

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

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Ronald T. Whitaker, Sr., et al :  
 :  
 Plaintiffs : CIVIL ACTION NO.:  
 v. :  
 : 1:08-cv-00627  
 Springettsbury Township, et al :  
 : JURY OF TWELVE (12) JURORS DEMANDED  
 Defendants :

**PLAINTIFF'S OMNIBUS RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS  
FOR SUMMARY JUDGMENT**

Incorporating by reference the attached Memorandum of Law, Plaintiff requests this Honorable Court deny Defendants' Motions for Summary Judgment.

WHEREFORE, Plaintiff requests this Honorable Court deny Defendants' Motions for Summary Judgment.

WEISBERG LAW, P.C.

/s/ Matthew B. Weisberg  
Matthew B. Weisberg, Esquire  
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF PENNSYLVANIA

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S OMNIBUS RESPONSE IN  
OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT**

**I. Introduction**

Because the law is not in dispute regarding Plaintiff's narrowed issues (Monell and Excessive Force-see below concessions, or Qualified Immunity), Plaintiff relies on the facts as contained in the video recorded event in omnibus opposition to summary judgment.

Plaintiff moves this Honorable Court to disregard as irrelevant, if not additionally unfairly prejudicial or hearsay, Defendants' Joint Statement and brief as they reference non-judicial investigations, decedent's prior alcohol and drug history, prior bad and good acts of decedent and Defendants, respectively, and, especially, predecessor counsel's motion to withdraw (which motion takes up much of Utter's brief), respectively, just as here plaintiff withdraws plaintiff's failure to protect vis-à-vis attempted suicide and Eighth Amendment claims.

Further, plaintiff requests this Honorable Court not literally weigh the length of opposing Motions for Summary Judgment against this response, but rather independently view the video- which is truly the only pertinent evidence for summary judgment purposes.

## II. Operative Facts

On January 7, 2007, at 23:55:21, decedent is seen struggling with Officer Utter. (Exh. A - Video<sup>1</sup>). Utter is armed. Decedent is unarmed.

Utter tasers decedent. Id.

At 23:55:23, decedent breaks free and tries to run. Id.

At 23:55:24, Utter shoots decedent **in the back**. Id. Decedent falls to the floor face down with legs extended. Id.

Utter points his firearm at the floor. Id.

Approximately four seconds later after the first shot, Utter fires the second and final shot.

Id.

Thereafter, Utter leaves "Holding Hall" (through the always immediately adjacent exit).

Id.

## III. Argument

### Question Presented:

Would a reasonable officer deem it necessary to protect himself against the threat of death or serious bodily injury by shooting custodial decedent in the back while decedent was running away, and then shoot decedent again in the back while decedent was face-down, prone on the floor incapacitated.

**No**; a reasonable officer could not have so feared, especially when there existed an immediately available exit. *Utter used excessive force.*

Utter is not entitled to qualified immunity for shooting decedent in the back while decedent was running away, and then shooting him again approximately four seconds later when

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<sup>1</sup> Due to ECF uploadable file size constraints, the video and video viewer will be forwarded via hard copy under separate cover.

decendent remained incapacitated with his back to Utter while decendent was on his stomach reeling from the first shot (Utter does not and cannot argue that shooting a fleeing suspect in the back entitles Utter to qualified immunity for that unnecessary force). Hung, *infra*.

It is precisely that this Honorable Court cannot substitute its judgment as to whether Utter's use of deadly force was excessive that summary judgment should be denied. Hung v. Watford, 2002 WL 31689328, fnote 7 (citing Groman v. Township of Manalapan, 47 F.3d 628 (C.A.3 1995); Saucier v. Katz, 533 U.S. 194, 200-208, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (Ginsburg, J., concurring in the judgment) (“[I]f an excessive force claim turns on which of two conflicting stories best captures what happened on the street, *Graham* will not permit summary judgment in favor of the defendant official.... [A] trial must be had.”)).

Plaintiff points to the attached video to identify a fact in dispute: when was decendent initially shot? Plaintiff contends the video reflects decendent first shot while running away.

Plaintiff disputes that Utter's second shot was not “two (2) shots in quick succession so that it was one continuous motion.” On the contrary, the second shot followed the first shot by about four seconds (after Utter pointed his firearm downward, as if to rest, following the first shot).

Plaintiff simply, respectfully suggests that the video speaks for itself: the question as to whether a reasonable officer would have been in reasonable fear from a fleeing and then incapacitated decendent requires a trier's analysis.

Plaintiff has met the burden of proving an issue of fact as to excessive force.

Question Presented:

When Utter testified that his training is to fire twice regardless of the circumstance<sup>2</sup>, does plaintiff present a triable Monell claim.

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<sup>2</sup> Defendants' Joint Statement, ¶¶61, 94.

Yes; plaintiff presents a triable Monell claim against the municipal authority and Chief responsible for training Utter to fire twice with deliberate indifference as to circumstance.

Plaintiff's Monell claim mimics municipal policy and Chief Eschback's supervisory practice, which is to train police officers, like Officer Utter, to "double tap" with deliberate indifference as to whether the second shot constitutes excessive force.

In this instance, Utter claims to double tap in continuous succession such as would make one motion, but the video shows differently; it is Utter's attempt to follow this Constitutionally faulty training that constitutes the excessive force and creates an issue of fact.

Regardless that Defendants' contend either shot was fatal, they, tautologically, cannot argue that *both* were immediately fatal. In fact, the second shot clearly predeceased decedent, who was of no threat at that point, thus constituting excessive force no Constitutionally different than a punch to the back of a handcuffed suspect.

To double tap is to consciously disregard-deliberate indifference. *Collins v. City of Harker Heights, Tex.* 503 U.S. 115, 112 S.Ct. 1061, 1068 (1992) (citing *City of Canton, Ohio v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 1204 (1989)).

Plaintiff has proven an issue of fact as to Monell.

WHEREFORE, Plaintiff requests this Honorable Court deny Defendants' Motions for Summary Judgment.

WEISBERG LAW, P.C.

/s/ Matthew B. Weisberg  
Matthew B. Weisberg, Esquire  
Attorneys for Plaintiff

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**CERTIFICATE OF SERVICE**

I, Matthew B. Weisberg, Esquire, hereby certify that on this 12th day of November, 2009, a true and correct copy of the foregoing Plaintiff's omnibus response in opposition to Defendants' Motions for Summary Judgment was served via ECF, upon the following parties:

Brian P. Gabriel, esq

David MacMain, esq

WEISBERG LAW, P.C.

/s/ Matthew B. Weisberg  
Matthew B. Weisberg, Esquire  
Attorneys for Plaintiff

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**CERTIFICATE OF WORD COUNT PURSUANT TO LR 7.8(b)(2)**

I, Matthew B. Weisberg, Esquire, certify that the number of words in the Brief, pursuant to the word count feature of Microsoft Word, totals: 890.

WEISBERG LAW, P.C.

/s/ Matthew B. Weisberg  
Matthew B. Weisberg, Esquire  
Attorneys for Plaintiff

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**PLAINTIFF'S RESPONSE TO DEFENDANTS' JOINT AND CONCISE STATEMENT  
OF MATERIAL FACTS**

1. Admitted.
2. Denied in part; admitted in part. Plaintiff waives the Eighth Amendment claim.

Plaintiff waives the failure to protect claim vis-à-vis failure to prevent attempted suicide.

3-5. Admitted.

6-12. Objection. Irrelevant; unfairly prejudicial.

13-30. Admitted.

31. Denied. Plaintiff had just been involved in the incident at Giant.

32-33. Objection. Irrelevant.

34-47. Admitted.

48. Denied as stated.

49-54. Admitted.

55. Denied as stated. There was an exit way.

56-59. Admitted.

60. Denied as stated. It is denied that Utter had, in fact, exhausted all less-than-lethal means of force and was in danger of serious injury or death. On the contrary, Utter was immediately adjacent to an exit door whereat he fired one shot at decedent when decedent was

running away and then fired another four full seconds later when decedent was incapacitated on the floor. (Exh. A).

61. Denied. The two shots were not in continuous motion nor were they a “double tap.” On the contrary, the first shot was when decedent was a distance away from Utter. The second shot was four seconds later when decedent had already been incapacitated by the first shot. In the middle of the two shots, Officer Utter pointed his weapon at the ground. Id.

62. Admitted as stated.

63. Denied. When Utter fired his gun the first time decedent was not facing him; the video shows, in fact, that decedent was quite a distance and running away when Officer Utter fired his gun for the first time. Id.

64. Denied. While Officer Utter testified as such, the video depicts the second shot being fired when decedent was face down on the ground, incapacitated, with his legs in prone position. Id.

65. Denied. The video shows decedent knocked to the ground by the first shot. Id.

66. Denied. Officer Utter fired two shots in five seconds; thus, it would have taken him approximately 35 seconds to fire all rounds. Officer Utter fired first when decedent was running away and second when decedent was already neutralized. Id.

67-94. Admitted.

95. Objection. Irrelevant; unfairly prejudicial.

96-119. Admitted.

120-121. Objection. Irrelevant.

122. Admitted.

123. Objection. Subsequent remedial measure.

124-137. Admitted.

138. Objection. Irrelevant; hearsay; unfairly prejudicial.

WEISBERG LAW, P.C.

/s/ Matthew B. Weisberg  
Matthew B. Weisberg, Esquire  
Attorneys for Plaintiff