stand because, in part, no arrests were made.

Regarding false arrest, "[a]n arrest made without probable cause creates a cause of action for false arrest under 42 U.S.C. § 1983." *O'Connor v. City of Philadelphia*, 233 F. App'x 161, 164 (3d Cir. 2007) (citing *Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3d Cir. 1988)). Additionally, "where the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest." *Id.* (citing *Groman*, 47 F.3d at 636. "Probable cause exists whenever reasonably trustworthy information or circumstances within a police officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been committed by the person being arrested." *United States v. Myers*, 308 F.3d 251, 255 (3d Cir. 2002). In determining whether a police officer had probable cause to arrest, a court must review the totality of the circumstances of the events leading up to the arrest and must do so from the "standpoint of an objectively reasonable police officer[.]" *Id.* (citation omitted).

Regarding false imprisonment, "[a] plaintiff may assert a § 1983 claim for unlawful detention, also referred to as false imprisonment, under both the Fourth and Fourteenth Amendment." *Potts v. City Of Philadelphia*, 224 F. Supp. 2d 919, 936 (E.D. Pa. 2002). A false imprisonment claim based on the Fourth Amendment requires "an arrest made without probable cause." *Groman*, 47 F.3d at 636. When a plaintiff suffers a false arrest, the plaintiff may have also suffered "a violation of his constitutional rights by virtue of his detention pursuant to that arrest." *Id.* "The Supreme Court suggested in *Baker* that prolonged detention in the face of a person's protestation of innocence may violate the Fourteenth Amendment" as well, meaning a plaintiff can sustain a claim for false imprisonment under Section 1983 without a false arrest. *Id.*

(referencing *Baker v. McCollan*, 443 U.S. 137, 143 (1979)). However, the Court went on to hold that detention for three days "does not and could not amount to such a deprivation." *Id.* (quoting *Baker*, 443 U.S. at 143).

Here, no Plaintiff was arrested in connection with this incident. Therefore, Plaintiffs' Section 1983 false arrest claim must fail. As to false imprisonment, Plaintiffs seem to be arguing that while Ponik deployed the pepper spray, he blocked the doorway to the vestibule for a few seconds, falsely imprisoning Maureen and Peter. Pl. Opp'n at 27. Yet, Plaintiffs have presented no authority to support that such action amounts to false imprisonment for constitutional purposes. Therefore, Plaintiffs' Section 1983 false imprisonment claim fails as well.

5. Loss of Consortium (Count XIII)

Jamie asserts that Defendants violated her Fourteenth Amendment rights by depriving her of her Peter's services. Pl. Opp'n at 28-29. Plaintiffs cite to *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 380 (E.D. Pa. 2002), where the Eastern District of Pennsylvania stated, "[w]e believe that in the Third Circuit, a spouse may assert a claim under § 1983 that the government improperly interfered with her personal right to the services, society and companionship of her husband (i.e., consortium), denying her Due Process of law, to which she is entitled under the Fourteenth Amendment." *Id.* at 28. Defendants respond that the Third Circuit has "merely suggested that a spouse may allege a loss of consortium claim under Section 1983, but that the Third Circuit ha[s] never directly confronted the question." Def. Reply at 11-12. Defendants also argue that the undisputed facts show that Plaintiff has not suffered any loss in services or companionship from her husband given that his life expectancy at the time of the incident was less than one year, and additionally that Plaintiffs' loss of consortium claim cannot be maintained because it is a derivative

claim that depends on the existence of another valid claim – which Defendants allege is lacking. Def. Reply at 10-11.

Although the Third Circuit has yet to definitively rule on the issue, other courts in this District have not recognized a loss of consortium claim under Section 1983. *See Love v. New Jersey State Police*, No. 14-1313, 2016 WL 3046257, at *9 (D.N.J. May 26, 2016) ("'[T]here exists no constitutional interest in the consortium of one's spouse' and therefore, 'such a claim cannot sustain an action pursuant to § 1983.'") (quoting *Pagan v. Twp. of Raritan*, Civ. No. 04-1407, 2006 WL 2466862 (D.N.J. Aug. 23, 2006)); *see also Norcross v. Town of Hammonton*, No. 04-2536, 2006 WL 1995021, at *3 (D.N.J. July 13, 2006) ("This Court now finds that there exists no constitutional interest in the consortium of one's spouse and deigns to create such a right."). At a minimum, it is not clear that Section 1983 includes a loss of consortium claim.

However, even if such a claim was valid under Section 1983, "[l]oss of consortium claims are derivative claims that are contingent upon the success of the spouse's related substantive claim." *Keller v. M & M Bail Bonds Inc.*, No. 17-1524, 2017 WL 2734715, at *6 (D.N.J. June 26, 2017) (citing *Acevedo v. Monsignor Donovan High Sch.*, 420 F. Supp. 2d 337, 347 (D.N.J. 2006)). Here, as explained, the Court finds that no constitutional violations occurred. Therefore, Jamie Williams' loss of consortium claim also fails. The Court grants summary judgment to Defendants on Plaintiffs' Section 1983 loss of consortium claim.

B. State Law Tort Claims

Plaintiffs also assert a number of New Jersey state law tort claims against Defendants. FAC ¶¶ 55-83. Such claims are subject to the New Jersey Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 *et seq*. Under TCA Section 59:3-3, "[a] public employee is not liable if he acts in good faith in the execution or enforcement of any law." N.J.S.A. § 59:3-3. The TCA provides, however, that

"[n]othing in this section exonerates a public employee from liability for false arrest or false imprisonment." N.J.S.A. § 59:3-3. "In false arrest/false imprisonment cases, the only relevant inquiry is whether, on an objective basis, the police officer's actions were proper." *DelaCruz v. Borough of Hillsdale*, 183 N.J. 149, 153-54 (2005). Hence, "[s]ummary judgment under section 59:3–3 is appropriate if a public official establishes that his or her 'acts were objectively reasonable or that they performed them with subjective good faith.'" *Nicini v. Morra*, 212 F.3d 798, 815 (3d Cir. 2000) (quoting *Canico v. Hurtado*, 144 N.J. 361, 365, 676 A.2d 1083, 1085 (1996)).

Here, the Court has already determined that Ponik acted in an objectively reasonable manner. Therefore, he is shielded from liability for Plaintiffs' New Jersey state law tort claims and is entitled to summary judgment. The Court nonetheless conducts an analysis of each claim in particular below.

In addition, there are two TCA provisions that govern a public entity's liability for conduct of an employee. Under Section 59:2-2(b), public entities are not liable for "an injury resulting from an act or omission of a public employee where the public employee is not liable." N.J.S.A. § 59:2-2(b). Additionally, under Section 59:2-10, public entities are not liable for "the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct." N.J.S.A. § 59:2-2(b). Here, Ponik's conduct was not tortious (as explained above and below); therefore, the City is not liable for any injury resulting from it, and is entitled to summary judgment on Plaintiffs' New Jersey state law tort claims.

Finally, Section 59:9-2(d) contains a "verbal threshold requirement" for when plaintiffs allege damages for pain and suffering; the section provides as follows:

> 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 $3,600.00.

N.J.S.A. § 59:2-2(b); *see also DelaCruz*, 183 N.J at 162 (referring to this subsection as the "verbal threshold requirement"). "[T]he Tort Claims Act's verbal threshold [also] applies to common law false arrest/false imprisonment claims." *DelaCruz*, 183 N.J at 153. The only exceptions to the verbal threshold requirement are "actual fraud, actual malice or willful misconduct." *Leang v. Jersey City Bd. of Educ.*, 198 N.J. 557, 584 (2009) (citing N.J.S.A. 59:3–14(a)).

As Defendants point out, Plaintiff Maureen Williams did not suffer any permanent injury or present any evidence that she incurred medical treatment expenses in excess of $3,600.00. Def. Br. at 11, 22. The same applies for Plaintiff Jamie Williams, who was not present at the incident. Plaintiffs appear to recognize this deficiency, arguing that Maureen's emotional distress are compensable damages for the constitutional excessive force violation. Pl. Opp'n at 22-23. As noted above, however, the Court is granting summary judgment to Defendants as to the alleged excessive force. Therefore, the Court grants summary judgment to Defendants on all of Plaintiffs' damages claims for pain and suffering.

1. False Arrest/Imprisonment (Count VII)

Plaintiffs bring a claim under New Jersey law for false arrest and imprisonment. TAC ¶¶ 60-62. Defendants reiterate their argument as to the Section 1983 false arrest and imprisonment claims, and argue that Plaintiffs have not met the TCA verbal threshold requirement. Def. Br. at 10-12. Although not entirely clear, the Court assumes that Count VII refers to common law false arrest and imprisonment.

In New Jersey, "false arrest and false imprisonment are not separate torts; they are different names for the same tort." *Rasmussen v. United States*, No. 14-6726, 2015 WL 9581874, at *4 (D.N.J. Dec. 30, 2015) (citing *Price v. Phillips*, 90 N.J. Super. 480, 484 (App. Div. 1966)); *see*

also DelaCruz v. Borough of Hillsdale, 183 N.J. 149, 153 (2005). This common law tort requires "an arrest or detention of the person against his or her will; and lack of proper legal authority or 'legal justification." *Id.* (citing *Mesgleski v. Oraboni*, 330 N.J. Super. 10, 24 (App. Div. 2000)). "[U]nder N.J.S.A. 59:3-3, a police officer's subjective good faith belief as to the propriety of his/her actions is irrelevant as to liability for any false arrest or false imprisonment claims." *DelaCruz*, 183 N.J. at 153. Instead, "[i]n false arrest/false imprisonment cases, the only relevant inquiry is whether, on an objective basis, the police officer's actions were proper." *Id.* at 153-54.

Here, as explained above, Defendant did not arrest or detain any Plaintiffs. Moreover, the Court has already determined that Ponik's actions were objectively reasonable. Further, Plaintiffs present no authority, nor could the Court find any, to support a claim of common law false arrest or imprisonment under the circumstances here. While Defendant Ponik did stand in the doorway of the vestibule for a moment, no one was trying to leave at that point. *See* D.E. 59-2. To the contrary, Ponik was attempting to clear the vestibule. As Plaintiff Maureen Williams concedes, she did not even know that Defendant Ponik was present in the vestibule until after he deployed the pepper spray. Def. SOMF ¶ 16. Further, immediately after deploying the pepper spray, Defendant Ponik moved aside so that the occupants of the vestibule could exit. *See* D.E. 59-2. In fact, it appears that Defendant Ponik even ushered individuals *out* of the vestibule through arm signaling, physical assistance, and holding open the door. *See id.* The Court grants Defendants summary judgment on Plaintiffs' common law false arrest/imprisonment claim.

2. Negligence and Gross Negligence (Counts VIII & IX)

Plaintiffs bring claims for negligence and gross negligence against Ponik for his use of the pepper spray, FAC ¶¶ 66, 70, and the City, BPD, and Chief Scianni for an alleged failure to properly train Defendant Ponik, *id.* ¶¶ 67, 70. Defendants assert that Ponik acted reasonably, and

the other Defendants cannot be held liable because Defendant Ponik is not liable for any underlying violation (in addition to the TCA "verbal threshold" arguments addressed above). Def. Br. at 21-22.

Even though Plaintiffs' constitutional claims fail, Plaintiffs may still attempt to bring common law tort claims based on the same conduct. *See Baker*, 443 U.S. at 146 ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought . . . under traditional tort-law principles."). "Negligence involves a breach of a duty of care that causes injury." *Roccisano v. Twp. of Franklin*, No. 11-6558, 2013 WL 3654101, at *11 (D.N.J. July 12, 2013) (citing *Weinberg v. Dinger*, 106 N.J. 469, 484 (1987)). Thus, "to succeed on a negligence claim, a plaintiff must show: (1) a duty of care, (2) a breach of that duty, (3) causation, and (4) actual damages." *Id.* (citing *Weinberg*, 106 N.J. at 484). Specifically, police officers "have a duty to act reasonably, and, in the context of effectuating an arrest, they have a duty to exercise 'reasonable care to preserve the life, health, and safety of the person in custody.'" *Id.* (citing *Del Tufo v. Township of Old Bridge*, 147 N.J. 90, 101 (1996)). "With regard to a claim of gross negligence, the difference between gross and ordinary negligence is one of degree rather than of quality." *Smith v. Kroesen*, 9 F. Supp. 3d 439, 442 (D.N.J. 2014) (quoting *Fernicola v. Pheasant Run at Barnegat*, 2010 WL 2794074, *2 (N.J. Super. Ct. App. Div. July 2, 2010)) (internal quotations omitted). "Gross negligence refers to behavior which constitutes indifference to consequences." *Id.* (quoting *Griffin v. Bayshore Medical Center*, 2011 WL 2349423, *5 (N.J. Super. Ct. App. Div. May 6, 2011)).

Here, as explained above, Defendant Ponik acted in an objectively reasonable manner when he used the pepper spray. Because Ponik did not breach his duty to act reasonably, the

negligence claim fails. Because Ponik was not negligent, the more demanding gross negligence counts also falls, and the City and Chief Scianni are not liable for any alleged negligence in failing to train him. The Court grants Defendants summary judgment on Plaintiffs' negligence and gross negligence claims.

3. Wrongful Death and Survival Action (Counts X & XI)

Plaintiffs also assert a wrongful death and survival action claims. FAC ¶¶ 72-79. Defendants argue that such actions are inappropriate because Defendants did not cause Peter's death. Def. Br. at 22, 24. Plaintiffs insist that a causal connection exists, relying on their own experts. Pl. Opp'n at 26.

New Jersey's Survivor's Act, N.J.S.A. 2A:15-3, "permits, for the benefit of the decedent's estate, an appointed representative to file any personal cause of action that *decedent* could have brought had he lived." *Aronberg v. Tolbert*, 207 N.J. 587, 593 (2011) (emphasis added). "In other words, the survival action preserves the right of action which the deceased himself would have had to redress his own injuries." *Id.* (internal quotations omitted). In contrast, New Jersey's Wrongful Death Act, N.J.S.A. 2A:31-1, *et. seq.*, "provides to decedent's heirs a right of recovery for pecuniary damages for *their* direct losses as a result of their relative's death due to the tortious conduct of another." *Id.* (emphasis added); *Capone v. Nadig*, 963 F. Supp. 409, 414 (D.N.J. 1997) ("Unlike a survival action which seeks to compensate the estate for the pain and suffering of the decedent prior to death, a wrongful death action under N.J.S.A. § 2A:31–1, *et seq.*, seeks to compensate for the pecuniary loss that the survivors suffer as a result of the death of the decedent."). Damages in a wrongful death action may include "the loss of expected financial contribution and the pecuniary loss of future services, companionship and advice." *Id.* (citing *Green v. Bittner*, 85 N.J. 1, 12 (1980)). Yet, "[c]ompanionship and advice in this context must be

limited strictly to their pecuniary element." *Id.* "In other words, to be compensable, companionship lost by death must be that which would have provided services substantially equivalent to those provided by the 'companions' often hired." *Id.* (internal quotations omitted). "No pecuniary value may be attributed to purely emotional loss." *Id.*

Here, both Plaintiffs' wrongful death and survival action fail because Plaintiffs have not established (1) any underlying violation that Peter could have used to redress his own injuries had he lived, or (2) any underlying tortious conduct the other Plaintiffs can rely on to redress their own direct losses. There are no genuine disputes of material fact as to underlying wrongful conduct that would permit the claims to proceed. The Court grants summary judgment in favor of Defendants on Plaintiffs' wrongful death and survival action claims.

4. IIED & NIED (Count XII)

Plaintiffs bring an IIED claim against Defendants. TAC ¶¶ 80-83. Defendants first argue that the City of Bayonne and BPD are immune from intentional tort liability pursuant to N.J.S.A. 59:2-10 (in addition to the TCA "verbal threshold" argument addressed above). Def. Br. at 27.

Under New Jersey law, a claim for IIED requires a plaintiff to show the following:

> (1) that the defendant acted intentionally or recklessly, both in doing the act and in producing emotional distress; (2) that the defendant's conduct was so outrageous in character and extreme in degree as to go beyond all bounds of decency; (3) that the defendant's actions were the proximate cause of the emotional distress; and (4) that the emotional distress suffered was so severe that no reasonable person could be expected to endure it.

Smith v. Exxon Mobil Corp., 374 F. Supp. 2d 406, 422 (D.N.J. 2005) (quoting *Wigginton v. Servidio*, 324 N.J. Super. 114, 130 (App. Div. 1999)). "In judging the plaintiff's reaction or emotional distress, mere allegations of aggravation, embarrassment, an unspecified number of

headaches, and loss of sleep, may be insufficient as a matter of law." *Id.* at 423 (quoting *Wigginton*, 324 N.J. Super. at 132) (internal quotations omitted).

Here, as explained above, the Court finds Defendant Ponik to have acted reasonably. This means that his conduct was not "was so outrageous in character and extreme in degree as to go beyond all bounds of decency." Therefore, he cannot be liable for IIED to Plaintiffs. Since Defendant Ponik is not individually liable, the remaining Defendants also cannot be held liable. Additionally, since this is an intentional tort, the remaining Defendants could not be held liable even if Defendant Ponik's conduct reached this requisite standard of outrageous.

Plaintiffs also bring an NIED claim against Defendants. TAC ¶¶ 80-83. New Jersey law recognizes two forms of NIED claims: (1) "zone of danger claims" and (2) "*Portee* claims." *In re Paulsboro Derailment Cases*, No. 13-784, 2013 WL 5530048, at *6 (D.N.J. Oct. 4, 2013) (hereinafter "*Paulsboro*") (citing *Jablonowska v. Suther*, 195 N.J. 91, 104 (2008)). The "zone of danger" form occurs when "the defendant's negligent conduct placed the plaintiff in reasonable fear of immediate personal injury, which gave rise to emotional distress that resulted in a substantial bodily injury or sickness." *Id.* (quoting *Jablonowska*, 195 N.J. at 104). This requires the plaintiff to have been "presen[t] within [the] zone of danger" and "usually involves a plaintiff who narrowly escaped a reasonably apprehended physical impact as a result of a defendant's negligent conduct." *Id.* (quoting *Jablonowska*, 195 N.J. at 103) (internal quotations omitted).

The "*Portee* claim" gets its name from the New Jersey Supreme Court's decision in *Portee v. Jaffee*, 84 N.J. 88 (1980). This claim is "for emotional damages caused by a plaintiff witnessing the death or serious bodily injury of a spouse or close family member." *Paulsboro*, 2013 WL 5530048, at *6 (citing *Jablonowska*, 195 N.J. at 103). However, "[t]he plaintiff must have a

'sensory and contemporaneous observation of the death or injury' at the scene where it took place and must suffer severe emotional distress as a result." *Id.* (quoting *Jablonowska*, 195 N.J. at 103).

Here, Plaintiff Jamie Williams meets neither scenario – she was not in the zone of danger and she did not witness the event. Therefore, only Plaintiff Maureen Williams can assert these NIED claims, as she was in the vestibule at the time the pepper spray was deployed and contemporaneously witnessed it. Yet, as noted, the Court does finds that Defendant Ponik was not negligent; there are no genuine disputes of material fact to the contrary. The Court grants summary judgment to Defendants on Plaintiffs' IIED and NIED claims.

C. Motions in Limine

Both parties have filed motions in limine seeking to exclude testimony of each other's expert witnesses. D.E. 61, 70.[7] Because the Court is granting summary judgment in favor of Defendants, the Court finds these motions to be moot.

V. CONCLUSION

Peter Lee Williams' death, regardless of the cause, was tragic. However, Defendants must still be potentially liable for this matter to proceed to trial. As discussed, because there are no genuine issues of material fact, Plaintiffs' claims fail. For the reasons set forth above, Defendants' motion for summary judgment (D.E. 59) is granted. The parties' motions in limine (D.E. 61, 70) are dismissed as moot. An appropriate Order accompanies this Opinion.

Date: January 11, 2019

John Michael Vazquez, U.S.D.J.

[7] This Court's practice is to address motions in limine only after the Court's final pretrial order is entered. No final pretrial order has been entered in this matter, so the motions in limine were premature.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1159

JAMIE WILLIAMS,
Individually and as Administratrix ad Prosequendum
of Estate of Peter Lee Williams, deceased;
MAUREEN WILLIAMS,
Appellants

v.

GEORGE PONIK; BAYONNE POLICE DEPARTMENT;
CITY OF BAYONNE; JOHN DOE POLICE OFFICERS 1-10;
JOHN DOE 1-10, individually and/or in their official capacities,
jointly, severally and/or in the alternative
RALPH SCIANNI, Bayonne Police Department

(D.N.J No. 2-15-cv-01050)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and FUENTES,* Circuit Judges

The petition for rehearing filed by appellees, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the

* Pursuant to Third Circuit I.O.P. 9.5.3., Judge Fuentes's vote is limited to panel rehearing.

circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ Julio M. Fuentes
Circuit Judge

Dated: September 23, 2020
PDB/cc: All Counsel of Record