UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

CARDELL HAYES, ET AL.	*	**CIVIL ACTION**
VERSUS	*	**NO. 06-2917**
CITY OF NEW ORLEANS, ET AL	*	**SECTION "B-5"**

* * * * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

This case arises out of an incident in which Anthony Hayes ("Hayes") was fatally shot by New Orleans Police Sergeants Hochman and Walls, and NOPD Officer Kessel, when he attacked Lieutenant William Ceravolo with a knife.

Defendants have moved for summary judgment upon submitting that the officers' actions in using lethal force were reasonable and justified under the circumstances. Accordingly, there exist no genuine issues of material fact and Defendants are entitled to judgment as a matter of law.

FACTS[1]

The Court is well aware of the factual back-drop of this entire case. The facts have been previously recited in a prior motion for summary judgment, Rec. Doc. 18, which are hereby adopted and incorporated herein as if copied in extensor pursuant to Fed. R. Civ. P. 10(c). The facts were likewise argued in open court on November 13, 2008, the transcript of which is made part of the record (Rec. Doc. 57) and is adopted and incorporated herein by reference as if copied in extensor pursuant to Fed. R. Civ. P. 10(c). The Court had the opportunity to view much of the incident on the video captured of the incident, which was attached to Plaintiff's opposition memorandum (Rec. Doc. 24) to Defendants' motion for summary judgment (Rec. Doc. 18), and is also adopted and incorporated herein by reference.

At this point, as the Court has intimated, the only relevant period of time for purposes of the issues before the Court is the period of time wherein Hayes reversed his knife blade and lunged at

[1] Excerpted from paragraph 6 of the complaint as well as officer statements and sworn affidavits, attached hereto as Defendants' Exhibits 1, 2, 3, and 4.

Ceravolo and tried to stab Ceravolo in the chest. It was at this time that Officer Gary Kessel, believing that Ceravolo's life was threatened, discharged his weapon at Hayes. Sergeant Jeffrey Walls likewise saw Hayes charge at Ceravolo and fired his weapon at Hayes. Sergeant Jeffrey Hochman also saw Hayes turn his knife over and lunge at Ceravolo. Believing that Ceravolo was in mortal danger, he fired at Hayes as well. Lieutenant Ceravolo stated that had he drawn his gun from his holster, he would have shot at Hayes as well.

ARGUMENT

First, Sgt. Walls, Sgt. Hochman, and Officer Kessel acted reasonably in using lethal force to stop the deadly threat the Hayes posed to Captain Ceravolo. Second, and alternatively, Sgt. Walls, Sgt. Hochman, and Officer Kessell are nonetheless entitled to qualified immunity insofar as their actions cannot be said to have violated clearly established law. Third, Plaintiff has failed to allege or prove that a municipal policy, practice or custom was the moving force behind any alleged constitutional violation and the City is thus entitled to judgment as a matter of law. Lastly, for all of the

aforementioned reasons, Plaintiff's state law claims ought to be dismissed.

A. EXCESSIVE FORCE CLAIM UNDER THE FOURTH AMENDMENT

Plaintiff alleges that the Officers used force that was excessive to the need in violation of 42 U.S.C. sections 1983 and 1988, as well as the Fourteenth Amendment. Defendants have asserted the affirmative defense of qualified immunity. Qualified immunity protects officers from suit unless their conduct violates a clearly established constitutional right. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). Clams of qualified immunity require a two-step analysis. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). Indeed, in *Saucier*, the Supreme Court proscribed a mandate: In a suit against an officer for an alleged violation of a constitutional right, the requisites of a qualified immunity defense must be considered in proper sequence. *Saucier*, 553 U.S. 194, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).[2]

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[2] *Saucier* was overruled in part by *Pearson v. Callahan*, 129 S. Ct. 808 (2009)(courts can now proceed directly to the second inquiry). However, although *Saucier*'s rigid "order of battle" - requiring courts to always address the constitutional issue of whether alleged conduct violated the constitution - is now advisory

The *Saucier* Court, admonishing the lower courts, proscribed as follows:

> A court required to rule upon the qualified immunity issue must consider, then, this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? This must be the initial inquiry. If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established. This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition; and it too serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable.

Id. (internal citations and quotations omitted).

Where the defendant, as here, seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive. *Id.* Qualified immunity is an entitlement not to stand trial or face the other burdens of litigation. *Id.; citing Mitchell v.*

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under *Pearson*, courts still have discretion to conduct a full *Saucier* inquiry. *Lytle v. Bexar County, Tex.*, 560 F.3d 404 (5th Cir. 2009).

Forsythe, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The privilege is an ***immunity from suit rather than a mere defense to liability***; and like the absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial. *Id*. (Emphasis added).

1. CONSTITUTIONAL VIOLATION

In this case, the Court's inquiry must begin with a determination of whether Officers Hochman, Kessel, and Walls violated Anthony Hayes' constitutional right to be free from excessive force. Claims that law enforcement officers used excessive force are analyzed under the Fourth Amendment. *Graham v. Connor*, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). A Plaintiff must prove injury suffered as a result of force that was objectively unreasonable. *Ikerd v. Blair*, 101 F.3d 430, 433-34 (5th Cir. 1996). Applying the Fourth Amendment's objective reasonableness standard, the Court must determine the reasonableness of the use of deadly force in the light of the facts and circumstances confronting him at the time he acted, without regard to his underlying intent or motivation. *Graham,* 490 U.S. at 396, 109 S.Ct. 1865.

In making this determination, courts must be mindful that police officers are "forced to make split-second judgments-in circumstances that are tense, uncertain, and rapidly evolving-about the amount of force that is necessary in a particular situation." *Id.* at 396-97, 109 S.Ct. 1865. Use of deadly force is not unreasonable when an officer would have reason to believe that the suspect poses a threat of serious harm to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1649, 85 L.Ed.2d 1 (1985). ***Although alternative courses of action may have existed in retrospect, the courts are not to use "the 20-20 vision of hindsight" to judge the reasonableness of an officers use of force***. *Graham*, 490 U.S. at 396, 109 S.Ct. 1865 (emphasis added).

Here, the facts are undisputed. It is undisputed that three different officers responded to an overt life threatening knife attack on Lieutenant Ceravolo. It is undisputed that each officer fired believing that Ceravolo was in imminent danger of death or great bodily harm. It is not objectively unreasonable for an officer in the situation confronted by these Officers to believe that there was a danger to himself or to other officers. Further, whether the officers

may have had alternative options in the moments prior to the encounter is not relevant to the Court's inquiry as to whether the officer actions were reasonable. This is well settled.

In *Ontiveros v. City of Rosenberg, Texas*, 564 F.3d 379 (5th Cir. 2009), also involving a police shooting where the officer believed that the decedent had retrieved a weapon but no weapon was ultimately discovered, the Court held that the Police officer's use of deadly force was reasonable under the circumstances, and thus, did not amount to excessive force under the Fourth Amendment where (1) the officer was executing an arrest warrant for a suspect, (2) observed that someone was hiding in the bedroom of the suspect's home, (3) when no one answered, he kicked the door in, yelled for the suspect to show his hands, but suspect did not respond, and (4) officer then observed suspect reaching into his boot at chest level. *Ontiveros,* 564 F.3d at 382. The Court further reasoned that although a subsequent search of the bedroom revealed no weapons, the officer could have reasonably believed that the suspect was reaching for a weapon in his boot and that the suspect posed a threat of serious physical harm to the officer or others. *Id*.

In *Ontiveros*, as in this case, Plaintiffs asserted a litany of immaterial facts that Plaintiffs claimed were material and precluded summary judgment. The Court rejected Plaintiffs' arguments:

> "The Appellants rest the majority of their argument on the short time frame covering the events in question, the location of Ontiveros's boots, and the position of Ontiveros's body when he was shot. None of these facts is disputed by the Appellees, yet none contradicts Lt. Logan's testimony. Instead, Appellants are attempting to use these undisputed facts to imply a speculative scenario that has no factual support.
>
> Appellants most forcefully assert that no fact-finder could reasonably believe that all of Logan's self-described conduct happened in eight seconds before Ontiveros was shot. Notably, Appellants provide no evidence to support their skepticism, and at the summary judgment stage, we require evidence-not absolute proof, but not mere allegations either.
>
> The issues raised by the Appellants do not create the kind of genuine dispute that can overcome summary judgment in excessive force cases involving police shootings."

Ontiveros, 564 F.3d at 383 (Internal citations omitted).

Similarly, in *Reese v. Anderson*, 926 F.2d 494, 500-501 (5th Cir. 1991), the 5th Circit held that a police officer is justified in using deadly force to defend himself and others around him where a passenger in a vehicle repeatedly reaches down below a police

officer's sight line in defiance of the police officer's orders to raise his hands, and the officer could reasonably have believed that the passenger had retrieved a gun and was about to shoot, even where the passenger is later determined to be unarmed.

In finding that Officer Anderson had acted reasonably, the 5th Circuit in *Reese* reasoned as follows:

> "Anderson ordered the vehicle's occupants to raise their hands. Clear communication was difficult because of the siren noise, a situation for which Anderson is not to blame; nonetheless, the vehicle occupants clearly understood Anderson's commands and initially complied. Then Crawford repeatedly reached down in defiance of Anderson's orders. At least twice, Crawford reached below Anderson's sight line. The second time, Crawford tipped his shoulder and reached further down.
>
> Under these circumstances, a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that Crawford had retrieved a gun and was about to shoot. That is, an officer would have probable cause to believe that 'the suspect pose[d] a threat of serious physical harm.' Anderson had repeatedly warned Crawford to raise his hands and was now faced with a situation in which another warning could (it appeared at the time) cost the life of Anderson or another officer. Under such circumstances, an officer is justified in using deadly force to defend himself and others around him. Accordingly, the individual defendants are entitled to summary judgment as a matter of law.

> The fact that the vehicle was 'totally surrounded' by police does not change matters; had Crawford in fact retrieved a gun from beneath his seat, he could have caused injury or death despite the presence of numerous police officers. Also irrelevant is the fact that Crawford was actually unarmed. Anderson did not and could not have known this. The sad truth is that Crawford's actions alone could cause a reasonable officer to fear imminent and serious physical harm."

Reese, 926 F.2d 494, at 500-501(citations omitted)

Likewise, in *Sanchez v. Tangipahoa Parish Sheriff's Office*, 2010 WL 3720903 (E.D.La. Sept. 14, 2010) the Honorable Judge Lemmon held that Officers who fired into an advancing motor vehicle did not offend the Constitution. The Court reasoned:

> The court finds that Schwebel and Banquer acted reasonably under the circumstances. At the time of the incident, they could reasonably have believed that Banquer's life was in danger. Schwebel and Banquer, the only eyewitnesses to the incident, testified that they did not fire shots until after Sanchez accelerated the vehicle in Banquer's direction. Also, the witnesses who heard the event testified that they heard the acceleration before the gunshots. Moreover, plaintiff's ballistics and reconstruction expert, Richard Ernest, testified that it is possible that Banquer was in front of the vehicle when Sanchez began to accelerate. Thus, the evidence shows that Schwebel and Banquer had a reasonable perception of a serious threat to Banquer's life. "Given the extremely brief period of time an officer has to react to a perceived threat like this one, it is reasonable to do so with deadly

force."

> Further, the officers' "actions were predicated on responding to a serious threat quickly and decisively" and "we must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes reasonable action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. Because Schwebel's and Banquer's actions were objectively reasonable, they did not violate Sanchez's Fourth Amendment Rights. Schwebel and Banquer are entitled to summary judgment on plaintiffs' § 1983 claims alleging violations of the Fourth Amendment, and those claims are DISMISSED.

Sanchez, 2010 WL 3720903, at * 3 (internal citations and quotations omitted).[3]

In the present case, as the Court has previously taken cognizance, the only material time period is the split second in which the Defendant officers decided to shoot. In this regard, as the Court has likewise previously noted, the few and simple facts surrounding the Officers' decision to use lethal force are wholly uncontested. Specifically, as Lt. William Ceravolo approached the scene with his weapon holstered and began to talk to Hayes, pleading with him to

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[3] The U.S. Fifth Circuit Court of Appeal just affirmed this ruling. *See Sanchez v. Edwards*, 2011 WL 2893020 (5th Cir. July 20, 2011).

put the knife down, Hayes reversed his knife blade and lunged at LT. Ceravolo in an attempt to stab him in the chest. Believing Lt. Ceravolo's life to be in danger, Sergeants Hochman and Walls, and Officer Kessle, independently and simultaneously made the decision to fire, eliminating the threat. This ends the Court's inquiry into this matter, as it cannot be said that the Officer's actions were anything short of heroic, let alone unreasonable.

Notwithstanding the foregoing, the Court previously made some mention that perhaps the officers' approach of Hayes, knowing that Hayes was apparently himself acting unreasonably might somehow alter or affect the Courts analyses. The Court suggested that Plaintiff pursue such a theory. Defendants submit that such a theory is not cognizable in this circuit.

Indeed, although the circuits are somewhat split with respect to whether and to what extent pre-seizure conduct must be taken into account in assessing the reasonableness of police use of force, the Fifth Circuit has routinely, and squarely rejected arguments that police officers could be held liable for "manufacturing the circumstances that gave rise to a fatal shooting." *See Young v. City of*

Killeen, Texas, 775 F.2d 1349 (5th Cir. 1985)(the only fault found against Olson was his negligence in creating a situation where the danger of such a mistake would exist. We hold that no right is guaranteed by federal law that one will be free from circumstances where he will be endangered by the misinterpretation of his acts.); *Fraire v. City of Arlington*, 957 F.2d 1268 (5th Cir. 1992)("t]he constitutional right to be free from unreasonable seizure has never been equated by the Court with the right to be free from a negligently executed stop or arrest. There is no question about the fundamental interest in a person's own life, but it does not follow that a negligent taking of life is a constitutional deprivation.")

Like the Fifth Circuit, the Fourth Circuit has held that *Graham v. Connor* requires the courts to focus on the moment force was used and, further, instructs that ***conduct prior to that moment is not relevant in determining whether an officer used reasonable force***. *See Elliott v. Leavitt*, 99 F.2d 640 (4th Cir. 1996).

In both *Young* and *Fraire*, the courts treated the alleged failure to follow proper police procedures as negligent at most, and thus an insufficient basis for a constitutional violation. In neither case did the

courts even discuss whether the officer's arguable unreasonable approach to the decedent should be considered as part of the totality of the circumstances.

In this case, as above, whether or not the Officers' initial approach of Hayes was perfectly in line with every proper police procedure is of no moment for purposes of this Court's analysis of the ***only*** relevant period of time – the split-second wherein all three officers independently determined that lethal force was the only appropriate means of removing the lethal threat to Lt. Ceravolo. It was in this moment that the Defendants acted with clear purpose in eliminating the threat to Lt. Ceravolo's life, which was reasonable.

This ought to end the Court's inquiry into this matter.

2. CLEARLY ESTABLISHED LAW

Because there is no constitutional violation, the Court need not address the second prong of the qualified immunity analysis. The second prong of the inquiry would require the Court to determine whether it would be clear to a reasonable officer that his conduct was unlawful in the situation confronted. *Saucier*, 533 U.S. at 202, 121 S.Ct. 2151. "The concern of the immunity inquiry is to acknowledge

that reasonable mistakes can be made as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts… Qualified immunity operates in this case, then, just as it does in others, to protect officers from the sometimes 'hazy border between excessive and acceptable force.'" *See Mace v. City of Palestine*, 333 F.3d 621 (5th Cir. 2003), *citing Saucier*, 533 U.S. at 205-206, 121 S.Ct. 2151.

In the present case, again, there is no question that Sergeants Hochman and Walls, and Officer Kessel, simultaneously perceived precisely the same threat at precisely the same time and made the decision to fire only when the decedent turned his hand over, positioned the knife as to strike, and lunged at Captain Ceravolo. Thus, the line between excessive and acceptable force was anything but hazy. To the contrary, the force used by the officers was the only reasonable force option available and was necessary to preserve life.

B. PLAINTIFF'S *MONELL* CLAIMS

Plaintiff attempts to assert a third cause of action as against the City of New Orleans. However, a municipality may not be held

liable pursuant to a theory of respondeat superior under federal law; rather, the plaintiff has the burden of proving that there was a constitutional deprivation and that municipal policy was the driving force behind the constitutional deprivation. *Monell v. Department of Social Services*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Where, as here, no constitutional deprivation has occurred, there can be no liability against the City. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986).

In *Monell,* the Supreme Court held that a local government is liable under § 1983 for its policies that cause constitutional torts. *Id.* A municipality may not be held liable pursuant to a theory of *respondeat superior* under federal law; rather, the plaintiff has the burden of proving that there was a constitutional deprivation and that municipal policy was the driving force behind the constitutional deprivation. *Id.* Isolated unconstitutional actions by municipal employees will almost never trigger liability. *Piotrowski v. City of Houston,* 237 F.3d 567, 579 (5th Cir. 2001) *citing Bennett v. City of Slidell,* 728 F.2d 762, 768 n. 3 (5th Cir.1984), cert. denied, 472 U.S. 1016, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985); *McKee v. City of Rockwall,*

877 F.2d 409, 415 (5th Cir.1989), cert. denied, 493 U.S. 1023, 110 S.Ct. 727, 107 L.Ed.2d 746 (1990).

Municipalities can only be held liable when execution of a government's policy or custom inflicts an injury. *Burge v. Parish of St. Tammany,* 187 F.3d 452, 468-71 (La. 1999). The tortious conduct however, must be part of an 'official policy.' *Id.*

> Official policy is ordinarily contained in duly promulgated policy statements, ordinances or regulations. But a policy may also be evidenced by custom, that is, . . . a persistent, widespread practice of City officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. . . Actions of officers or employees of a municipality do not render the municipality liable under section 1983 unless they execute official policy as above defined.

Piotrowski 237 F.3d at 549. The "official policy" requirement can be met in three different ways. *Id*. First, when the municipality promulgates a generally applicable statement of policy and the injury resulted from that policy. *Id.* Second, when no "official policy" exists, but the action of the policy maker violated a constitutional right and third, when the policymaker fails to act to control its agents when it was "so obvious, and the inadequacy [of existing practice] so likely to

result in the violation of constitutional rights, that the policymake[r] ... can reasonably be said to have been deliberately indifferent to the need." *Id* at 471. Deliberate indifference of this sort is a stringent test, and "a showing of simple or even heightened negligence will not suffice" to prove municipal culpability. *Piotrowski,* 237 F.3d at 579 Thus, it follows that each and any policy which Plaintiff alleges caused a constitutional violation must be specifically identified by Plaintiff, and it must be determined whether each one is facially constitutional or unconstitutional. *Id.*

Under limited circumstances liability under § 1983 can result from a 'failure to train' where the failure to train results in a deliberate indifference to the rights of persons with whom the police come into contact. *Id* at 473. If the need for more or different training is so likely to result in the violation of constitutional rights so as to say that the policymakers of a city can reasonably be said to have been deliberately indifferent to the need than liability attaches. *Id*.

Proof of deliberate indifference generally requires a showing "of more than a single instance of the lack of training or supervision causing a violation of constitutional rights." *Thompson*, 245 F.3d at

459. In fact, to show deliberate indifference Plaintiff must demonstrate "at least a pattern of similar violations" arising from training that is so clearly inadequate as to be "obviously likely to result in a constitutional violation." *Id.*

> *Monell* will not be satisfied by a mere allegation that a training program represents a policy for which the city is responsible. Rather, the focus must be on whether the program is adequate to the tasks the particular employees must perform, and if it is not, on whether such inadequate training can justifiably be said to represent 'city policy.' Moreover, the identified deficiency in the training program must be closely related to the ultimate injury. Thus, respondent must still prove that the deficiency in training actually caused the police officers' indifference…To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under § 1983; would result in de facto *respondeat superior* liability, a result rejected in *Monell*; would engage federal courts in an endless exercise of second-guessing municipal employee-training programs, a task that they are ill suited to undertake; and would implicate serious questions of federalism.

City of Canton v. Harris, 489 U.S. 378-9 (1989).

There is an exception, in a limited set of cases, where a plaintiff, unable to show a pattern of constitutional violations, may establish deliberate indifference by "showing a single incident with proof of the possibility of recurring situations that present an obvious

potential for violation of constitutional rights." *McClendon v. City of Columbia*, 258 F.3d 432, 442 (5th Cir. 2001).

In the case *sub judice*, Plaintiff has heretofore been unable to identify what, if any, policy practice or custom of the City of New Orleans caused any alleged constitutional deprivation in conformity with the above standard. For the first time at oral argument on the Defendants' first motion for summary judgment (Rec. Doc. 18), Plaintiff alluded to a theory that it was the City's failure to equip its officers with TASERs that caused the deprivation of Hayes' rights – that had the officers on scene been equipped with TASERs, Mr. Hayes would be alive today. Aside from the glaring, total and complete lack of any empirical or other evidence to support such a conclusion, the fact is this is not even a theory cognizable under the law of this, or any circuit.

Indeed, the Fifth Circuit has held that the Constitution "does not mandate that law enforcement agencies maintain equipment useful in all foreseeable situations." *Salas v. Carpenter*, 980 F.2d 299, 310 (5th Cir.1992). The precedent is the same in every circuit. In *Plakas v. Drinski*, 19 F.3d 1143 (7th Cir. 1994) the Seventh Circuit

rightly noted that "[t]here is, however, not a single precedent which holds that a governmental unit has a constitutional duty to supply particular forms of equipment to police officers." The *Plakas* court further explained:

> Indeed, Plakas merely states this theory, he does not argue it. Nor does he show how such a rule of liability could be applied with reasonable limits. We do not think it is wise policy to permit every jury in these cases to hear expert testimony that an arrestee would have been uninjured if only the police had been able to use disabling gas or a capture net or a taser (or even a larger number of police officers) and then decide that a municipality is liable because it failed to buy this equipment (or increase its police force). There can be reasonable debates about whether the Constitution also enacts a code of criminal procedure, but we think it is clear that the Constitution does not enact a police administrator's equipment list. We decline to use this case to impose constitutional equipment requirements on the police.

Plakas, 19 F.3d at 1151.

The Seventh Circuit panel further opined, albeit in *dicta*, that it would not impose a training standard beyond that which was in existence, as Plaintiff would have this Court do in the context of this case:

> Likewise, we decline to impose a constitutional requirement to train the police to use all available equipment beyond the acceptable training program already mandated. In this record,

> there is expert opinion that Drinski might have been better trained to negotiate with Plakas and that he may have said one thing to Plakas that he ought not to have said, *i.e.,* that Plakas could hit Drinski with the poker as long as it was not in the head. Plakas, however, merely mentions this testimony to show that Drinski was badly trained. There is no contention that this "invitation" immediately preceded the shooting or caused Plakas to charge Drinski. The only argument in this case is that Plakas did not charge at all.

Plakas, 19 F.3d at fn. 8. Similarly, the Third Circuit has made clear that they "have never recognized municipal liability for a constitutional violation because of failure to equip police officers with non-lethal weapons." *See Carswell v. Borough of Homestead,* 381 F.3d 235, 245 (3d Cir.2004)(quoting with approval the Seventh Circuit's observation that "the Constitution does not enact a police administrator's equipment list.")(*quoting Plakas v. Drinski,* 19 F.3d 1143, 1150–51 (7th Cir.1994)).

In this case, in addition to the aforementioned total absence of evidence that had the Officers been equipped with TASERs Hayes would be alive today, there is likewise no theory of liability under Section 1983 pursuant to which any such evidence could attach. Accordingly, Plaintiff's claims against the City ought to be dismissed.

C. PLAINTIFF'S STATE CLAIMS

For the same reasons that there was no constitutional tort of excessive force committed, there was no state tort of excessive force. Indeed, the same standard is used in analyzing a state law claim of excessive force, namely reasonableness under the circumstances. *See Reneau v. City of New Orleans*, 2004 WL 1497711 (E.D.La. 2004); *citing Mathieu v. Imperial Toy Corp.*, 94-952, 646 So.2d 318 (La. 11/30/94); *Kyle v. City of New Orleans*, 353 So.2d 969 (La. 1977).

Further, because there was no violation of any state law, the City cannot be held vicariously liable, as plaintiff attempts in his fourth cause of action, pursuant to a theory of *respondeat superior*.

CONCLUSION

First, Sgt. Walls, Sgt. Hochman, and Officer Kessell acted reasonably in using lethal force to stop the deadly threat that Hayes posed to Captain Ceravolo. Second, and alternatively, Sgt. Walls, Sgt. Hochman, and Officer Kessell are nonetheless entitled to qualified immunity insofar as their actions cannot be said to have violated clearly established law. Third, Plaintiff has failed to allege or prove that a municipal policy, practice or custom was the moving force

behind any alleged constitutional violation and the City is thus entitled to judgment as a matter of law. Lastly, for all of the aforementioned reasons, Plaintiff's state law claims ought to be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been sent to all counsel of record, via electronic filing or by placing same in the United States Mail, this 26th day of July, 2011.

/s/ Jim Mullaly__________
Jim Mullaly