At a term of the Supreme Court of the State of New York, held in and for the County of Oneida at the Oneida County Supreme Court, 200 Elizabeth Street, Utica, New York, on the 20th day of January, 2022.

STATE OF NEW YORK
SUPREME COURT COUNTY OF ONEIDA

Michael Rose as administrator of the Estate of Jessie Rose and individually as father of Jessie Rose; Kristine Rose individually as mother of Jessie Rose,

Plaintiffs,

v.

Anthony Ellis, City of Utica,

Defendants.

DECISION AND ORDER

Index No. EFCA2018-002900
RJI No. 32-20-0240

Attorney for Plaintiffs — Woodruff Lee Carroll, P.C.
Woodruff L. Carroll, Esq.

Attorney for Defendant — City of Utica: Department of Law Corporation Counsel
Zachary C. Oren, Esq.

Merrell, C. C., J.S.C.

Plaintiffs Michael J. Rose and Christine Almas Rose bring this action asserting claims arising out of the July 14, 2013 death of their son, Jessie Lee Rose. Plaintiff's First Amended Complaint alleges State law claims for assault; battery; use excessive police force; negligence; violations of New York Constitution; vicarious liability of the City of Utica; and negligent hiring, retention, and supervision. Defendants have moved for summary judgment dismissing all causes of action.

Procedural History

On or about October 10, 2014, Plaintiff commenced an action against the Defendants City of Utica, Utica Police Department and Officer Anthony Ellis in the

United States District Court for the Northern District of New York (Case Number 6:14-CV-012511). On or about February 28, 2015, Plaintiffs filed an Amended Complaint in the federal action. Defendants thereafter filed a motion to dismiss the Amended Complaint, which was granted in part and denied in part by Memorandum-Decision and Order dated December 2, 2015. Relevant to this action, District Court dismissed with prejudice Plaintiffs' claims for violation of due process under the New York Constitution, and official capacity claims against Officer Ellis.

On October 23, 2017, Defendants filed a motion for summary judgment pursuant to FRCP 56. On April 19, 2018 the District Court entered a Memorandum-Decision and Order (hereafter "MDO") granting Defendants' motion for summary judgment on all federal claims based on qualified immunity and declining to exercise supplemental jurisdiction over the state law claims. On May 16, 2018, Plaintiffs appealed said Judgment and MDO to the United States Court of Appeals for the Second Circuit.

On October 15, 2018 Plaintiffs commenced this action in State Court. The parties agreed to stay the State Court action during the federal appeals process. On October 16, 2019, the Second Circuit issued affirmed the MDO and judgment in its entirety. Plaintiffs' petition for writ of certiorari was denied by the United States Supreme Court on February 24, 2020.

On May 14, 2020 Defendants served an answer and filed a trial note of issue in this action. The parties undertook no further discovery in the State action and rely on the record in the Federal action for the purposes of this motion.[1]

Summary Judgment, Generally

1 Although Plaintiffs' opposition papers contend that there is outstanding discovery, Plaintiffs advised the Court they are not relying on those outstanding items with respect to the summary judgment motion.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and, thus, summary judgment should only be granted "when there is no doubt as to the absence of triable issues" (Andre v. Pomeroy, 35 NY2d 361, 364 [1974]; Kolivas v. Kirchoff, 14 AD3d 493 [2nd Dept 2005]). The court's function on a motion for summary judgment is "to determine whether material, factual issues exist, not to resolve such issues" (Lopez v. Beltre, 59 AD3d 683 [2nd Dept 2009]; see also Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (Alvarez v. Prospect Hospital, 68 NY2d 320, 324 [1986]). A defendant, to prevail on a motion for summary judgment, must "tender evidence in admissible form establishing that the plaintiff is unable to prove at least one of the essential elements" of the claim (Oberkirch v. Eisinger, 35 AD3d 558 [2nd Dept. 2006] citing Terio v. Spodek, 25 AD3d 781, 784 [2006]). Moreover, "[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (Mennerich v. Esposito, 4 AD3d 399, 400 [2nd Dept 2004], quoting George Larkin Trucking Co. v. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept 1992]). The prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the Plaintiff in the pleadings (Katz v. Bell, 142 AD3d 957, 965 [2nd Dept. 2016]).

The movant's burden is a "heavy one", and the parties' competing contentions must be viewed in the light most favorable to the party opposing the motion (William J. Jenack Estate Appraisers and Auctioneers Inc. v. Rabizadeh, 22 NY3d 470, 475 [2013];

Palumbo v. Bristol-Meyers Squibb Co., 158 AD3d 1182, 1183-1184 [4th Dept. 2018]). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Ruiz v. Griffin, 71 AD3d 1112, 1115 [2nd Dept 2010], quoting Scott v. Long Is. Power Auth., 294 AD2d 348 [2nd Dept 2002]; see also Baker v. D.J. Stapleton, Inc., 43 AD3d 839 [2nd Dept 2007]).

"The moving party's 'failure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, regardless of the sufficiency of the opposing papers'" (Veba v. Restani Const. Corp., 18 NY3d 499, 503 [2012] quoting Alvarez, 68 NY2d at 324).

Summary Judgment – Collateral Estoppel – Material Facts

Defendants argue that Plaintiffs are collaterally estopped from asserting new facts on this summary judgment motion and are bound by the Federal Courts' factual determinations. Plaintiffs counter that collateral estoppel does not apply because the Federal Court considered only qualified immunity, and the State claims were never litigated in Federal Court.

A finding of collateral estoppel requires that "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." (Conason v. Megan Holding, LLC, 25 NY3d 1 [2015]).

The standard of review pursuant to CPLR 3212 is essentially the same as that pursuant to FRCP 56. Facts and inferences therefrom must be viewed in the light most favorable to the non moving party (Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,

475 US 574 [1986]). There must be no genuine issue as to any material fact and movant must be entitled to summary judgment as a matter of law (Anderson v. Liberty Lobby, 477 US 242, 247 [1986]).

Collateral estoppel applies to factual issues in a state action that are identical to issues of fact necessarily resolved in Federal Court in dismissing Plaintiff's claims pursuant to 42 U.S.C. 1983 (Johnson v. IAC/InterActive Corp, 179 AD3d 551 [1st Dept. 2020]; Russell v. New York University, 204 AD3d 577 [1st Dept. 2022]; Simmons-Grant v. Quinn Emanuel Urquhart & Sullivan, 116 AD3d 134 [1st Dept. 2014]).

District Court made extensive factual findings based on undisputed material facts supported in the record, taken from Defendants' Statement of Material Facts and disputed material facts taken from Plaintiffs' submissions (MDO page 9, fn 4). Certain facts were found by District Court but noted as unnecessary to the issue of qualified immunity. This Court will conduct an analysis of those undisputed material facts and disputed facts construed most favorably to Plaintiffs found by District Court which are relevant and material to the State Law claims. The Court notes that Plaintiffs have submitted a statement of facts in their memorandum of law which includes a number of facts for which no citation to the record is made and others which appear to cite to an appendix not before the Court on this motion.

The Court finds that collateral estoppel applies to the following facts, as found by District Court and affirmed on appeal, as identical to the issues of fact necessarily resolved by the District Court in granting summary judgment dismissing Plaintiff's §1983 claims.

The material facts found by the Federal Court are set forth in detail in the MDO, (NYSCEF Doc. 33) and are summarized as follows:

On July 14, 2013, around noon, Jessie Lee Rose ("Jessie" or the "individual") was observed discharging a firearm—which some witnesses recognized as a shotgun - into the air and ground while walking through a field in Addison Miller Park, a public park in Utica, New York. At the time, Lonnie Willis was on the park's basketball courts playing basketball with his son and daughter. Mr. Willis' daughter observed Jessie "racking the shotgun," and Jessie cleared the shotgun of a spent casing after firing his last shot in the park field. According to Mr. Willis, he and his children were the only other people in the park. The shots were heard or seen not just by Mr. Willis and his children but also by neighbors in the park's vicinity, including Thomas and Monica Rabbia, who were in the driveway of Mr. Rabbia's parents' house, Robert Maddox, who was gardening, and his wife Deborah Maddox, who was outside on the porch of their house.

After witnessing some of these shots, Mr. Willis and his children left the basketball courts, and Mr. Rabbia and Mr. Maddox called the police. Mr. Maddox went inside his home and called the Utica Police Department station, but no one answered. Mr. Rabbia "jumped" into the car with his wife and child, and, as his wife was driving the car away from the park, called 911. Mr. Rabbia was connected to the Oneida County Dispatch and stayed with the dispatcher throughout the incident. As a result of the 911 call, the Oneida County Dispatch sent Defendant Ellis to the area on a shots-fired call. While Defendant Ellis was en route, the Oneida County Dispatch advised him that there was a white male in a black shirt firing a shotgun in Addison Miller Park. The Oneida County Dispatch never advised him of the direction of the shots.

While on the phone with the 911 operator, Mr. Rabbia asked his wife to drive around the block and go back toward the park. The Rabbias reached the street

adjoining the park and stopped the car there, but Mr. Rabbia could not see the individual, believing the individual had vacated the area. The operator inquired whether Mr. Rabbia or anyone else was "in immediate danger." and Mr. Rabbia responded, "At the moment, no." The 911 operator asked Mr. Rabbia if he could see a police officer approaching, and "all of a sudden" Mr. Rabbia saw Defendant Ellis' patrol car coming toward him. The operator told Mr. Rabbia to make contact with the officer. In his deposition, Mr. Rabbia described his first contact with Defendant Ellis as follows:

> So I told [the operator] I see him. She says, flag him down, go to the officer. So I had my wife pull the car out onto York Street to basically cut him off. I jumped out of the car and waved to him. And he basically said, what's going on? I said, there is a person in the park with a gun. He goes, where? I said he was over there. He goes, where? And I said, I don't know, I don't see him now, he's over there.

Meanwhile, upon seeing the patrol car, Mr. Willis and his children returned to the basketball courts. Mr. Maddox saw the patrol car in front of his house and went outside. As Defendant Ellis was talking to Mr. Rabbia, Mr. Maddox proceeded to join them. Defendant Ellis asked where the individual was. Ms. Maddox, who was standing in her driveway, could see feet dangling from the slide in the park's jungle gym, and she pointed it out to the officer. Defendant Ellis then proceeded to the northern entrance to the park and exited his patrol car.

The parties present diverging narratives of what happened after Defendant Ellis got out of his car, but both parties agree that at some point Defendant entered the park from York Street (the street adjoining the park) using the northern gate. Defendant Ellis testified that he saw someone "either sitting or crouching behind the furthest end of the jungle gym on the tube side" and was able to determine that the individual matched the description given by dispatch, a white male wearing a black shirt.

Plaintiffs contend that Defendant Ellis could not identify Jessie when he exited his car because at that time Jessie was "sitting with his back to the charging and shooting officer." The District Court rejected this argument as unsupported by the record (MDO p.13, fn 12). In any event, Plaintiffs admit that "[s]econds later Ellis was able to identify Jessie because [Ellis] had charged into the park to the side of the gym."

Defendant Ellis testified that he said "show me your hands" repeatedly as he was walking toward Jessie. Several witnesses testified that they heard Defendant Ellis issue commands for Jessie to show his hands or drop his gun before any shooting began. Plaintiffs argued that there was insufficient time for repeated commands in the three seconds before Ellis started shooting. The Court rejected this argument as unsupported by the record (MDO p.13 fn14). Plaintiffs concede that Jessie did not react to Defendant Ellis' commands.

As Defendant Ellis approached, Jessie stood and turned, and Defendant Ellis was able to see Jessie's shotgun. There is no dispute that Defendant Ellis saw the shot gun before he fired his first shot. There are issues of fact as to the direction in which the shotgun was pointed when Defendant Ellis fired his first shot. Two witnesses, Mr. Maddox and Mr. Willis testified Jessie turned the shotgun toward his body. District Court found this testimony to be immaterial because qualified immunity shields Defendant Ellis' actions after he saw Jessie holding the shotgun (MDO p. 13 fn15).

The parties disagree about what occurred when Jessie turned to face Defendant Ellis. Defendant Ellis testified that Jessie "racked" the shotgun while he was turning. Plaintiffs assert that "Ellis is lying," but cite no evidence in support of this assertion. According to Defendant Ellis, Jessie "discharged a round and [Defendant Ellis]

immediately returned fire." By contrast, Plaintiffs assert, without any citation to the record, that Defendant Ellis ordered Jessie to drop the gun and, as Jessie was turning, Defendant Ellis fired a shot. In any event, whether or not Jessie discharged the shotgun before Defendant Ellis fired his weapon, Jessie was holding the shotgun with one or two hands when Defendant Ellis shot. The parties agree that Defendant Ellis' first shot hit the jungle gym. District Court found it is uncontroverted that Jessie did not actually shoot in Defendant Ellis' direction, but the parties dispute whether Defendant Ellis actually or reasonably believed that Jessie's shotgun pointed in the officer's direction. The Court acknowledged the dispute and assumed for the purposes of determining qualified immunity that Defendant Ellis did not perceive that a shot was fired in his direction or that the shotgun was pointed at him (MDO p. 14 fn17).

The parties agree that Defendant Ellis shot a second time shortly after the first shot that hit the jungle gym. Defendant Ellis testified that he fired his second round almost immediately. Defendant Ellis' second shot entered the dorsal side of Jessie's left hand and exited on the palm side. Relying on the opinion of his proposed expert Kevin Dix, Plaintiffs theorize that this second shot caused a "sympathetic nerve response," causing Jessie's right hand "to move/jerk setting off the [shot]gun or the [shot]gun to move and go off." In sum, whereas Defendants contend that Jessie discharged the shotgun first, followed by Defendant Ellis' two gunshots, Plaintiffs assert that Defendant Ellis fired his gun twice and that the second shot caused Jessie to discharge the shotgun. The District Court fount this difference to be immaterial to the qualified immunity analysis.

Regardless of the sequence of gunshots, both parties agree that when the second bullet struck Jessie's left hand, Jessie dropped the shotgun and fell to the

ground. Defendant Ellis then approached Jessie, kicked off the shotgun away from Jessie, secured him in handcuffs, patted him down for any other weapons, called for backup and emergency medical services, and stood guard until backup arrived. Officer Brian French arrived at the scene next and discovered that Jesse had a shotgun wound. Emergency services transported Jessie to a hospital, where he later succumbed to his injuries. The autopsy revealed that Jessie died of a shotgun wound to the abdomen.

1. Assault and Battery

Defendants seek dismissal of Plaintiffs' causes of action for assault and battery on the basis that even assuming the material facts construed most favorably to Plaintiffs, the elements of the causes of action cannot be met as a matter of law, and also based on collateral estoppel.

As a general matter, "To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, i.e., wrongful under all of the circumstances, and intent to make the contact without the plaintiff's consent." (Higgins v. Hamilton, 18 AD3d 436 [2nd Dept. 2005]).

A civil assault is like a battery, but involves the "intentional placing of another person in fear of imminent harmful or offensive contact." (Charkhy v. Altman, 252 AD2d 413, 414 [1st Dept. 1998] quoting United Natl. Ins. Co. v. Waterfront N.Y. Realty Corp., 994 F2d 105, 108 [2nd Cir.1993]).

To prevail on a cause of action for battery committed in the performance of a public duty, plaintiff must establish that defendant used excessive force (Disla v. New York, 117 AD3d 617 [1st Dept. 2014]; see generally PJI 3:4). Only such force as is reasonably believed necessary under the circumstances may be used (Holland v. Poughkeepsie, 90 AD3d 841 [2nd Dept. 2011]; see Davila v. New York, 139 AD3d 890

[2nd Dept. 2016]). Claims that law enforcement personnel used excessive force in the course of an arrest are analyzed under the Fourth Amendment and its standard of objective reasonableness (Bridenbaker v. City of Buffalo, 137 AD3d 1729, 1730 [4th Dept. 2016]). If found to be objectively reasonable, the officer's actions are privileged under the doctrine of qualified immunity (Holland v. Poughkeepsie, supra; see Higgins v. Oneonta, 208 AD2d 1067 [3rd Dept. 1994]). "The reasonableness of a particular use of force…takes into account 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officer or others, and whether he [or she] is actively resisting arrest or attempting to evade arrest by flight'" (Hernandez v. Denny's Corp., 177 AD3d 1372, 1374 [4th Dept. 2019] citing Williams v. City of New York, 129 AD3d 1066 [2nd Dept. 2015]).

The reasonableness of an officer's use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight (Lepore v. Greenburgh, 120 AD3d 1202 [2nd Dept. 2014]; Graham v. Connor, 490 US 386, 109 SCt 1865 [1989]). The decision to use deadly force will be deemed objectively reasonable if the officer has probable cause to believe that the person against whom it is used poses a significant threat of death or serious physical injury to the officer or others (Bridenbaker v. Buffalo, supra 137 AD3d 1729 [4th Dept. 2016]; Williams v. New York, supra). Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for the jury (Holland v. Poughkeepsie, supra; Harvey v. Brandt, 254 AD2d 718 [4th Dept. 1998]).

Penal Law §35.30(1)(c) likewise provides that "regardless of the particular offense which the subject of the arrest or attempted escape, the use of deadly physical

force is necessary to defend the police officer or peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force."

The essential elements of a §1983 claim for use of excessive force and State law assault and battery are substantially identical (Marcano v. City of Schenectady, 38 F Supp. 3d 238, 263 [N.D.N.Y. 2014]; Posr v. Doherty, 944 F2d 91, 94-95 [2nd Cir. 1991]; Biggs v. City of New York, 2010 WL 4628360 at 8 [S.D.N.Y. 2010]).

District Court's findings of fact on the issue of qualified immunity are in this case identical to those applicable to State law claims of assault, battery, and use of excessive force. "Qualified immunity [under 42 USC §1983] attaches when an official's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known (Kisela v. Hughes, 138 S. Ct. 1148 [2018] quoting White v. Pauly, 137 S. Ct. 548, 551 [2017]). "Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct." *Id.* (quoting Brosseau v. Haugen, 543 U.S. 194, 198 [2004]). An officer "cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in the defendant's shoes would have understood that he was violating it (Plumhoff v. Rickard, 134 S. Ct. 2012, 2023 [2014]).

In the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts (Kisela, quoting Mullenix v. Luna, 136 S. Ct. 305, 308 [2015]). Qualified immunity thus "protects 'all but the plainly incompetent or those who knowingly violate the law (Mullenix, 136 S. Ct. at

308, quoting Malley v. Briggs, 475 US 335, 341 [1986]).

District Court held under the facts in this case, viewed in the light most favorable to Plaintiffs, present the following question: whether it was clearly established, on July 14, 2013, that a police officer could not lawfully use deadly force in a situation where an armed individual had reportedly been firing a shotgun inside a public park, did not react to the approaching officer's command to drop the shotgun. and turned toward the officer while holding the shotgun in his hands. The Court found no authority, much less "clearly established" authority, holding, that such conduct would violate the Fourth Amendment. Therefore, while the Court accepted Plaintiffs' version of the facts insofar as supported by the record and viewed all of the facts in the light most favorable to the Plaintiffs, the Court only considered those circumstances that were knowable to Defendant Ellis (MDO p. 22 fn 20).

District Court granted qualified immunity to Defendant Ellis on the excessive force claim finding that there "was no requirement under existing law that an officer wait for an active shooter to shoot first." (MDO p.24). The Court concluded that "Defendant Ellis is entitled to qualified immunity because his actions did not violate clearly established law; therefore the Court does not reach the issue of whether Defendant Ellis used reasonable force in the circumstances." Applying the same "objective reasonableness" standard, as discussed in the case law above, the Second Circuit further held on appeal that: "On the undisputed facts, it was objectively reasonable for Ellis to believe that Rose posed a threat of serious physical harm to others. Existing case law supports defendants' position that an officer is entitled to use deadly force when an armed individual fails to comply with an order to put down a weapon and moves in what the officers reasonably perceives to be a threatening manner." (Rose v.

City of Utica, 777 Fed. Appx.575 [2nd Cir. 2019]).

The record reflects that Plaintiffs had a full and fair opportunity to litigate and did litigate the facts material and relevant to the excessive force claim in Federal Court, where the Second Circuit held that it was objectively reasonable for Ellis to believe that Rose posed a threat of serious physical injury to others, and are collaterally estopped from relitigating this claim in State Court. In any event, on the facts established by District Court and taken in a light most favorable to Plaintiff one could not reasonably conclude that Defendant Ellis' use of force was wrongful under all the circumstances or exceeded such force as the officer reasonably believed necessary.

2. Police Arrest/Excessive Force

Defendants contend Plaintiffs' third cause of action for police arrest/excessive force should be dismissed on the merits and on the basis of collateral estoppel.

Plaintiffs concede in their opposition papers that the "excessive force claim is dropped to the extent it overlaps Fourth Amendment claim under the New York Constitution" (NYSCEF Doc 65, p 5 of 9).

3. Negligence vs. Officer Ellis

The negligence cause of action should be dismissed because the undisputed facts establish intentional conduct and Plaintiffs failed to establish a special duty. Here, the material facts taken most favorably for Plaintiffs show Defendant Ellis' acts to be intentional and claim for assault must be dismissed insofar as it is based on allegations of negligence (Shaw v. City of Rochester, 200 AD3d 1551 [4th Dept. 2021]; Mazzaferro v. Albany Motel, Inc., 127 AD2d 374 [3rd Dept. 1987]).

Defendants also contend the negligence cause of action should be dismissed because Plaintiffs have not established that Defendants violated a special duty to Jessie

(Metz v. State, 20 NY3d 175 [2012]). Plaintiffs concede in their opposition papers that the doctrine does not apply to this claim (Carroll Affidavit p. 5, NYSCEF Doc. 65).

5. New York State Constitution Claims

Defendants contend Plaintiffs' claims under the New York State Constitution are duplicative of Plaintiffs' Fourth Amendment excessive force claim pursuant to 42 U.S.C. §1983.

Plaintiffs' Fifth Cause of Action alleges "violations of the rights of Jessie Rose under the New York Constitution as stated herein". Where, as here, Plaintiffs have an adequate Federal remedy for violation of their State constitutional rights dismissal is required (Gustafson v. Village of Fairport, 2015 WL 3439241 [W.D.N.Y.]; Corbett v. City of New York, 2013 WL 5366397 [E.D.N.Y.]; Malay v. City of Syracuse, 638 F.Supp. 2d 303, 316 [N.D.N.Y. 2009]; Richardson v. City of New York, 2015 WL 7752143 [S.D.N.Y. 2015]). District Court previously dismissed Plaintiffs' State law due process claim (MDO dated December 2, 2015, p. 22-23 NYSCEF Doc. 54).

6. Vicarious Liability – City of Utica

Plaintiffs claims for vicarious liability against the City of Utica on the basis of respondent superior are dismissed by reason of dismissal of the underlying claims.

7. Negligent Hiring, Retention and Supervision

These claims are barred as having been dismissed by the District Court pursuant to FRCP 12(b)(2), which held that to the extent that plaintiffs assert a State law claim for negligent hiring, entrustment, supervision and retention the complaint failed to state a plausible claim because it failed to allege any facts to infer the City of Utica had knowledge or notice that Officer Ellis was likely to engage in the complained of conduct (NYSCEF Doc. 54, p. 22).

8. Governmental Immunity

Defendants seek dismissal of all state law claims (Negligence, Assault, Battery) on the basis of governmental immunity due to discretionary acts. The Court does not reach this issue given its previous rulings.

9. Kristine Rose - Standing

Defendants contend Kristen Rose, the natural mother of Jessie Rose, lacks standing because she is not a named administrator. Defendants' motion dismissing the Amended Complaint as to Kristen Rose individually and as a distributee is also granted on this ground (Ambroise v. United Parcel Service of America, 143 AD3d 929, 931-932 [2nd Dept. 2016]).

In conclusion, Defendants' motion for summary judgment is granted and Plaintiff's Amended Complaint is dismissed.

The foregoing constitutes the Decision and Order of the Court.

ENTER

Dated: September 28, 2022

Hon. Charles C. Merrell
Justice of the Supreme Court

Submissions:

All documents filed under Motion number one (1) in New York State Court's Electronic Filings.