

No. 17-9134

**In the
Supreme Court of the United States**

LENA YOUNG,

Petitioner,

— V. —

CITY OF TAMPA et al,

Respondents.

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

RESPONDENT'S APPENDIX —BRIEF IN OPPOSITION

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INDEX OF APPENDIX

First Amended Complaint	Tab A/Dkt. 24
Motion to Dismiss First Amended Complaint	Tab B/Dkt 26
Response in Opposition to Motion to Dismiss First Amended Complaint	Tab C/Dkt 30
Appellant’s Brief to Eleventh Circuit Court of Appeal	Tab D

Tab A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Lena L. Young, as Personal
Representative of the Estate of
Arthur Green, Jr., deceased,

Plaintiff,

v.

City of Tampa, Officer Anthony Portman
and Corporal Matt Smith;

Defendants.

Case No. 8:15cv226-T-35MAP

FIRST AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW the Plaintiff, Lena L. Young, as Personal Representative of the Estate of Arthur Green, Jr., deceased, and sues Defendants, the City of Tampa, Officer Anthony Portman, and Matthew Smith, and alleges as follows:

JURISDICTION

1. This is an action for damages arising out of one or more violations of Federal Law detailed below, as well as state tort claims.

2. This action arises pursuant to 42 U.S.C. §1983, the Fourteenth Amendment to the United States Constitution. The action also arises under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), and Title II of the Americans with Disabilities Act, 42 U.S.C. § 12131, et seq., federal laws which protect disabled individuals such as the Decedent in this case from discrimination.

3. Jurisdiction is founded on 28 U.S.C. §§ 1331 and 1343, as well as 42 U.S.C. §1983 for the claims of deprivation of a clearly established federally protected right under the Fourteenth Amendment.

4. Supplemental jurisdiction is proper under 28 U.S.C. §1367(a) for the state law wrongful death claims in that they arise out of the same transaction and occurrence as the claims under 42 U.S.C. §1983, and are so related to those claims that they form part of the same case and controversy. Supplemental jurisdiction is also proper pursuant to Local Rule 1.02(b) (4).

VENUE

5. All relevant facts occurred in Hillsborough County, Florida, which is in the Middle District of Florida. Venue is proper in the Tampa Division of the United States District Court for the Middle District of Florida.

6. This is an action for damages which exceeds \$15,000.00, exclusive of costs and attorney's fees.

STATUTES OF LIMITATION

7. This action alleges unconstitutional conduct by the Defendants, occurring on or about April 16, 2014, and is timely filed within the relevant statute of limitations for violations of 42 U.S.C. §1983 and Florida wrongful death claims, Fla. Stat. §95.11.

COMPLIANCE WITH CONDITIONS PREDICATE

8. The Plaintiff has complied with all conditions predicate for the filing of this Complaint and, specifically, with the notice requirements of Florida Statute §768.28(6). Notice letters were sent via certified mail and U.S. mail to the City of Tampa on September 2, 2014 and the Tampa Police Department on August 22, 2014. Both letters were copied to the Florida

Department of Financial Services. Final disposition of the claim was not made prior to the expiration of the statutory period for wrongful death actions, deeming it a final denial.

PARTIES

9. The Plaintiff, Lena L. Young, as Personal Representative of the Estate of Arthur Green, Jr., ("Plaintiff") is, and at all times material hereto has been, an individual United States citizen residing in Hillsborough County, Florida. Plaintiff is the surviving spouse and duly appointed personal representative of the Estate of Arthur Green, Jr. The Letters of Administration are attached hereto as "Exhibit A." Lena L. Young is also a survivor under Florida's Wrongful Death Act. Decedent's Estate is also a beneficiary under Florida's Wrongful Death Act and is entitled to recover damages under 42 U.S.C. §1983.

10. Defendant City of Tampa is a municipal entity chartered through the State of Florida which, among its other functions, operates and maintains a law enforcement agency known as the Tampa Police Department ("TPD"). Defendant City of Tampa receives federal funds. Defendant City of Tampa by and through its officials and employees is under a duty to run its policing activities in a lawful manner so as to preserve the peace of the City of Tampa and to preserve to its citizens the rights, privileges, and immunities guaranteed and secured to them by the constitutions and laws of the United States and the State of Florida. The City of Tampa does not have immunity for violating the civil rights of citizens and has waived sovereign immunity for the negligent acts, omissions, or intentional torts of its employees arising out of and in the course and scope of their employment complained of herein pursuant to Florida Statute §768.28.

11. Defendant Officer Anthony Portman ("Defendant Portman") was at all times relevant hereto a police officer of the Tampa Police Department acting under color of law, to wit,

under color of statutes, ordinances, regulations, policies, customs, and usages of the State of Florida and/or the Tampa Police Department. Defendant Officer Anthony Portman is sued in his individual capacity.

12. Defendant Corporal Matt Smith ("Defendant Smith") was at all times relevant hereto a police officer of the Tampa Police Department acting under color of law, to wit, under color of statutes, ordinances, regulations, policies, customs, and usages of the State of Florida and/or the Tampa Police Department. Defendant Corporal Matt Smith is sued in his individual capacity.

FACTS COMMON TO ALL COUNTS

13. On the afternoon of April 16, 2014, a chain of events occurred which resulted in the death of Decedent Arthur Green ("Mr. Green"). This period started at approximately 4:30 p.m. and ended with Mr. Green being declared dead just an hour later at 5:34 p.m.

14. At approximately 4:30, Mr. Green was driving in the area of North Central Avenue and East Idlewild Rd., in Hillsborough County, Florida, when he began driving erratically.

15. A witness, Julie Rose, who observed Mr. Green's erratic driving called 911 and reported her observations. Ms. Rose informed the 911 operator that she thought Mr. Green was possibly suffering from a medical condition.

16. Defendant Portman responded to the dispatcher's call regarding Mr. Green's driving and arrived in the area of Central Avenue North and Idlewild Avenue at approximately 4:39 p.m. Defendant Portman was aware from the call that Mr. Green might be having a medical condition.

17. Defendant Portman approached Mr. Green's black Lincoln Blackwood pickup from the rear in his patrol car. He signaled briefly with his siren as he approached Mr. Green's vehicle, which was positioned halfway on the curb of the east (northbound) side of Central Avenue facing southbound.

18. As Defendant Portman signaled with his siren, Mr. Green stopped on the curb of the Northbound lane while facing south, but then began rolling forward again, southbound on Central Avenue, in the northbound lane (the east side of Central Avenue).

19. Mr. Green continued southbound in the northbound lane across Idlewild Avenue at a very slow rate of speed.

20. Mr. Green's vehicle contacted two northbound vehicles that were ultimately able to turn out of the path of Mr. Green's very slow-moving vehicle – sustaining minor damage to the right rear sides of their northbound vehicles.

21. After striking the sides of the two oncoming vehicles, Mr. Green came to a complete stop with the front of his vehicle facing southbound just south of Idlewild Avenue at an angle across the northbound and southbound lanes.

22. At approximately 4:40 p.m., Defendant Portman exited his patrol car, approached Mr. Green's vehicle on the left side and asked Mr. Green to step out of his vehicle.

23. Mr. Green responded in a confused and incoherent manner, and stated that he had done nothing wrong. He did not exit the vehicle. According to Defendant Portman, Mr. Green's face was "droopy," he had a "blank stare," and had "slurred speech" and was unable to communicate with Defendant Portman.

24. Defendant Portman reached in the front driver's side door of Mr. Green's vehicle and removed the keys from the ignition of Mr. Green's vehicle with no resistance from Mr. Green.

25. Defendant Portman continued to speak to Mr. Green, asking him to exit his vehicle. Mr. Green remained in the driver's seat. He did not respond to Defendant Portman's questions. He kept repeating, "I didn't do anything wrong."

26. Defendant Portman then began forcibly pulling Mr. Green from his vehicle. Mr. Green, rather than attacking or physically engaging Defendant Portman, pulled away from Defendant Portman, fell back into his vehicle, and continued to appear confused.

27. For nearly two minutes, Defendant Portman spoke with and observed Mr. Green sitting in his seat, during which time Mr. Green continued to seem confused and made no aggressive moves toward Defendant Portman, who called for backup.

28. At this time, Mr. Green had a blank stare, was not responsive to questions and was not showing signs of intoxication. Under these circumstances, it would have been reasonable to conclude that Mr. Green was suffering from a medical condition and call for medical assistance. Defendant Portman did not, however, ask Mr. Green if he had a medical condition or needed medical attention.

29. At approximately 4:42 p.m., Defendant Smith arrived on the scene. Defendant Portman never informed Defendant Smith that he had secured Mr. Green's keys.

30. Defendants Portman and Smith had no discussion as to whether Mr. Green was having a medical issue or whether there was a need to restrain him.

31. Nevertheless, at that point, Defendants Portman and Smith forcefully dragged Mr. Green from his vehicle and slammed him facedown on the pavement in a prone position on his stomach.

32. Defendants Portman and Smith continued to try to handcuff and place leg restraints on Mr. Green, ignoring his obvious physical and mental distress.

33. Defendant Portman placed weight on Mr. Green's back with his chest and then his knee, all the while both officers were forcing Mr. Green's hands behind his back in an upward motion. After Mr. Green was handcuffed, Defendant Portman continued to place his knee on Mr. Green's back and shoulder with his shin across his neck to pin him to the ground in a prone position. Defendant Smith then moved to Mr. Green's lower body and used his body weight to cross Mr. Green's legs and push them toward his buttocks.

34. As a result of Defendants Portman and Smith's actions, Mr. Green suffered wounds on his right knee, the right side of his face, and his temple area. His sunglasses were broken and his hat was ripped from his head.

35. Specifically, the right side of his face had an 8x7 centimeter abraded cutaneous contusion, his right eyebrow had a .2 centimeter deep cutaneous laceration, his lip had an abrasion, his tongue had few small contusion, his left shoulder had 20 to 30 milliliters of extravasated dark red blood in the belly of the deltoid muscle, his right shoulder had an estimated 10 milliliters of extravasated dark blood in the belly of the deltoid muscle, the dorsum of his right arm had an estimated 2 to 5 milliliters of extravasated dark red blood in the belly of his triceps muscle, the dorsum of his left wrist had an abrasion, the dorsum of his right had had an estimated 2 milliliters of extravasated dark blood; his left knee had a 6x4 centimeter abraded contusion, his right knee had dry abrasions, and his brain was slightly swollen.

36. During this time, Tampa Police Officer Steven D. Barber arrived on the scene. Officer Barber took Officer Smith's place and continued to push Mr. Green's legs toward his buttocks, while Officer Scott helped Defendant Portman pin Mr. Green's upper body against the pavement. Officer Smith then left to get leg shackles out of his vehicle. During the struggle, he noticed discolorations on Mr. Green's legs. As he ran to his car, he warned the other officers that Mr. Green might have diabetes. Despite this warning, Defendant Portman continued to restrain Mr. Green in a prone position with his weight on Mr. Green's back and did not remove the handcuffs or otherwise evaluate Mr. Green to see if he was having a diabetic issue.

37. After being deprived of oxygen for over two minutes, Mr. Green became limp, unresponsive and stopped breathing. A foam substance came out of his mouth.

38. As a result of the decision of Officers Portman and Smith to restrain Mr. Green in a prone position, of Officer Portman to place his knee on Mr. Green's shoulder, back and neck and use his weight to pin him to the ground, of Officer Smith's actions in pushing Mr. Green's heels towards his buttocks, Mr. Green was severely deprived of oxygen for over 2 minutes and suffered from positional asphyxia (also known as "restraint asphyxia") which caused and/or contributed to his death.

39. At approximately 4:44 p.m. –four minutes into the incident – Defendant Portman finally noted that Mr. Green might be having a "diabetic issue."

40. Mr. Green, however, had already become completely unresponsive while the officers were attempting to handcuff him.

41. Still, no attention to his medical condition was considered by any of the officers.

42. Finally, at approximately 4:45 p.m., the dispatcher received a call requesting emergency medical personnel be sent to the scene of the incident and dispatched Tampa Fire and Rescue ("TFR") at approximately 4:48 p.m.

43. Meanwhile, several more police officers arrived at the scene of the incident. Two of whom, Officer Reeves and Detective Simms, searched Mr. Green's vehicle for medical information and found a bottle of medicine that indicated Mr. Green had a serious medical condition.

44. No sense of urgency regarding Mr. Green's physical condition appeared present among the Tampa Police Department officers on the scene.

45. Not until approximately 4:48 p.m., nearly eight minutes into the incident and four minutes after officers noted that they needed to call emergency medical help, did any of the officers begin to administer CPR chest compressions to Mr. Green.

46. No attempts by any police officers were made to treat Mr. Green for diabetic symptoms.

47. At 4:52 p.m., TFR personnel arrived at the scene, assumed resuscitation efforts on Mr. Green and administered Dextrose for treatment of hypoglycemia.

48. TFR efforts to revive Mr. Green at the scene of the incident were unsuccessful and he was transported by ambulance to St. Joseph's Hospital where emergency personnel assumed his care at 5:15 p.m.

49. Additional efforts to revive Mr. Green at the St. Joseph's Hospital emergency room proved futile and he was pronounced dead at 5:34 p.m., April 16, 2014.

50. Mr. Green's death could have been avoided if he had not been restrained in a prone position with weight on his back and shoulders and his heels pushed toward his knees and if he had received appropriate and timely medical care.

51. Defendants Portman and Smith received no training while employed at the Tampa Police Department in how to identify or handle a person who was having a diabetic issue or episode.

52. Defendants Portman and Smith had numerous encounters while on duty as officers of the Tampa Police Department with persons having diabetic episodes, including hyperglycemic and hypoglycemic episodes.

53. Video of the incident was retained from Defendant Portman's police cruiser. Audio of the 911 call and calls to and from the Dispatcher were also retained. Additional video may have existed, however, from the police cruiser No. 122 that pulled up directly in front of Mr. Green's truck where the struggle was taking place at 16:43 on the video from Defendant Portman's vehicle. This police cruiser had its lights on which, according to Defendant Smith, should have activated the video in the vehicle. That video, however, has not been produced and it is not known if the video was downloaded and retained as evidence.

COUNT I
FLORIDA WRONGFUL DEATH ACT AGAINST CITY OF TAMPA – VICARIOUS
LIABILITY OF DEFENDANT PORTMAN

54. Plaintiff re-alleges paragraphs one (1) through fifty-one (53) as if fully set forth herein.

55. This is an action for wrongful death under Florida's Wrongful Death Act, Fla. Stat. §§768.18-21.

56. Defendant City of Tampa is liable for the negligent actions of its agents and employees acting within the scope of their employment, including Defendant Portman. *See* Fla. Stat. §768.28.

57. Defendant Portman, a City of Tampa police officer, owed a duty of reasonable care to Decedent after pulling him over.

58. Defendant Portman breached that duty when he unreasonably failed to timely recognize that Decedent was suffering from a medical incident, used undue and unnecessary force on Decedent, improperly restrained him in a prone position and placed his weight on his back and failed to timely call for medical personnel to evaluate and, ultimately, treat Decedent.

59. As a direct and proximate result of the negligent conduct of Defendant Portman, Decedent suffered severe oxygen deprivation and ultimately stopped breathing and was delayed in receiving the proper medical treatment for his diabetic incident, which caused him to suffer an untimely death.

60. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant City of Tampa for wrongful death and for all damages allowed by law, including compensatory damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

COUNT II

FLORIDA WRONGFUL DEATH ACT AGAINST CITY OF TAMPA – VICARIOUS
LIABILITY OF DEFENDANT SMITH

61. Plaintiff re-alleges paragraphs one (1) through fifty-one (53) as if fully set forth herein.

62. This is an action for wrongful death under Florida's Wrongful Death Act, Fla. Stat. §§768.18-21.

63. Defendant City of Tampa is liable for the negligent actions of its agents and employees acting within the scope of their employment, including Defendant Smith. *See* Fla. Stat. §768.28.

64. Defendant Smith, a City of Tampa police officer, owed a duty of reasonable care to Decedent after pulling him over.

65. Defendant Smith breached that duty when he unreasonably failed to timely recognize that Decedent was suffering from a medical incident, used undue and unnecessary force on Decedent by restraining him in a prone position, allowing Defendant Portman to place his weight on Mr. Green's back and by pushing Mr. Green's heels toward his back, and failed to timely call for medical personnel to evaluate and, ultimately, treat Decedent.

66. As a direct and proximate result of the negligent conduct of Defendant Smith, Decedent suffered severe oxygen deprivation and ultimately stopped breathing and was delayed in receiving the proper medical treatment for his diabetic incident, which caused him to suffer an untimely death.

67. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant City of Tampa for wrongful death and for all damages allowed by law, including compensatory damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

COUNT III
42 U.S.C. §1983 and *MONELL* – CUSTOM AND PRACTICE OF DELIBERATE
INDIFFERENCE AGAINST CITY OF TAMPA

68. Plaintiff re-alleges paragraphs one (1) through fifty-one (51) as if fully set forth herein.

69. The number of Americans with diabetes is approximately 29 million. Even those who manage the disease best can suffer from low blood sugar. Hypoglycemia, a condition in which the blood sugar gets below a certain level, can cause symptoms such as confusion, dizziness, irritability, shakiness, racing pulse, sweating, weakness, and anxiety. When a person's blood sugar continues to fall, disorientation and confusion can increase.

70. Across the United States, police officers are trained in recognizing diabetes versus intoxication. A plethora of training materials and videos exist, including materials such as "Treating Diabetes Emergencies: What Police Officers Need to Know" which is provided free from the American Diabetes Association. At a minimum, and especially when a person does not smell like alcohol, trainings include questioning the person to see if the person needs medical attention, if they have diabetes, or if they have another medical issue.

71. The prevalence and recurrence of diabetes and hypoglycemia in the general public and in Tampa, Florida, put Defendant City of Tampa on notice that its officers must be trained in recognizing the symptoms of hypoglycemia and low blood sugar. They need to be able to appreciate by receiving training when someone is suffering from hypoglycemia and when to provide medical assistance, or call for emergency medical services, when necessary.

72. Defendant City of Tampa was aware of the need for training its officers in how to recognize and handle members of the public who were experiencing diabetic episodes. For example, Defendant Smith had at least a half dozen occasions when he encountered someone that was having a diabetic issue while on duty at the Tampa Police Department. These experiences included: being dispatched to respond to the following calls: a) a person who was unresponsive due to a diabetic issue lying on the sidewalk; b) a person in a car at a stoplight who was unresponsive due to a diabetic issue; c) following a car that was swerving drastically on I-4 whose driver was altered and unresponsive due to having a diabetic issue and was ultimately forced off the road by the Florida Highway Patrol. Defendant Portman also had experiences where he encountered someone who was having a diabetic issue while on duty at the Tampa Police Department. These experiences included being dispatched on the following calls: a) in approximately 2012, a person who was pulled over on Bruce B. Downs Blvd. by another officer for DUI, but it was determined that he was having a diabetic incident and Tampa Fire and Rescue came and measured his blood sugar at about 320; b) two separate incidents where Defendant Portman pulled over male drivers who were driving erratically for suspected DUI, but were ultimately determined to be having diabetic issues. Upon information and belief, there have been numerous similar incidents experienced by other officers of the Tampa Police Department.

73. Despite the numerous incidents of officers of the Tampa Police Department having to respond to calls of persons experiencing diabetic episodes, Defendant City of Tampa provided Defendants Portman and Smith with no training on how to recognize or handle a person who is having a hypoglycemic episode. As a result, Defendant City of Tampa's officers are not prepared to handle predictable and non-aggressive encounters with persons suffering from

hypoglycemia or a diabetic episode. Defendant City of Tampa did not send officers trained to recognize these symptoms in Decedent.

74. By the failures set forth above, Defendant City of Tampa acted with deliberate indifference to a known risk of constitutional deprivation to Decedent and similarly situated citizens.

75. Defendant City of Tampa, through its agents, had a special relationship with Mr. Green, by virtue of the fact that the City's officers pulled Mr. Green over and detained him when it was reasonably apparent that he was not intoxicated and, instead, was suffering from a medical issue requiring medical attention – which he ultimately did not receive.

76. Neither Decedent nor Plaintiff could have reasonably discovered that Defendant City of Tampa failed to provide adequate training to implement reasonable practices as it relates to citizens having diabetic episodes, because such knowledge was specifically held by officers and agents of Defendant City of Tampa. Nor could they have imagined that Decedent would have been treated with such physical force with a disregard for his medical need, should that situation so arise.

77. As a direct and proximate result of Defendant City of Tampa's deliberate indifference to the risk of deprivation of Decedent and similarly situated citizen's constitutional liberty interests, including that of medical care, Decedent suffered constitutional injury and, ultimately, died.

78. Decedent suffered constitutional injury. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the

personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant City of Tampa for all damages allowed by law, including compensatory damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

COUNT IV

42 U.S.C. §1983 – DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED
UNDER THE FOURTEENTH AMENDMENT AGAINST DEFENDANT PORTMAN

79. Plaintiff re-alleges paragraphs one (1) through fifty-one (51) as if fully set forth herein.

80. This is an action for violation of Constitutional rights under 42 U.S.C. §1983.

81. Under the 14th Amendment of the United States Constitution, Decedent had a constitutional right to be free from punishment during the period of his detention. This right, which includes the right to receive medical attention while in custody, was clearly established at the time Defendant Portman detained Decedent in an attempt to take him into custody.

82. Defendant Portman, while acting under color of state law and by virtue of the authority vested in him by the State and/or its agencies, had actual and/or constructive notice, by virtue of Decedent's behavior and by lack of physical evidence of intoxication that Decedent had a serious medical need and should be taken to the hospital for further evaluation.

83. Defendant Portman acted with deliberate indifference to Decedent's serious medical need when he chose to exert physical force over Decedent to take him into custody as opposed to asking him the appropriate questions about his medical history and calling for medical services.

84. Defendant Portman further acted with deliberate indifference to Decedent's serious medical need by refusing to take his weight off of Decedent's back when it was clear that he was suffering from severe oxygen deprivation and suffocating.

85. Defendant Portman's failure to timely have Decedent medically evaluated was an act of deliberate indifference with respect to Decedent's serious medical condition and posed a substantial risk of serious harm to Decedent. Defendant Portman's failure to act denied Decedent the right to adequate medical care and violated Decedent's 14th Amendment constitutional rights.

86. Defendant Portman's violation of Decedent's constitutional rights caused Decedent to stop breathing and/or suffer from severe oxygen deprivation, caused Decedent's hypoglycemic state to worsen and the delay caused by Defendant Portman's unconstitutional actions caused Decedent to suffer constitutional injury, personal injury, and ultimately, die.

87. Decedent suffered constitutional injury. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant Portman for all damages allowed by law, including compensatory damages, punitive damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

COUNT V

42 U.S.C. §1983 – DELIBERATE INDIFFERENCE TO A SERIOUS MEDICAL NEED
UNDER THE FOURTEENTH AMENDMENT AGAINST DEFENDANT SMITH

88. Plaintiff re-alleges paragraphs one (1) through fifty-one (51) as if fully set forth herein.

89. This is an action for violation of Constitutional rights under 42 U.S.C. §1983.

90. Under the 14th Amendment of the United States Constitution, Decedent had a constitutional right to be free from punishment during the period of his detention. This right, which includes the right to receive medical attention while in custody, was clearly established at the time Defendant Smith detained Decedent in an attempt to take him into custody.

91. Defendant Smith, while acting under color of state law and by virtue of the authority vested in him by the State and/or its agencies, had actual and/or constructive notice, by virtue of Decedent's behavior and by lack of physical evidence of intoxication that Decedent had a serious medical need and should be taken to the hospital for further evaluation.

92. Defendant Smith acted with deliberate indifference to Decedent's serious medical need when he chose to exert physical force over Decedent to take him into custody as opposed to asking him the appropriate questions about his medical history and calling for medical services.

93. Defendant Smith further acted with deliberate indifference to Decedent's serious medical need by refusing to stop pushing Decedent's heels toward his back, by failing to stop Defendant Portman from placing his weight on Decedent's back when it was clear that he was suffering from severe oxygen deprivation and was suffocating Decedent.

94. Defendant Smith's failure to stop the suffocation of Decedent and failing to timely have Decedent medically evaluated was an act of deliberate indifference with respect to Decedent's serious medical condition and posed a substantial risk of serious harm to Decedent. Defendant Smith's failure to act denied Decedent the right to adequate medical care and violated Decedent's 14th Amendment constitutional rights.

95. Defendant Smith's violation of Decedent's constitutional rights caused Decedent to stop breathing and/or suffer from severe oxygen deprivation, caused his hypoglycemic state to worsen and the delay caused by Defendant Smith's unconstitutional actions caused Decedent to suffer constitutional injury, personal injury, and ultimately, die.

96. Decedent suffered constitutional injury. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant Smith for all damages allowed by law, including compensatory damages, punitive damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

COUNT VI
42 U.S.C. §1983 – EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT AGAINST
DEFENDANT PORTMAN

97. Plaintiff re-alleges paragraphs one (1) through fifty-one (51) as if fully set forth herein.

98. This is an action for violation of Constitutional rights under 42 U.S.C. §1983.

99. Under the 4th Amendment of the United States Constitution, Decedent had a constitutional right to be free from excessive force for the period of his detention.

100. Defendant Portman, while acting under color of state law and by virtue of the authority vested in him by the State and/or its agencies, had actual and/or constructive notice, by virtue of Decedent's behavior and by lack of physical evidence of intoxication that Decedent had a serious medical need.

101. Instead of evaluating Decedent or assisting him in receiving medical care, Defendant Portman intentionally and forcefully pulled him out of his car, threw him to the ground, and pinned him in a prone position on the concrete with his weight on Mr. Green's back which caused him to suffer severe oxygen deprivation due positional asphyxia and ultimately stop breathing and die.

102. Defendant Portman's use of force constituted excessive, unjustified and unnecessary force as Decedent posed no threat to any officer.

103. Defendant Portman failed to adequately assess the scene and circumstances for the use of force and in doing so failed to act as a reasonable officer. Decedent needed medical attention, not to be thrown down on the concrete and restrained in a prone position. Defendant Portman's use of excessive force included his decision to remove Mr. Green from the vehicle when he was no danger because the keys had been removed, restraining Mr. Green in a prone position on the ground with his weight on his back and shoulder area which caused him to suffer from severe oxygen deprivation and positional asphyxia and refusing to un-handcuff or get off of Mr. Green when it was clear that he was being deprived of oxygen. Defendant Portman was aware from the Standard Operating Procedures of the Tampa Police Department in effect at the time of this incident that restraining a person in a prone position carried the risk of positional asphyxiation

104. Defendant Portman's use of force upon Decedent was an objectively unreasonable use of force given the totality of the circumstances.

105. Defendant Portman's violation of Decedent's constitutional rights caused Decedent's hypoglycemic state to worsen his heart rate to increase and his physical state to deteriorate and restricted his airway to such an extent that he suffered severe oxygen deprivation

and positional asphyxia which caused him to stop breathing. Defendant Portman's unconstitutional actions caused Decedent to suffer constitutional injury, personal injury, and ultimately, die.

106. Decedent suffered constitutional injury. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant Portman for all damages allowed by law, including compensatory damages, punitive damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

COUNT VII
42 U.S.C. §1983 – EXCESSIVE FORCE UNDER THE FOURTH AMENDMENT AGAINST
DEFENDANT SMITH

107. Plaintiff re-alleges paragraphs one (1) through fifty-one (51) as if fully set forth herein.

108. This is an action for violation of Constitutional rights under 42 U.S.C. §1983.

109. Under the 4th Amendment of the United States Constitution, Decedent had a constitutional right to be free from excessive force for the period of his detention.

110. Defendant Smith, while acting under color of state law and by virtue of the authority vested in him by the State and/or its agencies, had actual and/or constructive notice, by virtue of Decedent's behavior and by lack of physical evidence of intoxication that Decedent had a serious medical need.

111. Instead of evaluating Decedent or assisting him in receiving medical care, Defendant Smith intentionally and forcefully threw him to the ground, and pinned him face down on the concrete in a prone position which restricted his airway. Defendant Smith further restricted Decedent's ability to breath by crossing his legs and pushing his heels toward his back and by failing to un-handcuff Mr. Green or otherwise stop Defendant Portman from putting his weight on Decedent's back when it was clear that Mr. Green was being severely deprived of oxygen. Defendant Smith was aware from the Standard Operating Procedures of the Tampa Police Department in effect at the time of this incident that restraining a person in a prone position carried the risk of positional asphyxiation.

112. Defendant Smith's use of force constituted excessive, unjustified and unnecessary force as Decedent posed no threat to any officer,

113. Defendant Smith failed to adequately assess the scene and circumstances for the use of force and in doing so failed to act as a reasonable officer. Decedent needed medical attention, not to be thrown down on the concrete and held in a prone position until he stopped breathing.

114. Defendant Smith's use of force upon Decedent was an objectively unreasonable use of force given the totality of the circumstances.

115. Defendant Smith's violation of Decedent's constitutional rights caused Decedent's hypoglycemic state to worsen his heart rate to increase and his physical state to deteriorate and restricted his airway to such an extent that he suffered severe oxygen deprivation and positional asphyxia which caused him to stop breathing. Defendant Smith's unconstitutional actions caused Decedent to suffer constitutional injury, personal injury, and, ultimately, die.

116. Decedent suffered constitutional injury. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant Smith for all damages allowed by law, including compensatory damages, punitive damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

COUNT VIII
AMERICANS WITH DISABILITIES ACT; REHABILITATION ACT OF 1973 AGAINST
CITY OF TAMPA

117. Plaintiff re-alleges paragraphs one (1) through fifty-one (51) and sixty-seven (67) through seventy-five (75) as if fully set forth herein.

118. Decedent was at all times relevant hereto a person with insulin treated diabetes mellitus. At the time of the incident, he was suffering from an acute hypoglycemic episode due to this chronic condition. This condition substantially limited one or more of Decedent's major life activities, including the ability to care for oneself and the major bodily function of endocrine system function. Decedent's insulin treated diabetes is and was at all relevant times a "disability" under the Americans with Disabilities Act and the Rehabilitation Act of 1973.

119. Defendant City of Tampa is a "public entity" within the definition of the ADA.

120. Defendant City of Tampa receives federal funds and is otherwise subject to the provisions of the Americans with Disabilities Act and the Rehabilitation Act of 1973.

121. Defendant City of Tampa's police officers, Defendants Portman and Smith, were authorized to act for Defendant City of Tampa when they committed the ADA violations alleged herein.

122. As discussed *supra* in Count III, Defendant City of Tampa and the officers who detained Decedent failed to make "reasonable modifications in policies, practices, or procedures when the modifications [were] necessary to avoid discrimination on the basis of a disability" pursuant to 42 U.S.C. 12132 (quoting 28 C.F.R. 35.130(b)(7)), "when Decedent's disability and corresponding medical need were apparent minutes into their interaction..

123. To the contrary, Defendant City of Tampa and the officers who detained Decedent, failed to respond to Decedent's need for reasonable accommodation by failing to facilitate immediate medical care when it was apparent that Decedent was a diabetic with a serious medical need.

124. Moreover, the City of Tampa a. failing to adequately train officers on how to recognize the symptoms of hypoglycemia or other diabetic episode; failed to adequately train officers on what medical treatment is required for a person suffering from hypoglycemia or other diabetic episode; and failed to put protocols in place for when an officer is faced with a person suffering from hypoglycemia or other diabetic episode.

125. Decedent's need for reasonable accommodations was obvious given the numerous incidents of officers dealing with persons who were suffering from a diabetic incident, including but not limited to the experiences of Defendants Portman and Smith as described herein.

126. Defendant City of Tampa and the officers who detained Decedent knew and/or should have known of Decedent's need for reasonable accommodation. In particular, Defendants Portman and Smith knew from information provided by the 911 caller to the dispatch

and from their own observations and experience that Decedent elderly and was likely having a medical emergency. In addition, Defendant Smith knew from observing mottling and discoloration on Mr. Green's legs that he was potentially diabetic and informed Defendant Portman of this fact. Despite this fact, Defendant Portman continue to restrain Mr. Green in handcuffs in a prone position with weight on his back, shoulders and neck and his heels pushed up toward his buttocks.

127. As a direct and proximate result of Defendant City of Tampa's discriminatory acts and omissions, Decedent suffered constitutional injury, personal injury, and, ultimately, died.

128. Decedent suffered constitutional injury. Plaintiff individually sustained and continues to sustain damages for past and future loss of support, services, companionship and protection and mental pain and suffering. In addition, Plaintiff also seeks damages as the personal representative of Decedent's estate for past medical expenses and funeral expenses, as well as lost earnings and loss of net accumulations.

WHEREFORE, the Plaintiff demands judgment against Defendant City of Tampa for all damages allowed by law, including compensatory damages, attorneys' fees and costs, and any such other and further relief as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiff requests a trial by jury on all issues in this matter.

Dated: February 19, 2015

Respectfully Submitted,

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Attorneys for Plaintiff

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

**LENA L. YOUNG,. As personal representative
Of the Estate of Arthur Green, Jr., deceased,**

Plaintiff,

v.

CASE NUMBER: 8:15-cv-00226-MSS-MAP

**CITY OF TAMPA, OFFICER ANTHONY PORTMAN,
And CORPORAL MATT SMITH;**

Defendants

**MOTION TO DISMISS AMENDED COMPLAINT AND
MEMORANDUM OF LAW**

Defendants, pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule 3.01, hereby file this Motion to Dismiss and Memorandum of Law, and in support thereof would state that the First Amended Complaint (**Dkt. 24**) should be dismissed because it: (1) fails to state a cause of action; and (2) does not overcome Defendant Officers' qualified immunity.

The Amended Complaint asserts the same claims as the original Complaint; however additional allegations have been added to bolster the claims. The First Amended Complaint alleges that the City is liable for Wrongful Death (Counts I and II); § 1983 Failure to Train (Count III); and violations of the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA")(Count VIII). The First Amended Complaint also alleges that Defendant Officers are liable for Deliberate Indifference to Mr. Green's Serious Medical Need (Count IV and Count V) and Excessive Force (Count VI and Count VII). Plaintiff seeks compensatory damages, attorney's fees and costs. The additional allegations have been added as follows:

SECTION OF COMPLAINT	AMENDED or NEW PARAGRAPH	OLD PARAGRAPH
Facts Common to All Counts	15, 16, 23, 25, 28, 29, 30, 33, 36, 37, 38, 39, 50, 51, 52, 53	15, 16, 23, 25, 28, 29, 30, 33, 36, 37, 38, 39, 50
Count I — Wrongful Death (Portman)	58, 59	55, 56
Count II — Wrongful Death (Smith)	65, 66	62, 63
Count III — <i>Monell</i> Claim — Failure to Train	72, 73	--, 69
Count IV — Medical Indifference (Portman)	84, 86	--, 81
Count V — Medical Indifference (Smith)	93, 94, 95	--, 88, 89
Count VI — Excessive Force — (Portman)	101, 103, 105	95, 97, 99
Count VII — Excessive Force — (Smith)	111, 113, 115	105, 107, 109
Count VIII — ADA/RA	125, 126	119, 120

SUMMARY OF FACTS

On April 16, 2014, at 4:30 p.m., the Tampa Police Department (“TPD”) received a 911 call from a citizen reporting that a truck, being driven by Mr. Green, was driving erratically. [AC ¶ 14, 15] Officer Anthony Portman was dispatched to the call and located the subject vehicle and observed several traffic violations. [AC ¶ 16] Officer Portman activated his emergency equipment and the driver appeared to respond by stopping on the side of the road; however, the vehicle drove off before Officer Portman was able to exit his car and make contact. [AC ¶ 17-18] As the truck traveled southbound away from Officer Portman, it traveled in the northbound lane of traffic and impacted two cars. [AC ¶ 19-20] After hitting both cars, the truck came to a stop in the middle of the road obstructing the southbound and northbound lanes of travel. [AC ¶ 21]

At 4:40 p.m., Officer Portman approached the truck and made contact with the driver/Mr. Green, later identified as Arthur Green, Jr. [AC ¶ 22] Officer Portman asked the driver to get out of the car and he did not comply. [AC ¶ 22-23] Officer Portman removed the keys from the ignition and again asked the driver to exit the car and he failed to comply. [AC ¶ 25] Officer Portman then tried to physically remove the driver from the car but he resisted by pulling away and climbing back into the passenger compartment. [AC ¶ 26] Officer Portman called for back-up and Corporal Matt Smith was the first back-up officer to respond. [AC ¶ 27, 29] Officer Portman and Corporal Smith removed the driver from the truck and placed him on the ground. Shortly after removing the driver from the truck, other back-up officers also arrived on scene. Several officers assisted with restraining the driver until he was secured in handcuffs. [AC ¶ 31-33, 36] At some point during the effort to restrain Mr. Green, he went limp and became unresponsive. [AC ¶ 37, 40]

At some point while trying to restrain Mr. Green, Officer Smith called out that diabetes could be an issue as he noticed some discoloring on Mr. Green's legs. [AC ¶ 36] At 4:44 p.m., Officer Portman verbalized that Mr. Green "might be" having a diabetic issue. [AC ¶ 39] At, or about 4:45 p.m., the dispatcher was asked to summon Tampa Fire Rescue ("TFR"). The request for a response was sent to TFR at 4:48 p.m. [AC ¶ 42] While waiting for TFR, several officers performed CPR on Mr. Green and continued those efforts until TFR's arrival at 4:52 p.m. and thereafter TFR assumed the driver's care. [AC ¶ 45, 47] Tampa Fire Rescue transported the driver to St. Joseph's Hospital. At, or about, 5:15 p.m., medical personnel at St. Joseph's Hospital assumed care and custody of the driver. Mr. Green was pronounced dead at 5:34 p.m. [AC ¶ 49]

‘SUMMARY OF ARGUMENT

Plaintiff has added facts in the First Amended Complaint alleging that the officers’ method of restraining Mr. Green — placing him on stomach in a prone position, placing weight on his back, and pushing his legs back toward his buttocks — either caused, or contributed to, his death. Despite these facts, the essence of the Amended Complaint is the same as the original Complaint. Plaintiff still contends that the officers should have recognized that Mr. Green was in medical distress upon first contact with him and this recognition would have led them to focus on his medical needs. Plaintiff further contends that focusing on Mr. Green’s medical needs would have avoided the efforts to arrest Mr. Green which would have prevented his death. In sum, the Amended Complaint still says that Defendant Officers failed to save Mr. Green. Neither Florida law nor Federal law imposes liability on police officers or police agencies when they are unaware that a person is in medical distress and that lack of knowledge prevents them from attempting to alter a citizen’s preexisting medical trajectory.

STANDARD OF REVIEW

Under Federal law, when considering a motion to dismiss under Federal Rules of Civil Procedure Rule 12(b)(6), the Court must accept all factual allegations in the complaint as true, consider the allegations in the light most favorable to the plaintiff, and accept all reasonable inferences that can be drawn from such allegations. *Hill v. White*, 321 F. 3d 1334, 1335 (11th Cir 2003); *Jackson v. Okaloosa County, Fla.*, 21 F. 3d 1531, 1534 (11th Cir. 1994). A Complaint may not be dismissed under Rule 12(b)(6) “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Lopez v. First Union Nat’l Bank*, 129 F.3d 1186, 1189 (11th Cir. 1997) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). On a motion to dismiss, the Court limits its considerations to the pleadings and exhibits attached thereto. *GSW v. Long County, Ga.*, 999 F.2d 1508, 1510 (11th Cir. 1993). In

order to survive a motion to dismiss, a complaint must contain sufficient factual allegations which, when taken as true, “state a claim to relief that is plausible on its face”. *Ashcroft v Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement’, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged, but it has not ‘shown’- ‘that the pleader is entitled to relief.” *Id.* at 1950. In other words, the factual allegations must be substantial enough to raise the right to relief above the speculative level. *Bell Atlantic v. Twombly*, 550 U.S. 544, 555 (2007) On a motion to dismiss, “the qualified immunity inquiry and the Rule 12(b)(6) standard become intertwined.” *Wooten v. Campbell*, 49 F.3d 696, 699 (11th Cir.1995). The purpose of the doctrine of qualified immunity is to protect government officials not only from liability and damages, but also from being subject to suit. *Marsh v. Butler County*, 268 F.3d 1014, 1022 (11th Cir.2001) (en banc). Because the doctrine of qualified immunity is not a defense, but immunity in its truest sense, whether or not a defendant is entitled to qualified immunity should be determined “at the earliest possible stage of the litigation.” *Johnson v. Breeden*, 280 F.3d 1308, 1317 (11th Cir.2002). *Case v. Eslinger*, 555 F. 3d 1317, 1325 (11th Cir. 2009)(recognizing that “qualified immunity is a privilege that provides an immunity from suit rather than a mere defense to liability.”) Plaintiff bears the burden of demonstrating that qualified immunity should not apply. *Edwards v. Shanley*, 666 F. 3d 1289, 1294 (11th Cir. 2012).

I. WRONGFUL DEATH (COUNTS I and II)¹

In the First Amended Complaint, (¶ 58, 65), Plaintiff alleges that in addition to failing to get Mr. Green medical care, Defendant officers breached a duty to Mr. Green by improperly placing him in a prone position and placing weight on his back. In paragraphs 56, 59, 63, and 66 of the Amended Complaint, Plaintiff alleges that the conduct of the officers was negligent. However, paragraphs 58 and 65 allege intentional, rather than accidental, acts. The negligence claims cannot be based on the force used by the officers because those acts were intentional — even if the consequences were unintentional — because Florida does not recognize any cause of action for the negligent commission of intentional acts. *City of Miami v. Sanders*, 672 So. 2d 46, 48 (Fla. 3d DCA 1996).

Next, Plaintiff alleges that the City is liable for Mr. Green's death because Defendant Officers' failed to timely recognize his hypoglycemic state and seek medical assistance. [FAC 58, 59, 65, 66] In order to state a negligence claim, Plaintiff must establish: (1) a duty, (2) a breach of the duty, (3) causation, and (4) damages. *Santana v. City of Hialeah*, 2009 WL 6635306, at 4(S.D. Fla. 2009) Florida law imposes a duty on police officers to use reasonable care to ensure the safety of persons in their custody. *Hutchison v. Miller*, 548 So. 2d 883 (Fla. 5th DCA 1989); *Ferguson v. Perry*, 593 So. 2d 273 (Fla. 5th DCA 1992). Therefore, Florida law requires that "when a person detained by the police manifests such symptoms as would place a reasonable person on notice that the arrestee is in need of medical attention, the police must take reasonable steps to obtain such care." *Ferguson* at 277; *United States v. Stevens*, 994 So. 2d 1062, 1068 (Fla. 2008). An officer is not required to take any action to render aid, or secure medical care, unless he knows, or should know, the person in his custody is ill or injured. Once

¹ The City also contends these counts are duplicative because Counts I and II arise out of the same core facts and the same allegations of negligent conduct.

the officer has that knowledge, the Officer must take reasonable steps to secure access to medical care. *Santana v. City of Hialeah*, 2009 WL 6635306 (S.D. Fla. 2009)(involving a 19 minute delay between a 911 call and the time of paramedics initial examination) Officers “will seldom be required to do more than give such first aid as [they] reasonably can, and take reasonable steps to turn the sick person over to a physician or to those who will look after the person and see that medical assistance is obtained”. *Ferguson* at 277.

The First Amended Complaint does not demonstrate that Defendant officers breached their duty to secure medical care for Mr. Green. See *City of Revere vs. Massachusetts General Hosp.*, 463 U.S. 239 (1983); *Santana v. City of Hialeah*, 2009 WL 6635306 (S.D. Fla. 2009) Regardless of whether Officer Portman should have called for medical assistance at 4:42², rather than 4:45 p.m. (*the time dispatch made for TFR assistance, at C ¶ 42*); the fact remains that Mr. Green had access to medical care on the date of incident. Moreover, prior to the arrival of Fire Rescue, several Tampa officers performed CPR on Mr. Green, and it is of no moment that Plaintiff alleges that CPR should have started sooner than 4:48 p.m.³ Finally, Plaintiff asserts at paragraph 46 that no police officer attempted to **treat** Mr. Green’s diabetic symptoms. Florida law does not impose any duty on police officers to exercise medical judgment. Thus, there would be no duty to diagnose, or treat, Mr. Green’s medical issue once the officers knew that one existed. Even if the officers suspected Mr. Green was having diabetic complications; their only affirmative duty was to call for medical assistance. The First Amended Complaint does not

² Paragraphs 27 and 28 of the Complaint assert that Officer Portman talked to Mr. Green for “nearly two minutes” and based on Mr. Green’s conduct he should have concluded that he had a medical condition and called for medical attention. Thus, Plaintiff contends that Officer Portman should have known he needed to secure medical care at least by 4:42 p.m.

³ In paragraph 40, Plaintiff alleges that Mr. Green became unresponsive, and then alleges in paragraph 45 that the officers did not start CPR until 4:48, implying that the officers intentionally did nothing to assist Mr. Green. This implication is unwarranted because there are no allegations indicating when the officers knew that Mr. Green had stopped breathing. Moreover, the fact that Mr. Green became unresponsive does not mean Mr. Green immediately stopped breathing so the reasonable inference is that the officers started CPR when it was clear that CPR was necessary.

show the officers breached their duty to Mr. Green and for that reason Counts I and II should be dismissed.

II. § 1983 FAILURE TO TRAIN (Count III)

Plaintiff asserts that the City lacks adequate training to address awareness of hypoglycemic symptoms in persons they may encounter. [AC ¶ 71] To state a claim for failure to train, Plaintiff must demonstrate that (1) the City inadequately trained its employees regarding recognition of hypoglycemic incidents; (2) the failure to train is an official policy; and (3) the policy caused Defendant Officers to violate Mr. Green's rights.⁴ *Thomas ex rel Thomas v. Roberts*, 261 F. 3d 1160, 1173 (11th Cir. 2001) *Gold v. City of Miami*, 151 F. 3d 1346, 1351 (11th Cir. 1998) Plaintiff must show deficiency of the department as a whole in this respect, and not focus on any particular officer to establish the cause of action. *City of Canton v Harris*, 489 US 388, 390 (1989) To demonstrate municipal liability, Plaintiff must demonstrate that the municipality had notice of a need to train in a particular area to prevent constitutional violations. *Wright v. Sheppard*, 919 F. 2d 665, 674 (11th Cir. 1990) Plaintiff alleges in paragraph 70 that hypoglycemic awareness training exists, and some police departments have elected to provide this training; but contends that the City does not. The City is not automatically liable under section 1983 **even if** it inadequately trained its employees regarding hypoglycemic awareness and those employees violated Mr. Greens' rights because municipal liability attaches **only where** the final policymaker knew of the need for better training as a result of recurring constitutional violations **and** made a deliberate choice not to implement corrective measures. *Canton* at 388-89, *Thomas* at 1173

⁴ The City also contends that the arguments for Defendant Officers in Counts IV, V, VI and VII demonstrate Plaintiff has not shown a violation of Mr. Green's Fourth or Fourteenth Amendment rights and proof of a constitutional violation is an element of a municipal liability claim. *McDowell v. Brown*, 392 F 3d 1283, 1289 (11th Cir. 2004)

A municipality may be put on notice in two ways – if it is aware of a pattern of prior constitutional violations, but nevertheless fails to provide adequate training **or** if the likelihood for constitutional violations is so high the need for training would be obvious. *Gold* at 1350.

Prior Constitutional Violations

In paragraph 72, Plaintiff added facts which appear to be attempts to allege prior, similar incidents. The incidents listed in paragraph 72 are not a summary of encounters garnered from experiences of the City's 1,000 police officers. Instead, the incidents are ones that Defendant Portman and Defendant Smith detailed during their deposition in response to a question about their individual encounters, occurring before the date of incident, where diabetes was involved. Plaintiff asserts that the five (5) cumulative encounters of Officer Smith and Officer Portman are sufficient to have placed the City on notice of a need to train in diabetes awareness before April 2014. Plaintiff also *believes* that Tampa's other 998 police officers have had similar encounters. The additional facts in paragraph 72 do not bolster the failure-to-train claim in any way because they do not allow any inference that the five (5) encounters also involved the violation of a constitutional right. The allegations in paragraph 72 also fail because, even if the prior incidents did involve constitutional violations, the few incidents listed could not support a widespread pattern necessary to support a municipal liability claim. Finally, the fact that Tampa officers have encounters with diabetics is insufficient to put the Chief of police on notice of a need to train. See *Weiland v. Palm Beach County Sheriff's Office*, (11th Cir., published opinion 7/18/15, FN 21)(an appeal from an order dismissing a complaint, finding the mere "contacts" between deputies and mentally ill citizens was insufficient to put the Sheriff on notice of a need for training, especially where failure to train or supervise is generally not so likely to produce a wrong decision to support an inference of deliberate indifference. *Sewell v. Town of Lake Hamilton*, 117 F. 3d 488, 490 (11th Cir. 1997). Therefore, the First Amended Complaint alleges,

but does not show that there has been a widespread pattern of similar unconstitutional incidents to place the City on notice of a need to train. *McDowell v. Brown*, 392 F. 3d 1283, 1290 (11th Cir. 2004) .

Obvious Need

Plaintiff also relies on the generalized recurrence of diabetes in the population at large as support for the contention that it would have been “obvious” there was a need to train in this area. (FAC ¶ 69, 71) However, there is no precedent for imposition of municipal liability under these factual circumstances. *Connick v. Thompson*, 131 S. Ct. 1350, 1363-1364 (2011)(recognizing that it is “rare” that “the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations”.) Further, the “patently obvious” method of proving failure to train is meant to encompass a very “narrow range of circumstances where the consequences, of the failure to equip law enforcement with the specific tools to handle recurring situations, would be highly predictable.” *Board of County Commissioners v. Brown*, 520 U.S. 397, 409 (1997) The only example in *Brown* that the United States Supreme Court gave of an “obvious” training need that implicates municipal liability, without notice of prior constitutional violations, is training on the use of deadly force when police officers carry firearms. See also *Love v. Tift County, Georgia*, 2010 WL 1257998, at *5, 8 (MD Ga. 3/29/10)(finding at summary judgment stage that the prevalence of strokes in the general population is an insufficient basis to impose municipal liability for failure-to-train patrol deputies how to assess whether a person is impaired or having a stroke.).⁵ Training officers in diabetes awareness does not fit within the “limited

⁵ See also *Mingo v. City of Mobile, Ala.*, 2014 WL 6435116 (11th Cir. 11/18/14) (use of hobble ties is not an obvious training need); *Gray ex. rel Alexander v. Bostic*, 458 F. 3d 1295 (11th Cir. 2006)(training officers how to detain students is not an obvious training need); *Gold v. City of Miami*, 151 F. 3d 1346, 1352 (11th Cir. 1998)(training officers in the use of handcuffs is not an obvious training need); *Stewart v. Sotolongo*, 2007 WL 1796545 (M.D. Fla. 2007)(dismissing claim because Court rejected that seizure was one of the very limited

circumstances” where liability can be imposed in the absence of evidence, or allegations, of similar prior constitutional violations. Plaintiff has not shown municipal liability for a failure to train.

III. DELIBERATE INDIFFERENCE TO SERIOUS MEDICAL NEEDS – (COUNTS IV AND V)

Qualified Immunity/Clearly Established Law

Qualified immunity protects officials performing discretionary functions from liability “where their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997), quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Strock v. City of Coral Springs*, 354 F.3d 1307, 1313 (11th Cir. 2003). As long as an official’s conduct is not unlawful, the doctrine of qualified immunity exempts government official from damage suits to enable them to perform their responsibilities without threats of liability. *Hutton v. Strickland*, 919 F.2d 1531, 1536 (11th Cir. 1990). Qualified immunity is intended to protect “all but the plainly incompetent or those who knowingly violate the law.” *McCoy v. Webster*, 47 F.3d 404, 407 (11th Cir. 1995), quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The Supreme Court has set forth a two part analysis to be applied to a defense of qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 736 (2002); *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The threshold inquiry a court must undertake is whether the plaintiff’s allegations, if true, establish a constitutional violation. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. *Saucier*, 533 U.S. at 201. However, if a constitutional right would have been violated under the Plaintiff’s version of the facts, the next sequential step is to ask whether the

circumstances where the need for training is obvious); *Morrissey v. Town of Agawam*, 883 F. Supp 2d 300, 316 (D. Mass. 2012)(finding at summary judgment stage, that the Plaintiff had not shown an obvious need for diabetes awareness training)

right was clearly established. *Id.*; *Strock*, 354 F.3d at 1314. In *Saucier*, the Supreme Court stated that the relevant query is whether it “would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” *Id.* In *Hope*, the Supreme Court refined the *Saucier* query, holding that the “...salient question... is whether the state of the law gave [the officers] fair warning that their alleged treatment [of the plaintiff] was unconstitutional.” The Court is no longer required to follow the rigid *Saucier* standard of analysis and is free to consider whether the law was clearly established in determining qualified immunity without the need to first consider whether a constitutional violation has been shown. *Pearson v. Callahan*, 555 U.S. 223 (2009).

Defendant Officers contend that the law was not clearly established in April 2014 and they did not have any fair warning that a few minutes delay, under the circumstances presented in the present case, would violate the Fourteenth Amendment. See *Youmans v. Gagnon*, 626 F. 3d 557 (11th Cir. 2010)(indicating that where there is no bright line case establishing the law, a Court is constrained to look to only the decisions of the United States Supreme Court, the Eleventh Circuit Court of Appeals, and the Florida Supreme Court to determine if a clearly established right existed at the time of the arrest). *Marsh v. Butler County, Ala.*, 268 F.3d 1014, 1032 n. 10 (11th Cir. 2001). If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the Defendant. *Dartland v Metropolitan Dade County*, 866 F. 2^d 1321, 1323 (11th Cir. 1989). Defendant Officers assert that there is no pre-existing case law that provides them with a fair warning that their conduct under these facts was unconstitutional. As noted by the United States Supreme Court, qualified immunity “shields an officer from suit when she makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances confronted”. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004). See also *Fernandez v. Metro-Dade Police Department*, 397 Fed. Appx. 507

(11th Cir. 2010)(a delay of 8 hours did not violate the Fourteenth Amendment); *Youmans v. Gagnon*, 626 F. 3d 557 (11th Cir. 2010)(a 4 hour delay did not violate the Fourteenth Amendment); *Pourmopghani-Esfajani v. Gee*, 625 F. 3d 1313 (11th Cir. 2010)(delay of 2-4 minutes in a jail setting did not violate the Fourteenth Amendment.) Further, in order to overcome qualified immunity at this stage, Plaintiff must allege facts that “show” that no reasonable person in the officers’ position could have thought the facts were such to justify the officer’s actions. *Sims v. Metropolitan Dade County*, 972 F.2d 1230 (11th Cir. 1992).

An arrestee has a right to necessary medical treatment, *Thomas v Town of Davie*, 847 F. 2d 771, 772 (11th Cir. 1988), and Mr. Green in this case received necessary medical care the instant it was clear that such care was required. However, Mr. Green did not have a right to medical omniscience or physiological clairvoyance; as that is what it would have taken for these officers to conclude that Mr. Green’s behavior resulted from his hypoglycemic state as opposed to him merely being impaired. At best, the Plaintiff has only shown that the officers’ error, if any, occurred because they focused on Mr. Green’s behavior rather than its etiology. Such a mistake should not deprive the officers of qualified immunity. *Butz v. Economou*, 438 U.S. 478, 507 (1978)(The concept of qualified immunity is meant to encompass mistakes of law, mistakes of fact, or mixed questions involving both.) Thus, Plaintiff has not “shown” that the law regarding medical indifference was clearly established in April 2014 such that these officers are not entitled to qualified immunity at this stage of the proceedings.

Qualified Immunity/Establishing Constitutional Violation

The law is well settled in the Eleventh Circuit that claims involving the mistreatment of arrestees, or pretrial detainees in custody, invoke the protection of the Fourteenth Amendment’s Due Process clause. *Cottrell v. Caldwell*, 85 F. 3d 1480 (11th Cir. 1996). In order to prevail on a claim of deliberate indifference, Plaintiff must show: (1) that Mr. Green had a serious medical

need; (2) that the officers deliberately disregarded that need; and (3) causation between the officers' indifference and Mr. Green's injury. *Mann v. Taser International*, 588 F. 3d 1291, 1306-07 (11th Cir. 2009). A serious medical need is one that has been diagnosed by a doctor as mandating treatment **or** is so obvious that even a layperson would recognize the necessity of a doctor's attention. *Hill v. Dekalb Regional Youth Detention Center*, 40 F. 3d 1176, 1186 (11th Cir. 1994). Regarding the objective component of a medical indifference claim, Defendants concede that Mr. Green had a pre-existing diagnosis of Insulin Dependent Diabetes Mellitus and that his hypoglycemic state would constitute a serious medical need; however the question for this Court is not whether the condition existed, but rather whether the Amended Complaint demonstrates that the manifestations of hypoglycemia were **so** obvious that Defendant Officers should have known they needed to secure medical treatment instead of trying to arrest Mr. Green.

Florida Statutes § 316.193 makes it unlawful for a person to drive while their normal faculties are impaired by alcohol, any substance in § 877.11 or any drug listed in Chapter 893.⁶ Officer Portman responded to a 911 call reporting erratic driving, which implicated a possibly impaired driver. Although Plaintiff alleges that the 911 caller speculated that the person could be in medical distress; he was still an impaired driver to the extent that his medical distress affected his normal faculties. Officer Portman witnessed the vehicle up on the curb of the wrong side of the road. [C 17] Officer Portman witnessed the vehicle fail to maintain a stopped status when his emergency equipment was activated even though most people would understand it to mean that you need to stop and not drive away. After driving away, Officer Portman witnessed the vehicle

⁶ F.S. § 316.193: A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if the person is driving or in actual physical control of a vehicle within the state and; (a) the person is under the influence of alcoholic beverages, any chemical substance set forth in s. 877.111, or any substance controlled under Chapter 893, when affected to the extent that the person's normal faculties are impaired.

continue to drive on the wrong side of the road even though oncoming traffic would have been a clue to a person with normal faculties that they were obviously on the wrong side of the road. [AC 18, 19] Officer Portman witnessed the vehicle drive head-on into oncoming traffic and impact two (2) cars. [AC 20] Thereafter, Officer Portman dealt with a driver who was incoherent, refused to get out of the car, and physically resisted efforts to remove him from the car. [AC 22, 23, 25] Thus, Mr. Green's driving actions, behavior, and lack of compliance established the reasonable probability that he was an impaired driver.

Plaintiff contends that Mr. Green was not showing "signs of intoxication" [AC ¶28]; however Mr. Green's driving actions, inability to follow simple commands; resistance, incoherence, "slurred speech"⁷; and confusion are all consistent with impairment. Thus, short of being told by Mr. Green that he was in diabetic distress or seeing some other indicator (i.e. medical alert bracelet); there would be no way for an officer to automatically conclude that the person was medically impaired rather than chemically impaired. Moreover, hypoglycemia is not a condition that can be assessed by just looking at a person, this is especially so where the physical manifestations of low blood sugar are virtually indistinguishable from signs of impairment. Moreover, even if Mr. Green did not exhibit signs of alcohol impairment, e.g. smell of alcohol or glassy eyes, there was still the reasonable probability that he was impaired by illicit drugs, controlled substances, narcotic drugs, prescription medications, or even bath salts. Under these circumstances, it was objectively reasonable that Officer Portman failed to immediately recognize that a medical issue was causing the unlawful conduct. Further, reasonable officers under the same circumstances could have come to the same conclusion. The objective component of a medical indifference claim requires a demonstration that the "serious medical need" be one that *even* a lay person would easily recognize. When Mr. Green went limp and lost

⁷ As alleged in paragraph 23 of the Amended Complaint.

consciousness it was obvious he needed medical assistance; however, prior to that, it was not. Therefore, if a lay person would not have easily recognized the serious medical need before the loss of consciousness, then the Court cannot hold these officers to any heightened standard of recognition. Similarly, if a lay person could not have looked at Mr. Green and determined that he was experiencing diabetic complications, then the Court cannot hold the officers to any heightened standard of medical recognition. Or stated differently, if a lay person could have also presumed Mr. Green was merely impaired before he lost consciousness, then the officers did not act unreasonably.

Plaintiff contends that the 2 minute delay of either recognizing the need for medical intervention, or calling for it, worsened Mr. Green's condition and the delay establishes deliberate indifference.⁸ The Eleventh Circuit has found deliberate indifference **only** in cases where there is actual knowledge of the need for medical care **and** the delay, in securing such care, is intentional. *Adams v. Poag*, 61 F. 3d 1537, 1543-44 (11th Cir. 1995) To demonstrate deliberate indifference, Plaintiff must show: (1) that the officers had subjective knowledge that there was a risk of serious harm to the Plaintiff (i.e. awareness of the facts from which the inference could be drawn and actually drawing the inference); (2) disregard of the risk; and (3) conduct that is more than gross negligence.⁹ *Bozeman v. Orum*, 422 F. 3d 1265, 1272 (11th Cir. 2005). Alternatively, a Plaintiff can show deliberate indifference by showing that an **excessive** delay in receiving medical care worsened the condition. *Pourmoghani-Esfajani v. Gee*, 625 F. 3d 1313 (11th Cir. 2010)(delay of 2-5 minutes is insufficient to show deliberate indifference.) Here, the facts do not show that these officers **intentionally** deprived Mr. Green of necessary

⁸ Defendants contend that where the Plaintiff fails to establish the objective component of this claim, the subjective component must also fail. Therefore, this section of argument is made assuming the Court finds the Complaint sufficiently establishes the objective component.

⁹ Mere negligence will not suffice to support the conduct necessary for the subjective component. *McElligot v Foley*, 183 F. 3d 1248, 1255 (11th Cir. 1999).

medical care. As previously argued, once it was obvious he needed medical intervention, medical intervention was requested. Even assuming, Officer Portman called for medical assistance between 4:40 p.m. – 4:42 p.m. (*during his initial interaction with Mr. Green*), the Complaint demonstrates that there was a 7 minute delay, **after** his request for medical assistance, over which Officer Portman had no control.¹⁰ Thus, even if Officer Portman called for medical assistance sooner, the Court cannot say it would have taken TFR less than 7 minutes to arrive. The Amended Complaint does not demonstrate that: (1) these officers had objective knowledge that Mr. Green was hypoglycemic; and (2) intentionally delayed medical care while having full knowledge that untreated hypoglycemia was likely to result in Mr. Green’s death or other serious medical consequences. Plaintiff has not raised the right to relief for a Fourteenth Amendment violation above the speculative level because the ultimate facts do not show that these officers ***unreasonably delayed***, or ***unreasonably denied***, medical care to Mr. Green.

IV. § 1983 EXCESSIVE FORCE - COUNTS VI AND VII

Plaintiff asserts that the force used against Mr. Green consisted of removing him from the car, taking him to the ground, pinning, restraint and handcuffing. The Amended Complaint expounds on the original claims in paragraphs 103 and 111 by asserting that the pinning and restraint was excessive “when it was clear” that Mr. Green was being deprived of oxygen. These additional allegations still fail because the fact that Mr. Green stopped breathing is not an indication that unreasonable force was used. There are no allegations that Mr. Green loudly gasped for breath, gagged, coughed, sputtered, or verbalized in any way that he could not breathe. There are no allegations that Defendant Officers sat on Mr. Green. There are no allegations that Mr. Green was placed in a chokehold. There are no allegations that multiple

¹⁰ In paragraphs 42 and 47, the Complaint alleges Officer Portman called dispatch for a medical response at 4:45 p.m., TFR was dispatched at 4:48 p.m. and TFR arrived at 4:52 p.m. Therefore, there was a three (3) minute delay between Portman’s request and TFR being summoned and a four (4) minute delay between dispatch and TFR arrival.

officers piled on top of Mr. Green. Thus, Plaintiff alleges, but does not show, that it would have been clear to Defendant Officers that Mr. Green could not breathe as they were trying to restrain him. The Amended Complaint alleges that even after Mr. Green was handcuffed, he was still being restrained. The Complaint implies that continued restraint of Mr. Green was unnecessary; however, the Amended Complaint also alleges that after Mr. Green was cuffed Officer Portman tried to control Mr. Green's legs. Further, the Complaint asserts that Officer Smith left to get leg restraints and then Officer Barber tried to control Mr. Green's legs. If the officers were trying to control Mr. Green's legs; it means he was still resisting and was not completely restrained and compliant. Since Defendant Officers did not know that Mr. Green was in medical crisis; they could not know that their efforts to overcome the resistance, by pinning and restraining, would cause Mr. Green to stop breathing. As such, the Amended Complaint still only shows that the officers were trying to take Mr. Green into custody and they used reasonable force to overcome his resistance.

The Supreme Court has recognized that the right of an officer to make an arrest also carries with it the right to use *some force* or the threat thereof. *Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L.Ed.2d 443 (1989). For that reason, "not every push or show, even if it may later seem unnecessary in the peace of the judge's chambers, violates the Fourth Amendment". *Id* at 396. The Eleventh Circuit has interpreted the Supreme Court's language in *Graham* as requiring the balancing of three factors in determine whether the force applied was reasonable. The Court must examine the need for the application of force; the relationship between the need and the amount of force used; and the extent of any injury. *Draper v. Reynolds*, 369 F. 3d 1270, 1277-78 (11th Cir. 2004).

Need for Force

In examining the need for the application of force, the Court should consider the severity of the crime, whether the suspect poses an immediate threat to the safety of the officer, and whether he is actively resisting arrest or attempting to evade arrest by flight. *Graham v. Connor*, 490 U.S. 386, 397 (1989) Plaintiff was being arrested for a criminal traffic offense, to-wit: Driving under the influence/Driving under the influence with property damage, a violation of F.S. § 316.193 or reckless driving, a violation of F.S. § 316.192¹¹. As such, some force was allowable in taking Mr. Green into custody. Further, Mr. Green failed to comply with lawful commands to exit his vehicle and physically resisted the Officer's efforts to remove him from his truck. Thus, an arrest for resisting arrest without violence, a violation of F.S. § 843.02¹², was also warranted. In sum, the need for the application of force was dictated by the fact that Mr. Green was being arrested and resisted the process. For the foregoing reasons, the need-for-force factor weighs in favor of Defendant officers. These officers did not know that Mr. Green's resistance was due to his medical issue; therefore, reasonable officers in the same position could have thought that Mr. Green was merely a non-compliant, resistant, impaired driver. Moreover, reasonable officers in the same position could have concluded that *some force* was immediately necessary to overcome the resistance.

Amount of force

Qualified immunity should only be denied at this stage to Defendant Officers if the Eleventh Circuit's case law would lead every reasonable officer in their position to conclude the

¹¹ F.S. § 316.192: (1)(a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving. (b) Fleeing a law enforcement officer in a motor vehicle is reckless driving per se. (2) Any person convicted of reckless driving shall be punished (a) upon a first conviction, by imprisonment for a period of not more than 90 days or by fine of not less than \$25 nor more than \$500, or by both such fine and imprisonment.

¹² F.S. § 843.02: Whoever shall resist, obstruct, or oppose any officer... in the lawful execution of any legal duty, without offering violence to the person of the officer shall be guilty of a misdemeanor of the first degree punishable as provided in s. 775.082.

force was unlawful. Therefore, the Court must determine whether the amount of force used was disproportionate to the need for force. The Eleventh Circuit has consistently found that *de minimis* force does not give rise to an action for excessive force. So this Court must compare the force used here, slamming to the ground, pinning and restraining, to exemplars in case law where the quantum of force used to accomplish an arrest was deemed lawful. *Post v. City of Fort Lauderdale*, 7 F. 3d 1552, 1556 (11th Cir. 1993)(court found that applying a chokehold, and pushing a handcuffed plaintiff against the wall *de minimis*); *Jones v. City of Dothan*, 121 F.3d 1456 (11th Cir. 1997)(court found that slamming the plaintiff against a wall, kicking his legs apart was *de minimis* force even when the plaintiff suffered minimal injury due to the officer's action by aggravating a previous condition from a stroke and his arthritic knee); *Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000) (court found that grabbing plaintiff from behind by shoulder and wrist, throwing him against a van, kneeing him in the back, pushing his head into the side of the van, searching groin in an uncomfortable manner, and cuffing him was *de minimis*); *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir 2002)(court concluded that grabbing plaintiff arms, jerking her out of chair, cuffing behind back and being dragged into the jail by her shirt, arm or hair was *de minimis*); *Durruthy v. Pastor*, 351 F.3d 1080, 1094 (11th Circ. 2003) (grabbing plaintiff from behind, forcing plaintiff to ground and cuffing was *de minimis*); *Woodruff v. City of Trussville*, 434 Fed. Appx. 852 (11th Cir. 2011)(court found punching plaintiff in face, pulling him from car, throwing him to pavement causing him to strike his head and cuffing *de minimis*).

The force allegedly used by Defendant officers against Mr. Green is no greater than the force described in *Durruthy* or *Woodruff* and thus was not disproportionate to the need to arrest Mr. Green and counter his resistance. In fact, the force in this case is significantly less than any of the above cited cases because these officers were still trying to gain control of Mr. Green. Further, the Amended Complaint alleges that Mr. Green was restrained for two minutes and in

that process he became unresponsive. Consequently, the Complaint does not “show” that Mr. Green was restrained or pinned for an unreasonable period of time. For that reason, qualified immunity is not defeated. Even if the Court concludes that the force was unnecessary; the Court should not find that “unnecessary force” is equivalent to “excessive force”. *Durruthy v. Pastor*, 351 F. 3d 1080, 1094 (11th Cir. 2003)(It is well established that “**some** use of force used by a police officer during a custodial arrest is necessary and altogether lawful, regardless of the severity of the alleged offense”). Eleventh Circuit precedent demonstrates that even where force could be considered unnecessary; it is not wholly unconstitutional especially when the force is used **before** the arrestee is completely restrained and compliant.

Extent of injury

In paragraphs 34 and 35, Plaintiff alleges that Mr. Green had a contusion to the right side of his face, a laceration to his right eyebrow, an abrasion on his lip, a contusion on his tongue, an abrasion to his left wrist, a contusion on his left knee, and abrasions on his right knee.¹³ Plaintiff also alleges that the force caused Mr. Green to stop breathing. The fact that Mr. Green had injuries or that he stopped breathing does not demonstrate that excessive force was used. Abrasions, lacerations, and contusions are the kind of injuries one would expect when there has been contact with, or a struggle against, asphalt. Further, the Complaint does not allege that Mr. Green had broken bones or fractures, which are the kind of injuries that could indicate the use of substantial force. Further, the Complaint does not allege that Mr. Green had injuries to his neck, back or lungs that might allow the inference that the force used to restrain him was unreasonable.

¹³ Defendants presume the details in paragraph 35 are taken from the Medical Examiner’s autopsy report. For that reason, Defendants do not address the allegation that Mr. Green had slight brain swelling as that postmortem finding would also be consistent with the fact that Mr. Green needed CPR and lack of oxygen can cause brain swelling. Thus, the slight brain swelling cannot be solely attributed to any use of force. Similarly, the allegations of extravasated blood (*blood that has left the vessel but is contained in the surrounding tissues*) in Mr. Green’s left shoulder, right shoulder, right arm and right hand are also not addressed herein because there is no allegation that these issues arose antemortem or are solely attributable to conduct by Defendant officers.

The law does not recognize an independent tort or convert an ordinary incident of arrest to an excessive force action merely because Mr. Green had injuries or the officer's actions aggravated a pre-existing condition. *Rodriguez v. Farrell*, 280 F. 3d 1341, 1352 (11th Cir. 2002); *Alderman v. McDermott*, 2004 WL 1109541 (M.D. Fla. 2004); *Martinez v. Palm Bay Police Department*, 2006 WL 1933812 (M.D. Fla. 2006). Since each of the factors above weighs in the officers' favor, Plaintiff has not shown that the use of force against Mr. Green was objectively unreasonable nor has Plaintiff shown the officers should be deprived of qualified immunity.

V. ADA/RA – COUNT VIII

Plaintiff contends that the City is liable for violations of the ADA and RA because the officers failed to accommodate Mr. Green's "disability" by immediately securing medical treatment. [FAC 118, 122, 123] Under certain circumstances, an "arrestee may state an ADA claim against a public entity based on the conduct of its arresting officers. *Bircoll v. Miami-Dade County*, 480 F. 3d 1072, 1082-86 (11th Cir. 2007). Plaintiff must show that (1) Mr. Green was a qualified individual with a disability¹⁴; (2) who was excluded from participation in, or denied the benefits of, the public entity's services **or** "otherwise was discriminated against by the public entity"; and (3) the discrimination was on the basis of the disability. *Bircoll* at 1083. Discrimination claims under the RA are governed by the same standard used in ADA cases. *Cash v. Smith*, 231 F. 3d 1301, 1305 (11th Cir. 2000). In order to recover compensatory damages under the ADA or RA, a plaintiff must demonstrate "intentional discrimination or bad faith", *Badillo v. Thorpe*, 158 Fed. Appx. 208, 214 (11th Cir. 2005), and good faith attempts to pursue legitimate ends are not sufficient to support an award of compensatory damages under the RA.

¹⁴ Insulin Dependent Diabetes is a physical impairment for ADA purposes. See 45 C.F.R, pt 84. App A,

Wood v. President & Trs. Of Spring Hill College in City of Mobile, 978 F. 2d 1214, 1219 (11th Cir. 1992)

The Eleventh Circuit has cautioned that the reasonableness of ADA accommodations, as they relate to the conduct of arresting officers are relative to the particular circumstances of the case, and the circumstances of an arrest on the roadside are different from those of an officer or school or even a police station. *Id* at 1086. See also *Vial v. Miami-Dade county*, 2014 WL 6976273. The City contends that this encounter with Mr. Green is not a scenario meant to be encompassed by the protection of the ADA/RA because: (1) the circumstances were occurring on the street and were rapidly evolving; and (2) Mr. Green had broken the law.¹⁵ The officers had to make quick decisions, and take quick action, to manage the criminal conduct and in doing so did not have the luxury of determining the reason for the criminal conduct before Mr. Green was under control. See *DeBoise v. Taser International*, 760 F. 3d 892, 899 (8th Cir. 2014)(holding that in responding to a call about a schizophrenic man who had assaulted his mother, and who was non-compliant once police arrived on scene; the officers did not have to hesitate to consider other possible actions in the course of making split-second decisions about how to best manage the criminal conduct they encountered.); *Everson v. Leis*, 412 Fed. Appx. 771, 776-777 (6th Cir. 2011)(holding in summary judgment posture that an officer's response to a call about an epileptic engaged in criminal conduct did not demonstrate a violation of the ADA); *Bates ex re Johns v. Chesterfield County, Va.* (216 F. 3d 367 (4th Cir. 2000)(holding in summary judgment posture that officer did not violate ADA when he detained and arrested autistic teenager); *Hainze v. Richards*, 207 F. 3d 795, 801 (5th Cir. 2000)(holding "Title II does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether

¹⁵ Mr. Green violated many traffic laws on the date of incident and perhaps he could have later mitigated sentencing for said offenses by explaining his illness, but the fact remains that Mr. Green broke the law.

or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life because requiring police officers to factor in whether their actions are going to comply with the ADA would pose an unnecessary risk.")

In paragraph 117, Plaintiff asserts that the officers "failed to facilitate immediate medical care when it was apparent that Mr. Green was a diabetic with a serious medical need." However, the conduct by Mr. Green was equally indicative of intoxication as it was medical distress. Certainly, nothing about Mr. Green's conduct would have told the officers that he was diabetic who was having an acute incident of low blood sugar. Mr. Green did not tell the officers that he was a diabetic, Mr. Green did not wear a medical alert bracelet indicating such condition, and Mr. Green did not have any item with him, or on his person, that declared the disability.¹⁶ Thus, there were no facts available to these officers that made it "apparent" or "obvious" that the disability existed or needed to be accommodated. In fact, the Amended Complaint asserts that only in the midst of their struggle with Mr. Green did Officer Smith notice discoloration of Mr. Green's legs that suggested that diabetes "might" be an issue.¹⁷ Since the officers did not know that Mr. Green was a diabetic; it can hardly be said that the officers intentionally denied him medical care because of it. For that reason, Plaintiff has not shown that discrimination occurred because of the disability. Ultimately, the facts demonstrate that reasonable accommodations were made for Mr. Green's medical condition¹⁸ by removing him from handcuffs, turning him over

¹⁶ Plaintiff alleges at paragraph 43 that officers Reeves and Sims found a bottle of medicine that indicated Mr. Green had a "serious medical condition", but the Plaintiff **does not** allege the medicine was for treatment of diabetes. This further demonstrates that the officers had no affirmative knowledge that the disability existed.

¹⁷ It is important to note that even if an officer correctly concluded that a person is suffering from diabetic complications, without a glucometer, and medical knowledge to interpret the results, no officer could ever know whether the person is suffering from high blood sugar (hyperglycemia) or low blood sugar (hypoglycemia).

¹⁸ Defendant, City does not contend that these measures were accommodations for diabetes (the disability). However, these measures did reasonably accommodate the fact that Mr. Green had become unresponsive.

onto his back¹⁹, calling for medical assistance, and starting CPR. Moreover, the claims in Count VIII are just a restatement of the claims already asserted in Counts I, II, III, IV and V.

For all of the reasons stated herein, Defendants request this Honorable Court to grant this Motion; dismiss the First Amended Complaint with prejudice; find that Defendant Officers are entitled to qualified immunity; enter judgment in Defendants favor; and order such other relief as the Court deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have filed the foregoing with the Clerk of Court on this 16th day of March, 2016, using the CM/ECF system which will send an electronic notice to: Paul W. Rebein, Esq. and Melody J. Manning, Esq.; Rebein Bangerter Rebein, P.A., 102 W. Whiting Street, Suite 500, Tampa, Florida 33602 (attorneys for Plaintiff).

**JULIA C. MANDELL, CITY ATTORNEY
CITY OF TAMPA, FLORIDA**

By: /s/ Ursula D. Richardson

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¹⁹ In paragraph 31, Plaintiff indicates Mr. Green was placed face down on the pavement and in paragraph 45 Plaintiff asserts that chest compressions were started. This allows the reasonable inference that the handcuffs were removed and Mr. Green was turned onto his back.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Lena L. Young, as personal
Representative of the estate of
Arthur Green, Jr., deceased,

Plaintiff,

v.

City of Tampa, Officer Anthony
Portman, and Corporal Matt
Smith,

Defendants.

Case No. 8:15-cv-00226-MSS-MAP

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS
AMENDED COMPLAINT**

Plaintiff, Lena L. Young, as personal representative of the estate of Arthur Green, Jr., deceased, files this Response to the Motion to Dismiss Amended Complaint (Dkt. 26) filed by Defendant City of Tampa and Defendant Anthony Portman and, in support of same, states and alleges as follows:

INTRODUCTION

Plaintiff filed her original Complaint alleging both civil rights violations and negligence on behalf of Defendants that resulted in Mr. Green's death after he was pulled over for erratic driving while experiencing a diabetic emergency. After taking the depositions of Defendants Portman and Smith, this Court granted Plaintiff leave to file an Amended Complaint that included additional allegations that officers' method of restraining Mr. Green in a prone position, placing weight on his back and pushing his legs toward his buttocks severely deprived Mr. Green of oxygen resulting in positional

asphyxia which caused or contributed to his death (Dkt. 24). Defendants argue that the Amended Complaint should be dismissed because it fails to state a cause of action and does not overcome the Defendant Officers' qualified immunity (Dkt. 26).

LEGAL STANDARD

As discussed below, Plaintiff's Complaint should survive Defendants' Motion to Dismiss because it contains sufficient factual matter that, if accepted as true, "state[s] a claim to relief that is plausible on its fact." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*

The Eleventh Circuit, in addressing the pleading standard under *Twombly*, has stated that "[t]his rule does not 'impose a probability requirement at the pleading stage.'" *Rivell v. Private Health Care Sys., Inc.*, 520 F. 3d 1308, 1309 (11th Cir. 2008) (citations omitted). Instead, the "standard 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence' of the required element." *Id.* at 1309-10 (citations omitted). "It is sufficient if the complaint succeeds in 'identifying facts that are suggestive enough to render [the element] plausible.'" *Id.* at 1310 (citations omitted). When considering a motion to dismiss for failure to state a claim, the "allegations in the complaint are taken as true and construed in the light most favorable to the plaintiffs." *Id.* at 1309.

ARGUMENT AND MEMORANDUM OF LAW

- I. Plaintiff has Sufficiently Stated a Claim for Wrongful Death against the City of Tampa for the actions of its officers (Counts I and II).**

Defendants first argue that the new allegations in paragraphs 58 and 65 of the Amended Complaint that Defendant Officers were negligent by restraining Mr. Green in a prone position and placing weight on his back allege intentional, rather than “accidental” acts and cannot be the basis of a negligence action because “Florida does not recognize any cause of action for the negligent commission of intentional acts” (Dkt.; 26 at 6) (citing *City of Miami v. Sanders*, 672 So.2d 46, 48 (Fla. 3d DCA 1996)).

Paragraph 58 alleges that Defendant Portman breached his duty to use reasonable care when he used “undue and unnecessary force on Decedent, improperly restrained Decedent in a prone position and placed his weight on his back” (Dkt. 24 at 11). Paragraph 65 alleges that Defendant Smith used “undue and unnecessary force on Decedent by restraining him in a prone position, allowing Defendant Smith to place his weight on Mr. Green’s back and by pushing Mr. Green’s heels toward his back” (*Id.* at 12).

Plaintiff agrees that under current Florida case law, there is no cause of action for negligent use of excessive force. *City of Miami v. Sanders*, 672 So.2d 46, 48 (Fla. 3d DCA 1996). However, “[i]f excessive force is used in an arrest, the ordinarily protected use of force by a police officer is transformed into a battery. *Id.* (citations omitted). Accordingly, Plaintiff asks this Court to construe this language in Counts I and II of the Complaint as claims for battery against Officers Portman and Smith and, if the Court deems an amendment of the pleadings is necessary, for leave to amend the Complaint to include separate counts for battery against Officers Portman and Smith.

It is well established, however, that “a separate negligence claim based upon a distinct act of negligence may be brought against a police officer in conjunction

with a claim for excessive use of force. Nevertheless, the negligence component must pertain to something other than the actual application of force during the course of the arrest. It cannot serve as the exclusive basis for liability in an excessive force claim.” *Id.* (citations omitted).

Here, Counts I and II do allege a separate negligence claim based upon distinct acts of negligence from the use of force for failure to use reasonable care in failing to timely recognize that Decedent was suffering from a medical incident or to timely call for medical personnel to evaluate and treat Decedent. (Dkt. 24 at 11-12). Florida law imposes a duty on police officers to use reasonable care to ensure the safety of persons in their custody. *Hutchison v. Miller*, 548 So. 2d 883 (Fla. 5th DCA 1989); *Ferguson v. Perry*, 593 So. 2d 273 (Fla. 5th DCA 1992). It requires that “when a person detained by the police manifests such symptoms as would place a reasonable person on notice that the arrestee is in need of medical attention, the police must take reasonable steps to obtain such care.” *Ferguson* at 277; *United States v. Stevens*, 994 So. 2d 1062, 1068 (Fla. 2008). In *Ferguson*, one of the cases cited by Defendants, the 11th Circuit reversed an award of summary judgment in favor of the sheriff even though the Court agreed with the sheriff that nothing in the record showed that the plaintiff was suffering any malady other than intoxication due to drugs. *Id.* at 277. In doing so, the Court stated:

We disagree, however, that the sheriff's belief that Bryant was under the influence of drugs precludes liability. That belief may have been unreasonable. Moreover, in addition to intoxication, the ingestion of drugs can cause death or illness giving rise to a need for medical care. **No matter what the cause, when a person detained by the police manifests such symptoms as would place a reasonable person on notice that the inmate is in need of medical attention, the police are bound to take steps that are reasonable under all relevant circumstances to obtain such care. This duty is even greater to a person whose condition is such that he is unable to adequately care for himself.**

Id. (emphasis added). Similarly, in the *Hutchinson* case, also cited by Defendants, the 11th Circuit also reversed an award of summary judgment in favor of the sheriff stating as follows:

In order for injuries to be a foreseeable consequence of a negligent act, it is not necessary that the initial tortfeasor be able to foresee the exact nature and extent of the injuries, or the precise manner in which the injuries will occur. It is only necessary that the tortfeasor be able to foresee that some injury will likely result in some manner as a consequence of its negligent act. *Lieb v. City of Tampa*, 326 So. 2d 52 (Fla. 2d DCA 1976); *Crislip v. Holland*, 401 So. 2d 1115 (Fla. 4th DCA, petition for review denied, 411 So. 2d 380 (Fla. 1981)).

Id. at 885 (citing *Budet v. K-Mart Corp.*, 491 So. 2d 1248 (Fla. 2d DCA 1986, 1251)).

In other words, it is not necessary that the officers reasonably should have known that Mr. Green needed medical assistance due to a diabetic episode – it is only necessary that the officers reasonably should have known that Mr. Green needed medical assistance period. Defendants argue that the “Amended Complaint does not demonstrate that Defendant Officers breached their duty to secure medical care for Decedent.” (Dkt. 26 1t 7). Specifically, Defendant Officers argue that “[r]egardless of whether Officer Portman should have called for medical Assistance at 4:42, rather than 4:445 p.m. (*the time dispatch made for TFR assistance at*, C ¶ 42); the fact remains that Mr. Green had access to medical care on the date of the incident” (Dkt. 26 at 7). Defendant Officers miss the point. It is not sufficient to provide medical care “on the date of the incident.” Rather, the law requires that medical care as soon as they reasonably should have known that Mr. Green needed medical care. In this case, it has been alleged that the witness who called 911 reported that Mr. Green might be having a medical condition and that Officer Portman was aware when he arrived at the scene at 4:39 p.m. that Mr. Green might be having medical condition. (Dkt. 24 at ¶¶ 15, 16). Mr. Green exhibited symptoms of

confusion and incoherence to Defendant Officers, his face was “droopy, he had a “blank stare,” had “slurred speech,” was unable to communicate with Defendant Portman and was not aggressive toward the officers. (Dkt. 24 at ¶ 23).

For nearly two minutes, Defendant Portman observed Mr. Green sitting in the driver’s seat during which time Mr. Green continued to appear confused and made no aggressive moves toward Defendant Portman. (*Id.* at ¶ 27). Nevertheless, Officer Portman called for back-up – not medical assistance – and when backup arrived the officers next chose to forcefully remove Mr. Green from his vehicle and slam him facedown on the pavement – instead of calling for medical assistance. (*Id.* at ¶ 31). Even after finally deciding to search Mr. Green’s vehicle and finding a bottle of medicine indicating that Mr. Green had a serious medical condition, there continued to be a delay until CPR chest compressions were administered to Mr. Green. (*Id.* at ¶¶ 43-45). Mr. Green’s objective physical symptoms of confusion and incoherence, his lack of physical aggression, his medicine bottle in his car, and his limp and unresponsive state, together, constitute more than sufficient information for Defendant officers to have reasonably believed that Mr. Green was diabetic and/or suffering from a serious medical need – whether he was able to say it, or not. All of these allegations are sufficiently supported by the facts alleged in Plaintiff’s Complaint and demonstrate that Defendant Officers failed to provide Decedent with medical assistance once they were aware or reasonably should have been aware that Decedent was having a medical condition.

Lastly, Defendants implicitly argue that because any delay in response by the officers was only a matter of minutes, they cannot have acted unreasonably, or their delay could not have been to Mr. Green’s detriment. When dealing with a medical emergency,

minutes matter. Each minute counts. Each minute can mean the difference between life and death. The question of whether a three minute, or a four minute, or a five minute, or a six minute delay in this scenario is unreasonable is a question of fact for the jury and is not appropriately resolved on a motion to dismiss where all facts must be construed in Plaintiff's favor.

Plaintiff has alleged sufficient facts in her Complaint that, when taken as true for purposes of a motion to dismiss, establish claims for negligence and wrongful death against and, thus, Defendants' Motion to Dismiss Counts I and II should be denied.

II. Plaintiff has Sufficiently Stated a *Monell* Claim against the City of Tampa for custom and practice of deliberate indifference/failure to train (Count III).

Defendants concede that there can be municipal liability for failure to train where the need for training is so high that the need for training is obvious and the likelihood of constitutional violations so predictable that liability attaches from a single incident. (Dkt. 26 at 8). The United States Supreme Court recognized that liability could attach under this scenario in *City of Canton v. Harris*, 489 U.S. 378, 390 n. 10 (1989) and the Eleventh Circuit applied this law in *Gold v. City of Miami*, 151 F.3d 1346, 13511 (11th Cir. 1998). For example, in *City of Canton*, the Supreme Court gave the example of the obvious need to train police officers on the use of force when the city provides its officers with guns and knows that they will be required to use them to arrest fleeing felons. 489 U.S. at 390 n. 10. The need for training of dealing with persons who have diabetes is equally obvious.

As Plaintiff alleges in her Complaint, there are approximately 29 million Americans who suffer from diabetes. (Dkt. 24 at ¶ 69). This is 29 million Americans

who may experience and exhibit the disorientation and confusion exhibited by Mr. Green in this case caused by hypoglycemia. *Id.* Because of this, there exists a plethora of training materials for police departments across this state and the nation on dealing with persons who are having diabetes emergencies. *Id.* at ¶ 70. As such, the City of Tampa was on notice that its officers must be trained in recognizing the symptoms of hypoglycemia.

In addition to this general awareness of the need for diabetes training, the Amended Complaint identifies multiple specific instances where Defendants Portman and Smith encountered people suffering from diabetic episodes:

Defendant City of Tampa was aware of the need for training its officers in how to recognize and handle members of the public who were experiencing diabetic episodes. For example, Defendant Smith had at least a half dozen occasions when he encountered someone that was having a diabetic issue while on duty at the Tampa Police Department. These experiences included: being dispatched to respond to the following calls: a) a person who was unresponsive due to a diabetic issue lying on the sidewalk; b) a person in a car at a stoplight who was unresponsive due to a diabetic issue; c) following a car that was swerving drastically on I-4 whose driver was altered and unresponsive due to having a diabetic issue and was ultimately forced off the road by the Florida Highway Patrol. Defendant Portman also had experiences where he encountered someone who was having a diabetic issue while on duty at the Tampa Police Department. These experiences included being dispatched on the following calls: a) in approximately 2012, a person who was pulled over on Bruce B. Downs Blvd. by another officer for DUI, but it was determined that he was having a diabetic incident and Tampa Fire and Rescue came and measured his blood sugar at about 320; b) two separate incidents where Defendant Portman pulled over male drivers who were driving erratically for suspected DUI, but were ultimately determined to be having diabetic issues. Upon information and belief, there have been numerous similar incidents experienced by other officers of the Tampa Police Department.

Id. at ¶ 72). Despite this awareness of the need for diabetes training, the City provided no training to Defendants Portman, Smith or any of the other officers in the Tampa Police

Department. *Id.* If, as has been alleged in this case, the City makes a conscious decision to not provide training on how to respond to a person who has diabetes, it constitutes deliberate indifference to constitutional rights.

The City argues that the allegations in the Amended Complaint are not sufficient to support a claim for municipal liability for failure to train. (*Id.* at 8). Specifically, the City alleges that the incidents identified by Plaintiff do not involve a violation of a constitutional right. (*Id.*). Granted, of the incidents found to date, the individuals were fortunate to not have been mistreated the way Mr. Green was. However, discovery is ongoing and Plaintiff seeks additional discovery on these and other cases to demonstrate that others had their constitutional rights violated as well.

In any event, this issue is not properly addressed on a motion to dismiss. Plaintiff has alleged that the need for diabetes training is obvious and that the City of Tampa was on notice of the need for such training and acted with deliberate indifference to Decedent's constitutional rights. (*Id.* at ¶¶ 68-78). This Court, on a motion to dismiss, must accept these allegations as true and, thus, deny the motion.

III. Plaintiff has Sufficiently Stated a Claim for Deliberate Indifference to a Serious Medical Need against Defendants Portman and Smith (Counts IV and V)

Deliberate Indifference to a Serious Medical Need. Defendant Officers assert that there is no pre-existing case law that provides them with a fair warning that their conduct under these facts was unconstitutional. (Dkt. 26 at 12). To the contrary, there are several circuit cases across the United States that discuss deliberate indifference of a serious medical need in the context of diabetics and arrestees, and finding that the officers were not entitled to qualified immunity for their actions. *See, e.g., Lolli v. Cnty of Orange*, 351 F. 3d 410 (9th Cir. 2003), *Ortiz v. City of Chic.*, 656 F. 3d 523 (7th Cir.

2011), *Garretson v. City of Madison Heights*, 407 F. 3d 789 (6th Cir. 2005). Unlike these cases, however, in this case, Mr. Green was already in such a diabetic state that he was unable to verbally communicate to the officers that he was a diabetic or that he needed medical care. Nevertheless, as the Ninth Circuit acknowledged in *Lolli*, “a constitutional violation may take place when the government does not respond to the legitimate medical needs of a detainee whom it has reason to believe is diabetic.” 351 F. 3d at 420 (emphasis added). The *Lolli* Court further acknowledged that:

Diabetes is a common yet serious illness that can produce harmful consequences if left untreated for even a relatively short period of time. See DIABETES IN AMERICA 5 (Maureen I. Harris et al. eds., 2d ed. 1995) (noting 10-50% mortality rate for certain acute metabolic complications from diabetes), *available at* <http://www.diabetes.niddk.nih.gov> (last visited Nov. 13, 2003); *see also Barnes v. Indep. Auto. Dealers Ass’n of Cal. Health & Welfare Benefit Plan*, 64 F. 3d 1389, 1395 n.2 (9th Cir. 1995) (“Well-known medical facts are the types of matters of which judicial notice may be taken.”) (internal quotation marks omitted). It constitutes a serious medical need.

Id. at 419.

In this case, Mr. Green exhibited symptoms of confusion and incoherence to Defendant Officers, and was not aggressive towards the officers. (Dkt. 24 at ¶¶23 -28). Officer Portman knew when he arrived at the scene that Mr. Green might be experiencing a medical condition. (*Id.* at ¶ 16). When he arrived that scene, Mr. Green’s face was “droopy,” he had a “blank stare,” his speech was “slurred,” and he was unable to communicate. (*Id.* ¶ 23). After observing Mr. Green for approximately two minutes, Defendant Portman realized that Mr. Green was not showing the typical signs of intoxication and suspected that Mr. Green could be suffering from a medical issue instead. (*Id.* at ¶28). Nevertheless, he called for back-up – not medical assistance. (*Id.* at ¶ 27 – 28). Despite these obvious, objective signs that Decedent was suffering from a

medical condition, Defendant Portman never asked Decedent if he was suffering from a medical condition or if he needed medical assistance. (*Id.* at ¶ 28). Defendant Smith arrived shortly thereafter and Defendant Portman never told him that he had taken Decedent's keys and they had no discussion as to whether Mr. Green was suffering from a medical condition or whether there was a need to restrain him (*Id.* at ¶¶ 29-30). Nevertheless, Defendant Officers chose to forcefully remove Mr. Green from his vehicle and slam him facedown on the pavement – instead of calling for medical assistance. (*Id.* at ¶¶31-32). Despite Mr. Green's objective symptoms and despite Defendant Officers' subjective beliefs that Mr. Green may have been suffering from a medical issue, Defendant Officers chose at that restrain him in a prone position, place weight on his back, push his knees toward his buttocks, and handcuff and place leg restraints on Mr. Green, pinning him to the ground, instead of calling for medical assistance. (*Id.* ¶¶ 33-38). Additional officers arrived to the scene and it was not until after Mr. Green became entirely limp and unresponsive that emergency medical personnel were called. (*Id.* at ¶¶38-42). While waiting for emergency personnel to arrive, officers on the scene finally decided to search Mr. Green's vehicle and found a bottle of medicine indicating that he had a serious medical condition. (*Id.* at ¶¶ 43-45).

Defendants argue that “Mr. Green in this case received necessary medical treatment the instant it was clear that such care was required.” (Dkt. 26 at 13). As shown above, this is not accurate given the facts of this case. But even if the Court were to find that it was reasonable for Defendants to wait as long as they did to call TFR, it was not until 4 minutes after emergency medical personnel were contacted that the officers finally began to administer CPR chest compressions to Mr. Green. (*Id.* at ¶45).

Mr. Green's objective physical symptoms of confusion and incoherence, his lack of physical aggression, his medicine bottle in his car, and his limp and unresponsive state, together, constitute more than sufficient information for Defendant officers to have reasonably believed that Mr. Green was diabetic and/or suffering from a serious medical need – whether he was able to say it, or not. Contrary to Defendants' assertion, the officers did not need "medical omniscience or physiological clairvoyance," (Dkt. 24 at 13), to see that Mr. Green was suffering from a serious medical need – they just needed to look at the person in front of them. They had subjective knowledge that there was a risk of serious harm to the Plaintiff, they disregarded that risk, and their conduct was more than gross negligence. Thus, they demonstrated deliberate indifference to Mr. Green's serious medical need. *Bozeman v. Orum*, 422 F. 3d 1265, 1272 (11th Cir. 2005).

Similarly, in *McAllister v. Price*, the Seventh Circuit was faced with an excessive force case where the plaintiff, suffering from a diabetic episode, caused a car crash. 615 F. 3d 877 (7th Cir. 2010) (affirming the denial of defendant officer's motion for summary judgment on qualified immunity grounds). Although the Court noted that it was hesitant to second-guess the snap judgments made by law enforcement personnel, the Court reached the conclusion that there was enough evidence so that a jury could infer the officer's mistaken belief that the plaintiff was intoxicated was unreasonable. *Id.* at 883. Specifically, the Court pointed out that it was apparent that the plaintiff was impaired during and after the accident, that he was observed to be convulsing or twitching, and that at least one eyewitness concluded that he was not intoxicated. *Id.* Moreover, although the officer was trained to ask if someone who appears unwell is diabetic, did not do so;

nor did he attempt to look to see if there was a medical alert necklace – he, instead, just “leapt to the conclusion that the plaintiff was intoxicated.” *Id.*

This is important because if Mr. Green was not intoxicated, the only other reasonable explanation for his symptoms is that he was suffering from a serious medical condition – one which the officers showed deliberate indifference to when they for no apparent reason delayed and delayed in calling for emergency medical assistance and further delayed in providing chest compressions. And, in determining whether an officer is deliberately indifferent, relevant factors include: “(1) the seriousness of the medical need; (2) whether the delay worsened the medical condition; and (3) the reason for the delay.” *Goebert v. Lee County*, 510 F. 3d 1312, 1327 (11th Cir. 2007).

Qualified Immunity. “A right may be clearly established for qualified immunity purposes in one of three ways: (1) case law with indistinguishable facts clearly establishing the constitutional right; (2) a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right; or (3) conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.” *Lewis v. City of W. Palm Beach*, 561 F.3d 1288, 1291-92 (11th Cir. 2009) (internal citations omitted). A judicial precedent with materially identical facts, however, is not essential for the law to be clearly established. See *Evans v. Stephens*, 407 F. 3d 1272, 1282 (11th Cir. 2005) (en banc). As discussed above, although there is not a previous case with materially identical facts, there is a broad statement of principle within the existing case law that clearly establishes a constitutional right – a right that, in this case, was disregarded and violated and, as such, Defendants are not entitled to the defense of qualified immunity.

Plaintiff has alleged sufficient facts in her Complaint that, when taken as true for purposes of a motion to dismiss, establish claims for deliberate indifference to a serious medical need against the Defendant Officers and, thus, Defendants' Motion to Dismiss these counts should be denied.

IV. Plaintiff has Sufficiently Stated a Claim for Excessive Force against Defendants Portman and Smith (Counts VI and VII).

The test for excessive force requires a balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.' *Graham v. Connor*, 490 U.S. 386, 396 (1989) (quotation omitted). "The objective reasonableness test requires careful attention to the circumstances of a particular case, including the severity of the crime, whether the suspect posed immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight." *Bursey v. Ameigh*, 2010 U.S. Dist. LEXIS 78550 at *10 (citing *Graham*, 490 at 396).

McAllister is also instructive for the Court's analysis of the excessive force claims in this case. 615 F.3d 877. In *McAllister*, when a police officer arrived at the scene, he ordered the plaintiff to turn off his ignition, but the plaintiff was unresponsive and was unable to do so or even to respond verbally due to his low blood sugar. *Id.* The officer became angry because he believed that he was dealing with a drunk driver who had caused two accidents. *Id.* at 879-880. The officer forcibly removed the plaintiff from his vehicle, threw him to the ground, applied a knee to his back and handcuffed him. *Id.* at 880. At this point, a witness suggested that the officer check the plaintiff for a medical-alert tag and, when the officer found a tag on the plaintiff's necklace indicating that the plaintiff had diabetes, the officer removed the handcuffs. *Id.* The plaintiff was

eventually diagnosed with a broken hip, a bruised lung and abrasions to his face and wrists which he attributed to the altercation. *Id.*

The plaintiff brought a Fourth Amendment unreasonable force claim pursuant to section 1983 against the defendant police officer in his individual capacity. *Id.* The defendant officer moved for summary judgment, but his motion was denied by the district court. *Id.* On appeal, the Seventh Circuit affirmed the district court's decision and, in its opinion, the Seventh Circuit discussed the three factors set forth by the Supreme Court in *Graham* to determine whether the officer's actions were objectively reasonable. *Id.* at 878.

As to the first factor, the plaintiff argued that he was involved in a traffic offense, not a serious crime. *Id.* at 883. Moreover, the plaintiff argued that even if the officer's "erroneous belief that he was intoxicated was reasonable, he would only have reason to believe that McAllister [the plaintiff] had committed a nonviolent crime resulting in no physical injuries." *Id.* at 884. As to the second factor, whether the suspect posed immediate threat to the safety of the officers or others, the plaintiff argued that he posed no threat to the officers or others. *Id.* The court found that the plaintiff had "introduced evidence to suggest that he was only semiconscious and physically unable to even turn off the ignition of his car" at the time of his encounter with the officer. *Id.* Finally, as to the third factor, the plaintiff argued that "he was unable to flee or resist [the defendant police officer] because of his diabetic episode." *Id.* In support of this claim, the plaintiff relied on witness testimony that he was "twitching" or "convulsing" and his own testimony that "he attempted to turn off the ignition but could not." *Id.* The Seventh

Circuit, in making its decision, found that the plaintiff's proffered evidence on these issues created "factual disputes not amenable to resolution on summary judgment." *Id.*

Turning to the case at bar, analysis of these factors demonstrates that Plaintiff has alleged sufficient facts to support a claim for excessive force. First, as to the severity of the crime, as in *McAllister*, Mr. Green was involved in a traffic offense, not a serious crime. And, like *McAllister*, even if the officers' erroneous belief that plaintiff was intoxicated were correct, he would only have reason to believe that he had been involved a nonviolent crime resulting in no injuries. Second, as in *McAllister*, Mr. Green posed no immediate threat to the safety of the officers or others. His truck was stopped and Officer Portman took his keys, thus preventing him from causing any more damage with the vehicle. And, like *McAllister*, Mr. Green was only semi-conscious and was unable to even remove his keys or respond to the officer's questions. Moreover, Mr. Green made no threats of violence and took no action which harmed Officer Portman or anyone else. Finally, Mr. Green did not actively resist arrest. As in *McAllister*, due to his hypoglycemic state of confusion, Mr. Green was unable to flee or resist and made no efforts to do so.

The amount of force used by the Defendant Officers was excessive. In the Amended Complaint, Plaintiff has asserted additional allegations that the force used by Defendants was excessive when they restrained him in a prone position on the ground with weight on his back and shoulder area while simultaneously pushing his legs toward his buttocks which caused him to suffer from severe oxygen deprivation and positional asphyxia and then refused to un-handcuff or get off of Mr. Green when it was clear that he was being deprived of oxygen (Dkt. 24 at ¶ 103).

Plaintiff has alleged sufficient facts in her Complaint that, when taken as true for purposes of a motion to dismiss, establish claims for excessive force and, thus, Defendants' Motion to Dismiss these counts should be denied.

V. Plaintiff has Sufficiently Stated a Claim for Violation of the Americans with Disabilities Act/Rehabilitation Act against the City of Tampa (Count VIII).

In order to state a claim under the ADA/RA, Plaintiff must show: 1) that Decedent was a qualified individual with a disability; 2) that he was discriminated against by the public entity; and 3) that the discrimination was because of Decedent's disability. 42 U.S.C. 12132.

Plaintiff has alleged each of these elements in the Complaint. (Dkt. 24 at ¶ 118-127). Defendants acknowledge that the Eleventh Circuit has held in *Bricoll v. Miami-Dade County*, 480 F.3d 1072, 10082086 (11th Cir 2007) that the ADA/RA applies to claims arising out of an arrest. (Dkt. 26 at 22). Defendants argue, however, that "this encounter with decedent is not a scenario meant to be encompassed by the protection of the ADA/RA because: 1) the circumstances were occurring on the street and were rapidly evolving; and 2) the decedent had broken the law." (Dkt. 26 at 23).

Defendants then go on to cite numerous *summary judgment* cases from other circuits holding that the ADA/RA was not violated where officers failed to make an accommodation due to "exigent circumstances" presented by criminal activity and safety concerns. *Id.* As an initial matter, it must be noted that inquiry into "exigent circumstances" is "highly fact specific and varies depending on the circumstances of each case." *DeBoise v. Taser Int'l*, 760 F.3d 892, 899 (8th Cir. 2014). As such, determination of this issue is not appropriate on a motion to dismiss where all factual allegations are construed in favor of the plaintiff.

In any event, such an analysis is inappropriate here where the police were successful at securing the scene once they removed Decedent's keys from his ignition. At that point, any "exigent circumstances" no longer existed and the police should have granted Decedent a reasonable accommodation by calling for medical assistance rather than violently removing him from the vehicle.

In this regard, the case *Schreiner v. City of Gresham*, 681 F. Supp. 2d 1270 (D. Or. Jan. 15, 2010) is on point. In *Schreiner*, the plaintiff, a diabetic, was suffering a hypoglycemic episode and a friend called the police when she was attempting to inject herself with insulin using a bent needle. *Id.* at 1273. When police officers arrived, they ordered the plaintiff to drop the needle. *Id.* At that point, the plaintiff was slipping in and out of consciousness and was unable to comply with the command and did not drop the needle. *Id.* The police officers decided to use a taser to get plaintiff to drop the needle. *Id.* At that point, plaintiff's friend pleaded for the officers not to use the taser. *Id.* The plaintiff then dropped the needle, but bent down to pick it up at which point the police tased her. *Id.*

The plaintiff in *Schreiner* filed claims for, among other things, violation of the ADA and RA, claiming that the police officers intentionally discriminated against plaintiff because of her disability and failed to reasonably accommodate her disability while providing emergency services. *Id.* at 1278. As to the intentional discrimination claim, the Court found that plaintiff could not proceed because she had no evidence that the officer "was motivated by discriminatory intent." *Id.*

As for the failure to accommodate claim, the defendants argued -- as the Defendants have argued at the case at bar -- that plaintiff could not proceed upon a

reasonable accommodation theory because “Title II does not apply to officer responses to calls prior to the officers ensuring the threat to human safety has been addressed, regardless of whether the subject has a disability.” *Id.* The district court disagreed, holding: “[o]nce the area was secure and there was no threat to human safety, the [defendants] would have been under a duty to reasonably accommodate [plaintiff’s] disability in handling and transporting him to a mental health facility.” *Id.* at 1279 (quoting *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir. 2000)). Accordingly, the district court denied the defendants’ motion for summary judgment because “at the time Officer Silva tased plaintiff, the situation was under control and rather than inflicting pain upon her, Officer Silva should have consulted with paramedics and administered medical treatment.” *Id.* The court further held that “[a] question of fact remains as to whether defendants reasonably accommodated plaintiff’s diabetes in rendering the City’s emergency services. Plaintiff may proceed with her ADA and Rehabilitation Act claims.” *Id.*

The reasoning in *Schreiner* applies here. Once the police removed Decedent’s keys from the ignition, the scene was secure and there was no threat to human safety. As such, there was no “exigent circumstances” and the police had a duty to make a reasonable accommodation by getting Decedent medical treatment rather than violently taking him to the ground, handcuffing him and holding him down for several minutes.

The *Defendants* conclude their motion by arguing that they could not have intentionally discriminated against Plaintiff because they did not have “the benefit of actual knowledge that Decedent was diabetic.” (Dkt. 26 at 24). This argument fails for two reasons. First, Plaintiff has alleged sufficient facts to support that it was “apparent”

and “obvious” that Mr. Green was not intoxicated and was suffering from a diabetic emergency: 1) when he arrived at the scene, Defendant Portman knew from the dispatch call that Mr. Green might be suffering from a medical condition (Dkt. 24 at 15-16); 2) when approached by Defendant Portman, Mr. Green “responded in a confused and incoherent manner,” his face was “droopy,” he had a “blank stare,” had “slurred speech,” and was unable to communicate with Defendant Portman (*Id.* at ¶ 23) Mr. Green “appeared confused” for nearly two minutes as he spoke to Defendant Portman, (*Id.* at ¶27); 3) Defendant Smith noticed while attempting to get leg shackles on Mr. Green that his legs were discolored and warned the other officers that Mr. Green might have diabetes (*Id.* at ¶ 36); and 4) despite Defendant Smith’s statement, Defendant Portman continued to restrain Mr. Green in a prone position with his weight on Decedent’s back and did not remove the handcuffs (*Id.* at 36)

These factual allegations are sufficient to support the allegation that Defendants knew that Decedent was suffering from a diabetic emergency and nevertheless failed to accommodate his disability. If Defendants’ argument were accepted, the police could never be held liable in this scenario unless they saw actual blood results or medical records showing that Decedent was a diabetic. Such absolute proof is not required to prove discrimination, especially on a motion to dismiss.

Regardless, as was discussed above in the *Schreiner* case, the Court found that even though there was no evidence to support a claim for intentional discrimination theory, the claim for failure to accommodate could nevertheless survive summary judgment. *Schreiner*, 681 F.Supp.2d at 1278-1279. The same is true here. Even though Defendants deny that they intended to discriminate against Decedent because of his

disability, they can still be held liable their failure to provide a reasonable accommodation of it.

Plaintiff has alleged sufficient facts in her Complaint that, when taken as true for purposes of a motion to dismiss, establish claims for violation of the ADA and RFA and, thus, Defendants' Motion to Dismiss these counts should be denied.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that Defendants' Motion to Dismiss be denied in its entirety. Alternatively, Plaintiff requests that, should the Motion to Dismiss be granted, that it be granted without prejudice so that Plaintiff may amend her Complaint. Plaintiff further requests leave to conduct discovery to establish her claims.

REQUEST FOR ORAL ARGUMENT

Plaintiff respectfully requests this Court to grant oral argument on this motion.

Dated: March 30, 2016

Respectfully Submitted,

s/ Paul W. Rebein, Esq.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of March 2016, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to:

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Tab D

17-11471-H

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

LENA L. YOUNG, AS PERSONAL REPRESENTATIVE OF THE
ESTATE OF ARTHUR GREEN, JR., DECEASED,

Plaintiff-Appellant,

v.

CITY OF TAMPA, OFFICER ANTHONY PORTMAN, AND
CORPORAL MATTHEW SMITH,

Defendants-Appellees.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
TAMPA DIVISION
THE HONORABLE MARY S. SCRIVEN**

INITIAL BRIEF OF APPELLANT LENA L. YOUNG

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TABLE OF CONTENTS

Certificate of Interested Parties	iv
Statement Regarding Oral Argument	vi
Table of Authorities	vii
Statement of Jurisdiction	1
Statement of the Issues	1
Statement of the Case	1
Procedural History	2
Statement of the Facts	2
Standard of Review	5
Summary of the Argument	5
Argument	7
I. The District Court Improperly Granted Defendant/Appellee's Motion to Dismiss For Failure to State a Claim	7
a. Plaintiff Adequately Pled Her Monell Claim Against the City of Tampa	11
b. Plaintiff Adequately Pled Her ADA and Rehabilitation Act of 1973 Claim Against the City of Tampa	16

II. The District Court Improperly Granted Defendant/Appellee’s Motion to Dismiss For Qualified Immunity_____	21
a. The Defendant Officers Were Not Entitled to Qualified Immunity for Their Deliberate Indifference to Mr. Green’s Serious Medical Need_____	25
b. The Defendant Officers Were Not Entitled to Qualified Immunity for Their Unreasonable Use of Excessive Force_____	28
Conclusion_____	30
Certificate of Compliance_____	31
Certificate of Service_____	32

CERTIFICATE OF INTERESTED PERSONS

Appellant, LENA YOUNG, as Personal Representative of the Estate of Arthur Green, Jr., deceased, through her undersigned counsel and pursuant to 11th Circuit Rule 26.1-1, hereby submits the following list of all attorneys, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

Beale, Aronica – family member of deceased;
City of Tampa – Defendant City/Employer at issue in case;
Cruikshank, Brian – counsel for Appellant;
Green, Alice – family member of deceased;
Green III, Arthur - deceased;
Green, Evelyn – family member of deceased;
Manning, Melody – counsel for Appellant;
Portman, Officer Anthony – Defendant Officer at issue in case;
Rebein, Paul – counsel for Appellant;
Richardson, Ursula D. – counsel for Appellee;
Scriven, Hon. Mary S. – District Court Judge;
Smith, Corporal Matt – Defendant Officer at issue in case;
Young, Kareem – family member of deceased;
Young, Kurt – family member of deceased;
Young, Lena L. – family member of deceased;

Young, Owen – family member of deceased.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs/Appellants, pursuant to Federal rules of Appellate Procedure 34(a) and Eleventh Circuit Rule 34-3, respectfully request an oral argument in this case. It concerns the District Court's ruling that Defendants/Appellees, City of Tampa police officers, are entitled to qualified immunity. As a result, the District Court dismissed Plaintiff's Complaint, despite specific allegations that the Defendant had knowledge that their actions violated Plaintiff's Constitutional Rights. Plaintiff submits that oral argument will assist this Court in consideration of the issues raised herein, and will assist this Court regarding the record herein.

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<i>* Gomez v. Toledo</i> , 446 U.S. 635 (1980)	9, 11, 25, 30
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800 (1982)	22, 24
<i>Jones v. Bock</i> , 549 U.S. 199 (2007)	28
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Wood v. Strickland, 420 U.S. 308 (1975) 22

United States Court of Appeals for the Eleventh Circuit

Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir. 1998) 18

Bircoll v. Miami-Dade Cnty., 480 F.3d 1072 (11th Cir. 2007) 18

Carter v. Broward Cnty. Sheriff's Dep't Med. Dep't, 558 F. App'x 919 (11th Cir. 2014). 26

Epps v. Watson, 492 F.3d 1240 (11th Cir. 2007) 23

Fils v. City of Aventura, 647 F.3d 1272 (11th Cir. 2011) 29

Gilmore v. Hodges, 738 F.3d 266 (11th Cir. 2013) 26

Gold v. City of Miami, 151 F.3d 1346 (11th Cir. 1998) 19

* *McKinley v. Kaplan*, 177 F.3d 1253 (11th Cir. 1999) 6, 9, 10, 11

Vineyard v. County of Murray, 990 F.2d 1207 (11th Cir. 1993) 14

All Other Jurisdictions

Barnett v. Mount Vernon Police Dep't, 523 Fed.Appx. 811

(2d Cir. 2013). 24, 28, 30

Bursey v. Ameigh, 2010 U.S. Dist. LEXIS 78550 (M.D. Fla. 2010) 29

<i>Field Day, LLC v. Cnty. Of Suffolk</i> , 463 F.3d 167 (2d Cir. 2006)	23, 24
<i>Gohier v. Enright</i> , 186 F.3d 1216 (10 th Cir. 1999)	20
<i>Gregory v. City of Louisville</i> , 444 F.3d 725 (6 th Cir. 2006)	18
<i>Jackson v. Inhabitants of the Town of Sanford</i> No. 94-12-P-H, 1994 WL 589617 (D.Me. Sept.23, 1994)	24
<i>Jacobs v. City of Chicago</i> , 215 F.3d 758 (7 th Cir. 2000)	24
<i>Owens v. Baltimore City State’s Attorneys Office</i> , 767 F.3d 379 (4 th Cir. 2014), <i>cert. denied sub nom. Baltimore City Police Dep’t v. Owens</i> , 135 S. Ct. 1893 (2015)	23
<i>Schreiner v. City of Gresham</i> , 681 F. Supp. 2d 1270 (D. Or. 2010).	20, 21
<i>Sharp v. City of Houston</i> , 164 F.3d 923 (5 th Cir. 1999)	12
<i>Watson v. City of Kansas City</i> , 857 F.2d 690 (10 th Cir. 1988)	12

Statutes

28 U.S.C. § 1291.	1, 14
28 U.S.C. § 1331.	1
28 U.S.C. § 1343.	1

* 42 U.S.C. § 1983. 1, 2, 8, 9, 10, 11, 12, 13, 24, 25, 26, 28

29 U.S.C. § 794(a) 2

42 U.S.C. § 12131. 2

28 C.F.R. 35.130(b)(7) 17

Rules

Federal Rule of Civil Procedure 8(a) 7

* Federal Rule of Civil Procedure 12(b)(6) 5, 7, 10, 11, 23, 24, 25, 29

Federal Rule of Civil Procedure 56. 24, 25

STATEMENT OF JURISDICTION

This Court has jurisdiction over this Appeal pursuant to 28 U.S.C. § 1291. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343, and 42 U.S.C. § 1983, because the Plaintiff alleged deprivation of a clearly established, federally protected right under the Fourteenth Amendment, Fourth Amendment, and Americans With Disabilities Act. Plaintiff/Appellant filed her notice of Appeal on April 04, 2017, after the District Court's order on March 06, 2017.

STATEMENT OF ISSUES PRESENTED TO REVIEW

- A. Whether the District Court improperly dismissed Counts III and VIII of Plaintiff's Amended Complaint for failure to state a cause of action.
- B. Whether the District Court improperly dismissed Counts IV through VII of Plaintiff's Amended Complaint on the basis of qualified immunity.

STATEMENT OF THE CASE

On April 16, 2014, Tampa Police Department responded to a 911 call reporting erratic driving by a vehicle traveling on North Central Avenue and East Idlewild Road in Hillsborough County, Florida. Arthur Green, Jr., the driver in question, was a diabetic suffering from a hypoglycemic episode. Tampa Police Department Officers pulled over the driver, who was unresponsive to their questioning as a result of his medical condition. The responding officers dragged Mr. Green out of his car, slammed him onto the ground, and attempted to forcibly

restrain him. Mr. Green, became limp, unresponsive, and stopped breathing.

Attempts at resuscitation failed, and Mr. Green passed away.

Plaintiff, Lena Young, as the wife of Arthur Green, Jr. and the Personal Representative of his Estate, initiated her complaint under 42 U.S.C. § 1983, 29 U.S.C. § 794(a), and 42 U.S.C. § 12131, and alleged that the officers' treatment of Arthur Green, Jr. violated his Constitutional Rights. (Doc. 22-1). This is an appeal from the district court's order granting the Defendants' Motion to Dismiss the case. (Doc. 26)¹.

Procedural History

Plaintiff filed her initial Complaint on February 03, 2015. (Doc. 1). Defendant City and Officers moved to dismiss the Complaint on March 02, 2015. (Doc. 9). Plaintiff moved to amend her complaint on February 19, 2016 (Doc. 22), which the district court granted on February 24, 2016. (Doc. 23). Plaintiff filed her First Amended Complaint on February 24, 2016. (Doc. 24). Defendants moved to dismiss this Complaint on March 16, 2016. (Doc. 26). The District Court granted Defendants' motion on March 06, 2017. (Doc. 37). Plaintiff now appeals that decision.

Statement of the Facts

¹ Throughout this brief, the record will be cited as "(Doc 3: Pg #.)".

On the afternoon of April 16, 2014, Arthur Green, Jr. (“Mr. Green”) drove his Lincoln pickup truck in the area of North Central Avenue and East Idlewild Road in Hillsborough County, Florida. (Doc. 24: 3-4). Julie Rose observed that Mr. Green began to drive erratically and called 911 to report this behavior. (Doc. 24: 4). City of Tampa Police Officer Anthony Portman responded to a dispatch call regarding Mr. Green’s driving at approximately 4:39 p.m. (Doc. 24: 4). The dispatch call informed Officer Portman that Mr. Green might be having a medical emergency. (Doc. 24: 4). Mr. Green’s truck slowed down while headed southbound on Central Avenue, but in the northbound lane, ultimately colliding with two northbound vehicles. (Doc. 24: 5). His truck came to a complete stop with the front of his vehicle facing southbound near the intersection of Idlewild Avenue. (Doc. 24: 5).

Officer Portman approached Mr. Green around 4:40 p.m., and asked Mr. Green to step out of his vehicle. (Doc. 24: 5). Officer Portman noted that Mr. Green’s face was droopy, that he had a blank stare, and that his slurred speech made communication difficult. (Doc. 24: 5). Officer Portman removed the keys from the ignition. (Doc. 24: 6). Officer Portman told Mr. Green to get out of the car, but Mr. Green remained in the driver’s seat and asserted that he had done nothing wrong. (Doc. 24: 6). Officer Portman tried to forcibly remove Mr. Green

from the vehicle. (Doc. 24:6). Mr. Green pulled away from Officer Portman's grip, fell back into his vehicle, and continued to appear confused. (Doc. 24: 6).

City of Tampa Police Corporal Matt Smith arrived at the scene at approximately 4:42 p.m. (Doc. 24: 6). Officer Portman and Corporal Smith then forcibly dragged Mr. Green from his vehicle and slammed him, facedown, on the pavement. (Doc. 24: 7). They tried to handcuff Mr. Green and place his legs in restraints. (Doc. 24: 7). Officer Portman placed his knees on Mr. Green's back in order to prevent him from standing up. (Doc. 24: 7). Corporal Smith crossed Mr. Green's leg and pushed them towards his buttocks. (Doc. 24: 7). At this time, Mr. Green exhibited wounds on his right knee, right side of his face, and his temple area. (Doc. 24: 7). His sunglasses were broken and his hat was ripped from his head. (Doc. 24: 7).

Shortly thereafter, Tampa Police Officer Steven D. Barber arrived at the scene. (Doc. 24: 8). Officer Barber secured Mr. Green's legs while Officer Smith acquired leg shackles from his vehicle. (Doc. 24: 8). As Corporal Smith walked towards his patrol vehicle, he told the other officers that Mr. Green might have diabetes. (Doc. 24: 8). Mr. Green then became limp, unresponsive, and stopped breathing. (Doc. 24: 8). At approximately 4:44 P.M., Officer Portman first noted that Mr. Green may be having a diabetic issue. (Doc. 24: 8). At 4:45 p.m., one of

the officers alerted their dispatch system that they needed Tampa Fire and Rescue assistance. (Doc. 24: 9).

While Officer Portman, Officer Barber, and Corporal Smith waited for Fire Rescue's arrival, several more police officers arrived at the scene. (Doc. 24: 9).

Two of these officers searched Mr. Green's truck and found medication that indicated Mr. Green suffered from a serious medical condition. (Doc. 24: 9). At 4:48 p.m., the officers attempted to use CPR to resuscitate Mr. Green. (Doc. 24: 9).

Tampa Fire Rescue arrived at the scene at 5:52 p.m., and immediately attempted to resuscitate Mr. Green and administer Dextrose. (Doc. 24: 9). Tampa Fire Rescue transported Mr. Green to St. Joseph's Hospital, where emergency personnel assumed his care at 5:15 p.m. (Doc. 24: 9). Resuscitation attempts were unsuccessful, and hospital personnel pronounced Mr. Green dead at 5:34 p.m.

Standard of Review

Final orders granting a 12(b)(6) motion for failure to state a cause of action are reviewable de novo, "construing the complaint in the light most favorable to the plaintiff and accepting as true all facts which the plaintiff alleges." Day v. Taylor, 400 F.3d 1272, 1275 (11th Cir. 2005). Rulings on questions of immunity are reviewable de novo. Kesinger ex rel. Estate of Kesinger v. Herrington, 381 F.3d 1243, 1247(11th Cir. 2004).

SUMMARY OF THE ARGUMENT

The District Court granted Defendant's Motion to Dismiss Counts III and VIII of Plaintiff's Amended Complaint for failure to state a cause of action upon which relief may be granted. The Federal Rules of Civil Procedure require only a "short and plain statement of the claim showing that the pleader is entitled to relief." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Count III is a *Monell* claim against the City of Tampa. It alleges that the City violated Mr. Green's constitutional rights while acting under the color of state law. Those are the only two allegations that a plaintiff must plead in order to survive a motion to dismiss. *McKinley v. Kaplan*, 177 F.3d 1253, 1257-58 (11th Cir. 1999). Count VIII alleges that the City of Tampa violated the Americans with Disabilities Act and the Rehabilitation Act of 1973. This Count stated that Mr. Green suffered from diabetes, the City of Tampa discriminated against him because of this disability, and this discrimination caused Mr. Green to suffer injuries that caused his death. Nothing more is needed to plead a violation of the ADA and Rehabilitation Act.

The District Court granted Defendant's Motion to Dismiss Counts IV-VII of Plaintiff's Amended Complaint on the basis of qualified immunity. Counts IV and V alleged that City of Tampa Police Officers were deliberately indifferent to Mr. Green's serious medical need for diabetes medication. Plaintiff's Amended Complaint alleged that the officers were subjectively aware of Mr. Green's diabetes, whether through the dispatch call or their own observations of Mr. Green,

and that their inaction constituted deliberate indifference to his medical need, in violation of the Fourteenth Amendment. Counts VI and VII alleged that City of Tampa Police Officers used unreasonably excessive force while they detained Mr. Green. The Complaint alleges that Mr. Green did not actively resist arrest and posed no threat to the officers' safety. Dismissing these counts on the basis of qualified immunity was improper at this stage of the litigation.

ARGUMENT

The party that moves to dismiss a complaint, pursuant to Rule 12(b)(6), bears an extremely high burden to prove that the non-movants allegations are not plausible. *See Conley*, 355 U.S. at 47-48. The Defendant/Appellees did not meet this burden, and the District Court improperly granted their motion to dismiss Plaintiff's Amended Complaint.

I. THE DISTRICT COURT IMPROPERLY GRANTED DEFENDANT/APPELLEE'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Federal Rule of Civil Procedure 8(a)(2) provides that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47. The complaint does not need detailed factual allegations, but must provide "more than labels and conclusions . . ." because "a formulaic recitation of the elements of a cause of

action will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). However, a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely.” *Scheur v. Rhodes*, 416 U.S. 232, 236 (1974). This is because, at the motion to dismiss stage, the court must assume that all the facts alleged in the complaint are true. *See Conley*, 355 U.S. at 45-46. (holding that the Supreme Court must “follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”).

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting *Twombly*, 550 U.S. at 570). This is not a “‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Ashcroft*, 556 U.S. at 679. The Court does not accept legal conclusions in a complaint, but must deny a motion to dismiss where a complaint states a “plausible claim for relief.” *Ashcroft*, 556 U.S. at 679. This analysis is a “context-specific task that requires the reviewing court to infer more than the mere possibility of misconduct.” *Ashcroft*, 556 U.S. at 679.

“By the plain terms of § 1983, two -- and only two -- allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege

that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.” *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). In the Eleventh Circuit, these are the only two allegations that plaintiffs must plead in order to survive a motion to dismiss. *See McKinley v. Kaplan*, 177 F.3d 1253, 1257-58 (11th Cir. 1999) (“In order to state a cause of action under § 1983, the plaintiff must allege only two things: (1) some person has deprived him or her of a federal right; and (2) that he or she acted under color of state law.”)

In *McKinley*, Miami-Dade County removed the plaintiff from the County’s Film, Print, and Broadcast Advisory Board because the plaintiff publically criticized the County’s position on Miami-Cuba relations. *McKinley*, 177 F.3d at 1254. The plaintiff filed suit, pursuant to 42 U.C.S. § 1983, and claimed that this removal violated her right to free speech, as incorporated against the states by the Fourteenth Amendment. *McKinley*, 177 F.3d at 1255. Plaintiff’s initial complaint requested that the County reinstate plaintiff to her previous position on the Board. *McKinley*, 177 F.3d at 1255. The County moved to dismiss the complaint for lack of subject matter jurisdiction, claiming the issue was moot because, by local law, the plaintiff could not reassume a position she had previously left. *McKinley*, 177 F.3d at 1255. The district court granted Defendants’ motion and dismissed plaintiff’s claim with prejudice, citing that “it is unlikely that Plaintiff’s Amended

Complaint could survive dismissal pursuant to Rules 12(b)(6) and 9 of the Federal Rules of Civil Procedure.” *McKinley*, 177 F.3d at 1257.

This Court overruled the District Court’s decision, noting that the “heightened requirements of particularity on complaints in certain types of cases has no application to civil rights actions under 42 U.S.C. § 1983.” *McKinley*, 177 F.3d at 1257. Because the plaintiff pleaded that the County violated a federal right, and that the County acted under color of state law, the complaint “was not susceptible to dismissal under Rule 12(b)(6).” *McKinley*, 177 F.3d at 1258.

In the present case, the District Court granted Defendant/Appellee’s Motion to Dismiss Counts III and VIII of Plaintiff’s Amended Complaint for failure to state a cause of action upon which relief may be granted. (Doc. 37). In Count III, the plaintiff alleged that the City of Tampa, while acting under color of state law, violated Mr. Green’s constitutional rights. (Doc. 24: 13-16). In Count VIII, the plaintiff alleged that the City of Tampa violated the Americans with Disabilities Act and the Rehabilitation Act of 1973. (Doc. 24: 23-25).

The District Court’s Order ignores the presence of factual allegations in each of these Counts that “state a claim to relief that is plausible on its face,” *Ashcroft*, 556 U.S. at 662, even if it appears “that a recovery is very remote and unlikely.” *Scheur*, 416 U.S. 232. In Count III, the plaintiff alleged both requirements of a 42 U.S.C. § 1983 pleading: that the City violated a Constitutional right while acting

under the color of state law. (Doc. 24: 13-16). There are no heightened pleading requirements for this type of claim. *See Gomez*, 446 U.S. at 640. As a result, this pleading is not subject to dismissal under Federal Rule of Civil Procedure 12(b)(6). *See McKinley*, 177 F.3d at 1258.

In Count VIII, plaintiff alleged that the City of Tampa failed to adequately train its employees to deal with individuals suffering from diabetes and that this failure caused Mr. Green to suffer discrimination based on his disability. (Doc. 24: 23-25). The Complaint then states facts which, when accepted as true, demonstrate this failure and the resulting violation of Mr. Green's federally protected rights. This brief will address each of these allegations in turn and exhibit that the district court improperly granted Defendant/Appellee's motion to dismiss for failure to state a claim under 12(b)(6).

A. PLAINTIFF ADEQUATELY PLED HER MONELL CLAIM AGAINST THE CITY OF TAMPA

42 U.S.C. § 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . 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” The Supreme Court interprets the word “person” to include “municipalities and other local government units”. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 690 (1978). “Local governing bodies, therefore,

can be sued directly under § 1983 for monetary declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell*, 436 U.S. at 690. Local governing bodies may also face suit for "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels." *Monell*, 436 U.S. at 690-91.

To establish municipal liability, plaintiffs generally use one of four methods. First, they can point to an officially adopted or promulgated policy, *Monell*, 436 U.S. at 690. Second, they can use a custom or practice that is neither written nor formally adopted but is so pervasive and long-standing it has the force of law. *See e.g., Gregory v. City of Louisville*, 444 F.3d 725, 754 (6th Cir. 2006) (alleged custom of using overly suggestive show-ups); *Sharp v. City of Houston*, 164 F.3d 923, 936 (5th Cir. 1999) (finding a custom existed for transfers and demotion when officers reported misconduct); *Watson v. City of Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988) (finding a sufficient showing of the police department's custom for treating domestic violence cases lightly). Third, Plaintiffs may point to a municipality's failure to train, supervise, discipline, adequately screen, or otherwise guard their employees against committing a Constitutional violation. *See*

City of Canton v. Harris, 489 U.S. 378 (1989). Lastly, Plaintiffs can show that a final policymaker or decision maker for the entity made a decision or act that violated the Constitution, thus subjecting the governmental employer to liability under § 1983. *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83 (1989)).

Plaintiff's Amended Complaint alleges that Defendant/Appellee, City of Tampa, failed to adequately train their police officers to recognize or handle a person who is having a hypoglycemic episode. (Doc. 24: 14-15). This failure caused Mr. Green to suffer constitutional injury and, ultimately, death, because the responding officers did not know how to deal with someone like Mr. Green. (Doc. 24: 15).

In *Canton*, the Supreme Court held that the “inadequacy or police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact.” *Canton*, 489 U.S. at 387-388. To show this deliberate indifference, plaintiffs can show either that the municipality failed to provide adequate training in light of foreseeable consequences or a failure to act in response to repeated complaints of constitutional violations by its officers. *Canton*, 489 US at 397. To demonstrate the former, the Supreme Court referenced that an armed police force with the power to arrest felons should obviously be trained on the constitutional

limits on the use of deadly force. *Canton*, 489 U.S. at 390. To demonstrate the latter in the Eleventh Circuit, the plaintiff must identify a “pattern of injuries” linked to the governmental body’s practices. *McDowell v. Brown*, 392 F.3d 1283, 1291 (11th Cir. 2004).

This Court has sustained Monell claims where claimants show that governmental entities fail to adequately train its officers on the legitimate uses of force. *See Vineyard v. County of Murray*, 990 F.2d 1207 (11th Cir.) *cert. denied* 510 U.S. 1024 (1993). In *Vineyard*, the plaintiff claimed he was beaten while handcuffed, which led him to suffer a broken jaw. He alleged in his complaint that the county failed to adequately train its officers on the legitimate uses of force. *Vineyard*, 990 F.2d at 1209. At trial, the plaintiff demonstrated that the Sheriff’s Department failed to keep logs of citizen complaints against certain officers. *Vineyard*, 990 F.2d at 1212. The Department also failed to implement any policies or procedure manuals to warn officers about the proper use of force. *Vineyard*, 990 F.2d at 1212. The lack of a formal grievance system, as well as the failure to educate their officers about the proper use of force, “evidences a policy of deliberate indifference to the rights of the County’s inhabitants.” *Vineyard*, 990 F.2d at 1212.

One-off instances of inadequate training procedures will not be enough to sustain a Monell claim. *See e.g., Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell*, unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker.” *Tuttle*, 471 U.S. at 823-24. Rather, plaintiffs must point to a pattern of unconstitutional activity in order to sustain the *Monell* claim, and must demonstrate that the municipality “knew of a need to train . . . in a particular area and the municipality made a deliberate choice not to take any action.” *Gold v. City of Miami*, 151 F.3d 1346, 1350 (11th Cir. 1998).

Plaintiff’s Amended Complaint alleges that the City of Tampa failed to adequately train its officers in how to deal with diabetic individuals who suffered from hypoglycemia and other issues associated with diabetes. (Doc. 24: 14-15). The Complaint alleged that municipalities across the Country recognize the extreme prevalence of diabetes and hypoglycemia in the general public, and take steps to prepare their officers to face these individuals. (Doc. 24: 14). Specifically, the Complaint alleged that the City of Tampa knew of the prevalence of diabetes in Tampa residents through its interactions with those citizens. (Doc. 24: 14). The Complaint cites numerous other occasions where the City of Tampa dispatched officers, without adequate training, to attend to citizens who suffered from hypoglycemia and other issues associated with diabetes. (Doc. 24: 14). These examples demonstrate that the City had a policy, practice, or custom of dispatching

officers without adequate training to individuals who suffered from a known, serious medical condition, and represented deliberate indifference to the citizens the officers were sworn to protect. (Doc. 24: 14). Like the Sheriff's Department in *Vineyard*, the City of Tampa failed to implement any policies, procedures, or manuals instructing their officers in the proper method to handle citizens with diabetic episodes, despite the availability of such manuals or procedures. (Doc. 24: 14). The Complaint also alleges that, had the City adequately trained its officers in how to deal with these individuals, through the use of these available manuals, policies, or procedures, Mr. Green would have received adequate medical treatment that could have saved his life. (Doc. 24: 15). These allegations properly state a cause of action that would, if true, entitle Plaintiff to relief.

B. PLAINTIFF ADEQUATELY PLED HER ADA AND REHABILITATION ACT OF 1973 CLAIM AGAINST THE CITY OF TAMPA

Count VIII of Plaintiff's Amended Complaint alleged that the City of Tampa violated the Americans With Disabilities Act (hereinafter "ADA") and Rehabilitation Act of 1973 (hereinafter "Rehab Act"). (Doc. 24: 23). This count alleges that Mr. Green's diabetes was, at all relevant times, a disability under the definitions of both of these acts. (Doc. 24: 23). At all relevant times the City of Tampa, a public entity, received federal funds and was otherwise subject to the provisions of the ADA and Rehab Act. (Doc. 24: 23). Acting on behalf of their

employer, the City of Tampa, the police officers who restrained Mr. Green failed to make “reasonable modifications in policies, practices, or procedures when the modifications [were] necessary to avoid discrimination on the basis of a disability.” (Doc. 24: 24) (quoting 28 C.F.R. 35.130(b)(7)). This failure to act was a result of the City of Tampa’s failure to adequately train its officers on how to recognize the symptoms of hypoglycemia or other diabetic episodes, failure to adequately train its officers on what medical treatment is needed for individuals suffering from these episodes, and failure to put in place adequate protocols from when an officer encounters an individual suffering from these episodes. (Doc. 24: 24). These failures, coupled with the Officers alleged personal knowledge of Mr. Green’s condition, caused Mr. Green to suffer constitutional injury and, ultimately, death. (Doc. 24: 24-25).

The District Court dismissed this count for failing to state a claim upon which relief may be granted. (Doc. 37). Specifically, the District Court focused on the Complaint’s allegations that the responding officers failed to facilitate immediate medical care to support granting the motion to dismiss. (Doc. 37). The Court’s reasoning stated that, since the Complaint alleged inadequate medical care, Plaintiff failed to allege discrimination under the ADA. (Doc. 37).

In order to establish a violation of the ADA, a plaintiff must prove that (1) he or she is a qualified individual with a disability; (2) he or she either was

excluded from participation on or denied the benefits of a public entity's services, programs, or activities, or otherwise was discriminated against by the public entity; and (3) the exclusion, denial of benefit, or discrimination was by reason of the plaintiff's disability. *Bircoll v. Miami-Dade Cnty.*, 480 F.3d 1072, 1083 (11th Cir. 2007).

Plaintiff's Amended Complaint alleged that the City of Tampa is a public entity for the purposes of the ADA. (Doc. 24: 24). It also alleged that Mr. Green suffered from a disability as defined under the ADA, making him a "qualified individual with a disability." (Doc. 24: 24). The ADA protects qualified individuals with a disability from being subjected to discrimination by any such entity, and is not tied to directly to the services, programs, or activities of the public entity. *Bledsoe v. Palm Beach Cnty. Soil & Water Conservation Dist.*, 133 F.3d 816, 821-22 (11th Cir. 1998) (quoting 42 U.S.C. § 12132). The ADA, then, prohibits all discrimination by a public entity, regardless of the context.

In *Jackson v. Inhabitants of the Town of Sanford*, the plaintiff, who had partial right-side paralysis and slurred speech as the result of an earlier stroke, was arrested for operating a motor vehicle under the influence of intoxicating liquor or drugs. No. 94-12-P-H, 1994 WL 589617, at *6 (D.Me. Sept.23, 1994). The responding officer believed the plaintiff was drunk. *Jackson*, 1994 WL at * 2. The plaintiff was not drunk, but his physical disabilities caused him to appear to be

unsteady and confused. *Jackson*, 1994 WL at * 2. The officer arrested the plaintiff, who filed suit and alleged the defendant municipality discriminated against the plaintiff based on his disability, failed to train its police officers to recognize symptoms of disabilities, and failed to modify law-enforcement policies and procedures to prevent discriminatory treatment of disabled individuals. *Jackson*, 1994 WL at * 22-23. The municipality moved for summary judgment, which the District Court denied because the “legislative history of the ADA demonstrates that Congress was concerned with unjustified arrests of disabled persons such as [the plaintiff] alleges here.” *Jackson*, 1994 WL at * 24. The legislative history revealed that people with disabilities “are frequently inappropriately arrested and jailed because police officers have not received proper training . . .” and “[s]uch discriminatory treatment based on disability can be avoided by proper training.” *Jackson*, 1994 WL at * 24 n.12 (quoting H.R. Rep. N. 101-485, pt. 3, at 49-50 (1990), reprinted in 1990 U.S.C.C.A.N. 445, 472-73).

Plaintiff’s Amended Complaint alleges that the officers who arrested Mr. Green responded to a dispatch call reporting his erratic driving behavior, and that Mr. Green’s “face was droopy, he had a blank stare, and had slurred speech, and was unable to communicate with [Officer] Portman. (Doc. 24: 5). Plaintiff’s Amended Complaint alleged that City of Tampa Officers arrested Mr. Green because of these idiosyncrasies, which are directly tied to his disability and

condition as a diabetic with hyperglycemia. (Doc. 24: 24-25). The Complaint also alleges that the City's failure to train its officers to recognize when individuals are having a diabetic emergency directly caused the constitutional violation that Mr. Green suffered. (Doc. 24: 24). As a result, this case is identical to *Jackson*, where the court denied summary judgment because the plaintiff was unjustly arrested because of a disability.

Further, even if this Court decides that Mr. Green was lawfully arrested, due to his reckless driving, the Amended Complaint still alleged that the City unlawfully failed to reasonably accommodate Mr. Green's disability during the arrest, causing him to suffer greater injury or indignity in the process than other arrestees. *Gohier v. Enright*, 186 F.3d 1216, 1220-21 (10th Cir. 1999).

In *Schreiner v. City of Gresham*, the plaintiff attempted to inject herself with insulin while suffering from a hypoglycemic episode. *Schreiner*, 681 F. Supp. 2d 1270, 1273 (D. Or. 2010). A friend of the plaintiff called emergency services, and the officer who arrived on the scene instructed the plaintiff to drop the needle, despite being told that the Plaintiff had diabetes. *Schreiner*, 681 F.Supp. at 12763. The officer tasered the plaintiff in order to get her to drop the needle. *Schreiner*, 681 F.Supp. at 1273. The plaintiff sued under the ADA, claiming the municipality who employed the officer failed to reasonably accommodate her disability while providing emergency services. *Schreiner*, 681 F.Supp. at 1278. The district court

refused to grant the city's motion for summary judgment because the responding officer "should have consulted with paramedics and administered medical treatment" instead of arresting the plaintiff. *Schreiner*, 681 F.Supp. at 1279.

Similarly, in Plaintiff's Amended Complaint, Plaintiff alleged that, despite Mr. Green's need for medical treatment, City of Tampa Officers failed to reasonably accommodate his disability by immediately calling for medical attention. (Doc. 24: 24). On the contrary, the City of Tampa employees' dragged Mr. Green out of his car, slammed him to the ground, and forcefully restrained him while he underwent a hypoglycemic episode. (Doc. 24: 6). The officers took this action despite knowledge that Mr. Green might be undergoing a medical emergency and evidence on Mr. Green's body that he was in serious distress. (Doc. 24: 6, 7-8). These facts, if taken in the light most favorable to the Plaintiff, allege a cognizable violation of the ADA and the Rehab Act. As a result, the District Court improperly granted Defendant/Appellee's Motion to Dismiss Count VIII of Plaintiff's Amended Complaint.

II. THE DISTRICT COURT IMPROPERLY GRANTED DEFENDANT/APPELLEE'S MOTION TO DISMISS FOR QUALIFIED IMMUNITY

Supreme Court decisions have consistently "held that government officials are entitled to some form of immunity from suits for damages . . . to shield them from undue interference with their duties and from potentially disabling threats of

liability.” *Harlow v. Fitzgerald*, 457 U.S. 800, 806 (1982). Anytime a court resolves an issue of immunity involves “a balance between the evils inevitable in any available alternative . . .” because in “situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.” *Harlow*, 457 U.S. at 814-15. This balancing test thus serves to deny the affirmative defense of qualified immunity when an official “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury” *Harlow*, 457 U.S. at 815 (quoting *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). The takeaway from this test is that “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow*, 475 U.S. at 818.

The same Supreme Court that initially recognized the defense of qualified immunity also recognized its appropriateness at *summary judgment*. See *Harlow*, 475 U.S. at 818 (*emphasis added*) (“Reliance on the objective reasonableness of an official’s conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many

insubstantial claims on *summary judgment*. On *summary judgment*, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred.”). Though qualified immunity exists to shield public servants from unnecessary litigation, “summary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial.” *Crawford-El v. Briton*, 523 U.S. 574, 600 (1998).

“Within the context of a Rule 12(b)(6) motion, as there is no record beyond the complaint, the well-pleaded factual allegations in the plaintiff’s complaint are the focus of the determinations.” *Epps v. Watson*, 492 F.3d 1240, 1243 (11th Cir. 2007). The Court must look to “the defendant’s conduct as alleged in the complaint . . .” to determine the “objective legal reasonableness.” *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996). While “[a] qualified immunity defense can be presented in a Rule 12(b)(6) motion, ‘the defense faces a formidable hurdle’ and ‘is usually not successful.’” *Owens v. Baltimore City State’s Attorneys Office*, 767 F.3d 379, 396 (4th Cir. 2014), *cert. denied sub nom. Baltimore City Police Dep’t v. Owens*, 135 S. Ct. 1893 (2015) (quoting *Field Day, LLC v. Cnty. Of Suffolk*, 463 F.3d 167, 191-92 (2d Cir. 2006). The defense tends to fail at the 12(b)(6) stage because dismissal is only appropriate “if a plaintiff fails to state a claim that is plausible on its face.” *Ashcroft*, 556 U.S. at 678. In fact, “[d]ismissal under Rule 12(b)(6) is only appropriate if ‘it appears beyond doubt that the plaintiff can prove no set of facts in

support of his claim which would entitled him to relief.’” *Field Day*, 463 F.3d at 192 (quoting *McKenna*, 386 F.3d at 434. As a result, “a motion to dismiss ‘is a mismatch for immunity and almost always a bad ground for dismissal.’” *Barnett v. Mount Vernon Police Dep’t*, 523 Fed.Appx. 811, 813 (2d Cir. 2013) (quoting *Jacobs v. City of Chicago*, 215 F.3d 758, 775 (7th Cir. 2000) (Easterbrook, J., concurring in part)).

The Supreme Court agrees that a qualified immunity defense is properly presented in a Rule 56 Motion for Summary Judgment, rather than a 12(b)(6) Motion to Dismiss. *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, the Attorney General of the United States, John Mitchell, authorized a warrantless wiretap of a physics professor who was a member of an antiwar group. *Mitchell*, 472 U.S. at 513. The government intercepted numerous conversations between the professor and Forsyth. *Mitchell*, 472 U.S. at 513. When Forsyth learned that his conversations had been intercepted, he filed suit pursuant to 41 U.S.C. § 1983, alleging a Fourth Amendment violation. *Mitchell*, 472 U.S. at 515. Mitchell moved for summary judgment on the basis of qualified immunity. *Mitchell*, 472 U.S. at 515. In its decision, the Supreme Court outlined the defense of qualified immunity to state that the doctrine exists to “permit the resolution of many insubstantial claims on *summary judgment*.” *Mitchell*, 472 U.S. at 526 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982)) (emphasis added).

In Counts IV through VII of Plaintiff's Amended Complaint, she alleged that City of Tampa Police Officers, acting under color of state law, violated Mr. Green's constitutional rights to be free from excessive force and deliberate indifference to a serious medical need. (Doc. 24: 16-23). As mentioned *supra*, these allegations (that a state actor violated a federally protected right) are all that is needed to successfully plead violations of 42 U.S.C. § 1983. *See Gomez*, 446 U.S. at 640. The Defendants/Appellees moved to dismiss these Counts on the belief that the Tampa Police Officers are entitled to qualified immunity for their actions during their interaction with Mr. Green. (Doc. 26.). While qualified immunity is an affirmative defense that must be raised early on in the proceedings, courts generally refuse to dismiss cases based off this defense, preferring instead to litigate its merits at the Rule 56, summary judgment stage. Because Defendant/Appellees moved, pursuant to Rule 12(b)(6), to dismiss these counts because of qualified immunity, they face an extremely high burden to prove that "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *McKenna*, 386 F.3d at 434. Because Defendant/Appellees did not meet this burden, the district court improperly granted their Motion to Dismiss Plaintiff's Amended Complaint on the basis that the Defendant Officers were entitled to qualified immunity.

A. THE DEFENDANT OFFICERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY FOR THEIR DELIBERATE

INDIFFERENCE TO MR. GREEN'S SERIOUS MEDICAL NEED

Counts IV and V allege, respectively, that Officer Portman and Corporal Smith violated Mr. Green's Constitutional rights pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment by failing to render medical attention for Mr. Green's serious, known medical condition. (Doc. 24: 16, 18). This deliberate indifference to a serious, known, medical need falls under the umbrella of the Due Process Clause of the Fourteenth Amendment. *See Gilmore v. Hodges*, 738 F.3d 266, 271 (11th Cir. 2013). In order to "prevail on a claim of deliberate indifference, a plaintiff must show: (1) a serious medical need; (2) the defendant's deliberate indifference to that need; and (3) causation between the defendant's indifference and the plaintiff's injury." *Carter v. Broward Cnty. Sheriff's Dep't Med. Dep't*, 558 F. App'x 919, 922 (11th Cir. 2014).

Plaintiff's Amended Complaint alleged (1) Mr. Green had diabetes, (2) that the City of Tampa Police Officers knew of Mr. Green's serious medical condition but deliberately disregarded the risk of harm to the Mr. Green, and that (3) this violation caused Mr. Green to suffer constitutional injury, personal injury, and death. (Doc. 24: 16-19). Defendant/Appelles agree that Mr. Green suffered from a serious medical condition. (Doc. 37: 9). The District Court nevertheless ruled that the Complaint failed to allege that the Defendants had subjective knowledge of the serious need. (Doc. 37:13). If the officers lacked subjective knowledge, they could

not be deliberately indifferent to Mr. Green's need for medical attention. (Doc. 37: 13).

Plaintiff's Amended Complaint alleges that the dispatch call informed Officer Portman that the Mr. Green might be having a medical condition. (Doc. 24: 4). The Complaint also alleges that Officer Portman saw Mr. Green's droopy face, saw his blank stare, and noticed Mr. Green had slurred speech which made him unable to communicate. (Doc. 24:5). The Complaint alleges that, throughout this entire encounter, Mr. Green appeared confused. (Doc. 24: 6). The Complaint then alleges that, when Officer Barber arrived on the scene, Corporal Smith informed Officer Portman that Mr. Green may have diabetes. (Doc. 24: 8). The Complaint finally alleged that both Officer Portman and Corporal Smith noticed that Mr. Green became limp, unresponsive, and stopped breathing. (Doc. 24: 8). After all of this notice that Mr. Green suffered from a serious medical condition, the officers failed to render medical treatment until 4:48 p.m., nearly eight minutes into the entire incident and four minutes after the officers noted the need for medical attention. (Doc. 24: 9). On its face, then, the Complaint alleges that the Officers had subjective knowledge of Mr. Green's medical condition. Because the Complaint alleged that the failure to render medical care caused Mr. Green's injuries and ultimate death, the Complaint successfully stated a claim for deliberate indifference to a serious medical need.

However, the district court granted Defendant/Appellee's Motion to Dismiss these counts because the "allegations of Plaintiff's Amended Complaint fail to establish that a constitutional violation occurred and because the law was not clearly established." (Doc. 37: 15).

The Plaintiff is not required to anticipate an affirmative defense. *Crawford-El*, 523 U.S. at 595; *see also Jones v. Bock*, 549 U.S. 199, 215-216 (2007).

Accordingly, it is improper to dismiss a complaint on the basis of qualified immunity unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *McKenna*, 386 F.3d at 434. Though the Plaintiff conceded that there are no previously decided cases with materially identical facts, she did put forth similar cases where officers were denied qualified immunity because of their unreasonable responses to individuals suffering from diabetes. (Doc 12: 9). Even if Plaintiff's claims are ultimately unsuccessful, the immunity defense is "almost always a bad ground for dismissal." *Barnett*, 523 Fed. App'x at 813.

B. THE DEFENDANT OFFICERS WERE NOT ENTITLED TO QUALIFIED IMMUNITY FOR THEIR UNREASONABLE USE OF EXCESSIVE FORCE

Counts VI and VI allege, respectively, that Officer Portman and Corporal Smith violated Mr. Green's Constitutional rights pursuant to 42 U.S.C. § 1983 and the Fourth Amendment by using excessive force for the period of Mr. Green's

detention. (Doc. 24: 19, 21). To make out a case for excessive force, the plaintiff must allege that an officer's use of force was "objectively unreasonable in light of the facts and circumstances confronting the officer." *Fils v. City of Aventura*, 647 F.3d 1272, 1287 (11th Cir. 2011). The objective test "requires careful attention to the circumstances of a particular case, including the severity of the crime, whether the suspect posed immediate threat to the safety of the officers or others, and whether he was actively resisting arrest or attempting to evade arrest by flight." *Bursey v. Ameigh*, 2010 U.S. Dist. LEXIS 78550 at *10.

In the present case, Plaintiff has sufficiently alleged facts which support a claim for excessive force. Mr. Green was involved in a traffic offense, not a serious crime. (Doc. 24: 4). Mr. Green posed no immediate threat to the safety of the officers or others. His truck was stopped and Officer Portman took his keys, thus preventing him from causing any more damage with the vehicle. (Doc. 24: 6). Finally, Mr. Green did not actively resist arrest. The district court should view these alleged facts in the light most favorable to the plaintiff at the 12(b)(6) stage, leading to a conclusion that the officers' use of force was objectively unreasonable. *See Conley*, 355 U.S. at 45-46 The District Court, however, ruled that "the totality of the circumstances as alleged in the Amended Complaint could give an officer reason to believe that Mr. Green posed a potential risk to the safety of himself and others that he was, albeit not aggressively or violently, resisting arrest," so the

counts should be dismissed. (Doc. 37: 17). This position ignores the pleading standard, which merely requires the Plaintiff to assert facts that, if true, give rise to a constitutional violation by a state actor. *See Gomez*, 446 U.S. as 640.

The district court further ruled that these counts should be dismissed because the officers were entitled to qualified immunity. (Doc. 37: 24). As discussed *supra*, the qualified immunity defense is a mismatch for a motion to dismiss. *Barnett*, 523 Fed. App'x. at 813. However, Plaintiff did cite to a Seventh Circuit decision holding an officer was not entitled to qualified immunity for his unreasonable use of force on a detainee who was clearly suffering from diabetes. (Doc. 12: 9). The existence of case law on point suggests that the plaintiff stated a claim that was at least plausible on its face, prohibiting dismissal, at this stage, based on qualified immunity.

CONCLUSION

For the aforementioned reasons, the Plaintiff/Appellant respectfully requests this Court overturn the decision of the United States District Court for the Middle District of Florida, Tampa Division to grant Defendant/Appellee's Motion to Dismiss Plaintiff's Amended Complaint. In the alternative, if this Court decides to affirm the District Court's decision, Plaintiff/Appellant respectfully requests this Court grant leave to the Complaint to conform with the order.

CERTIFICATE OF COMPLIANCE

This is to certify that this brief complies with Federal Rule of Appellate Procedure 32(a)(7). This brief is submitted in 14-point Times New Roman font, and it contains 7,221 words.

/s/ Paul W. Rebein, Esq.

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CERTIFICATE OF SERVICE

This is to certify that on May 12, 2017, a copy of this brief was served on the following individuals as indicated below:

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