

December 22, 2022**Christopher D. Rafano, J.S.C.**

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Attorneys for Defendants, Borough of Bound Brook, Borough of Bound Brook Police Department, Chief Vito Bet, Mayor Robert Fazen, Former Chief Michael D. Jannone, Sgt. Jeffrey Raub, Capt. Kevin Rivenbark, Lt. John Mazuera

Plaintiff,

ALFRED LAWSON

vs.

Defendants,

OFFICER JEFF DEWAR, OFFICER JANOS BOJTOS, SERGEANT ROBERT LAVIN, OFFICER BRIAN WERTHEIM, OFFICER KEITH KILGORE, CHIEF VITO BET, LIEUTENANT JOHN MAZUERA, SERGEANT JEFFREY RAUB, CAPTAIN KEVIN RIVENBARK, CHIEF MICHAEL D. JANNONE, MAYOR BOB FAZEN, BOROUGH OF BOUND BROOK and BOUND BROOK POLICE DEPARTMENT, John Does 1-30 (Fictitious individuals), ABC Corps. 1-30 (Fictitious Corps), Jointly and Severally, Official and Individual Capacities

SUPERIOR COURT OF NEW JERSEY
 MIDDLESEX COUNTY
 LAW DIVISION

DOCKET NO. MID-L-8788-20

CIVIL ACTION

ORDER

THIS MATTER having been brought before the Court on Motion of Hoagland, Longo, Moran, Dunst & Doukas, LLP, attorneys for Defendants, Borough of Bound Brook, Borough of Bound Brook Police Department, Chief Vito Bet, Mayor Robert Fazen, Former Chief Michael D. Jannone, Sgt. Jeffrey Raub, Capt. Kevin Rivenbark, and Lt. John Mazuera, for an Order granting Summary Judgment to said Defendants in the within cause of action, and the Court having reviewed the moving papers and oral argument and for the reasons set forth on the record and herein and for good cause shown;

IT IS ON THIS 22nd day of December, 2022,

ORDERED that Summary Judgment is **GRANTED** as to the Borough of Bound Brook Police Department and they are hereby dismissed with prejudice from this matter; and it is further

ORDERED that Summary Judgment is **GRANTED** as to all supervisory claims, based on

official and individual capacity, made against Mayor Fazen, Captain Rivenbark, Sergeants Raub, Bet and Mazuera and are dismissed with prejudice; and it is further

ORDERED that Summary Judgment is **GRANTED** as to all supervisory claims raised against Chief Jannone in his individual capacity; and it is further

ORDERED that Summary Judgment is **DENIED** as to Defendants motion to bar the Liability Report and Testimony of Richard Rivera and Elena Gonzalez; and it is further

ORDERED that Summary Judgment is **GRANTED** as to Defendants' motion as to Court IV and dismissing all Monell claims with prejudice; and it is further

ORDERED that Summary Judgment is **GRANTED** as Defendants are entitled to qualified immunity; and is further

ORDERED that Summary Judgment is **GRANTED** as to Defendants' motion as to NJCRA claims and they are dismissed them with prejudice; and it is further

ORDERED that Summary Judgment is **GRANTED** as to Defendant's motion as to punitive damages in their individual and official capacities; and it is further

ORDERED that service of this Order shall be deemed effectuated upon all counsel of record upon its upload to eCourts. Pursuant to Rule 1:5-1(a), movant shall serve a copy of this Order on all parties not served electronically within seven (7) days of the date of this Order.

s/ Christopher D. Rafano
Hon. Christopher D. Rafano, J.S.C.

Opposed: X

Unopposed

Statement of Reasons

Standard of Review:

For the purpose of determining whether a genuine issue of material fact exists, which would preclude summary judgment, the trial court must engage in the same type of evaluation, analysis and sifting of evidential materials as required by a motion for involuntary dismissal pursuant to R. 4:37-2(b). Brill v. The Guardian Life Ins. Co. of America, 142 N.J. 520, 523 (1995). Therefore, the court must consider whether the evidence, when viewed in the light most favorable to the non-moving party, is sufficient to permit a rational fact finder to resolve the disputed issue in favor of the non-moving party. Id. “The essence of the inquiry . . . is ‘whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.’” Id. at 536 (quoting Anderson v. Liberty Lobby Inc., 477 U.S. 242, 250-252 (1986)). When there is doubt as to the existence of a fact, a summary judgment motion should be denied. Gurski v. New Jersey State Police Department, 242 N.J. Super. 148, 160 (App. Div. 1990). Summary judgment is inappropriate prior to the completion of discovery. Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.) certify. Denied, 177 N.J. 493 (2003). The opponent of a summary judgment motion must show controverting facts based upon competent evidence, not merely bare assertions, representations, or allegations in pleadings without affidavit or other evidentiary support. Brill, 142 N.J. 520 at 541.

I. Bound Brook Police Department:

In this matter, Plaintiff Alfred Lawson (“Plaintiff”) has named the Bound Brook Police

Department as a separate entity. Following Monell v. Dep't of Soc. Servs.,¹ courts have concluded that a police department is a sub-unit of the local government and, as such, is merely a vehicle through which the municipality fulfills its policing functions. See Mikhaeil v. Santos, 646 F. App'x 158, 163 (3d Cir. 2016) ("Although local governmental units may constitute 'persons' against whom suit may be lodged under § 1983, a city police department is a governmental sub-unit that is not distinct from the municipality of which it is a part."); Bonenberger v. Plymouth Twp., 132 F.3d 20, 25 n. 4 (3d Cir. 1997); Johnson v. City of Erie, Pa., 834 F. Supp. 873, 878-79 (W.D. Pa. 1993). Thus, while a municipality may be liable under § 1983, a police department, as a mere sub-unit of the municipality, may not. Johnson, 834 F. Supp. at 878-79; see also Terrell v. City of Harrisburg Police Dept., 549 F. Supp. 2d 671, 686 (M.D. Pa. 2008) ("It is well-settled that police departments operated by municipalities are not 'persons' amenable to suit under § 1983").

In this case, Plaintiff does not oppose the arguments of counsel and submits the issue to the Court. Therefore, this Court **GRANTS** Summary Judgment as to the Bound Brook Police Department and the claims against the Borough of Bound Brook Police Department are dismissed with prejudice.

II. Supervisory Claims, Based on Official and Individual Capacity, Made Against Mayor Robert Fazen, Captain Kevin Rivenbark, Sergeants Jeffrey Raub, Chief Vito Bet (at the time of the incident, Bet was a sergeant), Lt. John Mazuera (at the time of the incident, Mazuera was a sergeant) and Individual Capacity Claims Made Against Former Chief Michael D. Jannone:

Plaintiff asserts in Count III of his complaint 1983 supervisory claims against Mayor Fazen, Chief Jannone, Captain Rivenbark, Sgt. Bet, Sgt. Mazuera, and Sgt. Raub. There are two types of suits brought against an individual defendant: official capacity and personal capacity. In

¹ Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

this matter, Plaintiff has asserted that the individual supervisory Defendants are liable in their official and personal capacities. To prove the claims, Plaintiff must establish a theory of supervisory liability. Generally, personal involvement by the defendant in the alleged constitutional violation is central to a § 1983 claim, and liability cannot rest on a theory of respondeat superior. See Chavarriaga v. N.J. Dep't of Corr., 806 F.3d 210, 222 (3d Cir. 2015). Supervisory liability generally requires some affirmative conduct by the supervisor, such as a supervisor's implementation or maintenance of a policy, practice, or custom that caused the plaintiff constitutional harm. Parketi v. Danberg, 833 F.3d 313, 330 (3d Cir. 2016); Santiago v. Warminster Township, 629 F.3d 121, 129 n.5 (3d Cir. 2010). Hence, there are two potential theories of supervisory liability. See A.M. ex. ret. JMK v. Luzerne Cty. Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004). Under the first theory, defendants may be sued as policy makers “if it is shown that such defendants, ‘with deliberate indifference to the consequences, established and maintained a policy, custom, or practice which directly caused [the] constitutional harm.’” *Id.* (quoting Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989)). The second theory of liability provides that a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiffs rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations. See Baker v. Monroe Township, 50 F.3d 1186, 1190—91 (3d Cir. 1995). Knowledge in a “failure to supervise” claim must consist of either “contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents.” C.H. ex. ret. Z.H v. Oliva, 226 F.3d 198, 202 (3d Cir. 2000).

Under a policy-maker theory, a person who has final policy-making authority may be liable under § 1983 if that person establishes a policy that is unconstitutional and that injures the plaintiff. Chavarriaga, 806 F.3d at 223; Sample v. Diecks, 885 F.2d 1099, 1118 (3d Cir. 1989).

“[T]o establish a claim against a policy maker under § 1983 a plaintiff must allege and prove that the official established or enforced policies and practices directly causing the constitutional violation.” Chavarriaga, 806 F.3d at 223. Alternatively, “[a] course of conduct is considered to be a custom when, though not authorized by law, such practices of state officials are so permanent and well-settled as to virtually constitute law.” Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990), superseded in part by statute on other grounds, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1072; see also Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996).

Further, the New Jersey Supreme Court in Schneider v. Simonini, adopted the Third Circuit approach to supervisory liability and held “the standard most consistent with implementing that goal is one of “recklessness or deliberate indifference.” Schneider v. Simonini, 163 N.J. 336, 376 (2000). The Court rejected “the “gross negligence” standard because it would impose supervisory liability based on constructive notice that a subordinate might engage in a constitutional tort.” Id. The Court also rejected “the stricter “knowledge and acquiescence” standard because it requires proof of actual knowledge of, and acquiescence in, the constitutional violation.” Id. The Schneider Court listed five non-exclusive factors for finding recklessness or deliberate indifference which are: “(1) whether there were any prior incidents similar to the constitutional violation alleged by the plaintiff; (2) how adequate the supervisor's response was to those prior incidents; (3) how the supervisor responded to the violation alleged by this particular plaintiff; (4) to what extent the supervisor can be said to have been a causal factor in contributing to the constitutional violation; and (5) to what extent the supervisor was aware of the constitutional misconduct.” Id. at 374. While negligence is generally left for the finder of fact, in extraordinary cases such issues may be removed from the jury. Id. at 375.

a. Defendants In Their Official Capacity:

The Supervisory Defendants argue that Plaintiffs' § 1983 claims against them in their official capacities should be dismissed. This Court agrees. The United States Supreme Court has made clear that suits against state government officials in their official capacities should be treated as suits against the state itself. See Hafer v. Melo, 502 U.S. 21, 25-27 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State."). It is well established that "a state is not a 'person' within the meaning of § 1983." Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989). Although "state officials literally are persons," they are not " 'persons under § 1983' and cannot be sued under the statute. Id. at 71; Hafer, 502 U.S. at 25-27 ('State officers sued for damages in their official capacity are not 'persons' for purposes of the suit because they assume the identity of the government that employs them.'). Accordingly, the § 1983 claims asserted against supervisory defendants Mayor Fazen, Captain Rivenbark, Sergeants Raub, Bet And Mazuera in their official capacities must be dismissed with prejudice. See, e.g., Bayete v. Ricci, 489 Fed. Appx. 540, 542 (3d Cir. 2012) ("The Eleventh Amendment bars federal suits for damages against state officers in their official capacities. Moreover, state officers sued in their official capacities for money damages are not 'persons' within the meaning of Section 1983. Consequently, the District Court correctly dismissed Bay-e-te's complaint against defendants in their official capacities.") (citations omitted).

b. Defendants In Their Individual Capacity:

Plaintiff asserts claims under § 1983 against Chief Vito Bet ("Bet"). At the time of the incident, Bet was a sergeant. A supervisor may be held liable in his individual capacity under § 1983 if he "with deliberate indifference to the consequences, established and maintained a

policy, practice or custom which directly caused [the] constitutional harm," A.M. ex rel. J.M.K. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004) (quoting Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir. 1989)), or, alternatively, if he "participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations," Id. at 586. While it is true that Bet was a sergeant in the Borough of Bound Brook at the time of this incident, Bet was not working at the time of the subject incident as he was assigned to the day shift. Bet was not personally involved in the incident, had no first-hand knowledge concerning the same, and was not a policymaker. Bet's only involvement with the incident came two years after Plaintiff's arrest when Bet reviewed the civil complaint. Moreover, Plaintiff's expert did not set forth any opinions as to the liability of Bet.

Furthermore, Plaintiff contends that Bet testified that there were times when other arrestees had been taken to a hospital post-arrest. However, Plaintiff never explored the nature of the injuries, the circumstances which caused the injuries or the extent of the injuries of these prior cases. Therefore, Bet cannot be held individually liable in his supervisory capacity. Accordingly, Defendants' motion for summary judgment on Plaintiff's claims against Defendant Bet is **GRANTED**.

Plaintiff asserts claims under § 1983 against Lt. John Mazuera ("Mazuera"). Mazuera was a sergeant at the time of Plaintiff's arrest. Like Bet, Mazuera was not on duty at the time of the subject incident. Mazuera's only involvement with the matter came when he reviewed the reports, completed the Affidavit of Probable Cause, submitted the same to the Somerset County Prosecutor's Office ("SCPO"), and at the behest of the SCPO, Mazuera interviewed the victim, Hernan Galan, and the witness, Maria Sena. SCPO authorized the charges and instructed

Mazuera on the completion of the Affidavits and the charges to be placed thereon. Moreover, Mazuera was not at the scene of the arrest, did not participate in any alleged civil rights violations, and only gained knowledge when the SCPO instructed him to review documents and interview witnesses. Therefore, Mazuera cannot be held individually liable in his supervisory capacity.

Further, Plaintiff's liability expert conceded that there was probable cause to charge Plaintiff with robbery and that the SCPO authorized the issuance of the charge. Given that Plaintiff was indicted on crimes of robbery, resisting arrest, criminal attempt/escape from detention, and criminal mischief and pled guilty to aggravated assault on Mr. Galan, a third-degree crime, and criminal mischief, a fourth-degree crime, Rivera could not find otherwise. Accordingly, Defendants' motion for summary judgment on Plaintiff's claims against Defendant Mazuera is **GRANTED**.

Plaintiff asserts claims under § 1983 against Sergeant Raub ("Raub"). Raub was not at the scene of Plaintiff's arrest. Raub's only involvement in the incident resulted from Raub's review of Sergeant Lavin's report for grammar, spelling, and punctuation since he is senior to Sergeant Lavin. Plaintiff seems to think that Raub's understanding of what his role is somehow transforms into liability or a policy of "turning a blind eye." Again, Plaintiff's opposition lacks any specifics as to how this creates a policy or custom. Also, Plaintiff's expert report makes no allegations as to Raub. Therefore, Raub cannot be held individually liable in his supervisory capacity. Accordingly, Defendants' motion for summary judgment on Plaintiff's claims against Defendant Raub is **GRANTED**.

Plaintiff asserts claims under § 1983 against Mayor Robert Fazen ("Fazen"). Although Fazen was the Mayor of the Borough of Bound Brook at the time of this incident, Fazen was not

personally involved in Plaintiff's arrest and had no first-hand knowledge concerning the same. Plaintiff did not take the deposition of Fazen. Further, in his opposition papers, Plaintiff provides no argument that Fazen was aware of the arrest of Lawson. Moreover, Rivera does not set forth any opinions as to Fazen in his report and his only citation to Fazen is in the caption of his report. Therefore, Fazen cannot be held individually liable in his supervisory capacity. Accordingly, Defendants' motion for summary judgment on Plaintiff's claims against Defendant Fazen is **GRANTED**.

Plaintiff asserts claims under § 1983 against Captain Rivenbark ("Rivenbark"). Rivenbark was not on duty at the time of the subject incident. However, he reviewed the reports and signed off on them. He was second to the Chief of Police, who at the time was Chief Jannone, assigned as the Executive Officer, an administrative position, which included acting as the Supervisor of the Internal Affairs Unit of the Bound Brook Police Department. Rivenbark was acting in his official capacity as a police officer in Bound Brook Police Department. Rivenbark reviewed the documents and materials and concluded that the officers' actions were appropriate.

Plaintiff argues that Rivenbark's failure to keep statistics on the race of an arrestee imposes liability. However, in 2015, at the time of the arrest, no standard required a police department to compile data on the racial makeup of arrestees. Further, as outlined in the briefs and reply papers, Plaintiff does not have a valid Equal Protection argument and cannot maintain a race-based cause of action based on the claims in his complaint. Thus, Plaintiff's contention that racial statistics should have been maintained is unrelated to any of Plaintiff's pending claims. Further, Plaintiff alleges that the reports Rivenbark reviewed were falsified. However, it is undisputed that the SCPO reviewed all of the reports and videos and did not remand this matter

to Bound Brook for an internal affairs investigation or bring criminal charges against the involved officers.

Rivenbark's other involvement in this matter took place after the civil complaint was filed two (2) years to the day of the incident. Rivenbark reviewed the investigation reports, supplemental investigation reports, photographs, property damage estimates and motor vehicle recordings. Rivenbark determined that the actions of all officers were appropriate, proper and consistent with the Attorney General Guidelines and the Bound Brook Police Department policies, rules and regulations. Therefore, Rivenbark cannot be held individually liable in his supervisory capacity. Accordingly, Defendants' motion for summary judgment on Plaintiff's claims against Defendant Rivenbark is **GRANTED**.

Lastly, Plaintiff asserts claims under § 1983 against Former Chief Michael D. Jannone ("Jannone"). Jannone was the Chief of the Bound Brook Police Department and acted in his official capacity as a police officer in the Borough Bound Brook until his retirement on April 1, 2017. At the time of Plaintiff's arrest, Chief Jannone was the highest-ranking supervisory official in the Bound Brook Police Department and the chief policymaker for the Bound Brook Police Department. Accordingly, Chief Jannone's actions while acting in an official capacity are the same as the actions of the Borough. Plaintiff did not take the deposition of Jannone. Further, in his opposition papers, he provides no argument that Defendant was aware of Plaintiff's arrest. Therefore, Jannone cannot be held individually liable in his supervisory capacity.

"Individual defendants who are policymakers may be liable under § 1983 if it is shown that such defendants, 'with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm.'" A.M. ex re. J.M.K. v. Luzerne County Juvenile Detention Center, 372 F.3d 572, 586 (3d Cir. 2004)

(quoting Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 725 (3d Cir.1989)). Plaintiff alleges that Jannone had the responsibility to and did set the Borough's policies as to training for members of the police force. He also alleges that the Chief had personal knowledge of the past incidents that provide the basis for establishing the alleged unconstitutional policy, practice or custom. Plaintiff has not established any of these allegations.

The claim against Chief Jannone will be dismissed to the extent it is premised on a theory that Chief Jannone "participated in violating [] plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations." Id. (citing Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995)). Pleading such a claim requires a factual basis that raises an inference that the supervisor participated in the violation or directed his or her subordinates to violate the plaintiff's constitutional rights or had knowledge that they were in the process of doing so and acquiesced in the offending course of conduct. Santiago v. Warminster Township, 629 F.3d 121, 130 (3d Cir. 2010). Plaintiff has not raised any facts to support an inference that Jannone had any personal involvement. Therefore he is not liable in his individual capacities. It is not enough to argue "that the constitutionally cognizable injury would not have occurred if the superior had done more than he . . . did." Brown v. Muhlenberg Twp., 269 F.3d 205, 216 (3d Cir. 2001). Plaintiff does not allege any specific incidents where anyone spoke with Jannone about the department's use of force practices. Consequently, the complaint does not set forth a plausible claim for relief under this theory of supervisory liability.

Defendants' arguments persuade the Court. As indicated previously, none of the individual supervisory Defendants were personally involved in Plaintiff's arrest. Nor is there an allegation that the respective officers directed the officers on the scene to use excessive force. In

short, the allegation is that the individual supervisory Defendants failed to supervise officers under their control in deliberate indifference to the constitutional rights of Lawson. However, like a failure to train claim, Plaintiff must identify the policy, custom, or practice, attribute the policy to the supervisory official and provide the necessary "affirmative link" between the identified. Plaintiff has failed to do so. Further, a supervisory officer cannot be held liable merely on the theory of Respondeat Superior. Accordingly, Defendants' motion for summary judgment on Plaintiff's individual supervisory claims against Defendant Jannone is **GRANTED**.

As for each of the individual supervisory Defendants, Plaintiff only addresses the arrest involving Plaintiff. He fails to point to other incidents before Plaintiff's arrest with any specifics which would have placed any one of the supervisors on notice of any alleged violations or conduct. Instead, Plaintiff focuses on the actions taken or not taken by the supervisors after Lawson's arrest and not those taken by supervisors before Lawson's arrest, which Plaintiff must do to prove this type of claim. As such, Plaintiff cannot establish knowledge by any supervisor of a prior pattern of similar incidents or a direct causal connection between any alleged indifference and Plaintiff's alleged constitutional injury.

Therefore, this Court **GRANTS** summary Judgment as to all supervisory claims, based on official and individual capacity, made against Mayor Robert Fazen, Captain Kevin Rivenbark, Sergeants Jeffrey Raub, Chief Vito Bet (at the time of the incident, Bet was a sergeant), Lt. John Mazuera (at the time of the incident, Mazuera was a sergeant) and individual capacity claims made against former Chief Michael D. Jannone.

Having reviewed the Complaint, it appears that Plaintiff has simply named every individual who potentially had some supervisory responsibility over the arresting officers, regardless of when that role existed or how disconnected that supervision was from these events.

Plaintiff makes conclusory statements, but conclusory statements are insufficient to overcome a motion for summary judgment.

III. The Liability Report and Testimony of Richard Rivera and Elena Gonzalez:

The New Jersey Rules of Evidence (hereinafter N.J.R.E.) specify the parameters upon which an expert may be permitted to testify. N.J.R.E. 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Thus, there are three basic requirements for the threshold admission of expert testimony:

“1) The intended testimony must concern a subject matter that is beyond the ken of the average juror; 2) the field testified to must be at a state of the art that such an expert’s testimony could be sufficiently reliable; and 3) the witness must have sufficient expertise to offer the intended testimony.” State v. Kelly, 97 N.J. 178, 208 (1984); Accord, Townsend v. Pierre, 221 N.J. 36, 53 (2015); Polzo v. County of Essex, 196 N.J. 569, 582 (2008).

“An expert is one who is qualified ‘by knowledge, skill, experience, training or education’ and who is therefore permitted to offer testimony in the form of an opinion that ‘will assist the trier of fact to understand the evidence or to determine a fact in issue.’” State v. McLean, 205 N.J. 438, 449 (2011) (quoting N.J.R.E. 702). One of the requirements that an expert witness must meet for his opinion testimony to be admissible is that “the witness must have sufficient expertise to offer the intended testimony.” State v. Jenewicz, 193 N.J. 440, 454 (2008).

Defendants argue that the Court should bar and Rivera and Gonzalez from testifying as Defendants claim they lack the necessary qualifications and rely on unreliable data. Defendants further claim that Rivera’s opinions invaded the province of the jury by making impermissible credibility determinations, and that Rivera and Gonzalez set forth impermissible net opinions. Throughout their briefing and oral argument, Defendants pointed out numerous alleged

examples of Rivera's deposition testimony contradicting his expert report and claim that "Rivera has recanted his opinion." Further, Defendants argue that Plaintiff has also not provided substantive opposition to many of the arguments they made in this section of their brief.

In response, Plaintiff argued that Rivera has specialized knowledge in internal affairs and should be permitted to offer opinions about Bound Brook Internal Affairs investigations and that the application to bar the testimony and opinions of Plaintiff's liability experts should be the subject of a motion in limine, not a dispositive motion.² Plaintiff adamantly denied that Rivera recanted or withdrew any portion of his report. In fact, Defendants concede that Plaintiff's expert did not use the word "recant."

On its face this Court does not find the expert opinions to be "net opinions." As to net opinions, it is a "corollary of [N.J.R.E. 703] ...which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data and requires an expert give the why and wherefore that supports the opinion, rather than a mere conclusion." Townsend v. Pierre, 221 N.J. 36, 54 (2015) (Citations and quotations omitted). Rivera's opinions are supported by the extensive factual record which allowed him to provide the why and wherefore to support those opinions. Rivera also relied on numerous sources when preparing his report. For example, Defendants concede that Plaintiff's expert has admitted that, in formulating his opinions, he relied upon the policies promulgated by the International Association of Chiefs of Police (IACP), Camden County, CALEA, the New Jersey Attorney General, and the Bound Brook Police Department in analyzing the officers' use of force." Defendants are free to poke holes in Plaintiff's sources and data, however, they can do so during

² A motion to bar the testimony of an expert, who's testimony is essential to Plaintiff's case, is in fact a dispositive motion and should not be filed as an in limine motion.

cross-examination. The issue of whether to find Mr. Rivera or Ms. Gonzalez credible is for the jury to decide.

Further, Defendants' motion appears to ask the Court to limit the expert testimony. The issues of inconsistency or contradictory opinions are matters that may be raised at trial during cross-examination. The simple fact that there may be contradictory statements does not warrant the striking of the expert's entire testimony. For example, Defendants claim that Rivera contradicted his report throughout his deposition and seemingly agreed with Defendants. In Defendants' statement of facts, they state, "Mr. Rivera testified during his deposition that Plaintiff was not unconscious for any period of time." However, upon the Court reviewing the deposition transcript, the Court is not convinced that this is exactly what Rivera stated. Defendants asked Rivera, "Well, did you make any conclusions in this case that Mr. Lawson was unconscious for any period of time?" To which Rivera responded, "I did not." Rivera's three-word answer is quite different from Defendants' conclusion. Arguments as to Rivera's opining on the credibility of the Plaintiff or of the police officers; encompassing relying on inaccurate or incomplete facts or other arguments of Defendants do not warrant the barring of the expert's entire testimony. The Court finds that it is up to the fact finder to determine the meaning of Rivera's responses, and it is further up to the jury to decide how much credibility they wish to give to either side. As the parties are aware, it is for the jury to resolve any conflicts in the testimony of the experts, using the same guidelines in determining credibility. Manning v. Public Service Elec. & Gas Co., 58 N.J. Super. 386, 393 (App. Div. 1959). In addition, the jury "must also decide whether the facts relied upon by the expert actually exist."³

³ Model Civil Jury Charge 1.13D.

Additionally, Defendants claim that Rivera "recanted" many of his opinions. However, upon a closer inspection of Rivera's expert report, Rivera's deposition testimony, and Defendants' statement of facts, the Court is still concerned with the conclusions advanced by the Defendants. The Court did not find Rivera "recanted" his opinions. Again, if the Defendants believe that Rivera contradicted himself, or relied on inaccurate facts, Defendants' counsel can confront the expert during cross-examination at trial. Alternatively, to the extent that it appears to the Court that the Defendants request that portions of the expert's opinion be barred, this Court will not do so at this time. However, this Court will not foreclose the right of the Defendants to move to limit the expert's testimony to those claims that are consistent with this Court's decision in this Order. Therefore, this Court **DENIES** Defendants' motion to bar Rivera and Gonzalez's Liability Report and Testimony.

IV. Monell Claims:

This Court next addresses the dismissal of Plaintiffs claims against the Borough of Bound Brook. "[NJCR]A was modeled after 42 U.S.C. § 1983," and federal courts "interpret NJCR]A analogously to [Section] 1983." Trafton v. City of Woodbury, 799 F.Supp. 2d 417, 443 (D.N.J. 2011). "When a suit against a municipality is based on [Section] 1983, the municipality can only be liable when the alleged constitutional transgression implements or executes a policy, regulation or decision officially adopted by the governing body or informally adopted by custom." Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996)) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)). "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur v. City of Cincinnati, 475 U.S. 469, 481, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986). "Although not authorized by written law," the practices of state

officials are considered a "custom" when such practices are "so permanent and well-settled as to constitute a 'custom or usage' with the force of law." Monell, 436 U.S. at 690. "Custom requires proof of knowledge and acquiescence by the decisionmaker." McTernan v. City of York, Pa., 564 F.3d 636, 658 (3d Cir. 2009) (citing Watson v. Abington Twp., 478 F.3d 144, 154 (3d Cir.2007); Beck, 89 F.3d at 971).

In Monell, the Supreme Court held that liability can attach to a municipality or local government entity that executes a policy or custom, which in turn "inflicts the injury" for which the plaintiff seeks redress. Monell, 436 U.S. at 694 (citations omitted). Further, the Monell Court has held a government entity "cannot be held liable under § 1983 on a respondeat superior theory." Monell, 436 U.S. at 691. Plaintiff must demonstrate causation between the municipal policy or custom and the constitutional injury. City of Canton v. Harris, 489 U.S. 378, 391 (1989). These principles apply with equal force to claims under NJCRA. Plaintiff must establish that the deprivation of a plaintiff's constitutional rights was the result of a policy, custom or practice, not a single act of an employee, and that there must be an affirmative causal link between the policy and the execution of the policy and the injuries suffered. Losch v. Borough of Parkesburg, 736 F. 2d. 903, 910 (3d. Cir. 1984).

To state a plausible claim, a plaintiff must allege that the municipality's policy or custom caused the violation of his constitutional rights. See Monell, 436 U.S. at 694. "To satisfy the pleading standard, [the plaintiff] must . . . specify what exactly that custom or policy was." McTernan v. City of York, PA, 564 F.3d 636, 658 (3d Cir. 2009). "Policy is made when a decisionmaker possess[ing] final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict." Estate of Roman v. City of Newark, 914 F.3d 789, 798 (3d Cir. 2019) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469,

1480 (3d Cir. 1990)). "Custom, on the other hand, can be proven by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." Id. (quoting Bielewicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990)). A plaintiff demonstrates that a custom was the proximate cause of his injuries by establishing that the defendant "had knowledge of similar unlawful conduct in the past, failed to take precautions against future violations, and that its failure, at least in part, led to his injury." Id. (internal quotations and alterations omitted). Further, "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 . . . municipal policy, which policy can be attributed to a municipal policymaker." See Brown v. City of Pittsburgh, 586 F.3d 263, 292 (3d Cir. 2009) (quoting Tuttle, 471 U.S. at 823-24.)

In this case, Plaintiff alleges in Court Four of his Complaint "Unlawful Policy, Custom, Practice, Inadequate Training, Failure to Discipline." However, Plaintiff has failed to assert any specific policy or custom that inflicted his alleged constitutional violations. In his brief in opposition, Plaintiff claims the supervisory Defendants failed to train and supervise the arresting Defendants in their alleged use of excessive force and alleged willful attempt to cover up the unconstitutional beating of Lawson. For example, Plaintiff also asserts that Bound Brook Police Department did not have its own Use of Force policy. The New Jersey Attorney General's Use of Force policy is the standard upon which to determine whether the amount of force used by a police officer was excessive. Bet testified that officers were required to follow the Use of Force policies promulgated by the Attorney General and Bound Brook, which were both in effect in 2015. He further testified that the Bound Brook Police Department policy is a continuum of the Attorney General's Use of Force Guideline, and that Bound Brook does not

have the authority to enact a different use of force policy than the AG policy. Also, Plaintiff alleges that the Borough of Bound Brook and Chief Jannone should have been aware of a policy, custom or practice within the Police Department of using excessive force. However, no proof has been offered of any knowledge, or any custom, practice or policy of excessive force or any causal link. Therefore, the Court finds Plaintiff's argument that Monell liability should be imposed for failure to have a policy on the use of force is without merit.

Plaintiff further contends that Bound Brook's failure to have a policy requiring an Internal Affairs investigation each time an arrestee is transported to a hospital post-arrest and the lack of training requiring the triggering of an Internal Affairs investigation compels the imposition of Monell liability on these Defendants. Any arrestee being taken to the emergency room for any reason after an arrest is not cause to open an Internal Affairs investigation. Further, Plaintiff has not stated why any arrestee in the past was transported to the hospital after an arrest. Plaintiff's hypotheticals are not facts. The Court cannot assume because an arrestee in the past went to the hospital, it was because of excessive force. Plaintiff failed to offer any facts to support this argument. Moreover, there is no requirement in the Attorney General's Internal Affairs Guideline requiring either training or enacting a policy where an arrestee is seen in an emergency room post-arrest.

Plaintiff also contends that Bound Brook's failure to adopt an Early Warning System (EWS) contributed to Plaintiff's alleged constitutional harms. However, Plaintiff is aware, the Attorney General did not issue an EWS Directive requiring municipal agencies to review instances of misconduct until three years after Plaintiff's arrest. Rivera concedes one prior act is not sufficient to establish a pattern, practice, or custom. The Court finds that changes in standards post-incident do not establish liability.

Lastly, Plaintiff argues that Defendants did not initiate an Internal Affairs investigation. However, Plaintiff, Mr. Crespo, or anyone else on their behalf ever filed an Internal Affairs complaint. Further, the SCPO reviewed all the reports, documents, and videos regarding the arrest and concluded that an internal investigation was not warranted or required, given the facts and circumstances of this arrest. Also, the SCPO did not remand the matter for an internal investigation, nor were criminal charges filed against the officers. This is in stark contrast to Plaintiff's contention that no supervisor "bothered to review the video" and compare the video to the officers' reports, which they did review, to determine whether an internal affairs complaint should be initiated.

Furthermore, for a § 1983 claim of failure to train or supervise municipal employees, a plaintiff must show that failure to provide training or supervision amounted to "deliberate indifference" to the rights of persons with whom the employee will come into contact." Thomas v. Cumberland Cnty., 749 F.3d 217, 222 (3d Cir. 2014). Deliberate indifference may be demonstrated either by showing a pattern of violations which puts the municipal employee on notice that a new program is necessary or a single incident violation where the need for training was patently obvious. Id. at 223. No such facts have been established.

However, Plaintiff has not provided sufficient evidence to withstand summary judgment on his failure to train claim in Count IV. To survive summary judgment on a failure to train claim, a plaintiff must "identify a failure to provide specific training that has a causal nexus with his or her injury" and additionally must demonstrate the failure to provide that training "can reasonably be said to reflect a deliberate indifference to whether constitutional deprivations of the kind alleged occur." Colburn v. Upper Darby Twp., 946 F.2d 1017, 1030 (3d Cir. 1991). A plaintiff's claim "is at its most tenuous" when it "turns on a failure to train." Connick v.

Thompson, 563 U.S. 51, 61, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011). Plaintiff has not provided proof indicating a specific training failure exists which can be causally connected to Defendants' actions. Nor has Plaintiff identified a specific training deficiency which caused the alleged violation.

In sum, Plaintiff did not show that any municipal policy or custom caused his constitutional injury. Also, Defendants were not present at the time of the incident and thus could not have had contemporaneous knowledge. Further, neither Plaintiff nor his liability experts point to any evidence of alleged flaws in the training program or the specific classes that would have prevented the alleged injuries in this matter. Plaintiff uses hypotheticals and speculation yet does not provide facts to support his claim that Defendants were not appropriately trained. Further, there was no prior specific event that Plaintiff points to in his opposition papers to establish that there existed a pattern or practice on the part of the Borough to fail to train their officers or that the supervising officers had contemporary knowledge of the incident. Therefore, this Court **GRANTS** Defendants' motion for summary judgment as to Count IV of the Compliant.

V. Qualified Immunity:

This Court finds this issue moot as it has granted summary judgment as to the supervisory claims.

VI. Ancillary NJCRA claims:

The New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 et seq., was modeled after 42 U.S.C. § 1983 to create a state law cause of action for violations of an individual's federal and state constitutional rights. It is interpreted as analogous to a Section 1983 claim. Szemple v. Corr. Med. Servs. Inc., 493 F. Appx. 238, 241 (3d Cir. 2012) and a court will analyze

“NJCRA claims through the lens of § 1983”. Trafton v. City of Woodbury, 799 F. Supp. 2d. 417, 444 (D.N.J. 2011); Estate of Martin v. U.S. Marshals Serv. Agents, 649 F. Appx. 239, 245 n. 4 (3d Cir. 2016). Accordingly, the foregoing analysis on Section 1983 is also applicable to the Plaintiff’s claims under the NJCRA and the NJCRA claims should also be dismissed.

VII. Punitive Damages:

The Plaintiffs Complaint requests punitive damages against the individual supervisory Defendants, as well as against the Defendant Municipality. The law is clear that municipalities cannot be liable for punitive damages under § 1983. Robey v. Chester County, 946 F. Supp. 333, 338 (1996); Newport v. Fact Concert, Inc., 453 U.S. 247, 271 (1981). Accordingly, all claims for punitive damages, as against the Borough of Bound Brook, are dismissed. Further, any claims against an individual defendant in his official capacity is the same as a claim against the municipal entity and, also not permitted.

In the alternative, Plaintiff can request punitive damages under his § 1983 claims as against the individual supervisory Defendants in their individual capacities. See Smith v. Wade, 461 U.S. 30, 31 (1983); Bernstein v. State, 411 N.J. Super. 316, 336 (App. Div. 2010). A jury is “permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.” Id.

Since Defendants’ Summary Judgement Motion will be granted with respect to all claims against the supervisory Defendants in their individual capacity Plaintiff cannot recover any damages against the supervisory Defendants, either in their individual or official capacity. As such, the claim for punitive damages as to Mayor Fazen, Chief Jannone, Captain Rivenbark, Sgt. Bet, Sgt. Mazuera and Sgt. Raub is dismissed and Defendants’ motion is **GRANTED**.