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| <b>Jones v City of New York</b>  |
| 2020 NY Slip Op 31990(U)   |
| June 22, 2020  |
| Supreme Court, New York County   |
| Docket Number: 156417/2013   |
| Judge: Dakota D. Ramseur   |
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR PART 5**

*Justice*

-----X

**INDEX NO.** 156417/2013

SANDRA CAROLINE JONES, as administrator of the  
Estate of DARRIUS HAYWARD KENNEDY, deceased,  
Plaintiff,

**MOTION DATE** 2/11/20

**MOTION SEQ. NO.** 003

- v -

CITY OF NEW YORK,  
Defendant.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Plaintiff Sandra Caroline Jones commenced this action against Defendant City of New York (the "City") to recover damages stemming from an August 11, 2012 incident in which Plaintiff's decedent Darrius Kennedy, an emotionally disturbed person, pulled a knife on NYPD officers, commencing a slow multi-block pursuit culminating in the arrival of NYPD Officers Peter Rogers and Michael Massett, who ultimately shot and killed Kennedy. Plaintiff's Complaint, as amended, alleges the following causes of action: (1) assault and battery; (2) negligence, including failure to deploy supervisory personnel and personnel capable of handling emotionally disturbed people utilizing non-lethal means and negligent hiring, training, and retention; (3) violation of Plaintiff's federal constitutional rights; (4) violation of Plaintiff's state constitutional rights; (5) punitive damages; and (6) wrongful death.

The City now moves, pursuant to CPLR 3212 and/or 3211, for judgment dismissing the Complaint, arguing: (1) that no genuine issue of facts exists as to whether officers acted reasonably in shooting Kennedy; (2) that the City is "immunized for the discretionary governmental actions of its officers"; (3) that no viable claim exists against the City for negligent failure to supervise or train the officers on the scene and/or deploy other police personnel; (4) that the causes of action under § 1983 and the New York State Constitution must fail as a matter of law; and (5) that the City cannot be held liable for punitive damages. Plaintiff opposes, arguing that material issues of fact exist with respect to whether the use of force was objectively reasonable under the circumstances. For the reasons below, the City's motion is granted in part, as detailed below.

**BACKGROUND FACTS**

On August 11, 2012 at approximately 3 p.m., NYPD Officer Jean Graf initially confronted Kennedy in Times Square, specifically the middle of the crosswalk at Seventh Avenue and Broadway and 44<sup>th</sup> Street, having allegedly observed him smoking marijuana

(*NYSCEF 69/Def Exh I [Graf EBT]* 13-16). As the confrontation escalated, nearby NYPD Officer Don Vort approached to assist Officer Graf (*Graf EBT* 18:3-12). When Officers Graf and Vort expressed their intention to place Kennedy under arrest, Kennedy refused and retrieved a knife from his pocket, which prompted Officer Vort to radio for assistance at about 3:05 p.m. (*NYSCEF 90 [Pl Affirm in Opp]* ¶¶ 13-14; *Graf EBT* 18-20). As NYPD Officer Quirk responded to the scene, Kennedy continued to brandish his knife, pace, and scream obscenities; all three officers drew their weapons (*Pl Affirm in Opp* ¶ 14; *Graf EBT* 23-25).

Kennedy back peddled, “skipping almost,” southbound on Seventh Avenue on the sidewalk with the three officers following him; at 40<sup>th</sup> Street, Graf holstered her weapon and maintained a 20-foot “zone of safety” from Kennedy (*Pl Affirm in Opp* ¶¶ 15-16; *Graf EBT* 25-28, 30, 34-44). At least 50 officers joined in pursuit of Kennedy; between 39<sup>th</sup> and 38<sup>th</sup> Streets, at least one officer deployed aerosolized mace at Kennedy, who “wipe[d] it from his eyes,” but otherwise continued to scream obscenities and, at least once, brandish the knife over his head (*Pl Affirm in Opp* ¶ 17, *Graf EBT* 34-38 59). Police officers had successfully kept civilians away from Kennedy during the pursuit, despite—as usual in Times Square—heavy pedestrian traffic (*Pl Affirm in Opp* ¶ 18; *Graf EBT* 65-67; *NYSCEF 93 [Pl Exh C/Internal Affairs Bureau Synopses]* 19; *accord City Affirm* ¶ 10).<sup>1</sup>

NYPD Sergeant Dittrich, the “impact supervisor” responsible for direct supervision of new officers in the area, heard Officer Vort radio for assistance (*NYSCEF 70 [City Exh J/Dittrich EBT]* 7-8). Sergeant Dittrich and another officer drove the command van to the scene immediately, arriving at 43<sup>rd</sup> street and, upon exiting the van, observing Kennedy with a knife acting “erratically,” *i.e.* “kind of dancing around, jumping around” (*Dittrich EBT* 10-16). Kennedy also “tied up his bandana,” which Dittrich perceived as “like a threat” (*Dittrich EBT* 13). When Dittrich sprayed Kennedy with pepper spray from about 5 to 10 feet away; to Dittrich, Kennedy’s lack of reaction to the mace was “abnormal” (*Dittrich EBT* 13-14). Dittrich endeavored to maintain the 20-foot zone of safety based on NYPD Patrol Guide protocols and procedures (*Dittrich EBT* 18).

Dittrich was not officially in command once NYPD Lieutenant Pfeffer, who held superior rank, arrived on the scene (*Dittrich EBT* 16). However, a car hit Lieutenant Pfeffer during the pursuit (*Dittrich EBT* 18). Dittrich, concerned about “an innocent civilian possibly being in the line of fire,” and aware that many of the officers on duty that day were new officers, directed officers to holster their weapons (*Dittrich EBT* 17).<sup>2</sup> At that time, only one officer was provided with a taser during a particular shift; during the subject shift, it was the Patrol Supervisor, Sergeant Pagano (*Dittrich EBT* 15-16). Dittrich twice requested a taser and, at least twice, the Emergency Services Unit (“ESU”), a specialized unit trained to respond to emotionally disturbed individuals (*Dittrich EBT* 15, 32).

Sergeant Pagano, the Midtown South Precinct supervisor who also heard Officer Vort’s radio transmission for assistance and was the only officer equipped with a taser, drove immediately to the scene with two other officers (*NYSCEF 72 [City Exh L/Pagano EBT]* 9, 15-

<sup>1</sup> For clarity, this opinion utilizes the e-filed PDF pagination rather than the handwritten pagination.

<sup>2</sup> It is unclear whether this directive was made over a radio broadcast; according to Dittrich, he “directed an officer to go around and have people holster their firearms” (*Dittrich EBT* 17).

17, 27). When they encountered traffic at 38<sup>th</sup> Street between Seventh and Eighth Avenues, the other officers exited and proceeded on foot; Pagano followed soon afterwards (*Pagano EBT* 26-28). Pagano did not arrive to the scene until after the officers had shot Kennedy; he could not recall having heard any radio transmission requesting a taser or ordering officers to holster their weapons (*Pagano EBT* 24, 29, 30, 35, 44, 49).

One of the officers with Pagano, Officer (now Detective) Alvin McCarthy, arrived at the scene and observed 50-60 officers in active pursuit of Kennedy, who had been “pretty much confined to the sidewalk” (*NYSCEF* 71 [*City Exh K/McCarthy EBT* 14-20, 31]). Kennedy appeared to Officer McCarthy to be “deranged” and “erratic,” prompting McCarthy to use pepper spray from a distance of about 15 feet (*McCarthy EBT* 16-17, 24). Officer McCarthy did not draw his weapon because he heard a radio command to hold fire; he did not, however, recall Sergeant Pagano giving instructions or being present at the scene (*McCarthy EBT* 15, 23, 27). Upon the arrival of Officers Massett and Rogers at the scene, Officer McCarthy observed Kennedy holding the knife above his head (*McCarthy EBT* 27-28).<sup>3</sup>

Officers Rogers and Massett were in their patrol vehicle at 29<sup>th</sup> Street between 6<sup>th</sup> and 7<sup>th</sup> Avenues monitoring the radio when they heard and responded, without being instructed to, to Officer Vort’s call for assistance (*NYSCEF* 67 [*City Exh G/Rogers EBT*] 19-20; *NYSCEF* 68 [*City Exh H/Massett EBT*] 36). Rogers was aware of the Patrol Guide protocol instructing officers dealing with an emotionally disturbed person to attempt to isolate and contain the disturbed individual within a zone of safety until the arrival of a patrol supervisor and ESU personnel (*Rogers EBT* 88-89). Officer Rogers, who was driving, could not recall hearing any radio broadcast that Kennedy was an emotionally disturbed person, that weapons should be holstered, or any ESU request (*Rogers EBT* 36, 39, 41, 70).

When Officers Rogers and Massett arrived at the scene, Officer Rogers pulled the vehicle “halfway on the sidewalk, halfway off,” ostensibly to prevent Kennedy’s further movement down 7<sup>th</sup> Avenue and “to create a barrier, stop ... people from coming up” (*Rogers EBT* 50-51). Rogers witnessed about “five, six, seven” officers spray pepper spray at Kennedy, who “knocked it off like it was water” (*Rogers EBT* 47-48). Rogers, who had positioned himself behind a Transit car, encountered Kennedy, at that point within the 20-foot zone of safety (*Rogers EBT* 72). According to Rogers, Kennedy “put his...left hand up in the air, almost as like a...shield,” the knife still in his right hand (*Rogers EBT* 72).

The testimony of Officers Rogers and Massett differ in key respects. For example, Rogers testified to the presence of ESU on the scene, in the form of an ESU “Hercules” vehicle attempting to knock Kennedy down with its door (*Rogers EBT* 41-53). By contrast, Massett denied seeing any ESU or unmarked vehicle attempting to disarm Kennedy (*Massett EBT* 45-46).

Similarly, Rogers never observed Kennedy “run at somebody” or make an aggressive move toward officers, but did observe Kennedy with the knife—according to Rogers, approximately a 10 to 12-inch blade— “above his head. ... He would swing the knife in a threatening manner” (*Rogers EBT* 72-77). Massett testified that “[Kennedy] was lunging towards

<sup>3</sup> Conflict w/ IAB interview?

me and my partner” (*Masset EBT* 35). Asked whether Kennedy lunged, Rogers’ testimony was more tentative: “[Kennedy] came at me, yes. He ... changed his direction and came towards me” (*Rogers EBT* 140).

Officer Rogers acknowledged that a video of the incident depicts police officers already on the scene working to maintain a zone of safety (*Rogers EBT* 121; *NYSCEF* 65, 106). Officer Massett, asked why he did not maintain that 20-foot zone of safety, responded that “he didn’t want to walk to Battery Park.” Massett assumed Kennedy was “guilty”; that is, “someone running from the police with a knife in their hand; you assume they did something wrong” (*Masset EBT* 20). Without supervisor approval, Massett and Rogers fired at least twelve times, killing Kennedy.

## DISCUSSION

### I. Threshold determinations

#### A. Hearsay (newspaper articles/IAB reports and transcripts)

The City argues in reply that the Court may not consider any hearsay evidence accompanying Plaintiff’s opposition, including newspaper articles and IAB transcripts/reports.<sup>4</sup> Although both are indeed hearsay, “hearsay may be used to defeat summary judgment as long as it is not the only evidence submitted in opposition” (*Rugova v Davis*, 112 AD3d 404, 404 [1st . Dept 2013]). As the City recognizes—indeed, (*City Reply Affirm* ¶ 10), Plaintiff deposed six officers. That testimony alone, as discussed in detail below, highlights issues of fact reserved for a jury’s determination.

To the extent that the City also argues in reply that Plaintiff’s “negligent supervision” theory of liability can be dismissed because all arguments related to that theory are premised upon—in the City’s estimation—inadmissible IAB transcripts of Captain Coates and Lieutenant Pfeffer, Plaintiff submits the transcripts in opposition to dismissal, which is permitted, not in support of summary judgment on the Complaint (*City Reply Affirm* ¶ 10). Accordingly, and for the reasons above, they may be considered.

#### B. Expert affidavit

The City also argues that the Court should not consider the affidavit of Plaintiff’s expert Joseph Pollini, a retired New York City Police Officer with 33 years of experience who reviewed voluminous materials related to this action (*NYSCEF* 91 [Pl Exh A]) because Plaintiff filed the note of issue without identifying Pollini pursuant to CPLR 3101(d) and despite the City’s demand, which was served with the City’s Answer six years earlier (*City Reply Affirm* ¶ 8, citing

<sup>4</sup> The City’s argument here is curious. The City argues that, despite the fact that IAB is a unit within the NYPD, “the transcripts were not documented by any member of service, are not sworn testimony, and do not constitute a business record of the NYPD” (*City Reply Affirm* ¶ 10). Thus, the City argues, the transcripts are not “official police documents.” The City does not identify any specific inaccuracies in the IAB reports, and cites no authority for its argument; indeed, case law undermines this argument (*Matter of Oliver v D’Amico*, 151 AD3d 1614, 1617 [4th Dept 2017] [finding that State Trooper’s termination did not “shock the conscience” where, among other things, the Trooper made false statements in an IAB interview]).

*NYSCEF 63 [City Exh C]*). The City cites three Second Department cases from 1996 to 2004 for that proposition; however, those cases were superseded by a 2005 amendment to CPLR 3212(b) which provides that

[w]here an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to [CPLR 3101(d)(1)(i)].

The legislature's intervention "eliminates any question regarding whether a CPLR 3101(d)(1)(i) statement is timely for summary judgment purposes and the need for courts to determine, on a case-by-case basis, whether to consider the affidavits of experts who weren't disclosed prior to the filings of notes of issue" (Dillon, CPLR 3212:15 [Westlaw 2019]; see *Brown v 43-25 Hunter, L.L.C.*, 178 AD3d 493, 494 fn 1 [1st Dept 2019] ["CPLR 3212(b) expressly permits the submission of expert affidavits in connection with a summary judgment motion, even where an expert exchange pursuant to CPLR § 3101(d) was not furnished prior to the affidavit's submission"]). Accordingly, the affidavit will be considered.

## II. *Applicable standards*

To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833). If the moving party fails to make its *prima facie* showing, the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]).

However, if the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is a "drastic remedy" and will only be granted in the absence of any material issues of fact (*id.*).

On a CPLR 3211 motion to dismiss, a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "[O]n such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff (*Alden Global Value Recovery Master Fund, L.P. v KeyBank N.A.*, 159 AD3d 618 [1st Dept 2018]). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" and the court "determine[s] only whether the facts as alleged fit within any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]).

### III. Excessive force

The City first argues that Plaintiff's first cause of action alleging assault and battery must be dismissed because officers did not use excessive force. In opposition, Plaintiff argues that the use of excessive force is nearly always a question of fact, particularly in cases of deadly force where—as here—the person shot dead is unable to testify.

Claims of excessive force are analyzed under the Fourth Amendment and its standard of objective reasonableness (*Ostrander v State*, 289 AD2d 463, 464 [2d Dept 2001], citing *Passino v State of New York*, 260 AD2d 915 [3d Dept 1999]). Under the Fourth Amendment, which governs the use of force in connection with an arrest, law enforcement officers may use only such force as is objectively reasonable under the circumstances (*Graham v Connor*, 490 US 386, 397 [1989]). “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful 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 US 386, 396 [1989]).

“The determination of an excessive force claim requires an analysis of the facts of the particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he or she is actively resisting arrest or attempting to evade arrest by flight” (*Vizzari v Hernandez*, 1 AD3d 431, 432 [2d Dept 2003], citing *Graham v Connor*, 490 US 386, 388 [1989]). “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation” (*id.* at 396–97). The reasonableness of a particular 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” (*Washington-Herrera v Town of Greenburgh*, 101 AD3d 986, 989 [2d Dept 2012]).

“It is not objectively reasonable for an officer to use deadly force to apprehend a suspect unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others” (*O'Bert ex rel. Estate of O'Bert v Vargo*, 331 F3d 29, 36 [2d Cir 2003], citing *Illinois v Gates*, 462 US 213, 230–32 [1983] [existence of probable cause is to be determined on the basis of the totality of the circumstances]). “[G]iven the difficult problem posed by a suit for the use of deadly force, in which the witness most likely to contradict the police officer's story—the person shot dead—is unable to testify, the court ... must ... consider circumstantial evidence that, if believed, would tend to discredit the police officer's story, and consider whether this evidence could convince a rational factfinder that the officer acted unreasonably” (*O'Bert*, 331 F3d at 37). “Because of its intensely factual nature, the question of whether the use of force was reasonable under the circumstances is generally best left for a jury to decide” (*Williams v City of New York*, 129 AD3d 1066, 1067 [2d Dept 2015]).

Of course, the immediate danger that Kennedy posed is subject to reasonable disagreement. But the evidence presented is, at best, inconclusive, and certainly well short of justifying summary judgment dismissing the Complaint. Much of the testimony of the officers on the scene before Officers Massett and Rogers indicated that even though Kennedy had not been

subdued, the zone of safety was maintained by dozens of officers. Even upon Massett and Rogers' arrival, unilateral action, and confrontation with Kennedy, the evidence remains unclear as to whether Kennedy posed an immediate threat to Massett and Rogers; that is, whether Kennedy actually lunged at the officers; indeed, by the City's admission, there remained a separation of three feet even after Kennedy "spun around and fell" (*City Affirm* ¶ 36).

Plaintiff's citations are distinguishable, as they fall primarily into one of two inapplicable categories: cases in which the Plaintiff was not killed (*Koيمان v City of New York*, 36 AD3d 451 [1<sup>st</sup> Dept 2007]; *Tracy v Freshwater*, 623 F3d 90 [2d Cir 2010], or clearly posed an imminent threat of harm (*Nash v Cahill*, 1996 US Dist LEXIS 10292 [SDNY] [Plaintiff fired shots near a school and several civilians, ignored verbal commands to "drop the gun," and pointed gun at officers]). In either case, the "careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake" is markedly different than the situation here, where Plaintiff, an emotionally disturbed individual, could reasonably have been viewed as posing a threat of harm, but must also be analyzed in the context of the weapon (a knife, not a gun) and the containment measures successfully employed for much of the confrontation.

Another case, *Tennessee v Garner*, (471 US 1, 11-12 [1985]), is cited by the City without crucial context. The City cites it, correctly, for the proposition that the "United States Supreme Court held that deadly force can be used when it is necessary to prevent escape and when an officer has probable cause to believe the Plaintiff posed a significant threat of death or serious injury to the officer or others. ... Thus, if there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, [even] deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given" (*City Affirm* ¶ 53). However, in addition to the fact that no "escape" has reasonably been alleged—all testimony points to Kennedy having been contained within a zone of safety at a walking pace—the *Garner* Court also held explicitly that

[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. *Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so.* It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not *always* justify killing the suspect. A police officer may not seize an unarmed, non-dangerous suspect by shooting him dead.

Indeed, the Court of Appeals, citing *Garner*, has stated explicitly that "...*Tennessee v Garner* does not create a limitation on plaintiff's right to recover or a shield of immunity for a municipal defendant in a common-law negligence action" (*McCummings v New York City Tr. Auth.*, 81 NY2d 923, 927 [1993]). Here, whether Kennedy posed an "immediate threat" is a

factual question for a jury, not the Court, to determine. Accordingly, the Court denies this branch of the City's motion.

#### IV. Governmental Immunity

The City argues that governmental immunity shields it from liability. In opposition, Plaintiff argues that the City is not entitled to immunity because an issue of material fact exists as to whether the officers' actions were objectively reasonable and/or violated acceptable police practice.

The City is correct, in its primary argument in and in reply, when it asserts that absolute governmental immunity attaches "when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial" (*Haddock v City of New York*, 75 NY2d 478, 484 [1990]). A government entity acting with discretionary or reasoned judgment is immune from negligence lawsuits (*Tango v Tulevech*, 61 NY2d 34 [1983]). Under this framework, "[a] municipality is not held to a standard of perfect judgment, but only reasoned judgment" (*Lubecki v City of New York*, 304 AD2d 224, 233 [1st Dept 2003]; see e.g. *McCormack v City of New York*, 80 NY2d 808 [1992] [a commanding officer's discretionary order not to shoot at an armed mentally disturbed person barricaded inside a house, under circumstances where a negotiator was present, did not invalidate the order and impute liability to the City even if a police officer was ultimately shot; accord *Flynn v City of New York*, 258 AD2d 129 [1999] [City not liable for officer's injuries where the officer did not wear a helmet during a riot, despite the Patrol Guide containing a provision for wearing helmets, where a supervisor had utilized discretion to opt for a nonconfrontational approach foregoing the use of helmets and batons]).

"However, the immunity afforded a municipality for its employee's discretionary conduct does not extend to situations where the employee, a police officer, violates acceptable police practice" (*Lubecki v City of New York*, 304 AD2d 224, 233-34 [1st Dept 2003] ["...the judgment error rule is not triggered by the action of a police officer who injures an innocent bystander in an altercation involving a violation of established police guidelines governing the use of deadly physical force by police officers."]). In examining the use of deadly force, departmental manuals "do not impose a higher duty of care than that appropriate for common-law negligence" and are therefore admissible "for purposes of evaluating whether the officers adhered to or materially deviated from prescribed protocol" (*Lubecki v City of New York*, 304 AD2d 224, 234-35 [1st Dept 2003] [rejecting challenge to admissibility of Patrol Guide pertaining to discharge of weapon during hostage situation and holding that "police violated clearly established protocols and procedures, rendering the professional judgment rule inapplicable to immunize their affirmative acts of negligence"]).

Plaintiff's expert Joseph Pollini opined, to a reasonable degree of certainty, that numerous officers involved in the subject incident violated NYPD Patrol Guide numbers 202-17, 202-23, 203-11, 203-12, and 216-05 (*NYSCEF 91 [Pl Exh A/Pollini Aff]*; *NYSCEF 102 [Pl Exh L/Patrol Guide]*; *Pl Affirm in Opp* ¶ 61, et seq.). In relevant part, Patrol Guide #203-11, "Use of Force," provides that

All uniformed members of the service are responsible and accountable for the proper use of force under appropriate circumstances. Members of the service are reminded that the application of force be consistent with existing law and with New York City Police Department Values, by which we pledge to value human life and respect the dignity of each individual. Depending upon the circumstances, both federal and state laws provide for criminal sanctions and civil liability against uniformed members of the service, when force is deemed excessive, wrongful or improperly applied.

The primary duty of all members of the service is to preserve human life. Only that amount of force necessary to overcome resistance will be used to effect an arrest or take a mentally ill or emotionally disturbed person into custody. Deadly physical force will be used ONLY as a last resort and consistent with Department policy and the law.

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Whenever it becomes necessary to take a violent or resisting subject into custody, responding officers should utilize appropriate tactics in a coordinated effort to overcome resistance (for example see *P.G. 216-05*, "Aided Cases-Mentally Ill or Emotionally Disturbed Persons"). The patrol supervisor, if present, should direct and control all activity (*NYSCEF 102 2* [emphasis in original]).

In turn, Patrol Guide #216-05 provides, in relevant part, that

The primary duty of all members of the service is to preserve human life. The safety of ALL persons involved is paramount in cases involving emotionally disturbed persons. If such person is dangerous to himself or others, necessary force may be used to prevent serious physical injury or death. Physical force will be used ONLY to the extent necessary to restrain the subject until delivered to a hospital or detention facility. Deadly physical force will be used ONLY as a last resort to protect the life of the uniformed member of the service assigned or any other person present. If the emotionally disturbed person is armed or violent, no attempt will be made to take the EDP into custody without the specific direction of a supervisor unless there is an immediate threat of physical harm to the EDP or others are present. If an EDP is not immediately dangerous, the person should be contained until assistance arrives. ...

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ZONE OF SAFETY - ... This distance should be greater than the effective range of the weapon (other than a firearm), and it may vary with each situation (e.g., type of weapon possessed, condition of EDP, surrounding area, etc.). A minimum distance of twenty (20) feet is recommended. An attempt will be made to maintain the “zone of safety” if the EDP does not remain stationary.

Based on his review of the evidence and Patrol Guide, Pollini concluded that: (1) Captain Coates and Lieutenant Pfeffer, the most senior officers on the scene, despite requesting ESU support, did not “immediately establish firearms control” or “direct and control all activity; (2) Sergeant Pagano violated his duty, as the only officer in the area with a taser, to notify anyone of his inability to appear at the scene; and (3) Officers Massett and Rogers did not radio updates regarding their locations “inserted themselves into a fluid but contained situation, violated the zone of safety,” utilized poor firearms control and failed to exercise alternative means to subdue Kennedy using the minimum effective force required (*Pollini Aff* ¶¶ 60-73). There are numerous other issues of fact which bear upon the reasonableness of the officers’ actions as to the manner of their arrival on the scene and engagement with Kennedy, including such fundamental facts as the presence of ESU vehicles at the scene, the decision to pull the patrol car onto the sidewalk, and why Pagano, the only officer in the area with a taser, was—unlike the officers traveling with him—neither able to arrive at the scene nor hear the radio broadcasts requesting a taser before Kennedy was shot.

To the extent that the City argues, in reply, that Pollini’s analysis attempts to “manufacture a triable issue of fact” or second-guess the Officers’ actions (*City Reply Affirm* ¶ 13, *et seq.*), the Court disagrees. “The Patrol Guide has frequently been accepted as evidence of the standard of care to be exercised by a police officer” (*Smith v City of New York*, 12 CIV. 4922 NRB, 2015 WL 4643125, at \*3 [SDNY Aug. 5, 2015] [“...evidence that the officers violated Patrol Guide procedures is sufficient to survive summary judgment.]). It is not for the Court, at this juncture and taking into consideration that a key witness is dead and therefore unable to testify, to enter the province of a jury by making a credibility determination regarding the officers’ conduct (*Rew v County of Niagara*, 115 AD3d 1316, 1318 [4th Dept 2014] [reversing grant of summary judgment where “the court ...concluded that plaintiff was standing upright when the deputy sheriff shot him, thus implicitly determining that plaintiff’s testimony was not credible.”]). Accordingly, the branch of the City’s motion seeking judgment on its immunity defense is denied.

#### V. Negligence

While the City is correct that “[t]here is no cause of action in New York for negligent investigation of a crime,” (*Santiago v City of Rochester*, 19 AD3d 1061, 1062 [4th Dept 2005]), Plaintiff’s Amended Complaint is not limited to negligent investigation, but for “common-law negligence sounding in wrongful death and personal injury claims predicated on the theory that responding police officers, in utilizing deadly physical force, did not exercise the degree of care which would reasonably be required of police officers under similar circumstances” (*Lubecki v*

*City of New York*, 304 AD2d 224, 232-33 [1st Dept 2003], citing *McCummings v New York City Tr. Auth.*, 81 NY2d 923, 925 [1993]). “Typically, such a case presents sharp factual disputes not amenable to summary dismissal and the jury must determine the issue of liability” (*Lubecki*, 304 AD2d at 233, citing *McCummings*, 81 NY2d 923 at 926). This is also such a case. To the extent that the City also argues that qualified immunity should preclude liability with respect to Plaintiff’s negligence claims, the Court disagrees, for the reasons set forth above in Section IV.

However, with respect to the component of Plaintiff’s Amended Complaint that seeks to recover for negligent hiring and retention, “[g]enerally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee’s negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention” (*Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]). “This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training” (*id.*; *cf Pinkney v City of New York*, 860 NYS2d 22 [1st Dept 2008] [Police officer was not acting within the scope of his employment when he visited a fellow police officer at her apartment for personal reasons and spent the night with her, and she used his off-duty weapon to commit suicide.]).

Thus, the “negligent hiring, retention, and training claims must be dismissed because it is undisputed that the officer was acting within the scope of his employment, and plaintiff cannot seek punitive damages based on gross negligence in the hiring or retention of the officer” (*see Karoon v New York City Tr. Auth.*, 241 AD2d 323, 324 [1st Dept 1997]; *Dorian v City of New York*, 129 AD3d 445, 446 [1st Dept 2015] [punitive damages are not recoverable against a state or its political subdivisions, which includes a municipality]; *see also Holland v City of Poughkeepsie*, 90 AD3d 841, 848 [2d Dept 2011] [“only where a municipality’s failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983”]). Accordingly, the branch of the City’s motion seeking summary judgment dismissing the portion of Plaintiff’s Amended Complaint alleging negligence is granted solely to the extent that any claims regarding negligent hiring, training, and retention are dismissed.

#### VI. Federal constitutional/§ 1983 Claims

The City argues that the Court should dismiss Plaintiff’s 42 U.S.C. § 1983 claims because municipal liability under § 1983 may not be predicated upon a theory of *respondeat superior*. In opposition, Plaintiff argues that evidence exists that the subject incident was part of a broader pattern of conduct and practice, as evidenced by a 2015 NYPD Office of the Inspector General (OIG) report (*NYSCEF 103 [Pl Exh M]*).

42 USC § 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.” As the City argues, a municipality—unlike

individual defendants—may only be liable for §1983 claims where the municipality itself causes the constitutional violation (*Monell v Dep't of Social Services*, 436 US 658, 694-95 [1978]). Municipalities are not subject to vicarious liability for constitutional tort claims brought under § 1983, and a municipality causes a constitutional violation only where a specific “official policy is responsible for a deprivation of rights protected by the Constitution” (*id.* at 690-91; *Holland*, 90 AD3d at 847 [2d Dept 2011] [“A municipality is not liable under 42 USC § 1983 for an injury inflicted solely by its employees or agents or solely upon the doctrine of respondeat superior or vicarious liability”]; *Bosone v County of Suffolk*, 274 AD2d 532, 534 [2d Dept 2000] [“The requirement of pleading an official policy or custom of a municipality through which a constitutional injury has been inflicted upon a plaintiff applies only to 42 USC § 1983 claims against a local government, and not to such claims against individual defendants in their official capacities.”]).

“To allege the existence of an affirmative municipal policy, a plaintiff must make factual allegations that support a plausible inference that the constitutional violation took place pursuant either to a formal course of action officially promulgated by the municipality’s governing authority or the act of a person with policymaking authority for the municipality” (*Missel v County of Monroe*, 351 Fed Appx 543, 545 [2d Cir 2009]). Here, Plaintiff—apparently for the first time in this litigation despite the Complaint having been amended in 2018—cites a 2015 NYPD OIG Report criticizing the NYPD’s use of force policy (*see Deskovic v. City of Peekskill*, 894 F Supp 2d 443, 462 n 27 [SDNY 2012] [“It is well established that a party cannot assert a claim for the first time in its motion papers.”]). Even if the Court were to consider this argument, at least one other judge has found, and this Court agrees, that (1) the report was insufficient to allege that the City was put on notice of the alleged pattern of misconduct because the incident at issue in that case took place six months (in this action, several years) before the publication of the report; and (2) the report was insufficient to support Plaintiff’s allegation that his incident was part of a pattern of use of excessive force rather than “an isolated incident” (*Marlin v City of New York*, 2016 WL 4939371, at \*20 [SDNY Sept. 7, 2016]).

Plaintiff’s citations are distinguishable. *Holland v City of Poughkeepsie*, (90 AD3d 841 [2d Dept 2011]), is inapposite; indeed, the passage quoted by Plaintiff affirms the survival of a civil rights claim against an individual (*see Pl Affirm in Opp* ¶ 103 [“...against Labrada...”]). Similarly, *Marlin v City of New York*, (2016 WL 4939371 [SDNY Sept. 7, 2016]), is procedurally distinct, as that action was pre-answer, unlike this action, which is post-note; indeed, in *Marlin*, the 2015 OIG report had been released about a year prior; moreover, in *Marlin*, the OIG report was accompanied by another report detailing specifically the treatment by NYPD of Occupy Wall Street protesters. Accordingly, Plaintiff’s third cause of action for violation of federal constitutional rights is dismissed.

## VII. State constitutional claims

The City argues that the Court should dismiss Plaintiff’s fourth cause of action alleging state constitutional violations, because such claims are unavailable when there is an alternate remedy available, including in common law tort. In opposition, Plaintiff argues that “the existence of a companion [§ 1983] action does not constitute an ‘alternative remedy’...” (*Pl Affirm in Opp* ¶ 112, citing *Brown v State*, 89 NY2d 172 [1996]).

In *Brown*, the Court of Appeals held that state constitutional torts may be found “when necessary to effectuate the purposes of ... State constitutional protections ... or appropriate to ensure full realization of [the plaintiff’s] rights” (*Brown*, 89 NY2d 172 [holding that “implying a damage remedy here is consistent with the purposes underlying the duties imposed by these provisions and is necessary and appropriate to ensure the full realization of the rights they state”]). However, as the City argues in reply, New York limits recovery for state constitutional violations where *any* alternate remedy is available, including a common law tort remedy; alternate remedies are not limited to federal constitutional claims (*Lyles v State*, 2 AD3d 694, 695 [2d Dept 2003], *affd*, 3 NY3d 396 [2004] [“In the present case, the recognition of the claimant’s state constitutional claims was neither necessary nor appropriate to ensure the full realization of his rights, because the alleged wrongs could have been redressed by an alternative remedy, namely, timely interposed common-law tort claims for assault and battery, false imprisonment, and the intentional and negligent injury to his property”]). Here, an alternate remedy is available through common law tort, including the assault and battery and wrongful death claims. Accordingly, Plaintiff’s fourth cause of action is dismissed.

#### VIII. Punitive Damages

As noted above, “punitive damages are not recoverable against a state or its political subdivisions, which includes a municipality” (*Dorian v City of New York*, 129 AD3d 445, 446 [1st Dept 2015]). Accordingly, and because Plaintiff has withdrawn the claim for punitive damages (*Pl Affirm in Opp* ¶ 115), Plaintiff’s fifth cause of action for punitive damages is dismissed.

### CONCLUSION/ORDER

For the reasons above, it is

**ORDERED** and **ADJUDGED** that the City’s motion for summary judgment (003) is **GRANTED** in part to the following extent, and the Clerk of Court shall enter judgment accordingly: it is

**ORDERED** that Plaintiff’s second cause of action, as solely limited to negligent hiring, training, and retention, is dismissed; and it is further

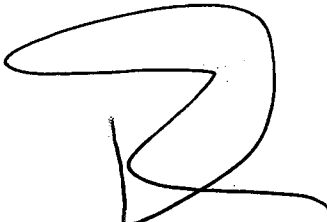
**ORDERED** that Plaintiff’s third, fourth, and fifth causes of action are dismissed; and it is further

**ORDERED** that the City shall, within 30 days of receipt of this order, e-file and serve, by certified mail, return receipt requested, a copy of this order with notice of entry upon Plaintiff at all known addresses; and it is further

**ORDERED** that the parties shall, within 30 days of receipt of this order, communicate jointly with Sam Wilkenfeld (swilkenf@nycourts.gov) to reschedule the adjourned August 13, 2019 early settlement conference.

This constitutes the decision and order of the Court.

6/22/20  
DATE

  
\_\_\_\_\_  
DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: