Zavec v. Collins et al Doc. 35

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

DAWN ZAVEC, *et al*.

Plaintiffs,

v.

ROBERT COLLINS, BRIAN GIST, and CITY OF WILKES-BARRE,

Defendants.

NO. 3:16-cv-00347

(JUDGE CAPUTO)

MEMORANDUM

Presently before me is a partial motion to dismiss (Doc. 23) Plaintiffs Dawn Zavec, individually, o/b/o M.Z., a minor, and as administrator of the estate of Joseph Zavec's Second Amended Complaint (Doc. 22) filed by Defendants Robert Collins ("Officer Collins"), Brian Gist ("Officer Gist"), and City of Wilkes-Barre (collectively "Defendants").

For the reasons that follow, Defendants' partial motion to dismiss the Second Amended Complaint will be granted in part and denied in part.

I. Factual Background

The pertinent facts, as set forth in Plaintiffs' Second Amended Complaint (Doc. 22), are as follows:

On November 10, 2014, at approximately 9:30 p.m., Wilkes-Barre Police Officers Robert Collins and Gist encountered Plaintiffs Dawn Zavec ("Mrs. Zavec"), Joseph Zavec ("Mr. Zavec"),[1] and their daughter, M.Z., at their home on Weston Lane in the City of Wilkes-Barre while responding to a parking complaint involving Mr. Zavec and a neighbor. Doc. 22, at ¶ 11.

Officers Collins and Gist approached the Zavecs' door and spoke to them about the parking issue. *Id.* at ¶¶ 13, 14, 16, 17. The Officers became aware of both Mr. and Mrs.

[1] On June 11, 2016, Mr. Zavec passed away. On July 29, 2016, Mrs. Zavec became the administrator of Mr. Zavec's estate. Although Mr. Zavec is now deceased, I will refer to his claims using his name, rather than referring each time to his estate or administrator.

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Zavec's disabilities during the encounter. *Id.* at ¶¶ 15, 18, 19, 20, 24-28. Mrs. Zavec was injecting medicine into her stomach within plain view of Officer Collins as he spoke to Mr. Zavec at the front door of the home. *Id.* at ¶ 14. A disposal container for Mrs. Zavec's needles and injection equipment was located in plain view as well. *Id.* at ¶ 15. Further, Mrs. Zavec explained to the Officers that she was holding an ice pack on her stomach because she had just given herself an injection of multiple sclerosis medication. *Id.* at ¶¶ 18-20. Mr. Zavec's speech disability, a pronounced stutter, was also apparent. *Id.* at ¶¶ 13, 14, 24-28.

While speaking to Mr. Zavec about his neighbor's parking complaint, Officers Collins and Gist began inspecting Mr. Zavec's vehicle and informed him that his window tint and tires were illegal. *Id.* at ¶ 21. Mr. Zavec, who was a licensed vehicle safety inspector in Pennsylvania, told the Officers that, in his opinion, the tints and tires were legal. *Id.* at ¶ 23.

At some point during the conversation, Officer Collins began mocking Mr. Zavec's speech impediment. *Id.* at ¶ 24-25. At that time, Mr. Zavec was inside his home and was conversing with the Officers, who were on the sidewalk in front of the home, through the front screen door. *Id.* at ¶ 26. Mrs. Zavec, who was inside the home seated on the couch, witnessed Officer Collins mocking Mr. Zavec's speech. *Id.* at ¶ 27.

Officer Gist then joined Officer Collins in mocking Mr. Zavec, and began to video and audiotape Mr. Zavec with a cell phone. *Id.* at ¶ 29. Officer Gist angled his cell phone in such a way as to film the conversations and activities which were occurring inside the Zavec home, including conversations Mr. and Mrs. Zavec were conducting privately with each other. *Id.* at ¶¶ 29, 31, 33, 34.

According to Plaintiffs, Officer Gist did not have a warrant to record the inside of the Zavecs' home and the conversations therein. *Id.* at ¶ 32. Moreover, Plaintiffs allege that they did not consent to any such recording. *Id.* at ¶ 35, 39, 55. Plaintiffs further contend that there was no reason for the Officers to continue interacting with them because the parking dispute had already been resolved. *Id.* at ¶ 41.

Mr. Zavec eventually ceased talking to the Officers. While still inside the home, he began speaking to Mrs. Zavec, at one point telling her "he [Officer Collins] just did it again,"

which was apparently a reference to Officer Collins continuing to mock Mr. Zavec's speech. *Id.* at ¶ 34. Shortly thereafter, Mrs. Zavec came out of the home and onto the front porch and asked Officers Collins and Gist to "[p]lease just go because I did see you do that [mock Mr. Zavec's speech impediment]. Please. Look, I am very sick and I don't need it. Just please leave. You did what you had to do, now you're just trying to antagonize him. Please leave." *Id.* at ¶ 40.

Mr. Zavec remained inside the home and observed the interaction between Mrs. Zavec and the Officers through the screen door. *Id.* at ¶ 46. Officer Collins then asked Mrs. Zavec if she thought Mr. Zavec was being "unruly" and whether she heard Mr. Zavec tell the Officers to "go fuck themselves." *Id.* at ¶ 47, 49. Mr. Zavec confirmed that he had, indeed, said that. *Id.* at ¶ 50. Mr. Zavec further expressed anger that Officer Gist was recording the incident on his cell phone. *Id.* at ¶ 51. During the entire encounter, Officer Collins continued to mock and ridicule Mr. Zavec's speech impediment. *Id.* at ¶ 53.

Mrs. Zavec remained on the porch near the screen door and Mr. Zavec was now standing just outside the door next to Mrs. Zavec. *Id.* at ¶ 54. Frustrated and embarrassed by Officer Collins' mockery, Mr. Zavec threatened Officer Collins that, if the Officer continued to mock him, Mr. Zavec would "knock [his] black fucking head off." *Id.* at ¶ 56, 58.

After Mr. Zavec levied the threat, Officer Collins began screaming, "Now you're threatening! Now you're threatening!" and immediately charged at Mrs. Zavec, tackling her onto the living room floor. *Id.* at ¶ 59-60.

Officer Gist stopped recording the incident with his cell phone and entered Plaintiffs' home to join Officer Collins in his attack on Mrs. Zavec. *Id.* at ¶ 61, 63. One of the Officers pinned Mrs. Zavec to the ground and "trampled" on top of her while she cried that they were hurting her, screamed for help, and begged them to stop. *Id.* at ¶ 62, 64. One of the Officers also stepped on Mrs. Zavec's stomach, which is where she had earlier given herself an injection, and Officer Collins put his knees in Mrs. Zavec's eyes. *Id.* at ¶ 65-66. While Officers Collins and Gist were "trampling" on Mrs. Zavec, Mr. Zavec was telling the Officers that Mrs. Zavec had multiple sclerosis and that they were going to "kill" her. *Id.* at ¶ 67. Mrs.

Zavec was able to get up off the ground, but her left leg was completely numb from the Officers' assault and, at some point, she lost control of her bladder. *Id.* at ¶ 68, 71- 72.

It was at this point that Officers Collins and Gist turned their attention to Mr. Zavec and pinned him to the floor as well. *Id.* at ¶ 68, 73. Mrs. Zavec yelled at the Officers to get Mr. Zavec off his stomach because he also has medical conditions when, suddenly, Officer Collins removed his Taser from its holster and pointed it at Mrs. Zavec' s face with his finger on the trigger, saying "I'm not telling you again," as he pulled her head back by her hair. *Id.* at ¶ 74, 76. M.Z., the Zavecs' daughter, attempted to assist Mrs. Zavec, but Officer Gist grabbed M.Z. by her shirt and threw her against a wall, breaking a hot wax warmer which dripped hot was on M.Z.'s back. *Id.* at ¶ 77. In the midst of all the commotion, the Zavecs' puppy broke free from its crate which led Officer Collins to draw his firearm and threaten to shoot the puppy. *Id.* at ¶ 78-79. As a result of the Officers' actions, Plaintiffs' personal property was damaged. *Id.* at ¶ 80.

Eventually, a neighbor called an ambulance for Mrs. Zavec. *Id*. at ¶ 71-72, 84-85. Before it arrived, Officers Collins and Gist left with Mr. Zavec in custody. *Id.* at ¶ 87. Following the incident, neither Mrs. Zavec nor M.Z. were charged with any crimes relating to this incident. *Id.* at ¶ 89. Mr. Zavec, on the other hand, was charged with misdemeanor terroristic threats, misdemeanor resisting arrest, summary disorderly conduct, and summary defiant trespass. *Id.* at ¶ 90. Mr. Zavec subsequently pled guilty to one count of summary disorderly conduct. *Id.* at ¶ 58, 92. The remaining charges were dismissed. *Id.* at ¶ 92.

In light of the above, Plaintiffs instituted the instant lawsuit (Docs. 1, 15, 22), asserting the following causes of action: (1) unreasonable search in violation of 42 U.S.C. § 1983, stemming from Officer Gist's video and audio recording of the encounter, Doc. 22, ¶¶ 96-99; (2) unreasonable entry into Plaintiffs' home in violation of 42 U.S.C. § 1983, *id.* at ¶¶ 100-103; (3) unreasonable seizure in violation of 42 U.S.C. § 1983, *id.* at ¶¶ 104-107; (4) use of excessive force in violation of 42 U.S.C. § 1983, *id.* at ¶¶ 108-111; (5) deprivation of personal property without due process of law in violation of 42 U.S.C. § 1983, *id.* at ¶¶ 112-115; (6) First Amendment retaliation against Mr. Zavec in violation of 42 U.S.C. § 1983,

id. at ¶¶ 116-119; (7) failure to accommodate in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*., and the Rehabilitation Act § 504, 29 U.S.C. § 794, *id.* at ¶¶ 120-144; (8) assault, *id.* at ¶¶ 145-148; (9) battery, *id.* at ¶¶ 149-152; and (10) trespass, *id.* at ¶¶ 153-155.

Defendants have filed a partial motion to dismiss Plaintiffs' Second Amended Complaint. *See* Doc. 23. The motion has been fully briefed and is now ripe for disposition.

II. Legal Standard

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). When considering a Rule 12(b)(6) motion, the Court's role is limited to determining if a plaintiff is entitled to offer evidence in support of their claims. *See Semerenko v. Cendant Corp.*, 223 F.3d 165, 173 (3d Cir. 2000). The Court does not consider whether a plaintiff will ultimately prevail. *Id*. A defendant bears the burden of establishing that a plaintiff's complaint fails to state a claim. *See Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). The statement required by Rule 8(a)(2) must give the defendant fair notice of what the . . . claim is and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197 (2007) (*per curiam*) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007)). Detailed factual allegations are not required. *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. However, mere conclusory statements will not do; "a complaint must do more than allege the plaintiff's entitlement to relief." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Instead, a complaint must "show" this entitlement by alleging sufficient facts. *Id*. "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009). As such, "[t]he touchstone of the pleading standard is plausibility." *Bistrian v. Levi*, 696 F.3d 352, 365 (3d Cir. 2012).

The inquiry at the motion to dismiss stage is "normally broken into three parts: (1) identifying the elements of the claim, (2) reviewing the complaint to strike conclusory allegations, and then (3) looking at the well-pleaded components of the complaint and evaluating whether all of the elements identified in part one of the inquiry are sufficiently alleged." *Malleus v. George*, 641 F.3d 560, 563 (3d Cir. 2011).

Dismissal is appropriate only if, accepting as true all the facts alleged in the complaint, a plaintiff has not pleaded "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, 127 S. Ct. 1955, meaning enough factual allegations "'to raise a reasonable expectation that discovery will reveal evidence of'" each necessary element. *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Id.* at 679, 129 S. Ct. 1937.

In deciding a motion to dismiss, the Court should consider the allegations in the complaint, exhibits attached to the complaint, and matters of public record. *See Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). The Court may also consider "undisputedly authentic" documents when the plaintiff's claims are based on the documents and the defendant has attached copies of the documents to the motion to dismiss. *Id*. The Court need not assume the plaintiff can prove facts that were not alleged in the complaint, *see City of Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 263 & n.13 (3d Cir. 1998), or credit a complaint's "'bald assertions'" or "'legal conclusions.'" *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (quoting *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1429–30 (3d Cir. 1997)).

III. Discussion

A. Claims Pursuant to 42 U.S.C. § 1983

42 U.S.C. § 1983 provides that "[e]very person who, under color of any statute,

ordinance, regulation, custom, or usage...subjects, or causes to be subjected, any citizen...or other person...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured[.]" 42 U.S.C. § 1983. "To establish liability under § 1983, a plaintiff must show that the defendant, acting under color of law, violated the plaintiff's federal constitutional or statutory rights, and thereby caused the complained of injury." *Elmore v. Cleary*, 399 F.3d 279, 281 (3d Cir. 2005) (citing *Sameric Corp. of Del., Inc. v. City of Phila*., 142 F.3d 582, 590 (3d Cir. 1998)).

1. Count I - Unreasonable Search

In Count I of the Second Amended Complaint, Plaintiffs allege that Officer Gist's audio and video recording of the inside of their home and the conversations therein constituted an unreasonable search in violation of the Fourth Amendment as the recording was made without a warrant and without the presence of any exception to the warrant requirement. (Doc. 22, ¶ 38).

The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by governmental actors. U.S. Const. amend. IV. The threshold question, thus, is whether the conduct complained of amounted to a search or a seizure within the meaning of the Fourth Amendment.

As the Supreme Court has held, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S. Ct. 1652, 1656 (1984); *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S. Ct. 3319, 3324 (1983) ("If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search'[.]"). Because individuals ordinarily possess the highest expectation of privacy within the "curtilage" of their home, that area typically is "afforded the most stringent Fourth Amendment protection." *United States v. Martinez-Fuerte*, 428 U.S. 543, 561, 96 S.Ct. 3074, 3084 (1976). However, "'[w]hat a person knowingly exposes to the public, even in his own home ..., is not a subject of Fourth Amendment protection.'" *California v. Ciraolo*, 476 U.S. 207, 213, 106 S. Ct. 1809, 1813

(1986) (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511 (1967)). Thus, an "officer's observations from a public vantage point where he has a right to be" and from which the activities or objects he observes are "clearly visible" do not constitute a search within the meaning of the Fourth Amendment. *Id*.

Here, at all relevant times to Count I, Officers Collins and Gist were standing on a sidewalk in front of Plaintiffs' home (Doc. 22, at ¶ 26), and Mr. Zavec was speaking with the Officers from inside his home through the front screen door. *Id*. at ¶ 26. The Officers were able to observe activities occurring inside Plaintiffs' home from where they were positioned. *Id*. at ¶¶ 26, 29. The interior of the home was visible from the street to anyone walking by. Moreover, Plaintiffs did not seek to confine their activities to the interior of their home where they could not been seen by those standing at the front door; Plaintiffs do not even maintain that they exhibited an expectation of privacy in their living room and the objects located in their home by shielding them from public view. I thus find that the visual observation at issue was not a “search” within the meaning of the Fourth Amendment. *See United States v. Hersh*, 464 F.2d 228, 230 (9th Cir.) (*per curiam*), *cert. denied*, 409 U.S. 1008, 93 S.Ct. 442 (1972) (holding that observations by law enforcement officers through window adjacent to front door and on porch did not constitute a search within the meaning of the Fourth Amendment because the officers "were in a place where they had a right to be, and ... whatever they saw through the window was in plain sight"); *see also United States v. Taylor*, 90 F.3d 903, 908 (4th Cir. 1996) (holding that officers did not conduct a search by looking into an open window because there was no expectation of privacy in the area and the items seen through the window provided the officers with probable cause and exigent circumstances to enter the home).

Plaintiffs concede that "[Officer] Gist can record any discussions between themselves and the police which occurred on the front porch of their home, as those discussions were clearly public." (Doc. 31, at 17). They claim, however that their "Fourth Amendment claim arises because [Officer] Gist did not simply choose to record those conversations and activities which the Zavecs made public. [Officer] Gist chose to aim his phone to video and

audiotape the interior of the Zavecs' home, where private conversations and activities were occurring." *Id.* at 17-18.

The use of the cell phone camera, however, is immaterial here because "the technology in question is in general public use". *See Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 2046 (2001) (holding that [w]here . . . the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant"). More importantly, as I have already explained, the Zavecs' activities were visible from a lawful vantage point. The depiction of the activities as "private" clashes with the fact that they could have been seen by any person passing by Plaintiffs' home. Plaintiffs' argument would be similarly unconvincing and lacking in precedential support had Plaintiffs argued that "[Officer] Gist chose to aim his [*eyes*] to [*see*] the interior of the Zavecs' home, where private conversations and activities were occurring." *See California v. Ciraolo*, 476 U.S. 207, 213, 106 S.Ct. 1809 (1986) ("The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares."). Plaintiffs' argument that "[Officer] Gist did not possess a warrant" and "[n]o exception to the warrant requirement existed" is equally flawed because it incorrectly presupposes that a "search" occurred. (Doc. 31, at 18).

Having exposed the interior of their home to anyone positioned at its entranceway, Plaintiffs possessed no reasonable expectation of privacy in the home or its plainly visible contents. Accordingly, the observations the Officers made through the front door, recorded by Officer Gist on his cell phone, did not constitute a search within the meaning of the Fourth Amendment. As such, Count I will be dismissed with prejudice.

2. Count II - Unreasonable "Entry" Into Plaintiffs' Home

Defendants next argue that "Count II . . . fails to state a claim for relief under 42 U.S.C. § 1983 that is plausible on its face for the alleged unreasonable 'entry' into Plaintiffs' home." (Doc. 28, at 29). They argue that Officers Collins and Gist had probable cause to

believe that Mr. Zavec's words and actions, namely, the conditional threat that Plaintiff Zavec would "come out of the house and knock [Collins's] black fucking head off" if he continued to mock Zavec, "amounted to, at a minimum, disorderly conduct and terroristic threats under the Pennsylvania Crimes Code." (*Id.* at 31). As such, Defendants argue, "because these offenses were committed outside Plaintiffs' home in public view, they were committed in a 'public place' where the Fourth Amendment does not recognize a reasonable expectation of privacy . . . . Thus, when Officers Collins and Gist followed Mr. Zavec into his home in order to effectuate an arrest which had 'been set in motion in a public place,' they did not violate the Fourth Amendment." (*Id.* at 31-32) (citations omitted).

a. Exigency[2]

A warrantless search or arrest made within a home is presumptively unreasonable. *See Payton v. New York*, 445 U.S. 573, 587, 100 S.Ct. 1371 (1980). Nonetheless, such a search may be sustained where probable cause and exigent circumstances exist. *Kentucky v. King*, 563 U.S. 452, 459, 131 S.Ct. 1849 (2011). "Examples of exigent circumstances include, but are not limited to, hot pursuit of a suspected felon, the possibility that evidence may be removed or destroyed, and danger to the lives of officers or others." *United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006).

As the Third Circuit has held,

> [f]actors that support a finding of exigent circumstances include: (1) the gravity of the crime that has been committed; (2) a reasonable belief that the suspect is armed; (3) a clear showing of probable cause based upon reasonably trustworthy information; (4) a strong belief that the suspect is in the premises; (5) "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) peaceable entry, affording the suspect "an opportunity to surrender ... without a struggle and thus to avoid the invasion of privacy involved in entry into the home."

United States v. Anderson, 644 F. App'x 192, 194-95 (3d Cir.), *cert. denied*, 137 S. Ct. 130 (2016) (nonprecedential) (citing *Dorman v. United States*, 435 F.2d 385, 392-93

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[2] As discussed in the following section, I find that the Officers had probable cause to arrest Mr. Zavec.

(D.C.Cir.1970) (*en banc*)). *See also Welsh v. Wisconsin*, 466 U.S. 740, 753, 104 S. Ct. 2091, 2099 (1984)"([A]pplication of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed.").

I find that the exigencies of the situation in the instant case do not justify the Officers' conduct. The alleged threat by Mr. Zavec was a minor offense, and there was no risk that he would have escaped if not immediately apprehended. Mr. Zavec did not retreat into his home, but, rather, Officer Collins "charged at the Zavecs and tackled Mrs. Zavec through the door to the ground on her living room floor," immediately following Mr. Zavec's threat, and Officer Gist followed. (Doc. 22) at ¶¶ 59, 61. There was also no danger of evidence destruction or a reasonable belief on the part of the Officers that Mr. Zavec was armed. Moreover, the police forcefully entered the Zavecs' residence rather than attempt a peaceful entry to afford Mr. Zavec an opportunity to surrender without a struggle. The Complaint also plausibly alleges that the Officers' conduct was both deliberate and culpable. As such, I do not endorse Defendants' theory that the Officers were in "hot pursuit" which would have justified a warrantless entry into Plaintiffs' home, and I find that the allegations in Count II state a plausible claim for relief.

b. Qualified Immunity

Defendants claim that Count II should nevertheless be dismissed because the Officers are entitled to qualified immunity. I agree.

As the Supreme Court has held, the defense of qualified immunity shields government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The standard for applying qualified immunity is an objective one. In *Hunter v. Bryant*, 502 U.S. 224 (1991), the Supreme Court recognized that "the qualified immunity standard gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Id.* at 229 (citation and internal quotation marks omitted).

The Third Circuit has held that "qualified immunity will be upheld on a 12(b)(6) motion only when the immunity is established on the face of the complaint." *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001). In order to defeat an assertion of qualified immunity, a plaintiff must allege that the official violated a "clearly established" right. *Anderson*, 483 U.S. at 635. A plaintiff does not fulfill this requirement simply by alleging that the defendant violated some constitutional provision. *McLaughlin v. Watson*, 271 F.3d 566, 571 (3d Cir. 2001). Rather, "the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense." *McLaughlin*, 271 F.3d at 571 (quoting *Anderson*, 483 U.S. at 640). As the Third Circuit has explained, "clearly established rights" are those with contours sufficiently clear that a reasonable official would understand that what he is doing violates that right. *McLaughlin*, 271 F.3d at 571. "Although officials need not predic[t] the future course of constitutional law, they are required to relate established law to analogous factual settings." *Id.* (citations omitted). The essential inquiry is whether a reasonable official in the defendant's position at the relevant time "could have believed, in light of clearly established law, that [his or her] conduct comported with established legal standards." *Id.* (citations omitted). In a qualified immunity analysis, the court must examine: (1) whether officials violated a constitutional right and (2) whether that right was clearly established at the time. *Wright v. City of Phila.*, 409 F.3d 595, 599–600 (3d Cir. 2005) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982))

As I have already found, the Complaint establishes that a constitutional violation occurred when the Officers entered the Zavecs' home. Taking the allegations in the Complaint as true, Defendants illegally and forcibly entered Mr. Zavec's home to effectuate an arrest for a minor crime. The general constitutional rule and prohibition against unreasonable entries into homes has long been established. *See Payton v. New York*, 445 U.S. 573, 576, 100 S. Ct. 1371, 1375 (1980) ("The Fourth Amendment . . . prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest.") (internal citation omitted); *see also Welsh v. Wisconsin*, 466 U.S. 740, 750, 104 S. Ct. 2091, 2098 (1984).

The issue in the instant case, however, is more narrow. The law is clearly established that, in order to effectuate the arrest for a crime that occurred in the Officers' presence, the Officers needed both probable cause and exigent circumstances, justifying the entry into the home. The Officers, however, may have believed that the crime occurred in a "public space," given where Mr. Zavec was positioned, while making the split-second decision to apprehend him following the threat.

As the Supreme Court has explained, "qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Ashcroft v. al-Kidd*, 563 U.S. 731, 743, 131 S. Ct. 2074, 2085 (2011) (quoting *Malley v. Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092 (1986)). Here, I find that the Officers deserve neither label.

Although an arrest in the home is subject to the warrant requirement and probable cause alone is insufficient, *Payton v. New York*, 445 U.S. 573, 589–90, 100 S.Ct. 1371 (1980), it is by now clear that an arrest conducted in a public place must be supported by probable cause only, and it does not require a warrant. *United States v. Watson*, 423 U.S. 411, 417 & n. 6, 96 S.Ct. 820 (1976). It is true, of course, that "[i]n terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 589–90, 100 S.Ct. 1371 (emphases removed). Here, however, as the Complaint alleges, "Mr. Zavec was standing just outside the door next to Mrs. Zavec" before Officer Collins "charged at the Zavecs," entering their living room. (Doc. 22, at ¶¶ 54, 59).

Defendants argue that the entry was justified under *United States v. Santana*, 427 U.S. 38, 96 S.Ct. 2406 (1976), and that *Santana*, not *Payton*, controls. According to Plaintiffs, however, *Santana* is distinguishable from the instant case because it is a "hot pursuit" case, and has been cited as such. *See, e.g., Brigham City v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 1947 (2006). Plaintiffs, however, fail to appreciate *Santana*'s two-part holding. The first part concerned the expectation of privacy under the Fourth Amendment;

the second addressed the permissibility of the subsequent police entry into the home.

In *Santana*, the police suspected the defendant, Dominga Santana, of distributing heroin and received a tip that she was holding marked money to make a heroin buy. 427 U.S. at 40. Officers drove to Santana's house and observed her standing in the doorway holding a paper bag. The officers "pulled up to within 15 feet of Santana and got out of their van, shouting 'police,' and displaying their identification." *Id.* As the officers approached, "Santana retreated into the vestibule of her house." *Id.* The officers followed through the open door and caught Santana in the vestibule of her home, arrested her, and seized heroin and the marked bills. *Id.*

The Supreme Court first assessed whether Santana had a reasonable expectation of privacy while standing in the threshold of her home. The Court held that a criminal suspect who is standing in the doorway to her home and is "not merely visible to the public" but also "exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house" is considered to be in a public place where she has no expectation of privacy. *Id.* at 42 (citing *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507 (1967) ("What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection.")).

Similarly, here, Mr. Zavec was "as exposed to public view, speech, hearing, and touch as if [he] had been standing completely outside [his] house." *Santana*, 427 U.S. at 42. "Thus, when the police, who concededly had probable cause to do so, sought to arrest [Mr. Zavec], they merely intended to perform a function which we have approved in *Watson*," namely, to make a "warrantless arrest of an individual in a public place upon probable cause" which does "not violate the Fourth Amendment." *Santana*, 427 U.S. at 42 (citing *United States v. Watson*, 423 U.S. 411, 96 S.Ct. 820 (1976)).

Although I have already found that Plaintiffs established that the Officers' conduct in Count II amounted to a constitutional violation, my only inquiry here is whether the constitutional violation was clearly established at the time of the incident, in November 2014. This inquiry "must be undertaken in light of the specific context of the case, not as a

broad general proposition." *Saucier*, 533 U.S. at 201. "[T]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02. Because I am unable to find any relevant case law applying the pertinent constitutional legal principle to a concrete factual context such that it would have been obvious to a reasonable government actor in each of the Officers' positions that their actions violated federal law, I find that the Officers are entitled to qualified immunity.

3. Count III - Unreasonable Seizure of Mr. Zavec

In Count III of the Second Amended Complaint, Plaintiffs assert an "unreasonable seizure" claim in violation of the Fourth and Fourteenth Amendments. *See* Doc. 22 at ¶¶ 105-106. Defendants move only to dismiss Mr. Zavec's claim in Count III; they do not move to dismiss Mrs. Zavec's claim.

a. Probable Cause

A claim under § 1983 for false arrest/false imprisonment is grounded in the Fourth Amendment guarantee against unreasonable seizures. *Groman v. Twp. of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995). To maintain a false arrest claim, a plaintiff must show that the arresting officer lacked probable cause to make the arrest. Thus, the proper inquiry in a Section 1983 claim based on false arrest is " 'whether the arresting officers had probable cause to believe the person arrested had committed the offense.' "*Id.* at 634. *See also Reedy v. Evanson*, 615 F.3d 197, 211 (3d Cir. 2010) ("It is well-established that the Fourth Amendment 'prohibits a police officer from arresting a citizen except upon probable cause.") (citations omitted).

However, unlike a malicious prosecution claim, for which each criminal charge is analyzed independently, a false arrest claim will fail if there was probable cause to arrest for at least one of the offenses involved. *Johnson v. Knorr*, 477 F.3d 75, 85 (3d Cir.2007); *Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994) (holding that for an arrest to be justified, "[p]robable cause need only exist as to any offense that could be charged under the circumstances"); *see also Cummings v. City of Phila*., 137 Fed. Appx. 504, 506 (3d Cir.

2005). Moreover,"[t]he proper inquiry in a section 1983 claim based on false arrest or misuse of the criminal process is not whether the person arrested committed the offense, but whether the arresting officers had probable cause to believe the person arrested had committed the offense." *Dowling v. Philadelphia*, 855 F.2d 136, 141 (3d Cir. 1988).

Probable cause exists when "the facts and circumstances within [the agents'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175–176, 69 S.Ct. 1302, 1311 (1949); *see also United States v. Myers*, 308 F.3d 251, 255 (3d Cir. 2002). Whether probable cause existed for an arrest is generally a question of fact for the jury. *Merkle v. Upper Dublin Sch. Dist.,* 211 F.3d 782, 788 (3d Cir. 2000) (citations omitted). Where, however, the court finds that the evidence, viewed in the light most favorable to the plaintiff, reasonably would not support a contrary factual finding, the court may conclude that probable cause exists as a matter of law. *Id.* at 788–89 (citation omitted).

Here, Plaintiff was arrested for the offenses of disorderly conduct (18 Pa. Cons. Stat. Ann. § 5503(a)) and terroristic threats (18 Pa. Cons. Stat. Ann. § 2706). The latter charge was subsequently dropped.

The Pennsylvania Crimes Code defines disorderly conduct as follows:

> A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;
> (2) makes unreasonable noise;
> (3) uses obscene language, or makes an obscene gesture; or
> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

Specifically, the "fighting words" provision of Pennsylvania's disorderly conduct statute sanctions an individual who "engages in fighting or threatening, or in violent or tumultuous behavior." 18 Pa. Cons. Stat. Ann. § 5503(a)(1). Fighting words "by their very utterance inflict injury or tend to incite an immediate breach of peace." *Victory Outreach Ctr. v. Melso*, 313 F.Supp.2d 481, 491 (E.D. Pa. 2004) (quoting *Commonwealth v. Hock*, 556 Pa. 409,

728 A.2d 943, 946 n. 3 (1999)). " '[P]rofane' words alone, unaccompanied by any evidence of violent arousal, are not 'fighting words' and are therefore protected speech." *Id.*

Here, the Officers had a sufficient basis for arresting Mr. Zavec for the offense of disorderly conduct because Mr. Zavec's statement warning Officer Collins that if he continued the mockery, Mr. Zavec would "knock [the Officer's] black fucking head off," (Doc. 22, at ¶ 58), constituted a threat by an already agitated person. The threat was made publicly and audibly, and was directed specifically at a law enforcement officer. Mr. Zavec, in clear language, expressed his willingness and readiness to resort to violence. Mr. Zavec's earlier aggression during the exchange, (*See* Doc. 22, at ¶¶ 49-50), and the subsequent verbal threat lead me to find that a reasonable officer, faced with the circumstances presented in the instant action, could have reasonably believed that Mr. Zavec committed the offense of disorderly conduct.

b. The *Heck* Preclusion

Defendants also argue that Mr. Zavec's "unreasonable seizure" claim is barred by the holding in *Heck v. Humphrey*, 512 U.S. 477 (1994) and its progeny. According to Plaintiffs, however, *Heck* is "inapposite" because, while the case "precludes § 1983 malicious prosecution claims in cases where there has been a criminal conviction . . . [,] Mr. Zavec did not raise a malicious prosecution claim. Mr. Zavec's claim is a Fourth Amendment claim for seizure without probable cause." (Doc. 31 at 49).

However, many courts have dismissed § 1983 false arrest claims relying on the general rule that a guilty plea establishes the existence of probable cause, thus applying *Heck* to false arrest claims. *See, e.g., Mitchell v. Grynkewicz,* 2012 WL 580164, at *4 (M.D. Pa. Jan. 31, 2012), *report and recommendation adopted sub nom*. *Mithcell v. Grynkewicz*, 2012 WL 580159 (M.D. Pa. Feb. 21, 2012); *Kokinda v. Breiner*, 557 F. Supp. 2d 581, 592 (M.D. Pa. 2008); *Burke v. Twp. of Cheltenham,* 742 F. Supp. 2d 660, 670 (E.D. Pa. 2010); *Rose v. Mahoning Twp*., 2008 WL 918514, at *6 (M.D. Pa. Mar. 31, 2008); *see also Ocasio v. Turner*, 19 F. Supp. 3d 841, 852 (N.D. Ind. 2014) (""[F]alse arrest claim is not automatically *Heck*-barred by a subsequent conviction for the same offense, but, in those

cases in which the grounds for the conviction flow from the same facts underlying the allegations of false arrest, the claim is barred."); *Hendrix v. City of Trenton*, 2009 WL 5205996, at *5 (D.N.J. Dec. 29, 2009); *Frederick v. Hanna*, 2006 WL 3489745, at *8 (W.D. Pa. Dec. 1, 2006) ("A guilty plea establishes the existence of probable cause."). Moreover, the Third Circuit has also applied *Heck* to cases not involving malicious prosecution. *See, e.g.*, *Gilles v. Davis*, 427 F.3d 197, 210 (3d Cir. 2005) (claims that arrest and conviction violated the First Amendment); *Ashton v. City of Uniontown*, 459 F. App'x 185, 188 (3d Cir. 2012) (First Amendment retaliation and excessive force claims).

Indeed, the Supreme Court in *Heck* did not limit its reasoning to "malicious prosecution" claims; rather, it invoked a much broader language when it barred challenges to the "unlawfulness of [the] conviction or confinement" through a civil, § 1983 action. 512 U.S. at 486. Specifically, the Court held that

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus[.]

Id. at 486-487.

It is true that *Heck* does not restrict civil rights claims that have no collateral effect on the underlying criminal conviction. Such claims might include those for excessive force or unlawful search. *See id.* at 487 n. 7 ("[A] suit for damages attributable to an allegedly unreasonable search may lie even if the challenged search produced evidence that was introduced in a state criminal trial ... [b]ecause of doctrines like independent source and inevitable discovery."); *Nelson v. Jashurek*, 109 F.3d 142, 146 (3d Cir. 1997) (opining that the plaintiff's success on an excessive force claim would not call into doubt his criminal conviction obtained after the allegedly improper arrest).

Here, however, the unreasonable seizure claim would call into doubt Mr. Zavec's criminal conviction obtained after the allegedly unconstitutional arrest. As such, Mr. Zavec's claim, which bears a relationship to a conviction that has not been invalidated, is not

cognizable under § 1983 because Mr. Zavec's argument in support of his false arrest claim is that the underlying disorderly conduct charge lacked probable cause. Thus, *Heck* is fully applicable to the instant case.

Mr. Zavec pled guilty to the offense of disorderly conduct, and his conviction[3] has not been reversed, expunged, declared invalid or called into question; Mr. Zavec also does not argue that his plea was not voluntary. *Cf. Unger v. Cohen*, 718 F.Supp. 185, 187 (S.D.N.Y.1989) (allowing plaintiff to maintain his § 1983 false arrest claim even though he had pled guilty to disorderly conduct because plaintiff had alleged in his § 1983 action that his conviction on guilty plea was invalid); *Pouncey v. Ryan*, 396 F.Supp. 126, 127 (D. Conn. 1975) ("[V]alid conviction precludes subsequent false arrest suit."). Moreover, the instant case does not involve any allegations or evidence of fraud, perjury, undue influence or other corrupt means in obtaining the plea or conviction.

Therefore, I will dismiss Mr. Zavec's claim in Count III of the Complaint because a favorable judgment on Mr. Zavec's instant claim would necessarily imply the invalidity of his disorderly conduct conviction.

Leave to amend will be denied as futile because I have already found that "the arresting officers had probable cause to believe the person arrested had committed the offense." *Groman*, 47 F.3d at 634 (citation omitted).

4. Count V - Deprivation of Plaintiffs' Personal Property

In Count V, Plaintiffs assert a cause of action under § 1983 for the alleged deprivation of their personal property without due process of law in violation of the Fourteenth Amendment which provides, in pertinent part, that "[n]o state shall . . . deprive any person of . . . property, without due process of law[.]" U.S. Const., amend. XIV,§ 1; *see*

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[3] "[A] plea of guilty is more than an admission of conduct; it is a conviction." *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S. Ct. 1709, 1712 (1969).

Doc. 22 at ¶ 113. Specifically, as the Complaint alleges, "[d]uring their illegal entry into the Zavec's home and during their illegal use of force against the Zavecs, [Officers] Collins and Gist damaged personal property and furniture in the Zavec home. Additionally, [Officer] Gist broke a hot wax warmer when he grabbed M.Z. by her shirt and threw her against a wall." (Doc. 31, at 51) (internal citations omitted).

Plaintiffs appear to allege a procedural due process claim based on intentional conduct. *Cf. Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 141 (3d Cir. 2000) (limiting "non-legislative *substantive* due process review to cases involving real property ownership"); *Indep. Enterprises Inc. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1179 (3d Cir. 1997) (stating that "only fundamental property interests are worthy of *substantive* due process protection").[4]

In order to determine whether an individual has been deprived of his property without due process "it is necessary to ask what process the State provided, and whether it was constitutionally adequate." *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S.Ct. 975 (1990). "This inquiry . . . examine[s] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." *Id*. Although a pre-deprivation hearing is generally required before a state seizes a person's property, "[i]n some circumstances ... the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Id*. at 128. Thus, Plaintiffs cannot prevail on their procedural due process claim if the state's post-deprivation procedures, including state tort remedies, are adequate. *See Revell v. Port Auth. of New*

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[4] Plaintiffs also cite *Daniels v. Williams*, 474 U.S. 327, 332 (1986) for the proposition that the Officers' "deprivations flowed from their 'abuse of power,' which is the exact concern the Fourteenth Amendment endeavors to address." (Doc. 31, at 52). This is not sufficient to state a substantive due process claim because it ignores the antecedent requirement that Plaintiffs establish a property interest that falls within the protection of the substantive Due Process Clause. *Nicholas v. Pennsylvania State Univ.*, 227 F.3d 133, 139-40 (3d Cir. 2000).

York & New Jersey, 598 F.3d 128, 139 (3d Cir. 2010).

In addition to the instant Count, Defendants included in the Complaint a state law claim for trespass in Count X, alleging that Plaintiffs suffered damages when the Officers entered Plaintiffs' home without consent, invitation, or permission. (Doc. 22 at ¶¶ 153-155). Defendants did not move to dismiss Plaintiffs' state law trespass claim.

Plaintiffs concede that "[s]hould the Court decide that plaintiffs' state law trespass claim adequately provides post-deprivation due process to the Zavecs, the Zavecs are satisfied to seek relief through that claim." (Doc. 31, at 53). Count X does not, in and of itself, provide adequate post-deprivation remedy because it encompasses only the Officers' act of entering and remaining in the home, not any damage to personal property found within the home. Rather, what would provide a more adequate remedy is an action for conversion, which is "the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification." *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 659 n. 3 (Pa. Super. 2000) (citation omitted); *see Revell*, 598 F.3d at 139 ("We have recognized that a civil cause of action for wrongful conversion of personal property under state law is a sufficient postdeprivation remedy when it extends to unauthorized seizures of personal property by state officers.") (citing *Case v. Eslinger*, 555 F.3d 1317, 1331 (11th Cir. 2009)).

Thus, I will dismiss Count V with prejudice, but grant leave to amend the Complaint to add any state law tort claims that provide Plaintiffs with a more adequate post-deprivation remedy.

5. Count VI - Fist Amendment Retaliation

In Count VI of the Second Amended Complaint, Plaintiffs allege that Officers Collins and Gist illegally and unreasonably entered Plaintiffs' home and seized Mr. Zavec through the use of excessive and unreasonable force in retaliation for Mr. Zavec' s exercise of his First Amendment free speech rights. (Doc. 22 at ¶ 117).

To establish a First Amendment retaliation claim, a plaintiff must prove: "first, that she engaged in protected activity; second, that the government responded with retaliation;

third, that this protected activity was the cause of the government's retaliation." *Pulice v. Enciso*, 39 F. App'x 692, 696 (3d Cir.2002). Dispositive here is an antecedent inquiry whether, in light of the Supreme Court's case in *Heck v. Humphrey*, Mr. Zavec can maintain a § 1983 First Amendment retaliation claim at all. 512 U.S. at 487; *see also Grayson v. Mayview State Hosp*., 293 F.3d 103, 108 (3d Cir.2002). Put differently, the essential inquiry is whether the retaliation claim asserted by Mr. Zavec would "necessarily imply the invalidity of his conviction." *Wallace v. Kato*, 549 U.S. 384, 398, 127 S.Ct. 1091 (2007) (Stevens, J., concurring) (quoting *Heck*, 512 U.S. at 486-87).

The Third Circuit in *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005) addressed *Heck* 's applicability to First Amendment retaliation claims. In *Gilles*, the plaintiff was cited and found criminally liable for disorderly conduct ancillary to his speech activity. *Id.* at 202-03. He subsequently brought a claim under § 1983, alleging First Amendment claims against the officers who arrested him. *Id.* The *Gilles* court rejected those claims, holding that *Heck* prevented the plaintiff from challenging his criminal prosecution by alleging that it was the result of retaliatory motive rather than in response to his criminal activity. *Id.* at 211. The Third Circuit explained,

> [a]s *Heck* noted, § 1983 "creates a species of tort liability." 512 U.S. at 483, 114 S.Ct. 2364. Thus, common law bars to suit apply to claims brought under § 1983. *Id.* In *Heck*, the Court held a § 1983 malicious prosecution claim was subject to the common law requirement that the plaintiff show the prior criminal proceeding terminated in his favor. *Id.* at 484, 114 S.Ct. 2364. The purpose of the requirement, the Court explained, is to avoid parallel litigation of probable cause and guilt. *Id*. It also prevents the claimant from succeeding in a tort action after having been convicted in the underlying criminal prosecution, which would run counter to the judicial policy against creating two conflicting resolutions arising from the same transaction. *Id.* These reasons are equally applicable in this context. [Plaintiff's] underlying disorderly conduct charge and his § 1983 First Amendment claim require answering the same question—whether [Plaintiff's] behavior constituted protected activity or disorderly conduct.

Id. at 209. Thus, the Third Circuit held that entering into a program permitting expungement of criminal records was not "favorable termination" for purposes of *Heck v. Humphrey*, and barred the plaintiff's § 1983 First Amendment retaliation claim.

Gilles directly controls my analysis as it demonstrates the Third Circuit's approach

to the "favorable termination" rule announced in *Heck*. Because Mr. Zavec has not demonstrated "favorable termination" of his disorderly conduct conviction, his retaliation claim is barred. *See Ashton v. City of Uniontown*, 459 F. App'x 185, 188 (3d Cir. 2012) ("Because we would have to decide whether [the appellant's] conduct on June 12, 2008 constitutes protected activity under the First Amendment, permitting his claim to proceed would necessarily impugn the validity of his underlying convictions for disorderly conduct and harassment.").

Leave to amend will be denied as futile except that Mr. Zavec may amend his complaint to assert the claim if he provides evidence in the form of certified court records demonstrating that his "conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 487.

B. Count VII - Claim Pursuant to the Americans with Disabilities Act and Rehabilitation Act Against Defendant City of Wilkes-Barre

In Count VII, Plaintiffs allege a claim against Defendant City of Wilkes-Barre pursuant to Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq*., ("ADA") and the Rehabilitation Act § 504, 29 U.S.C. § 794 ("RA").[5] To make a *prima facie* case under the ADA, a plaintiff must establish that: "(1) he is a qualified individual; (2) with a disability[6]; (3) he was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by

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[5] The substantive standards for determining liability under the ADA and RA are the same, and are analyzed together. *McDonald v. Pa. Dep't of Pub. Welfare*, 62 F.3d 92, 94–95 (3d Cir. 1995). I will, thus, be referring to both Acts under the label "ADA" or "Title II."

[6] At the outset, I note that Defendants did not move to dismiss Mr. Zavec's ADA claim, and do not contest whether Mrs. Zavec qualifies as a disabled individual under the ADA.

reason of his disability." *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 553 n. 32 (3d Cir. 2007).

Although the Third Circuit has not yet addressed the application of the ADA to police activities and procedures, district courts in this circuit have endorsed two theories under which police actions have been found to fall under the ADA: the "wrongful arrest" theory and the "reasonable accommodation" theory. *Schorr v. Borough of Lemoyne,* 243 F. Supp. 2d 232, 238-39 (M.D. Pa. 2003) (citing *Gohier v. Enright*, 186 F.3d 1216, 1221 (10th Cir.1999)).

> The "wrongful arrest" theory is applicable when "police wrongly arrested someone with a disability because they misperceived the effects of that disability as criminal activity." Alternatively, the "reasonable accommodations" theory applies when police investigate and arrest a person with a disability for a crime unrelated to that disability, but fail to "reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."

Young v. Sunbury Police Dep't, 160 F. Supp. 3d 802, 810 (M.D. Pa. 2016) (internal footnotes omitted).

Both parties concede that the ADA applies to arrests. Indeed, most courts to consider whether interactions between law enforcement and disabled individuals are "services, programs, or activities" subject to the requirement of accommodation under Title II of the ADA have generally found that Title II applies. *See, e.g., Sheehan v. City & Cty. of San Francisco*, 743 F.3d 1211, 1232 (9th Cir. 2014), *rev'd in part, cert. dismissed in part sub nom. City & Cty. of San Francisco, Calif. v. Sheehan*, 135 S. Ct. 1765 (2015); *Gohier v. Enright*, 186 F.3d 1216 (10th Cir.1999); *see also Yeskey v. Commonwealth of Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997), *aff'd*, 524 U.S. 206, 118 S.Ct. 1952 (1998) (finding that Congress intended the terms "program" and "activity," as used in Title II of the ADA, to be "all-encompassing").

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A "public entity" includes "any department, agency, special

purpose district, or other instrumentality of a State or States or local government." *Id.* at § 12131(1)(B).

Most courts which have found that law enforcement officers who are acting in an investigative or custodial capacity are performing "services, programs, or activities" within the scope of Title II have nevertheless held that the reasonableness of the accommodation required must be assessed in light of the totality of the circumstances of the particular case. Thus, for instance, the Fifth Circuit has held that Title II applied "[o]nce the area was secure and there was no threat to human safety" and that "deputies would have been under a duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility." *Hainze v. Richards*, 207 F.3d 795, 802 (5th Cir.2000). More broadly, the Eleventh Circuit focused on "whether, given criminal activity and safety concerns, any modification of police procedures is reasonable before the police physically arrest a criminal suspect, secure the scene, and ensure that there is no threat to the public or officer's safety." *Bircoll v. Miami–Dade Cnty*., 480 F.3d 1072, 1085–86 (11th Cir.2007).

Recently, the Ninth Circuit also found that Title II claims apply to arrests, but "agree[d] with the Eleventh and Fourth Circuits that exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment." *Sheehan*, 743 F.3d at 1232; *see also Hogan v. City of Easton*, 2004 WL 1836992 (E.D. Pa. Aug.17, 2004) (finding a claim under Title II because the situation was secure when the officers arrived on the scene); *Vincent v. Town of Scarborough*, 2003 WL 22757940, *25-26 (D. Me. Nov. 20, 2003) (finding that exigent circumstances prohibited the existence of a Title II claim); *Thompson v. Williamson County*, 219 F.3d 555, 556 (6th Cir.2000) ("[I]f the decedent was denied access to medical services it was because of his violent, threatening behavior, not because he was mentally disabled.").

Thus, although I note my skepticism about fitting an arrest[7] into the ADA, Plaintiffs' ability to recover appears to depend upon the existence of exigencies at the time of the seizure as well as, to recover compensatory damages, a showing of deliberate indifference, both of which are highly fact-specific inquiries inappropriately raised at the motion to dismiss stage. Put differently, the critical question for purposes of this aspect of the ADA claim is whether such exigent circumstances existed as would temporarily lift the normal ADA requirement of reasonable accommodations. This would require me to conduct a reasonableness analysis in light of the confrontation between Mrs. Zavec and the Officers to assess the existence, seriousness, and duration of any exigencies, what accommodations, if any, were due, and the adequacy of any precautions taken by the Officers, to determine whether the Officers "failed to reasonably accommodate [Mrs. Zavec's] disability" causing her "to suffer greater injury or indignity in that process than other arrestees." *Gohier v. Enright*, 186 F.3d at 1220. This, at a motion to dismiss, I cannot do.

In the Complaint, Mrs. Zavec sufficiently alleges that Officers Collins and Gist, who, according to the Complaint, were aware that Mrs. Zavec suffered from multiple sclerosis, (Doc. 22, at ¶ 65), tackled her onto the floor, (*Id.* at ¶ 58), physically attacked her (*Id.* at ¶ 61), pinned her to the ground (*Id.* at ¶ 64), trampled on her (*Id.*), stepped on her (*Id.* at ¶ 65), and Officer "Collins put his knees in Mrs. Zavec's eyes." *(Id.* at ¶ 66). Moreover, Officer Collins "pointed [a Taser gun] at Mrs. Zavec's face with his finger on the trigger" and "pulled her head down by her hair." (*Id.* at ¶ 76).

At this stage of the proceedings, it cannot be established conclusively as a matter of fact or law that the police conduct in question did not constitute an "arrest" or "seizure,"

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[7] Or a claim for failure to train, also alleged in the Complaint. *See, e.g., Waller v. City of Danville, Virginia*, 515 F. Supp. 2d 659, 665 (W.D. Va. 2007)*, aff'd sub nom. Waller ex rel. Estate of Hunt v. Danville, VA*, 556 F.3d 171 (4th Cir. 2009) ("By its plain language, a violation of Title II does not occur until there has been an exclusion or denial of participation in, or the benefits of, a public entity's services, which manifestly occurs well after any training of the public entity's agents.").

or that the Officers' actions did not constitute deliberate indifference, finding of which would, according to both parties, preclude Plaintiffs' ADA claims. These are disputed issues and on a motion to dismiss, the facts must be taken in a light most favorable to Plaintiffs as the nonmoving party. *See Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). At this stage, my only duty is to find whether Plaintiffs state a claim, not resolve any factual disputes. I find that Plaintiffs state a plausible claim for relief in Count VII in that they allege sufficient facts to survive the Rule 12(b)(6) challenge.

IV. Conclusion

For the above-stated reasons, Defendants' Partial Motion to Dismiss (Doc. 23) will be granted in part and denied in part. Counts I, II, and V will be dismissed with prejudice. Count III, as it relates to Plaintiff Joseph Zavec's claim only, will be dismissed with prejudice as well. Count VI will be dismissed without prejudice. Finally, Count VII properly states a claim, and, as such, Defendants' motion will be denied as to this Count.

An appropriate order follows.[8]

July 27, 2017
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

[8] I must note two observations. First, I encourage Plaintiffs' counsel to refrain from characterizing the opposing party's position as "absurd," "false," and "nonsense." It is unhelpful and undermines the merit of the position advanced. Second, Plaintiffs' counsel failed to cite to important, *binding*, on-point Third Circuit precedent, such as *Gilles v. Davis*, 427 F.3d 197 (3d Cir. 2005), among others.