IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ADRIAN ZUMBADO, CHRISTINE ZUMBADO, ROBERT WARD, and MIGUEL TORRES, SR., Individually and as Parent and Natural Guardian of Miguel Torres, Jr., a Minor Child,	)	Civil Action No. 07-CV-02459
Plaintiffs	)	
vs.	)	
THE CITY OF ALLENTOWN and CHIEF JOSEPH BLACKBURN, Individually, and in His Official Capacity as Chief of The Allentown Police Department,	)	
Defendants	)	

* * *

APPEARANCES:

JOHN P. KAROLY, JR., ESQUIRE
On behalf of Plaintiffs

DONALD E. WIEAND, JR., ESQUIRE
On behalf of Defendants

* * *

O P I N I O N

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on Defendants' Motion for Summary Judgment filed October 30, 2008 together with Defendants' Statement of Facts in Support of their Motion for Summary Judgment, and the Brief of Defendants, City of Allentown

and Chief Joseph Blackburn, in Support of their Motion for Summary Judgment. Also before the court is defendants' Motion for Sanctions filed October 7, 2008. For the reasons expressed below, I grant the motion for summary judgment and enter judgment in favor of defendants, and dismiss the motion for sanctions as moot.

Specifically, I conclude that there are no genuine issues of material fact that would preclude summary judgment in defendants' favor regarding plaintiffs' claims against the City of Allentown and Chief Joseph Blackburn.

JURISDICTION

Jurisdiction in this case is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367.

VENUE

Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiff's claims allegedly occurred in the City of Allentown, Lehigh County, Pennsylvania, which is located within this judicial district.

PROCEDURAL HISTORY

Plaintiffs initiated this action on June 18, 2007 by filing a twelve-count civil Complaint against the City of Allentown; Chief Joseph Blackburn, individually and in his

official capacity as Chief of the Allentown Police Department; and John Does I-X, individually and in their official capacity as members of the Allentown Police Department. Plaintiffs' claims arise from an alleged home invasion by the Allentown Police Department on June 17, 2005. Plaintiffs' Complaint avers that police entered the home of Adrian and Christine Zumbado, while they were at home with a number of other individuals, without a warrant and without probable cause to believe any unlawful activity was taking place.

By Order dated November 15, 2007, as amended by my Order dated January 31, 2008, I dismissed Count I (described in the Complaint simply as "42 U.S.C. § 1983"), Count VII (State Constitutional Violations), and Count XII (Negligent Infliction of Emotional Distress) of the Complaint; all claims under the First and Fourteenth Amendments of the United States Constitution; and plaintiffs' claim for injunctive relief. By Order dated March 19, 2008, I dismissed all claims against the John Doe defendants.

Accordingly, the remaining claims are as follows: Count II (Excessive Force and Physical Brutality); Count III (Unlawful Seizure (Arrest)); Count IV (False Imprisonment); Count V (Civil Conspiracy); Count VI (Municipal Liability); Count VIII (Assault and Battery); Count IX (False Arrest and

Illegal Imprisonment); Count X (Civil Conspiracy); and Count XI (Intentional Infliction of Emotional Distress).

By Order dated July 28, 2008, I referred this matter to United States Magistrate Judge Elizabeth T. Hey for the purpose of resolving discovery disputes. On August 25, 2008, Magistrate Judge Hey entered an Order directing plaintiffs to provide their Rule 26 disclosures, answers to defendants' interrogatories, and responses to defendants' requests for production of documents on or before August 29, 2008. On October 7, 2008, defendants filed the within Motion for Sanctions seeking dismissal of this action for plaintiffs' failure to comply with Magistrate Judge Hey's August 25, 2008 Order. On October 30, 2008, defendants filed the within motion for summary judgment. As discussed below at footnote 1, plaintiffs did not respond to the motion for summary judgment.

On December 23, 2008, I conducted a hearing on defendants' Motion for Sanctions, and took the matter under advisement. Hence this Opinion addresses both motions.

Initially, I address defendants' motion for summary judgment. Because I conclude that defendants are entitled to summary judgment on all remaining claims, as discussed below, I dismiss the Motion for Sanctions as moot.

STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-2510, 91 L.Ed.2d 202, 211 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 443 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, 477 U.S. at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). Plaintiffs cannot avert summary judgment with speculation or by resting on the allegations in their pleadings, but rather they must present competent evidence from which a jury could reasonably find in their favor. Ridgewood Board of Education v. N.E. for M.E.,

172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D.Pa. 1995).

FACTS

Based upon the pleadings, record papers, exhibits, and the uncontested concise statement of facts contained within defendant's motion for summary judgment and accompanying brief, the pertinent facts for purposes of the motion for summary judgment are as follows.[1]

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[1] By my Rule 16 Status Conference Order dated March 14, 2008, any party filing a motion for summary judgment was required to file a brief, together with "a separate short concise statement, in numbered paragraphs, of the material facts about which the moving party contends there is no genuine dispute." The concise statement of facts was required to be supported by citations to the record and, where practicable, relevant portions of the record were to be attached.

In addition, my Order provided that any party opposing a motion for summary judgment was required to file a brief in opposition to the motion and "a separate short concise statement, responding in numbered paragraphs to the moving party's statement of the material facts about which the opposing party contends there is a genuine dispute, with specific citations to the record, and, where practicable, attach copies of the relevant portions of the record."

Moreover, my Order provided that if the moving party failed to provide a concise statement, the motion may be denied on that basis alone. With regard to the opposing party, my Order provided: "All factual assertions set forth in the moving party's statement shall be deemed admitted unless specifically denied by the opposing party in the manner set forth [by the court]."

In this case, defendants filed a concise statement of facts in support of their motion. Plaintiffs filed no response in opposition, and did not file a responsive concise statement of undisputed facts with citation to the record as required by my Order.

The requirement for a concise statement and a responsive concise statement is consistent with the requirement of Rule 56 of the Federal Rules of Civil Procedure that the moving party provide proof that there are no genuine issues of material fact which would prevent him from being entitled to judgment as a matter of law. Moreover, in response, the non-moving party (in this case plaintiffs) may not rest on their pleadings, but must come forward with competent evidence that demonstrates a genuine issue of material fact. Ridgewood, supra.

(Footnote 1 continued):

On June 17, 2005, plaintiffs Adrian and Christine Zumbado were at their home at 1531 Liberty Street, Allentown, Pennsylvania. Plaintiffs Robert Ward and Miguel Torres, Sr., as well as minor plaintiff Miguel Torres, Jr., were also present. Without warning, members of the Allentown Police Department Emergency Response Team ("ERT") entered the residence through the front and back doors. Entry was made because ERT believed that an extremely dangerous suspect in a recent homicide was inside the home.

ERT officers pointed guns at the persons in the house, and forced everyone to lie on the floor while officers searched the house. The adults were handcuffed and plaintiffs were detained for approximately one hour. No warrant was ever presented to plaintiffs, and plaintiffs were subsequently released and no criminal charges were ever filed.

(Continuation of footnote 1):

In addition, Rule 83(b) of the Federal Rules of Civil Procedure provides:

> A judge may regulate practice in any manner consistent with federal law, rules adopted under 28 U.S.C. §§ 2072 and 2075, and local rules of the district. No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or local district rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.

Thus, even if my requirement for a separate concise statement were not consistent with Rule 56, I gave plaintiffs actual notice of my requirement, and plaintiffs clearly failed to comply with it.

Accordingly, although I do not grant the motion as unopposed, see E.D.Pa.R.Civ.P. 7.1(c), I deem admitted all facts contained in paragraphs 1-49 of Defendants' Statement of Facts in Support of their Motion for Summary Judgment filed October 30, 2008 for purposes of the within motion only.

At the time of the incident, Chief Joseph Blackburn was the only person in the Allentown Police Department ("Department") authorized to set or adopt policies for the Department. Chief Blackburn was not on duty during the incident, was not present during the events described in plaintiffs' Complaint, and had no personal involvement in the incident. He was not consulted about the incident and was not aware of the details or nature of the event until after it had occurred.

In addition to the Chief of Police, the Mayor of the City of Allentown was authorized to set or adopt policies for all city departments. Chief Blackburn was responsible for implementing any such policies within the Department. Additionally, a majority of the Allentown City Council, acting in their legislative capacity, could adopt ordinances or other legislative enactments which could set or adopt policies for the City, including the Department.

At the time of the incident giving rise to plaintiffs' Complaint, the City of Allentown had in place a Policy Manual detailing administrative policies and procedures that the Department was to follow in order to promptly, fairly, and thoroughly investigate complaints and allegations involving Department personnel. The Department had specific procedures in place concerning search and seizure, which established guidelines and procedures for police officers to follow when conducting

searches and seizures without a warrant. This policy specifically required officers to follow all constitutional guidelines, as well as all Pennsylvania and federal statutory and case law provisions when conducting searches and seizures.

The Department had a policy explicitly prohibiting officers from using unreasonable or excessive force. Moreover, the Department followed a policy governing arrest procedures wherein officers were required to follow the appropriate Pennsylvania Rules of Criminal Procedure and all other relevant statutes in making arrests both with and without a warrant.

The ERT is a unit of the Department that is specially trained to respond to crisis situations, including hostage rescue operations, officer rescue operations, barricaded subjects, execution of high-risk search and arrest warrants, active shooter incidents, and the apprehension of armed and dangerous persons. ERT operations are covered by a policy known as General Order 4-12, which outlines extensive policies and procedures that are to be followed by the ERT.[2]

In order to become a member of the ERT, a police officer must have at least three years of service with the Department, pass a physical test and a handgun test, and be approved by a review board. The review board considers an ERT candidate's ability to follow orders, work as a team member, and

[2] General Order 4-12 is attached to Defendants' Motion for Summary Judgment as Exhibit A to defendants' Exhibit 3 (Affidavit of Joseph Hanna).

perform well in high-stress situations, in addition to the candidate's disciplinary record, health records, and job performance. Successful candidates must pass a psychological examination and be approved by the Chief of Police.

New ERT members must train with the ERT for at least one year, attend a week-long seminar on the subject of ERT operations and tactics, and obtain National Rifle Association instructor certification for handguns and shotguns before participating in an actual operation of the ERT. Additionally, new ERT members must become qualified or certified by the National Tactical Officers' Association in the use of all weapons and devices used by the ERT before participating in ERT operations. All members are required to maintain yearly qualifications or certifications for all weapons used during ERT operations.

At the time of the incident giving rise to plaintiffs' claims, ERT members received a minimum of 24 training days per year, including at least six days' training on special weapons. The ERT trains as a unit at least two days per month, except for February, in which the unit trains one day. Additionally, once a year the ERT trains as a unit for four consecutive days. All such training requirements and membership standards are in addition to mandatory recertification training required for all

police officers under Pennsylvania law, and were in effect on June 17, 2005.

At the time of the incident giving rise to plaintiffs' claims, the Department had been accredited by the Pennsylvania Law Enforcement Accreditation Commission and the Commission on Accreditation for Law Enforcement Agencies. Both accreditation processes include self-assessment and formal assessment to determine whether department policies are in compliance with the organizations' respective standards.

DISCUSSION

Plaintiffs' claims include violations of the Eighth Amendment, actionable through 42 U.S.C. § 1983, and pendent state tort claims under Pennsylvania law. As discussed above, plaintiffs seek relief against the City in its municipal capacity, and against Chief Blackburn in both his individual and official capacities. Defendants contend they are entitled to summary judgment on all of plaintiffs' claims. The applicable federal law, the liability of the municipal defendants and the liability of the individual defendants in each capacity are addressed below.

Section 1983

Section 1983 is an enabling statute which provides a remedy for the violation of constitutional or statutory rights. The statute itself does not create any substantive rights, but

rather provides a mechanism for the enforcement of certain rights guaranteed by the United States Constitution. Gruenke v. Seip, 225 F.3d 290, 298 (3d Cir. 2000). Section 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

Thus, to state a claim under § 1983, a plaintiff must demonstrate the defendant, acting under color of state law, deprived plaintiff of a right secured by the Constitution or the laws of the United States. Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420, 428 (1986); Chainey v. Street, 523 F.3d 200, 219 (3d Cir. 2008)(quoting Kaucher v. County of Bucks, 455 F.3d 418, 423 (3d Cir. 2006)).

Municipal Liability

Defendants contend that Count VI, a Section 1983 claim against the City of Allentown, should be dismissed because plaintiffs have failed to submit sufficient evidence to establish municipal liability against the City.

Specifically, Count VI alleges that the June 17, 2005 incident was caused by the City's maintenance of policies or customs exhibiting deliberate indifference toward the

constitutional rights of persons in Allentown and that the City had a policy or custom of tolerating and inadequately investigating incidents of police misconduct. Moreover, plaintiffs allege in Count VI that the City had a policy or custom of failing to adequately screen and train new police officers, failed to require appropriate training of officers known to engage in or tolerate police misconduct, and failed to adopt or enforce polices intended to avoid constitutional violations.

Municipalities are considered "persons" under § 1983 and may be held liable for constitutional torts if two prerequisites are met: (1) the plaintiff's harm was caused by a constitutional deprivation; and (2) the municipal entity is responsible for that violation. Collins v. City of Harker Heights, 503 U.S. 115, 120, 112 S.Ct. 1061, 1066, 117 L.Ed.2d 261, 270 (1992).

A municipality cannot be held vicariously liable for the constitutional violations of its agents under a theory of respondeat superior. Langford v. Atlantic City, 235 F.3d 845, 847 (3d Cir. 2000). Instead, municipal entities are only liable under § 1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible for under

§ 1983." Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 694, 98 S.Ct 2018, 2037-2038, 56 L.Ed.2d 611, 638 (1978).

For purposes of § 1983, a municipal policy is a statement, ordinance, regulation, or decision officially adopted and promulgated by a government body's officers. Monell, 436 U.S. at 690, 98 S.Ct. at 2035-2036, 56 L.Ed.2d at 635. Thus, municipalities are liable only for "deprivations resulting from the decisions of its duly constituted legislative body or of those officials whose acts may fairly be said to be those of the municipality." Board of the County Commissioners v. Brown, 520 U.S. 397, 403-404, 117 S.Ct. 1382, 1388, 137 L.Ed.2d 626, 639 (1997). A custom may lead to municipal liability if "the relevant practice is so widespread as to have the force of law", even though not formally adopted by the municipality. Id.

A plaintiff can also plead a Monell claim for a municipality's failure to train police officers appropriately. However, such a claim can succeed only "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388-389, 109 S.Ct. 1197, 1204, 103 L.Ed.2d 412, 426-427 (1989). Such "deliberate indifference" must be shown to be part of a city policy. City of Canton, 489 U.S. at 389-390, 109 S.Ct. at 1205, 103 L.Ed.2d at 427.

Drawing all reasonable inferences in favor of plaintiffs as the non-moving party, as I must for purposes of this motion for summary judgment, I conclude that plaintiffs have not presented competent evidence from which a jury could reasonably find in their favor on the issue of municipal liability. See Ridgewood, 172 F.3d at 252.

Although plaintiffs' Complaint alleges that the City maintained policies or customs of exhibiting deliberate indifference to the constitutional rights of persons in Allentown, inadequately investigating citizen complaints of police misconduct and inadequately training its police officers, plaintiffs submitted no record materials to support these claims. On the contrary, the undisputed facts set forth above are that the City's policy regarding search and seizure required all officers to follow all constitutional guidelines, as well as state and federal law, when engaging in searches and seizures. Moreover, the City's Policy Manual detailed administrative policies and procedures that the Department was to follow in order to promptly, fairly, and thoroughly investigate complaints and allegations involving Department personnel.

Plaintiffs cannot avert summary judgment by resting on the allegations in their pleadings. Ridgewood, 172 F.3d at 252; Woods, 889 F.Supp. at 184. Because plaintiffs have not established the existence of a question of material fact with

regard to the issue of municipal liability, I grant summary judgment in defendant City of Allentown's favor as to Count VI of the Complaint. Accordingly, I dismiss Count VI of plaintiffs' Complaint.

Claims Against Chief Joseph Blackburn

Plaintiffs' remaining claims (Counts II-V and VIII-XI) are alleged against Chief Blackburn as an individual officer.[3] Although none of the claims in the Complaint specifically avers that it applies to Chief Blackburn in his official capacity, the Complaint's caption indicates that Chief Blackburn is sued in both his individual and official capacities.[4]

Section 1983 Claims Against Chief Blackburn

The United States Supreme Court differentiates between § 1983 claims against government employees acting in their individual and official capacities. Official capacity suits

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[3] The Complaint indicates that these claims are alleged by "Plaintiffs Against Individual Defendants", except for Count XI, which is articulated as "Plaintiffs Against Individual Officers". As discussed above, I previously dismissed the Complaint against officers John Does I-X. Accordingly, Chief Blackburn is the only remaining individual defendant.

[4] Although defendants' Answer pleads the doctrine of qualified immunity as an affirmative defense, their motion for summary judgment does not raise or brief the issue. The Supreme Court has stressed the importance of resolving immunity questions at the earliest possible stage in litigation. See Hunter v. Bryant, 502 U.S. 224, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991). Nevertheless, a defendant has the burden of establishing that he is entitled to qualified immunity. Kopec v. Tate, 361 F.3d 772, 776 (3d Cir. 2004).

Because defendants have not briefed the issue as required by Rule 7.1(c) of the Rules of Civil Procedure of the United States District Court for the Eastern District of Pennsylvania, I am unable to determine whether Chief Blackburn is entitled to qualified immunity. Therefore, I do not address qualified immunity and proceed to the merits of plaintiffs' claims against Chief Blackburn.

"generally represent only another way of pleading an action against an entity of which an officer is an agent." Kentucky v. Graham, 473 U.S. 159, 165-166, 105 S.Ct. 3099, 3104-3105, 87 L.Ed.2d 114, 121-122 (1985)(quoting Monell, 436 U.S. at 690 n.55, 98 S.Ct at 2035, 56 L.Ed.2d at 635).

State officers acting in their official capacity are not liable under § 1983 because the officers assume the identity of the government that employs them. Hafer v. Melo, 502 U.S. 21, 27, 112 S.Ct. 358, 362-363, 116 L.Ed.2d 301, 310-311 (1991) (citing Will v. Michigan Department of State Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45, 58 (1989)). Accordingly, I grant summary judgment in favor of defendant Chief Joseph Blackburn to the extent any claim in plaintiffs' Complaint may be construed as alleging a cause of action against Chief Blackburn in his official capacity.

In contrast, individual capacity suits attempt to impose liability on government officials for their actions under color of law. Kentucky v. Graham, 473 U.S. at 165-166, 105 S.Ct. at 3104-3105, 87 L.Ed.2d at 121-122 (1985). Individual defendants who are policymakers may be liable under § 1983 in their individual capacity 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. v. Luzerne County Juvenile

Detention Center, 372 F.3d 572, 586 (3d Cir. 2004)(quoting Stoneking v. Bradford Area School District, 882 F.2d 720, 725 (3d Cir. 1989)).

In addition, an official with supervisory responsibilities may also be held liable if the official participated in violating the plaintiff's rights, or directed others to violate them, or had knowledge of, and acquiesced in, his subordinates' violations. Baker v. Monroe Township, 50 F.3d 1186, 1190-1191 (3d Cir. 1995). However, there is no liability in individual capacity § 1983 actions based on a theory of respondeat superior. Monell, 436 U.S. at 693, 98 S.Ct. at 2037, 56 L.Ed.2d at 637.

In this case, plaintiffs allege four counts against Chief Blackburn pursuant to § 1983: Count II (excessive force), Count III (unlawful seizure), Count IV (false imprisonment) and Count V (civil conspiracy). First, I address Counts II-IV.

Plaintiffs do not allege, and have offered no record evidence, that Chief Blackburn directly participated in the June 17, 2005 incident giving rise to the claims set forth in Counts II-IV. Plaintiffs also have failed to present competent evidence that in his capacity as a policymaker, Chief Blackburn acted with deliberate indifference in establishing and maintaining a policy, practice or custom which directly caused a violation of plaintiffs' constitutional rights. A.M., 372 F.3d

at 586. Moreover, plaintiffs have not presented competent evidence that Chief Blackburn directed others to violate plaintiffs' rights, or had knowledge of, and acquiesced in, his subordinates' violations. Baker, 50 F.3d at 1190-1191.

Accordingly, I grant summary judgment in favor of defendant Chief Joseph Blackburn on Counts II, III and IV of plaintiffs' Complaint and dismiss those counts from the Complaint.

Count V alleges that individual members of the Allentown Police Department participated in a conspiracy to cover up the events giving rise to plaintiffs' claims. The Complaint does not specifically aver that Chief Blackburn participated in such a conspiracy.[5] However, I construe Count V as against Chief Blackburn as the only remaining individual defendant because the claim, which is marked as "Plaintiffs Against Individual Defendants", does not clearly indicate otherwise.

A claim for civil conspiracy is a vehicle by which § 1983 liability may be imputed to those who have not actually performed the act denying constitutional rights. County Concrete Corporation v. Town of Roxbury, 442 F.3d 159, 174 (3d Cir. 2006). To allege a civil conspiracy for purposes of § 1983, the

[5] Plaintiffs' Complaint states at paragraph 64 that the conspiracy "at times included unknown members of the Allentown Police Force identified as John Does I-X, who either facilitated, participated in, or acquiesced in Defendants' misconduct and false justification of same." The Complaint makes no such specific allegation that Chief Blackburn participated in the conspiracy.

plaintiff must show that two or more persons combined to do an unlawful or criminal act, or to do a lawful act by unlawful means or for an unlawful purpose. Walsh v. Quinn, 2008 WL 3285877, at *4 (W.D.Pa. Aug. 8, 2008)(Cohill, S.J.)(citing Ammlung v. City of Chester, 494 F.2d 811 (3d Cir. 1974)).

Plaintiffs have submitted no competent evidence that Chief Blackburn participated in, or was aware of, any civil conspiracy among police officers to conceal the June 17, 2005 events. Specifically, plaintiffs have not shown that Chief Blackburn combined with another person to do an unlawful or criminal act, or to do a lawful act by unlawful means or for an unlawful purpose. See Walsh, supra.

On the contrary, the undisputed facts set forth above are that Chief Blackburn was not on duty during the incident; was not present during the events described in plaintiffs' Complaint; had no personal involvement in the incident; was not consulted about the incident; and was not aware of the details or nature of the event until after it had occurred. Accordingly, I grant summary judgment in favor of defendant Chief Joseph Blackburn on Count V of plaintiffs' Complaint and dismiss Count V from the Complaint.

Tort Claims Against Chief Blackburn

Finally, I address plaintiffs' tort claims against Chief Blackburn as set forth in Count VIII (Assault and Battery),

Count IX (False Arrest and Illegal Imprisonment), Count X (Civil Conspiracy), and Count XI (Intentional Infliction of Emotional Distress).

As noted above in footnote 3, the Complaint articulates the tort claims as against "individual defendants" or "individual officers". None of Counts VIII-XI specifically alleges that Chief Blackburn participated in the tortious conduct; however, because it is not clear that plaintiff intended those counts to apply only to the now-dismissed John Doe defendants, I construe each as a claim against Chief Blackburn.

Defendant Chief Blackburn contends that Counts VIII-XI are barred by the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa.C.S.A. § 8541 ("Tort Claims Act").

Under the Tort Claims Act, local agencies, including municipalities, and their employees are generally immune from tort liability unless the alleged misconduct fits into one eight categories, which are specifically enumerated in the statute.[6]

The Tort Claims Act provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property

[6] None of the eight categories apply in this case. 42 Pa.C.S.A. § 8542 permits recovery against a local agency or its employee for injury caused by a "negligent act" that falls into one of eight categories: (1) vehicle liability; (2) care, custody or control of personal property; (3) real property; (4) trees, traffic control and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody or control of animals. 42 Pa.C.S.A. § 8542. Plaintiffs do not allege claims of negligence, nor do the facts that form the basis of plaintiff's claims fall into any of these categories.

> caused by any act of the local agency or an employee thereof or any other person.

42 Pa.C.S.A. § 8541. For purposes of the Tort Claims Act, a "local agency" is defined as a "government unit other than the Commonwealth government." 42 Pa.C.S.A. § 8501.

However, under 42 Pa.C.S.A. § 8550, Tort Claims Act immunity does not apply where an employee has engaged in "willful misconduct." Section 8550 provides:

> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

42 Pa.C.S.A. § 8550.

For purposes of the Tort Claims Act, "willful misconduct" has the same meaning as "intentional tort". Brown v. Muhlenberg Township, 269 F.3d 205, 214 (3d Cir. 2001). In the context of police misconduct cases, there must be a determination not only that the officer committed the acts in question, but also that he willfully went beyond the bounds of the law. DeBellis v. Kulp, 166 F.Supp.2d 255, 279 (E.D.Pa. 2001)(Van Antwerpen, J.)(citing Renk v. City of Pittsburgh, 537 Pa. 68, 641 A.2d 289 (1994).

Because Counts VIII-XI allege intentional torts, I conclude that Chief Blackburn is not immune from those claims under the Tort Claims Act, and address each claim on the merits.

Assault and Battery

Count VIII alleges state-law intentional tort claims of assault and battery. Under Pennsylvania law, "assault is an intentional attempt by force to do an injury to the person of another, and a battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." Geonnotti v. Amoroso, 2008 WL 701305, at *6 (E.D.Pa. March 13, 2008)(Schiller, J.)(quoting Renk v. City of Pittsburgh, 537 Pa. 68, 641 A.2d 289 (1994)).

As noted above, plaintiffs do not allege that Chief Blackburn directly participated in the June 17, 2005 incident giving rise to the assault and battery claims. Moreover, the undisputed facts are that Chief Blackburn was not personally involved and had no knowledge of the incident until after it had occurred. Plaintiffs have submitted no evidence to establish that Chief Blackburn intentionally attempted by force to do an injury to plaintiffs, nor that the violence menaced in such an assault was actually done to plaintiffs. Geonnotti, 2008 WL 701305, at *6. Additionally, plaintiffs have adduced no evidence to support a finding that in committing any such acts, Chief Blackburn "willfully went beyond the bounds of the law" as

required by DeBellis, supra, for purposes of their assault and battery claims.

Accordingly, because no genuine issue of material fact exists regarding the issue of whether Chief Blackburn committed the intentional torts of assault and battery against plaintiffs, I grant summary judgment in his favor on Count VIII and dismiss Count VIII from plaintiffs' Complaint.

False Arrest and Illegal Imprisonment

Count IX alleges a claim for the state-law intentional torts of false arrest and illegal imprisonment. In Pennsylvania, false arrest is defined as "an arrest made without probable cause" or "an arrest made by a person without privilege to do so". Russoli v. Salisbury Township, 126 F.Supp.2d 821, 869 (E.D.Pa. 2000)(Van Antwerpen, J.). The undisputed facts are that Chief Blackburn did not participate in the June 17, 2005 incident giving rise to these claims, and plaintiffs have not submitted evidence to suggest that Chief Blackburn arrested plaintiffs without probable cause or privilege to do so.

The elements of false imprisonment are "(1) the detention of another person, and (2) the unlawfulness of such detention". Id. (citing Renk, supra). An arrest is lawful if it is based upon probable cause. Id. However, although it is undisputed that plaintiffs were detained for approximately one hour, plaintiffs have not presented competent evidence to prove

that such detention was unlawful, or that Chief Blackburn had any knowledge of the incident or participated in the detention.[7] Moreover, plaintiffs have offered no evidence to support a finding that in committing any such acts, Chief Blackburn "willfully went beyond the bounds of the law" as required by DeBellis, supra, for purposes of their false arrest and illegal imprisonment claims.

Accordingly, because there is no genuine issue of material fact regarding the issues of false arrest and illegal imprisonment, I grant summary judgment in favor of defendant Chief Joseph Blackburn on Count IX and dismiss Count IX from plaintiffs' Complaint.

Civil Conspiracy

Count X alleges a state-law civil conspiracy claim. Specifically, the claim alleges that individual officers conspired with others to engage in the acts alleged in plaintiffs' other tort claims.

To state a claim for civil conspiracy under Pennsylvania law, a complaint must allege:

> (1) a combination of two or more persons acting with a common purpose to do an unlawful act

[7] The Complaint alleges that the Zumbados' home was entered without probable cause. Probable cause is normally a jury question. See Russoli, supra. However, because plaintiffs have presented no evidence that Chief Blackburn played any role in the June 17, 2005 incident and have failed to adduce any evidence suggesting that the incident was unlawful, I do not reach the issue of probable cause.

or to do a lawful act by unlawful means or for an unlawful purpose;

(2) an overt act done in pursuance of the common purpose; and

(3) actual legal damage.

McKeeman v. Corestates Bank, N.A., 751 A.2d 655, 660 (Pa.Super. 2000). Additionally, proof of malicious intent is an essential element of a claim for conspiracy. Thompson Coal Company, 488 Pa. at 211, 412 A.2d at 473.

Plaintiffs have adduced no evidence that satisfies any of the elements of civil conspiracy set forth in McKeeman. As discussed above, the undisputed facts set forth above are that Chief Blackburn was not on duty during the incident; was not present during the events described in plaintiffs' Complaint; had no personal involvement in the incident; was not consulted about the incident; and was not aware of the details or nature of the event until after it had occurred.

Plaintiffs have submitted no competent evidence supporting a finding that Chief Blackburn combined with any other person to commit any unlawful act, or any lawful act by unlawful means or for an unlawful purpose, against plaintiffs. Moreover, there is no record evidence to support plaintiffs' allegations of legal damage. McKeeman, 751 A.2d at 660. Additionally, plaintiffs have failed to present proof of malicious intent as

required by Thompson Coal Company, 488 Pa. at 211, 412 A.2d at 473.

Accordingly, because plaintiffs have not established a genuine issue of material fact with regard to their state-law claim for civil conspiracy, I grant summary judgment in favor of defendant Chief Joseph Blackburn on Count X and dismiss Count X from plaintiffs' Complaint.

Intentional Infliction of Emotional Distress

Finally, Count XI alleges a state-law tort claim for intentional infliction of emotional distress. Plaintiffs allege that the June 17, 2005 incident was "calculated, designed, and intended by the individual Defendants to intentionally inflict deliberate emotional distress, psychological trauma, and psychic pain and suffering upon the Plaintiffs and to instill in their minds an immediate and permanent sense of fear and trepidation", causing plaintiffs to suffer indefinite psychological damages.[8]

In order to state a claim for intentional infliction of emotional distress under Pennsylvania law, plaintiff must establish four elements: (1) the conduct of the defendant was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress; and (4) the distress was severe. Walker v. North Wales Borough, 395 F.Supp.2d 219, 232 (E.D.Pa. 2005)(Baylson, J.)(citing Chuy v.

[8] Complaint, paragraphs 90-91.

Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3d Cir. 1979).

A legally cognizable claim for intentional infliction of emotional distress must be based upon conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Cox v. Keystone Carbon Company, 861 F.2d 390, 395 (3d Cir. 1988)(quoting Buczek v. First National Bank of Mifflintown, 366 Pa.Super. 551, 531 A.2d 1122, 1125 (1987)).

In this case, plaintiffs have adduced no evidence to establish any of the elements of their intentional infliction of emotional distress against Chief Blackburn. First, as discussed above, the undisputed facts are that Chief Blackburn did not participate in, and had no knowledge of, the June 17, 2005 incident giving rise to plaintiffs' claims. Plaintiffs have not presented any evidence to suggest that Chief Blackburn engaged in any conduct with respect to plaintiffs that was intentional, reckless, extreme, or outrageous. Additionally, plaintiffs have presented no evidence that any of Chief Blackburn's conduct caused plaintiffs severe (or any) emotional distress. See Walker, 395 F.Supp.2d at 232.

Accordingly, because plaintiffs have failed to establish a genuine issue of material fact with regard to their

state-law claim for intentional infliction of emotional distress, I grant summary judgment in favor of defendant Chief Joseph Blackburn on Count XI and dismiss Count XI from plaintiffs' Complaint.

MOTION FOR SANCTIONS

Defendants seek sanctions against plaintiffs and their counsel because of alleged discovery violations. Specifically, defendants seek sanctions pursuant to Rule 37(b)(2)(A) of the Federal Rules of Civil Procedure for failure to obey a court Order to provide discovery; under Rule 37(d)(1)(A) for failure to attend their own deposition or serve answers to interrogatories; and under Rule 16(f) for failure to comply with court-ordered discovery deadlines.

The sanction sought is dismissal of plaintiffs' Complaint[9] or, in the alternative, preclusion of plaintiffs' expert reports and expert witness testimony at the trial of this matter.

Because, by this Order and Opinion, I have granted summary judgment in defendants' favor on all remaining claims in the Complaint and enter judgment in favor of defendants and against plaintiffs, I dismiss the Motion for Sanctions as moot.

[9] Defendants also seek dismissal of plaintiffs' Complaint for failure to prosecute pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons, I grant Defendants' Motion for Summary Judgment and dismiss all remaining counts of plaintiffs' Complaint, and I enter judgment in favor of defendants and against plaintiffs on all claims. Moreover, I dismiss defendants' Motion for Sanctions as moot.