No. 15-1141

# United States Court of Appeals for the First Circuit

EURIE A. STAMPS, JR.,
Co-administrator of the Estate of Eurie A. Stamps, Sr.;
NORMA BUSHFAN-STAMPS,
Co-administrator of the Estate of Eurie A. Stamps, Sr.
Plaintiffs – Appellees

v.

TOWN OF FRAMINGHAM; PAUL K. DUNCAN, individually and in his official capacity as a police officer of the Framingham Police Department
Defendants - Appellants

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

## BRIEF FOR THE DEFENDANTS-APPELLANTS TOWN OF FRAMINGHAM; PAUL K. DUNCAN, individually and in his official capacity as a police officer of the Framingham Police Department

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## JURISDICTIONAL STATEMENT

In their Complaint against the Defendants Town of Framingham ("Town") and Paul K. Duncan, individually and in his capacity as a police officer of the Framingham Police Department, the Plaintiffs Eurie A. Stamps, Jr., and Norma Bushfan Stamps, alleged a cause of action based on 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments and claimed jurisdiction in the United States District Court pursuant to 28 U.S.C. § 1331 and 1343(1). A. 17-18.[1]

The Defendants filed a partial motion for summary judgment, which motion was based in part on the defense that, even taking all material facts as undisputed, Defendant Officer Duncan was entitled to qualified immunity. A. 75-98. By memorandum and order entered on December 26, 2014, the District Court allowed summary judgment on certain of the counts of the Plaintiffs' complaint, but denied it on two counts that alleged Fourth Amendment violations based on the use of excessive force, ruling that Officer Duncan was not entitled to qualified immunity. A. 922-945. Defendants filed a notice of appeal on January 22, 2015. A. 946. This Court has jurisdiction to entertain an interlocutory appeal from a denial of

[1] The Defendants refer to the Appendix as "A." followed by a page cite. They refer to the Addendum as "Add." followed by a page cite.

summary judgment on qualified immunity grounds. See Mlodzinski v. Lewis, 648 F.3d 24, 27 (1st Cir. 2011).

## STATEMENT OF THE ISSUES

I. Whether the District Court improperly denied summary judgment on the two counts alleging Fourth Amendment violations based on the use of excessive force where the Plaintiffs failed to make out a violation of a constitutional right that was clearly established and therefore Officer Duncan is entitled to qualified immunity?

A. Whether under Brower v. County of Inyo, 489 U.S. 593 (1989), a volitional act by the police officer must cause the harm to the Plaintiff for a Fourth Amendment excessive force claim to succeed?

B. Whether under Graham v. Connor, 490 U.S. 386 (1989), the standard for unreasonable force under the Fourth Amendment is the same as the standard for general negligence so that an officer may be held liable for the accidental, inadvertent discharge of a firearm?

C. Whether Officer Duncan is entitled to qualified immunity for the accidental discharge of a firearm because the law as to whether and under what circumstances an unintentional discharge can give rise to a Fourth Amendment claim is not clearly established?

## STATEMENT OF THE CASE

On October 12, 2012, Plaintiffs Eurie Stamps, Jr., and Norma Stamps filed a complaint against the Town and Officer Duncan in the District Court. A. 3. The Plaintiffs filed an amended complaint on July 26, 2013 that alleged section 1983 violations by Duncan predicated on Fourth and Fourteenth Amendment violations; a section 1983 violation by the Town predicated on negligent training; a state law claim against Duncan for wrongful death; and two counts of wrongful death in violation of Massachusetts law against the Town. A. 17-53. The Defendants answered, raising inter alia the defense of qualified immunity. A. 54-74.

On July 1, 2014, the Defendants filed a motion for summary judgment as to all counts against them except for Count IX, alleging a claim of negligence against the Town for Duncan's actions. A. 75-549. The motion was based in part on the defense that Officer Duncan is entitled to qualified immunity. Id. Plaintiffs opposed. A. 551-835.

After a hearing, the District Court (Saylor, J.) issued a memorandum and order entered on December 24 and corrected on December 26, 2014. A. 922-945. The Court granted summary judgment as to following counts:

1. Count I, which alleged that Officer Duncan intentionally used deadly force was dismissed because the parties agreed that the shooting was accidental. A. 927, n. 3.

2. Count IV, which appeared to allege a Fourth Amendment violation based on an unlawful search since the undisputed facts showed that the warrant and search were authorized by law. A. 927, n. 3.

3. Count V, which alleged a violation of the Fourteenth Amendment Due Process Clause as the Court found that the excessive force claim arose in the context of Duncan's seizure of Stamps. A. 940.

4. Count VI, which requested punitive damages was dismissed because the Plaintiffs conceded that Officer Duncan accidentally fired his weapon, thus his actions could not have been motivated by evil motive or intent. A. 940-41.

5. Count VII, which alleged a § 1983 failure to train claim against the Framingham Police Department, as the Court found there was no evidence that the Police Department was on notice of possible flaws in its policy. A. 942-944.

6. Count VIII, which alleged a wrongful death claim and rested on an allegation of intentional conduct by Officer Duncan. A. 941.

7. Count X, which alleged a claim under Mass. Gen. Laws c. 258, § 2, as there was no evidence that the Town knew or should have known that Officer Duncan was committing any kind of tort and there were no facts supporting a finding of negligence against public employees other than Duncan that could be imputed to the Town. A. 945.

The Court, however, denied the motion for summary judgment as to Counts II and III, both of which alleged Fourth Amendment violations based on excessive force.[2] The Court ruled that (1) a reasonable jury could find that Officer Duncan's actions leading up to the shooting were objectively unreasonable and (2) that Officer Duncan was not entitled to qualified immunity. A. 927-940. As to the immunity issue, the Court noted that the First Circuit has not considered or concluded that an unintentional discharge of a firearm during a seizure can give rise to a Fourth Amendment claim. A. 934. It nonetheless held that "it was clearly established as of January 5, 2011, that an unintentional shooting during an intentional seizure can constitute excessive force if the officer's conduct leading up

[2] Count II's caption references "Fourth Amendment Rights Predicated On The Unintended But Unreasonable Infliction of Deadly Force During The Course Of A Seizure In Violation of 28 U.S.C. § 1983," and Count III's caption references "Fourth Amendment Rights Predicated On The Unintentional Infliction Of Greater Force To Restrain Mr. Stamps Than Intended In Violation Of 28 U.S.C. § 1983." A. 33, 37.

to the accident was objectively unreasonable" and that the law was clearly established in the specific context of this case. A. 936-37.

The Defendants filed a timely notice of appeal on January 22, 2015.[3] A. 946.

## STATEMENT OF THE FACTS

During the evening of January 4, 2011, between 9:30 and 10:00 p.m., Defendant Framingham Police Officer Paul Duncan and approximately ten other members of the SWAT team were called to the Framingham police station for the purpose of assisting detectives in the service of a search warrant at the first floor apartment at 26 Fountain Street, Framingham, MA. A. 283, 461-465. Eurie Stamps, Sr., his wife, Norma Bushfan-Stamps, and his stepson, Joseph Bushfan, resided in the apartment. A. 283.

The search warrant was based on probable cause that Joseph Bushfan and others were selling crack cocaine out of the apartment. A. 284, 468-488. Framingham police detectives believed three males in the Fountain Street apartment had affiliations to Boston gangs and had criminal histories including

[3] On January 23, 2015, the Plaintiffs filed a Notice of Cross Appeal, and that matter was assigned USCA Case Number 15-1152. A. 15. On April 17, 2015, this Court ordered Plaintiffs to Show Cause. Plaintiffs filed a Response on April 30, 2015. By Judgment dated June 29, 2015, this Court dismissed the cross-appeal for lack of jurisdiction.

armed robbery, armed assault, assault with a dangerous weapon, assault and battery with a dangerous weapon, theft of a firearm and cocaine related charges. A. 461-463, 495 (pp. 18-21). One of these men was believed to associate with the person who had shot Framingham Police Sergeant Phil Hurton. A. 461.

After midnight on January 5, 2011, the Framingham Police Department executed the search warrant at 26 Fountain Street, Framingham, MA. A. 111, 240. Officer Duncan entered the premises through the front door and moved into the living room, and then the den. A. 112. After Officer Duncan entered the apartment with other members of the SWAT team, he moved the selector switch of his M-4 rifle from "safe" to "semi-automatic." A. 284. Plaintiff's expert, James Gannalo, testified that Officer Duncan not engaging the gun's safety was a "judgment call." A. 198. In the SWAT training community there are differing views regarding whether officers should have their weapons "on safe" or "off safe" during missions. A. 383-386, 407-408. Some law enforcement agencies train that officers may have the safety off. A. 198.

While clearing other rooms, Officer Duncan heard a series of commands coming from the kitchen. A. 112. He heard officers in the kitchen telling someone to "get down." A. 284. Sergeant Vincent Stewart ordered Officer Duncan to go in the kitchen to assist those officers "as a trailer." A. 112, 284, 503-504 (pp. 53-54).

Duncan entered the kitchen and observed a man, later identified as Eurie Stamps, lying on his stomach in a narrow hallway that separated the kitchen from the bathroom and a rear bedroom. A. 112, 284.

Officers O'Toole and Sheehan had moments earlier encountered Mr. Stamps and ordered him to "get down." A. 111, 241, 284, 503 (p. 52). Mr. Stamps complied with their order by lying on his stomach with his hands up near his head. A. 284. Officers O'Toole and Sheehan observed another person moving in the hallway and then stepped over Mr. Stamps' body and entered a bathroom. A. 284, 504-505 (pp. 57, 58). They left Mr. Stamps in the hallway lying on his stomach. A. 112. He was not free to move. A. 500 (pp. 38, 39).

Mr. Stamps remained lying face down with his elbows resting on the floor, his hands and fingers open and his hands "hovering by his head." A. 112, 241, 284, 506-508 (pp. 63-72). Officer Duncan approached Mr. Stamps, stopping in the kitchen near the threshold into the hallway. A. 285. He assumed control of Mr. Stamps by pointing his M-4 rifle at Mr. Stamps while the other SWAT members continued the search of the rear of the apartment. A. 111. Officer Duncan "covered" Mr. Stamps by pointing his rifle at Mr. Stamps' head with the safety selector set on "semi-automatic" for the purpose of preventing him from moving. A. 193, 285-287, 382, 404, 408-409, 439-440, 508 (pp. 72-77).

Officer Duncan's rifle was in the low ready position, with the safety off, and the gun pointed at Mr. Stamps. A. 241. According to the Plaintiffs' expert, at some point during the time that Officer Duncan was covering Mr. Stamps, an unintentional fatal shot was fired from Officer Duncan's firearm. A. 111, 132-133. Officer Duncan's rifle discharged while he was standing erect in the kitchen and pointing the rifle at Stamps in the low ready position, which is about a 45-degree angle. A. 111, 261 (pp. 59-81). There is no evidence regarding the point in time at which Officer Duncan's finger went into the trigger guard other than it occurred prior to the accidental discharge. As to the timing of when Duncan's finger went in the trigger guard, Kim Widup, an expert for the Plaintiffs, testified: "I don't know" and "I don't know when that point was." A. 357-361; see also A. 241. For his part, Officer Duncan testified, "My finger was outside the trigger guard until I lost my balance and fell backwards."[4] A. 525 (pp. 134, 136).

The Plaintiffs' experts, Dr. Barbara Wolf and James M. Gannalo, opine that Officer Duncan discharged his rifle while he stood in the kitchen in front of Mr. Stamps. A. 117-121, 242-243, 285, 289. According to the Plaintiffs' experts, the

[4] Officer Duncan testified that the gun went off after he lost his balance as he approached Stamps. A. 525 (p. 135). For the purposes of summary judgment, the defendants have to accept the version of the Plaintiffs and their experts, which is that the weapon discharged as Duncan was standing still. A. 117-121, 242-243.

likely positions of Officer Duncan and his rifle, and Mr. Stamps at the time of the firearm discharge, can be seen in 3D renditions. A. 201-202, 223-224, 229-236, 250 (pp. 16-17), 251 (p. 20), 253 (pp. 28-29).

All parties agree that Officer Duncan never intended to discharge his firearm or to use any physical force upon Mr. Stamps. A. 132-33, 287, 307. The Plaintiffs' expert pathologist did not see any evidence that would lead her to believe that Officer Duncan intentionally shot Mr. Stamps. A. 260 (p. 54). The shot caused the death of Mr. Stamps by gunshot wound of the head, neck and chest. A. 238-244.

According to the Plaintiffs' firearms expert, a number of factors could have caused the involuntary discharge, including involuntary hand clenching. A. 122, 194. Involuntary contractions occur when muscles are activated by signals that arise from other locations within the nervous system besides the brain and such activation produces a muscle contraction that is not the result of a conscious decision. A. 116. The three most common causes of involuntary hand clenching are: (a) postural imbalance (when the shooter loses balance or trips, his hand will clench); (b) startle effect (when the shooter is under stress and surprised, there will often be a hand clench); (c) inter-limb interaction (under stress, when the non gun hand closes violently, the gun hand will clench, spontaneously duplicating the actions of the non-gun hand). A. 122.

## SUMMARY OF THE ARGUMENT

The Defendants sought summary judgment on the Plaintiffs' claims of excessive force arising out of the accidental shooting, which the District Court denied. This Court should reverse that decision and grant Officer Duncan qualified immunity because: (1) he did not violate Mr. Stamps' constitutional rights; and (2) even if he had, that constitutional right was not "clearly established" at the time.

This Circuit has not decided whether or when a police officer's purely accidental discharge of a firearm can implicate the Fourth Amendment. This Court should hold that an accidental discharge of a firearm does not violate the Fourth Amendment when the officer did not intend the bullet to bring the person within his control, as many other courts do. This holding is in keeping with the "intent" requirement of Brower v. Cnty of Inyo, 489 U.S. 593 (1989) as well as this Court's decision in Landol-Rivera v. Cruz Cosme, 906 F.2d 791, 795-796 (1st Cir. 1990), which noted that Brower addresses "misuse of power … not the accidental effects of otherwise lawful government conduct." Negligence is not sufficient to hold a defendant liable on an excessive force claim. Indeed, it makes little sense to apply a standard of reasonableness to an accident.

However, there is a line of cases that interpret and apply Brower differently and hold that, even if an officer accidentally shoots a person, the officer

nonetheless may have violated the Fourth Amendment if his actions leading up to the shooting were objectively unreasonable. This District Court applied this analysis here. Even if this Court were to follow that reasoning, it fails because Officer Duncan's conduct preceding the accident was not objectively unreasonable within the meaning of the Fourth Amendment. As the District Court properly determined, it was not objectively unreasonable for Officer Duncan to draw his weapon during the execution of the search warrant. The Court found, however, that it had issues with Officer Duncan having turned off his safety and having his finger end up on the trigger, the latter which was alleged to violate department policy, and that such conduct could form the basis for a constitutional violation. The Plaintiffs' expert though stated that turning off the safety was a legitimate judgment call on the part of an officer and that many other departments use this procedure when executing high risk operations. Meanwhile, there is no evidence that would support a finding that Officer Duncan made a volitional decision to place his finger on the trigger. In sum, neither a judgment call nor a negligent departure from police department policy or standard should form the basis of a constitutional violation. Negligence should not be synonymous with unreasonable conduct under the Fourth Amendment. Thus, even if this second line of reasoning

is applied here, Officer Duncan is entitled to judgment on the excessive force claim because his actions were not objectively unreasonable within the meaning of the Fourth Amendment.

In the absence of an underlying constitutional violation, there is no need to address the other prong of a qualified immunity question, which is whether the law was clearly established. Even if this prong is addressed, however, Officer Duncan is entitled to qualified immunity because the law on the subject of accidental discharges by police officers and whether an accident can give rise to a Fourth Amendment violation is not clearly established. This Circuit has not addressed this subject. Courts in other circuits take varying approaches, with some holding that an accidental shooting does not give rise to a Fourth Amendment excessive force claim because the Fourth Amendment requires intentional conduct, not negligent conduct, while other courts hold that an unintentional shooting may give rise to a Fourth Amendment claim if the officer's conduct leading up to the shooting was objectively unreasonable. Both lines of cases rest on opposing interpretations of Brower, which in and of itself shows that the law is not clearly established.

Moreover, the absence of precedent in this Circuit and differing interpretations of this Court's decision in Landol-Rivera undercut any contention that the law is clearly established. Here, the District Court cited to Landol-Rivera

in ruling that an unintentional discharge may give rise to a Fourth Amendment claim if the officer's actions preceding the discharge were objectively unreasonable while other courts cite to Landol-Rivera in holding that some nature of volitional act on the part of the state actor must cause the harm to the plaintiff for a Fourth Amendment excessive force case.

Thus, this Court should rule that Officer Duncan is entitled to qualified immunity and judgment should enter in his favor.

## ARGUMENT

### I. OFFICER DUNCAN IS ENTITLED TO SUMMARY JUDGMENT IN HIS FAVOR ON PLAINTIFFS' CLAIMS OF EXCESSIVE FORCE

In Counts II and III, the Plaintiffs allege Fourth Amendment violations based on the use of excessive force. Officer Duncan sought summary judgment on these counts on the grounds that (1) there was no constitutional violation, and (2) he is entitled to qualified immunity. The District Court denied summary judgment on these two counts. This Court's review of a denial of qualified immunity is de novo. Iacobucci v. Boulter, 193 F.3d 14, 22 (1st Cir. 1999).

In Pearson v. Callahan, 555 U.S. 223 (2009), the Supreme Court reiterated that the qualified immunity inquiry is a two-part test in which a court must decide: (1) whether the facts alleged or shown by the plaintiff make out a violation of a

constitutional right; and (2) if so, whether the right was "clearly established" at the time of the defendant's alleged violation. Id. at 815-16. A court has "discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." Pearson, at 236.

### A. Plaintiffs Cannot Make Out A Violation Of The Fourth Amendment

This Circuit has not decided whether or in what circumstances a purely accidental discharge of a firearm implicates the Fourth Amendment. Other federal courts, however, have addressed whether an accidental discharge can serve as the basis for a Fourth Amendment violation resulting from the use of unreasonable excessive and/or deadly force. These courts generally follow two distinct lines of reasoning: first, that an accidental discharge does not constitute a Fourth Amendment violation because the officer's unintentional conduct is insufficient to effect an actionable seizure, and second, that an accidental shooting may constitute a Fourth Amendment violation if the officer's conduct preceding the accidental weapon discharge is constitutionally unreasonable under the circumstances. Compare Brice v. City of York, 528 F.Supp.2d 504, 510 (M.D. Pa. 2007) ("Negligent, accidental, or unintentional conduct that has the coincidental effect of

producing a seizure will not substantiate an excessive force claim."), with Johnson v. City of Milwaukee, 41 F.Supp.2d 917, 929 (E.D. Wis. 1999) ("In emphasizing the accidental nature of the shooting defendants focus too narrowly on the end result of the alleged conduct .... A firearm does not discharge in a vacuum. The critical question is how the shooting came about. If the cause of the shooting was prior police conduct that was unreasonable under the Fourth Amendment, the accident is compensable.") This divide underscores Officer Duncan's entitlement to qualified immunity because the law is not clearly established.

### 1. This Court Should Hold That An Accidental Discharge Of A Firearm Does Not Violate The Fourth Amendment

The first line of reasoning - that an accidental discharge does not give rise to an excessive force claim - rests on the Supreme Court's holding in Brower v. Cnty. Of Inyo, 489 U.S. at 596-597, that a Fourth Amendment seizure requires an intentional act by a governmental actor and that "the Fourth Amendment addresses 'misuse of power,'… not the accidental effects of otherwise lawful government conduct." In Brower, the heirs of the decedent brought suit after he crashed into a police roadblock and was killed, alleging that the use of a roadblock to stop a fleeing vehicle was a violation of the Fourth Amendment. The Supreme Court explained that a seizure occurs only when "there is a governmental termination of

freedom of movement through means intentionally applied." Id. at 597. The Court restated the principle at greater length as follows:

> [A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement . . . , nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement . . . , but only when there is a governmental termination of freedom of movement *through means intentionally applied*.

Id. (emphasis in original; other emphasis deleted). The Court concluded the facts in Brower could set forth a claim for a seizure because the roadblock was "designed to produce a stop by physical impact if voluntary compliance did not occur." Id. In contrast, it is uncontroverted that Officer Duncan did not intend to cause any physical contact with Mr. Stamps.

This Court gave police officers guidance in this regard in Landol-Rivera v. Cruz Cosme, 906 F.2d at 795-796, citing to Brower in analyzing whether stray bullets "seized" a plaintiff hostage. The Court concluded that a police officer's deliberate decision to shoot at a car containing a robber and a passenger for the purpose of stopping the robber's flight, followed by the accidental shooting of the passenger, did not result in a seizure of the passenger. This Court, citing Brower's "intent" language, rejected the notion that the plaintiff passenger had been seized because there was no intention on the part of the police to bring him within their control. Id. The Court held there was no Fourth Amendment seizure of the

hostage because the injury to the hostage was not the intended consequence of the officer's act. This Court interpreted "intent" under Brower to require not only a deliberate act but also "police action directed toward producing a particular result." Id.

Importantly, the Landol-Rivera court cites to Dodd v. City of Norwich, 827 F.2d 1 (2d Cir. 1987), as an instance when an inadvertent shooting was not a seizure. Landol-Rivera, 906 F.2d at n. 9. In Dodd, the Second Circuit considered a claim in which a suspect was accidentally shot by a police officer who held his gun in one hand as he handcuffed the suspect. That Court held that "[t]he fourth amendment … only protects individuals against 'unreasonable' seizures, not seizures conducted in a 'negligent' manner" and it found that the accidental shooting did not support an excessive force claim. Id. at 8. The Court further explained that "[i]t makes little sense to apply a standard of reasonableness to an accident." Id.[5]

Meanwhile, the courts in Troublefield v. City of Harrisburg, 789 F. Supp. 160 (M.D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992), and Greene v. City of

[5] Also decided within the Second Circuit is Loria v. Town of Irondequoit, 775 F. Supp. 599 (W.D.N.Y. 1990), wherein the court observed that Brower required intentional acquisition of physical control but denied summary judgment on the factual question of whether the discharge of a firearm during a struggle between an officer and the father of a suspect was accidental.

Hammond, 2007 WL 3333367 (N.D. Ind. Nov. 6, 2007), cite to Landol-Rivera as indicating that non-intentional conduct by a police officer does not implicate the Fourth Amendment. In Troublefield, the Third Circuit held there was no seizure under the Fourth Amendment where a plaintiff was injured by a bullet fired by accident and the officer "did not intend the bullet to bring plaintiff within his control or to, perhaps, settle him down were he struggling to break free." Id. In Troublefield, the officer approached a suspect in a parked car who was suspected of stealing the car and ordered him out of the vehicle and onto the ground. The suspect complied. With the gun still drawn, the officer physically searched the suspect and then proceeded to handcuff him. After the officer locked the handcuffs, he started to return his weapon to his holster when the weapon accidentally fired, shooting the suspect in the leg. The court noted that the officer "did not intend the bullet to bring the plaintiff within his control . . ." and that "[n]egligence in pulling out a firearm or in reholstering is not sufficient in this court's view to hold a defendant liable for an excessive force claim." Id. at 166. See also Clark v. Buchko, 936 F. Supp. 212, 219 (D.N.J. 1996) (no seizure where officer's firearm accidentally discharged when suspect, who had been taken to the ground, lifted himself up and came into contact with firearm, causing its accidental discharge); Myrick v. Collingdale Borough, 2012 WL 4849129 (E.D. Pa. 2012)

(where there were no facts from which a jury could find the officer intentionally struck the plaintiff's car, summary judgment entered on plaintiff's excessive force claim).

In Greene, supra, the court also cites to Landol-Rivera as support for the assertion that "unintended conduct does not trigger a Fourth Amendment violation." Id. at * 5. In Greene, the district court held that the plaintiff had to provide evidence that the officer intentionally fired his weapon and, it concluded, the plaintiff had made no such showing. Instead, Greene pointed to statements that suggested the police officer was at fault because he pointed his weapon at Greene and because he placed his finger in the trigger well. But, the court noted, it was clear that the officer did not intend to seize Greene by the discharge of the firearm. The discharge was not the "means intentionally applied." Rather, the court said that Greene was seized by means that included the officers' verbal commands, physically placing Greene on the floor, and training their weapons on him. The fact that the officer may have been negligent in the way he handled the weapon did not trigger a Fourth Amendment violation. Id. at * 6.

The Fourth Circuit, in Culosi v. Bullock, 596 F.3d 195 (4th Cir. 2011), recognized that, under Brower, a Fourth Amendment seizure occurs only when there is a governmental termination of freedom of movement through means

intentionally applied but it upheld the denial of summary judgment on the seizure issue because the district court had found disputed issues of fact on whether the officer accidentally or intentionally discharged his weapon. Glasco v. Ballard, 768 F. Supp. 176 (E.D. Va. 1991) was also decided within the Fourth Circuit. There, after the officer exited his vehicle with his gun drawn, the vehicle unexpectedly began to roll. The officer leaned back into the car to put his foot on the brake, and the gun accidentally discharged, hitting a suspect. The court held that no seizure had occurred because an "understanding of the case law, as well as the history of the Fourth Amendment, suggest that a wholly accidental shooting is not a 'seizure' within the meaning of the Fourth Amendment." Id. at 180.

Notably, the Massachusetts Supreme Judicial Court cited to Troublefield and Glasco, and applied their interpretation of Brower, in Gutierrez v. Massachusetts Bay Transportation Authority, 437 Mass. 396, 401-402, 772 N.E.2d 552 (2002), holding that "[a]n accidental use of force, even if occurring during the course of an arrest or other physical restraint of a person, does not constitute a seizure because it is not 'means intentionally applied' to obtain control of the person."

Although this Circuit has not addressed the precise issue presented by the facts of this case, Landol-Rivera clearly falls in line with the line of cases that hold that an accidental discharge of a weapon does not constitute a violation of the

Fourth Amendment because it is not "means intentionally applied." The District Court, however, apparently concluded otherwise, citing language in Landol-Rivera that "unintentional conduct triggering Fourth Amendment liability may occur when a police officer accidentally causes *more severe harm than intended to an individual*." A. 929, 935, citing Landol-Rivera at 796 n. 9 (emphasis added). But, the Landol-Rivera court gave as examples of such instance as "when a suspect is injured by the accidental discharge of a gun with which he was only meant to be bludgeoned, or by a bullet in the heart that was only meant for the leg." Id. In both examples, the officer intended to inflict some physical harm or force upon the individual to effect a seizure but accidentally inflicted more severe harm than intended. In the instant case, Officer Duncan did not intend to apply *any* physical force or harm.

The case of Parker v. Swansea, 310 F. Supp. 2d 356, 367 (D. Mass. 2004), further illustrates this point. The Parker Court cited Landol-Rivera and Glasco when addressing an officer's claim that he did not intend the force he used against an individual (shooting him) to be excessive. The Court held:

> [T]he proper inquiry under the Fourth Amendment is not 'whether the police officer intended to brutalize a suspect or merely intended to discipline him,' rather, the question is 'whether the officer intended to perform the *underlying violent act at all*.' Glasco v. Ballard, 768 F.Supp. 176, 179 (E.D. Va. 1991) (accidental discharge of gun does not support a § 1983 claim); *accord* Landol-Rivera v. Cruz Cosme,

> 906 F.2d 791, 796 n. 9 (1st Cir. 1990) (when police conduct is intentional, Fourth Amendment is triggered when police officer accidentally causes more severe harm than intended). There is no dispute that [the Officer] intended to fire his gun at Parker 28 times. *The shooting was not the result of any 'mistake' or 'negligence.'*

Id. (Emphasis added).

Here, it is undisputed that Officer Duncan did not intend to perform any "violent act" or apply any physical force against Mr. Stamps. Rather, the shooting was the result of a "mistake" or "negligence." The firing of the gun was never the means intentionally applied by Officer Duncan to seize Mr. Stamps, and the officer never intended to use the rifle in any physical application to Mr. Stamps – as with the hypothetical bludgeoning referenced in Brower and Landol-Rivera.[6] See Connor v. Rodriquez, 891 F. Supp. 2d 1228 (D. N.M. 2011) (if an officer intends to seize a person by one means, and the person is seized by a different, unintended means, no seizure occurs).[7]

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[6] The case law distinguishes between the two different means of seizure – those by means of physical force and those by a show of authority to which the person submits. California v. Hodari D., 499 U.S. 621 (1991); United States v. Camacho, 661 F.3d 718, 725 (1st Cir. 2011) (police officer can restrain person's liberty through physical force *or* show of authority). See generally Couden v. Duffy, 826 F.Supp.2d 711, 715 (D. Del. 2011), citing United States v. Waterman, 569 F.3d 144, 146 (3d Cir. 2009) ("Here, there was no application of physical force. The police drew their guns in a 'show of authority.'")

[7] Here, Mr. Stamps had already submitted to commands of two other police officers, and Officer Duncan took over the detention by a show of authority.

***– footnote cont'd –***

As such, under Landol-Rivera and that Court's interpretation of Brower, Officer Duncan's accidental discharge of his weapon does not trigger Fourth Amendment liability. Like Dodd, Troublefield, and the other cases discussed, this Court should hold that Officer Duncan's unintentional firearm discharge was not a seizure and does not give rise to an excessive force claim under the Constitution.

**2. Even If This Court Were To Follow The Other Line Of Reasoning And Assess The Reasonableness of An Officer's Actions Preceding The Accidental Discharge, Officer Duncan's Actions Were Not Objectively Unreasonable Within The Meaning Of The Constitution**

There is a split among the circuit and district courts on the issue of a police officer's accidental discharge of a weapon. Unlike the courts discussed above that hold an unintentional firearm discharge is not a Fourth Amendment violation, there are courts that have held that whether a discharge was unintentional does not end the inquiry. These courts look to whether the officer's conduct leading up to the discharge of the gun was objectively reasonable under the circumstances. See Watson v. Bryant, 532 Fed. Appx. 453 (5th Cir. 2013) (holding that, even if

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The Plaintiffs properly make no argument that the other officers' detention of Mr. Stamps or Officer Duncan's taking over the detention of Mr. Stamps with a show of authority was constitutionally defective, and it was not. See Muehler v. Mena, 544 U.S. 93, 98 (2005) (officers executing search warrant have the authority to detain the occupants of the premises while a proper search is conducted").

shooting were accidental, officer may have violated Fourth Amendment if he acted objectively unreasonably "by drawing his pistol, or by not re-holstering it before attempting to handcuff" suspect); Tallman v. Elizabethtown Police Dept., 167 Fed. Appx. 459 (6th Cir. 2006) (no evidence officer intentionally discharged his weapon but court focused reasonableness inquiry on [the officer's] actions leading up to the unintentional discharge of the weapon.").

Notwithstanding the uncertainty in the law, the District Court undertook such an analysis here. In so doing, it appears to have deemed irrelevant the fact that the shooting was unintended because, it said, "[t]he officer's subjective intent or motivation is not relevant to the reasonableness inquiry" and that "[a]n officer's evil intentions will not make a Fourth Amendment violation of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." A. 929, citing Graham, 490 U.S. at 397. But, the question whether an officer's subjective motive is relevant to evaluating whether force was excessive – which it is not under Graham – differs from the question whether an officer's conduct was volitional – i.e., did the officer intend to perform the physical act that resulted in injury. See Myrick v. Collingdale Borough, supra ("In general, an officer's subjective intent or bad faith motive is not relevant to the Fourth Amendment excessive force analysis …[citation

omitted]. Rather, the appropriate inquiry is whether the officer intended to use the force applied; that is, whether the officer's actions were 'volitional.'"), citing Brendlin v. California, 551 U.S. 249 (2007).

But, putting that aside, the Plaintiffs argue that Officer Duncan acted unreasonably because he violated certain police department procedures or training in terms of his conduct preceding the shooting. As the District Court described it, Officer Duncan entered the apartment with his gun drawn, moved the safety from "safe" mode to "semi-automatic," pointed the weapon at Mr. Stamps, and placed his finger inside the guard on the trigger,[8] and accidentally shot Mr. Stamps. A. 931. The Court properly determined there was no issue with respect to the reasonableness of Officer Duncan having drawn his weapon. Id. The only issue was whether Officer Duncan acted unreasonably in not conforming to certain department policies or training such as in turning off the safety and having his finger somehow end up on the trigger.

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. It must embody allowance for the fact that police officers are often

[8] Again, there is no evidence as to when Duncan's finger went inside the guard.

forced to make split-second judgments - in circumstances that are tense, uncertain and rapidly evolving - about the amount of force necessary in a particular situation. Graham, 490 U.S. at 397 (1989). The District Court failed to take the circumstances into consideration in assessing Officer Duncan's actions.

For example, the Court said that Mr. Stamps posed no actual threat but the events occurred during an active SWAT Team search of the apartment due to Stamps' step-son selling crack cocaine and suspected weapons. Framingham police detectives believed three males in the apartment had affiliations to Boston gangs and had criminal histories including armed robbery, armed assault, assault with a dangerous weapon, assault and battery with a dangerous weapon, theft of a firearm and cocaine related charges. One of these men was even believed to have a connection to the shooting of Framingham Police Sergeant Phil Hurton. This was a tense situation and the officers had to be on high alert. There was no telling what any occupant of the apartment would do given the stakes involved. Thus, taking into account the tense and rapidly evolving circumstances that can exist when carrying out search warrants for drugs, it was not unreasonable to have the firearm trained on Mr. Stamps while the other officers were in the process of securing the apartment. See Bolden v. Vill. Of Monticello, 344 F. Supp. 2d 407, 419 (S.D.N.Y. 2004) (warrant to search home for drugs "implicitly carries with it authority to

detain the occupants at the premises while the search is conducted"), quoting Speights v. City of New York, 2001 WL 797982, *5 (E.D.N.Y. June 19, 2001).

In terms of having the safety off, the Plaintiffs' own expert testified that this was a judgment call on the part of the officer and that he is aware of other law enforcement agencies that train officers to have the safety off in these circumstances. A. 198. An officer's judgment call should not and cannot be deemed objectively unreasonable so as to form the basis for finding a constitutional violation. See generally Calvi v. Knox, 470 F.3d 422, 428 (1st Cir. 2006) (officer's decision not to deviate from standard handcuffing behind the back despite being told arrestee had elbow surgery was a "judgment call, pure and simple"); Hunt v. Massi, 773 F.3d 361, 370 (1st Cir. 2014) (a reasonable officer would not have understood that a judgment call about handcuffing behind the arrestee's back to be a violation of the Constitution).

The District Court meanwhile determined that "the placement of [Duncan's] finger apparently violated police department policy, and possibly proper police practice." A. 932. However, there is no evidence from which a jury can find when or how Officer Duncan's finger entered the trigger guard. There is certainly no evidence that he volitionally put his finger inside the trigger guard. Thus, that act cannot be the basis of a constitutional violation. Moreover, even assuming his

finger placement did violate department policy, local policies are not determinative of constitutional analysis. See McGrath v. Plymouth, 757 F.3d 20, n. 9 (1st Cir. 2014), citing Whren v. United States, 517 U.S. 806, 815 (1996). That is, the failure to use "proper procedure" does not prove or support a claim of excessive force. Watson v. Bryant, 532 Fed. Appx. at 458-459. In other words, a negligent departure from established police procedure does not signal violation of constitutional protections. Fraire v. City of Arlington, 957 F.2d 1268, 1276 (5th Cir. 1992).

Indeed, negligence simply is not synonymous with "unreasonable conduct" under the Fourth Amendment. The constitutional right to be free from unreasonable seizure has never been equated with the right to be free from a negligently executed stop or arrest. Id. "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." Young v. City of Killeen, 775 F.2d 1347, 1353 (5th Cir. 1985). This is consistent with the Supreme Court's recognition that mere negligence does not violate the due process clause of the Fourteenth Amendment. See Daniels v. Williams, 474 U.S. 327, 333 (1986) (concluding in a Fourteenth Amendment case that "injuries inflicted by governmental negligence are not addressed by the United States Constitution").

Inadvertent and negligent use of force by a police officer likewise should be insufficient to constitute an unreasonable seizure under the Fourth Amendment. See Brower, 489 U.S. at 596 (Fourth amendment addresses *misuse of power*) (emphasis added). In Roy v. Inhabitants of City of Lewiston, 42 F.3d 691, 694-96 (1st Cir. 1994), an officer shot a suspect who resisted arrest and threatened officers. This Court has held that objective reasonableness under the Fourth Amendment should not be judged by a common-law tort standard and that officer's actions, "even if mistaken, were not unconstitutional."[9]

State law negligence claims should not be shoehorned into this constitutional framework. Those cases that have attempted to do so have created needless complexity, often producing multiple opinions in a single case. For example, in Henry v. Purnell, 652 F.3d 524 (4th Cir. 2011) (en banc), the case went up and down between the district court and appellate court three times before the en banc opinion issued which held that the officers mistaken use of a pistol instead of a Taser could give rise to liability under the Fourth Amendment. Three judges, however, dissented, with one judge noting that "[t]he majority's analysis … had

[9] In discussing a due process violation, this Court in Landol-Rivera, 906 F.2d at 797, referenced Daniels in noting that negligence was insufficient to establish a due process violation, and indicated that this differed from assessment of conduct under a reasonableness standard.

the difficulty of now suggesting that an officer can violate the Fourth Amendment with merely negligent conduct." Henry, 652 F.3d at 556 (Niemeyer, J., dissenting).

The reasonableness standard of the Fourth Amendment should not be congruent with the standard of care in negligence cases. In fact, that there is confusion or conflagration of these standards highlights that a line of reasoning that looks to the objective reasonableness of an officer's actions that precede an accidental discharge of a weapon is simply unworkable.[10] The better line of reasoning is that discussed above which requires evidence of intentional governmental conduct in order to support a § 1983 Fourth Amendment claim. See Dodd v. City of Norwich, 827 F.2d 1, 7–8 (2d Cir. 1987) (the Fourth Amendment "only protects ... against 'unreasonable' seizures, not seizures conducted in a 'negligent' manner").

For the reasons discussed, this Court should not follow the analyses of those courts that look to the objective unreasonableness of an officer's actions preceding an accidental shooting. Even if it does, however, this Court should hold that

[10] That an accidental discharge should not implicate a Fourth Amendment analysis is also highlighted by the fact that a touchstone of immunity is to determine whether a reasonable officer would understand that his actions were violating a person's rights, but with an accident, the officer's understanding of the law has nothing to do with it.

Officer Duncan is entitled to judgment in his favor on the Plaintiff's excessive force claims because his actions simply were not objectively unreasonable and do not rise to the level of a violation of the Fourth Amendment. Officer Duncan cannot be held to have violated the Fourth Amendment through negligent conduct.

### B. Plaintiffs Cannot Establish A Violation Of Any Clearly Established Constitutional Right

Where there is no constitutional violation, the Court need go no further in the qualified immunity analysis. Nonetheless, even if this Court were to find a Fourth Amendment violation, the clearly established prong of the qualified immunity analysis presents an alternative basis for granting summary judgment in favor of Officer Duncan. This second part of a qualified immunity inquiry has two elements. MacDonald v. Town of Eastham, 745 F.3d 8, 11-12 (1st Cir. 2014). The first element "focuses on the clarity of the law at the time of the alleged civil rights violation," and this element turns on whether the contours of the relevant right were clear enough to signal to a reasonable official that his conduct would infringe that right. Id. The second element is more particularized; it turns on "whether a reasonable defendant would have understood that his conduct violated the plaintiff['s] constitutional rights." Id.

The Plaintiffs cannot sustain their heavy burden of establishing the violation of any clearly established constitutional right. See Clash v. Beatty, 77 F.3d 1045, 1047 (7th Cir.1996). See also Martinez v. Beggs, 563 F.3d 1082, 1088 (10th Cir. 2009) (when defendant asserts qualified immunity, burden shifts to plaintiff to show that: (1) defendant violated constitutional right and (2) constitutional right was clearly established).

In this case, as of January 5, 2011 Brower v. County of Inyo, supra, which held that "violation of the Fourth Amendment requires an intentional acquisition of physical control," provided the analytical framework for accidental shooting cases. As discussed, the Second Circuit's decision in Dodd, the Troublefield and Brice decisions within the Third Circuit, the Glasco and Culosi decisions within the Fourth Circuit, and the Greene decision within the Seventh Circuit all concluded that an unintentional discharge does not meet the intentionality requirement for a Fourth Amendment claim. Further, this Court, in Landol-Rivera, seems to have indicated that it would follow the Dodd and Troublefield cases and analysis. As a result, Officer Duncan is entitled to judgment because the plaintiffs cannot show a clearly established constitutional right. See Ashcroft v. al-Kidd, __U.S. __, 131 S.Ct. 2074, 2083 (2011) (existing precedent must have placed constitutional question "beyond debate").

### 1. There Is No "Clearly Established" Right In The Absence Of Binding Precedent In This Circuit And Where The Courts Are Divided In Their Analysis of Accidental Discharges

Precisely because there was, and is, disagreement among the courts as to whether an unintentional shooting may give rise to a Fourth Amendment violation, the law in this respect was not clear at the time of this incident and, moreover, is not clear to this day. This conflict rises from differing interpretations of Brower and its reference to "intent." Given the conflicting case law, the absence of a binding precedent in this Circuit, and differing interpretations of this Circuit's decision in Landol-Rivera, it would not have been clear to all reasonable police officers that he or she could be found to have *intentionally* effected a Fourth Amendment seizure of Mr. Stamps with an *unintentional* discharge of a gun.

The District Court overlooked this divide in analyses and instead stated that "[s]ince Brower, every circuit court to consider the issue has concluded or at least suggested that the unintentional discharge of a firearm during a seizure can give rise to a Fourth Amendment claim if the officer's actions leading up to the shooting were objectively unreasonable." A. 934. It held that this Court made similar statement in dicta in Landol-Rivera, 906 F.2d at 796 n. 9. A. 935. As discussed above, however, Landol-Rivera is more in keeping with the Dodd and Troublefield line of cases that have held that an unintentional firearm discharge is

not a seizure and does not give rise to an excessive force claim under the Fourth Amendment claim, and is cited in some of those cases. The District Court acknowledged Dodd and its holding that an accidental discharge of a firearm during the handcuffing of a suspect could not lead to § 1983 liability but found it "highly doubtful whether Dodd remains good law" because it was decided before Brower and Graham. A. 936. Dodd, however, does remain good law.

While Dodd was decided before Graham, supra, where the Supreme Court held that excessive force claims should be analyzed under the Fourth Amendment "reasonableness standard," Dodd relied, in part, on the Supreme Court's analysis in Tennessee v. Garner, 471 U.S. 1 (1985), applying a Fourth Amendment "reasonable seizure" test. Furthermore, although Dodd was decided before Brower, it follows the same logic as Brower that a Fourth Amendment violation must be grounded on intentional conduct on the part of the officer, and courts continue to follow it to this day.

Dodd has been relied on by numerous courts post-Graham and Brower in determining liability under the Fourth Amendment for unintentional police shootings. See Brice v. City of York, 528 F.Supp.2d at 510 (accidental shooting could not support an excessive force claim); Clark v. Buchko, 936 F.Supp. 212 (D.N.J. 1996) (plaintiff cannot maintain Fourth Amendment claim against officer

who lacked intent to seize by accidental firing of the gun); Troublefield, 789 F.Supp. at 166; see also Glasco v. Ballard, 768 F.Supp. at 177. The District Court dismissed these cases, saying they were "wrongly decided" because they turned on the officer's subjective intent (whether the shooting was an accident) rather than an objective reasonableness of the officer's action. A. 936, n. 8.[11] However, the Court overlooked that this Court cited to Dodd and compared its holding - that an inadvertent police shooting of a suspected burglar was *not* a seizure where the suspect already had been seized, and the shooting occurred thereafter - with Brower's discussion of when unintentional conduct triggering Fourth Amendment liability may occur. Landol-Rivera, 906 F.2d at n. 9.

In 2011, in Conner v. Rodriguez, 891 F. Supp. 2d 1228, 1237 (D. N.Mex. 2011), the court cited Dodd in support of the assertion that, upon review of precedent from other circuits, "[m]ost cases stand for the proposition that police negligence does not give rise to a Fourth Amendment excessive force claim. See … Dodd v. City of Norwich, 827 F.2d 1, 7–8 (2d Cir. 1987), *cert. denied*, 484 U.S. 1007, 108 S.Ct. 701, 98 L.Ed.2d 653 (1988) ('If such a standard were applied, it

[11] This again gets to the point that the Court seemingly confused the issue of an officer's subjective *motive* – which is irrelevant under Graham – with whether the officer's act was volitional (i.e., that he intended to perform the physical act that resulted in injury).

could result in a fourth amendment violation based on simple negligence. The fourth amendment, however, only protects individuals against "unreasonable" seizures, not seizures conducted in a "negligent" manner.'….)". The Connor court also cited the following cases from the Eleventh and Seventh Circuits: Evans v. Hightower, 117 F.3d 1318, 1321 (11th Cir. 1997) ("This record shows only that Mathis was negligent and is devoid of any evidence that Mathis intended that Hightower's car strike Evans. Therefore, Mathis is entitled to qualified immunity"); Campbell v. White, 916 F.2d 421, 423 (7th Cir. 1990) (holding that accident during police chase was not "means intentionally applied").[12]

Just recently, in March 2015, another court cited to Dodd in stating that negligence is not the operative standard for purposes of the Fourth Amendment, and that without evidence of any intentional conduct there is no § 1983 Fourth Amendment claim. Wilson v. Phares, 2015 WL 1474627 (M.D. Ala. March 31, 2015). Dodd thus remains good case law.

The District Court also dismissed a recent Ninth Circuit opinion, Powell v. Slemp, 2014 WL 5139243 (9th Cir. 2014), as unpersuasive. At the summary judgment hearing, Plaintiffs' counsel cited to the district court decision in Powell,

[12] In footnote 6, the Conner Court noted that numerous district courts have also addressed the question, with the majority concluding that police negligence cannot support a constitutional claim.

identified as Powell v. Slemp, 2013 WL 1723215 (E.D. Wash. April 2, 2013), as supporting their position. A. 900. More particularly, the Plaintiffs' counsel argued:

> [In] Powell v. Slemp, the gun accidentally discharged just before the officer went hands-on with the suspect, just the way Duncan describes how the accident happened. What needed to be clearly established, the Court held, was whether the amount of force was excessive, not whether the officer can be liable for an accidental discharge of his weapon.

A. 900. The Ninth Circuit, however, *reversed* that Powell ruling in its decision of October 14, 2014. It held that the district court had defined the clearly established right too broadly, without reference to the officer's particular actions in the case. Powell, at *1. "Unless existing law would have made it 'sufficiently clear' to a reasonable officer in Sgt. Slemp's position that attempting to restrain Powell with his gun drawn violated her Fourth Amendment rights, Sgt. Slemp was entitled to qualified immunity." Id. The court found that no such case law existed and that the illegality of his actions was not otherwise "beyond debate." Id. This Powell case is persuasive in that it held there was no case law that showed that the officer's conduct in restraining the plaintiff with a gun in his hand which then accidentally discharged violated the person's Fourth Amendment rights and, further, that the officer's actions had to be "illegal" – i.e., more than merely negligent. The same holds true here.

As the District Court remarked, neither the parties nor the Court found a case with a fact pattern similar to the one here in which there was found to be a Fourth Amendment violation. A. 938. Moreover, in many cases cited by the Plaintiffs below, the courts found either that no constitutional violation had occurred, that the officer was entitled to qualified immunity, or that, unlike here, there were material facts in dispute.[13] A. 850-854. Many of the cases cited were decided after 2011, which does not aid the Plaintiffs in establishing a clearly established right. Id.[14] See generally Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (salient question is whether the state of the law at the time gives officials fair warning that their conduct is unconstitutional).

Although the District Court remarked that the recent Powell ruling was decided three years after events here, many of the opinions it cites also issued after 2011 and thus are not salient to the analysis of Duncan's actions. A. 937, n. 9. The Court said there were five relevant appellate opinions as of the date of the

[13] See, e.g., Pleasant v. Zamieski, 895 F.2d 272 (6th Cir. 1990) (officer's conduct in drawing his gun and not returning it to the holster prior to struggling with suspect and accidentally discharging of his weapon was reasonable); Tallman v. Elizabeth Police Dept., 167 Fed. App'x. at 466 (if officer's accidental shooting of suspect violated suspect's Fourth Amendment rights, the right in question was not clearly established and officer was entitled to summary judgment); Sorenson v. McLaughlin, 2011 WL 1990143 at * 4-6 (D. Minn. May 23, 2011) (court notes that a reasonable factfinder could conclude that shooting was not an accident).

[14] See Watson v. Bryant, supra; Sorenson v. McLaughlin, supra.

incident here, in addition to Brower, Scott v. Harris, 550 U.S. 372 (2007), and Landol-Rivera. But, as discussed, there also were cases indicating that an unintentional or accidental conduct by a police officer could not give rise to an excessive force claim, including Dodd and Troublefield and many of these cases likewise cite to Brower and Landol-Rivera, just with a different interpretation and construction. For example, in Evans v. Hightower, 117 F.3d at 1320-21, the Eleventh Circuit Court held that no seizure occurred where an officer detained a suspect in the street while awaiting backup and the responding officer negligently ran over the suspect with a patrol car. The Court found that the suspect was already seized before being hit by the car and that being run over was not part of the seizure, but was rather, an accidental effect.

In McCoy v. City of Monticello, 342 F.3d 842, n. 3 (8th Cir. 2003), the court noted that the shooting was unintentional, which raised the question: "after an intentional Fourth Amendment seizure has occurred, does an accidental shooting implicate the Fourth Amendment?" Citing Dodd, it suggested the answer was necessarily no, though it did not decide the issue because it held that the officer's conduct was objectively reasonable.[15] See generally Campbell, 916 F.2d 421 (7th

[15] McCoy cites to Kathryn R. Urbonya, "Accidental" Shootings As Fourth Amendment Seizures, 20 Hastings Const. L.Q. 337, 341 (1992). In that

***– footnote cont'd –***

Cir. 1990) ("While it is clear that Officer White intended to stop Campbell and Miller for speeding and that White's actions caused, or contributed to, a 'termination of [Campbell's] freedom of movement,' there is no evidence whatsoever to suggest that White intended physically to stop or detain Campbell by running over him with his car in the event Campbell refused to pull over voluntarily. The collision between White and Campbell was not '*the means intentionally applied*' to effect the stop, but was rather an unfortunate and regrettable accident.)" (Emphasis in original).

Indeed, in one of the cases cited by the District Court issued after the incident here, Speight v. Griggs, 13 F.Supp.3d 1298, 1316 (N.D. Ga. 2013), *judgment vacated in part by* Speight v. Griggs, 579 Fed. Appx. 757 (11th Cir. 2014), the court expressly noted that courts in various circuits have "viewed the accidental shooting in opposing ways" and that they generally followed two distinct lines of reasoning. It expressly discussed the line of reasoning followed by Dodd and McCoy and other cases but determined to follow the "second line of

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article, the author notes that as a result of having different approaches to defining Fourth Amendment "seizures," and the context-specific nature of any application of the definitions by the Supreme Court, how a particular court resolves the issue whether a police officer seized an individual by shooting implicitly depends upon its interpretation of the Fourth Amendment. Id. According to the author, Brower "shields 'accidental shootings' from scrutiny under the Fourth Amendment." Id. at 357.

reasoning that an accidental firearm discharge … may constitute excessive force under the Fourth Amendment." Id. at 1319.[16]

That there are differing lines of reasoning on this subject necessarily undercuts any claim that the law was clearly established.[17] See generally Doe v. Delie, 257 F.3d 309, 321 (3d Cir. 2001) (the absence of binding precedent in this circuit, the doubts expressed by the most analogous appellate holding, together with the conflict among a handful of district court opinions, undermines any claim that the right was clearly established).[18] If the courts are conflicted and uncertain

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[16] Having noted and discussed the split in analysis, the Speight court determined that its analysis would be to assess whether the officer's conduct preceding the discharge was unreasonable under the circumstances. It found that the officer's conduct, which included his drawing his gun, not re-holstering it before push-kicking the plaintiff to the ground, and his trying to re-holster it as he put handcuffs on – was "not so unreasonable as to amount to excessive force." Id. The Court explained, "[w]hile the consequences of his actions were by accident, tragic, they were not objectively unreasonable." Id. at * 16.

[17] Further, in Bleck v. City of Alamosa, Colo., 540 Fed. App. 866 (10th Cir. 2013), the court conceded that the discharge of the firearm was unintentional but then looked to the officer's conduct preceding the discharge to assess whether there had been a Fourth Amendment seizure. According to that court's analysis, there was no requirement that the officer had to intend to *fire* the gun in order to effect a Fourth Amendment seizure under Brower. Id. at 874. The Tenth Circuit, however, noted that the law on this issue was not clearly established at the time of the April 6, 2010 incident before it, and it affirmed judgment for the defendant officer on the basis of qualified immunity.

[18] Meanwhile, as Plaintiff's counsel acknowledged, the Eighth Circuit is divided within itself on the issue whether Fourth Amendment consequences can

***– footnote cont'd –***

as to the state of the Fourth Amendment in cases involving a police officer's accidental discharge of a weapon, surely no reasonable officer could have fully understood the limits of liability. See Ashcroft v. al–Kidd, 131 S.Ct. at 2085 (2011) (holding that an officer was not plainly incompetent and did not knowingly violate the law "not least because eight Court of Appeals judges agreed with his judgment").

Moreover, with an accidental shooting, an officer's "understanding" of the law or legal limits does not come into play, which highlights the impropriety of a Fourth Amendment analysis to an accident. The following assertion by the District Court highlights this point: "[a]n objectively reasonable police officer in Duncan's position would therefore have known that the decision to point the weapon at Stamps' head, with the safety off and his finger on the trigger and inside the guard, could result in a constitutional violation if he discharged the weapon without cause." Apart from the fact there is no evidence as to when Officer Duncan's finger went onto the trigger, and no evidence whatsoever that he intentionally put

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arise from unintended harm. A. 892. Indeed, in Lyons v. City of Conway, 2008 WL 2465030 (E.D. Ark. June 16, 2008), the court framed the inquiry in yet another way: (1) whether it was objectively reasonable for the defendant officer to shoot the plaintiff (which the court found it was); and (2) whether the shooting was effectuated 'through means intentionally applied,' i.e., that the defendant intended to shoot the plaintiff (which the court found he did not as it was an accident). The Court entered judgment for the officer.

his finger there, the key phrase is "if he discharged the weapon without cause." This implies an intentional act. This excerpt reveals how the analyses and law on accidental shooting cases is confused and unclear.

In light of this split in the courts on this subject, Officer Duncan is entitled to qualified immunity on the Fourth Amendment claims because, at a minimum, any law as to whether and when an accidental discharge can give rise to a Fourth Amendment claim was not - and is still not - clearly established.

### 2. All Reasonable Officers Would Not Have Understood That His or Her Conduct Violated Stamps' Constitutional Rights

A reasonable police officer would not have understood that his or her conduct violated Mr. Stamps' constitutional rights. In other words, a reasonable officer could not have known that an unintentional discharge would violate the Fourth Amendment. Moreover, any argument that Officer Duncan violated the Fourth Amendment because he deviated from his training and protocol by having his finger on the trigger rather than outside the trigger guard or by not having the firearm's safety engaged fails as a matter of law. The case law holds that "[t]he failure to use 'proper procedure' does not prove excessive force." See Watson v. Bryant, 532 Fed. Appx. at 458, citing Young v. City of Killeen, 775 F.2d at 1352-1353. See also Smith v. Freland, 954 F.2d 343, 347 (6th Cir. 1992) ("Under

§ 1983, the issue is whether [the officer] violated the Constitution, not whether he should be disciplined by the local police force.") Indeed, the Supreme Court has stated that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provisions." Davis v. Scherer, 468 U.S. 183, 194 (1984). See also Medina v. Cram, 252 F.3d 1124, 1133 (10th Cir. 2001) (excluding expert affidavit that "officers' use of force did not conform with accepted police guidelines and practices," because "claims based on violations of state law and police procedure are not actionable under § 1983"). Accordingly, Officer Duncan is entitled to qualified immunity because all reasonable officers in his position would not have known that his or her conduct violated the constitution.

## CONCLUSION

For the reasons stated, the Defendants respectfully request that this Honorable Court reverse the lower court's ruling and grant summary judgment in favor of the Defendants on Counts II and III, and enter judgment in Defendants' favor in this case.

Respectfully submitted,
Defendants-Appellants,
By their attorneys,

/s/ Leonard H. Kesten

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# ADDENDUM

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**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| **EURIE A. STAMPS, JR. and NORMA BUSHFAN-STAMPS, Co-Administrators of the Estate of Eurie A. Stamps, Sr.,** | |
| **Plaintiffs,** | **Civil No. 12-11908-FDS** |
| **v.** | |
| **TOWN OF FRAMINGHAM and PAUL K. DUNCAN,** | |
| **Defendants.** | |

**MEMORANDUM AND ORDER ON**
**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (CORRECTED)**

**SAYLOR, J.**

This is a civil rights action arising out of the shooting of an individual during the execution of a search warrant. On January 5, 2011, Eurie Stamps, Sr., was shot and killed in his home by defendant Paul Duncan, an officer of the Framingham Police Department. Plaintiffs Eurie Stamps, Jr., and Norma Stamps are the co-administrators of the elder Stamps's estate. They have brought suit on behalf of the estate against Duncan and the Town of Framingham, alleging violations of the constitutional rights of the elder Stamps under 42 U.S.C. § 1983, and wrongful death under the Massachusetts Torts Claims Act, Mass. Gen. Laws ch. 258, § 2.

Defendants have moved for partial summary judgment. For the following reasons, the motion will be granted in part and denied in part.

## I. Background

### A. Factual Background

The following facts are undisputed unless otherwise noted.

On January 5, 2011, the Framingham police department executed a search warrant on a first-floor apartment at 26 Fountain Street. (Def. SMF ¶ 7). Eurie Stamps, Sr., a 68-year-old retired MBTA maintenance worker, resided in the apartment with his wife Norma and his stepson Joseph Bushfan. (Def. SMF ¶ 5; Pl. SMF ¶ 1).

The search arose out of a report that Bushfan and others were selling crack cocaine from the apartment. (Def. SMF ¶ 2). Framingham police detectives believed that Bushfan and two other males in the apartment had violent criminal histories and affiliations with Boston gangs. (Def. SMF ¶ 3; Pl. SMF ¶ 2; Duncan Dep. 19-21).

The Framingham police did not suspect Stamps of any crime. He did not have a history of violence. The SWAT team was informed that he posed no known threat to police during the execution of the warrant. (Pl. SMF ¶¶ 2, 6-7; *see* Duncan Dep. 21-25).

Officer Paul Duncan was one of approximately eleven SWAT team members that raided the apartment. (Def. SMF ¶ 1; Pl. SMF ¶ 4). He entered the apartment through the front door. (Def. SMF ¶ 8). He was carrying a loaded M-4 rifle. After entering the apartment, he moved the selector switch of his rifle from "safe" to "semi-automatic." (Def. SMF ¶ 9).[1]

During the search of the apartment, two officers encountered Stamps in a hallway that connected the kitchen to the bathroom and a rear bedroom. They ordered him to "get down." (Def. SMF ¶ 14; Pl. SMF ¶ 20). Stamps complied with the order and lay on his stomach with his

[1] When the gun is in "safe" mode, it cannot be fired. (Pl. SMF ¶ 36).

hands near his head. (Def. SMF ¶ 15). The officers who had ordered Stamps into this position left him to investigate other rooms. (Def. SMF ¶¶ 18-19; Pl. SMF ¶ 21).

Duncan was ordered to go to the kitchen. Once there, he encountered Stamps lying on the floor on his stomach in the hallway outside the kitchen. (Def. SMF ¶¶ 12-13, 20; Pl. SMF ¶¶ 22-25). While the other SWAT members continued the search of the apartment, Duncan approached Stamps and pointed his rifle at him. (Def. SMF ¶¶ 21-22). Duncan contends that he did so, with the rifle's selector switch still in its "semi-automatic" position, for the purpose of protecting himself and sending a message that Stamps should not move or do anything threatening. (Pl. SMF ¶ 28; Duncan Dep. 72-76). At some point, Duncan put his index finger inside the trigger guard and on the trigger.

While Duncan was pointing the rifle at Stamps, he pulled the trigger. The shot hit Stamps in the face. (Def. SMF ¶ 27; Pl. SMF ¶ 32). Stamps died as a result of the shot. (Def. SMF ¶ 36).

At no point did Stamps do or say anything to suggest that he was a threat to the police or anyone else, or to suggest that he was not cooperating. The parties agree that Duncan did not intend to pull the trigger or injure Stamps.

According to plaintiffs' expert, Duncan's failure to keep the rifle's safety engaged and his placement of his finger on the trigger contravened safe firearm-handling procedures. (Def. SMF ¶¶ 37, 39; Pl. SMF ¶ 40). Defendants concede that by placing his finger on the trigger, Duncan did not comply with Framingham police officer training or protocols. (Def. SMF ¶¶ 38, 43).

**B. Procedural Background**

On October 12, 2012, Eurie Stamps, Jr., and Norma Stamps filed the complaint in this case. The amended complaint alleges section 1983 violations by Duncan predicated on Fourth and Fourteenth Amendment violations; a section 1983 violation by the Town of Framingham predicated on negligent training; a state law claim against Duncan for wrongful death; and two counts of wrongful death in violation of Massachusetts law against the Town of Framingham.

Defendants have moved for partial summary judgment as to nine of the ten counts.[2] They contend that (1) Duncan's unintentional firearm discharge cannot violate a constitutional right; (2) that Duncan's decision to introduce the firearm into the encounter with Mr. Stamps was objectively reasonable; and (3) Duncan is entitled to qualified immunity because a constitutional right to be free from unintentional shootings was not clearly established at the time of the incident.

## II. Standard of Review

The role of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Mesnick v. General Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991) (internal quotation marks omitted). Summary judgment is appropriate when the moving party shows that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Essentially, Rule 56[] mandates the entry of summary judgment 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will

[2] Defendants have not moved for summary judgment on Count 9 against the Town of Framingham for wrongful death under the Massachusetts Torts Claims Act, Mass. Gen. Laws ch. 258 § 2, predicated on Duncan's negligence.

bear the burden of proof at trial.'" *Coll v. PB Diagnostic Sys.*, 50 F.3d 1115, 1121 (1st Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). In making that determination, the court must view "the record in the light most favorable to the nonmovant, drawing reasonable inferences in his favor." *Noonan v. Staples, Inc.*, 556 F.3d 20, 25 (1st Cir. 2009). When "a properly supported motion for summary judgment is made, the adverse party 'must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting Fed. R. Civ. P. 56(e)). The non-moving party may not simply "rest upon mere allegation or denials of his pleading," but instead must "present affirmative evidence." *Id.* at 256-57.

## III. Analysis

### A. Claims Against Duncan

#### 1. Section 1983

Section 1983 is a vehicle for vindicating substantive rights conferred by the Constitution or laws of the United States that have been violated by persons acting under color of state law. *See Graham v. Connor*, 490 U.S. 386, 393-94 (1989); *Albright v. Oliver*, 510 U.S. 266, 315 (1994). Here, it is not disputed that Duncan is a state actor being sued for actions taken pursuant to his official duties; the sole issue is whether his actions deprived Stamps of his constitutional rights. The complaint identifies both the Fourth Amendment and the Fourteenth Amendment Due Process Clause as the source of the substantive rights allegedly infringed by Duncan. The constitutional claim is based on the use of excessive force.

**a. Fourth Amendment (Counts 1-4)**

Counts 2 and 3 allege Fourth Amendment violations based on the use of excessive force.[3] The Fourth Amendment guarantees the right "to be secure . . . against unreasonable searches and seizures." Defendants deny that Duncan's action constitutes a violation of the Fourth Amendment and contend that, to the extent that he did infringe Stamps's constitutional rights, he is entitled to qualified immunity.

The doctrine of qualified immunity protects public employees "from liability for civil damages 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). Qualified immunity is determined according to a two-part test. *Pearson v. Callahan*, 555 U.S. 223 (2009); *Maldonado v. Fontanes*, 568 F.3d 263, 268-69 (1st Cir. 2009). Under *Pearson* and *Maldonado*, the relevant inquiries are (1) whether the facts alleged or shown by the plaintiff make out a violation of a constitutional right, and (2) whether the right at issue was clearly established at the time of defendant's alleged misconduct. *Pearson*, 555 U.S. at 224; *Maldonado*, 568 F.3d at 269. Although conducting this two-step analysis in sequence is sometimes advisable because doing so "promote[s] the development of constitutional precedent," courts have discretion to avoid the direct constitutional question when a matter may be resolved at the second step. *Maldonado*, 568 F.3d at 269-70.

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[3] Count 1 relies on allegations that officer Duncan intentionally used deadly force during the course of the seizure. However, the parties agree that Duncan's shooting of Stamps was accidental. Summary judgment as to Count 1 will therefore be granted. Counts 2 and 3 will be analyzed together as a claim for excessive force. Count 4 appears to be a claim for Fourth Amendment violations based on an unlawful search. However, the undisputed facts indicate that the warrant and search were authorized by law, and plaintiffs do not appear to have put forth any facts to create a genuine issue of material fact with respect to Count 4. Summary judgment will therefore be granted as to Count 4.

**(1) Alleged Violation of a Constitutional Right**

In order to establish a Fourth Amendment claim based on excessive use of force, the plaintiff must show (1) that there was a "seizure" within the meaning of the Fourth Amendment; and (2) that the use of force during the seizure was unreasonable under all circumstances. *Graham*, 490 U.S. at 394; *Bastien v. Goddard*, 279 F.3d 10, 14 (1st Cir. 2002). A "seizure" within the meaning of the Fourth Amendment occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower v. County of Inyo*, 489 U.S. 593, 597 (1989). The governmental termination of freedom of movement can occur "by means of physical force or show of authority." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) ("Examples of circumstances that might indicate a seizure . . . would be . . . the display of a weapon by an officer . . . ."). The relevant inquiry is whether the officer intended to acquire control over a specific individual. *See Landol-Rivera v. Cruz Cosme*, 906 F.2d 791, 794-95 (1st Cir. 1990) (explaining that the restraint of liberty must result from an attempt to gain control over an individual).

Here, the undisputed facts show that officer Duncan intentionally pointed his rifle at Stamps as a show of authority in order to assume control over him. (DSMF ¶¶ 21-22). Stamps was therefore unquestionably seized, and remained under seizure at all relevant times. The question, then, is whether the use of force during the seizure was reasonable under the circumstances.

All claims of excessive force must be judged by an "objective reasonableness" standard. *Graham*, 490 U.S. at 397. The reasonableness of the force is determined by a "careful

balancing" of the level of force used with the countervailing governmental interests at stake. *Id.* at 396. The reasonableness of the force may not be judged with the benefit of hindsight, but from "the perspective of a reasonable officer on the scene." *Id.* The objective reasonableness of the force used is determined by means of a balancing test that considers, among other things, the severity of the suspected offense, whether the suspect poses an immediate threat to the officer and others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.*; *see also Bastien*, 279 F.3d at 14.

The officer's subjective intent or motivation is not relevant to the reasonableness inquiry. *Bastien*, 279 F.3d at 14 (citing *Alexis v. McDonald's Rests.*, 67 F.3d 341, 352 (1st Cir. 1995)). "An officer's evil intentions will not make a Fourth Amendment violation of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional." *Graham*, 490 U.S. at 397.

The intentional use of deadly force during a seizure is unconstitutional unless the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). Even the unintentional or accidental use of deadly force in the course of an intentional seizure may violate the Fourth Amendment if the officer's actions that resulted in the injury were objectively unreasonable. *See Brower*, 489 U.S. at 599; *Landol-Rivera*, 906 F.2d at 796 (explaining that unintentional conduct may trigger Fourth Amendment liability "when a police officer accidentally causes more severe harm than intended to an individual").

Here, it is undisputed that Duncan fired his weapon by accident, not intentionally. Multiple courts have concluded or at least suggested that the accidental firing of a weapon in the

course of an intentional seizure can give rise to an excessive force claim under the Fourth Amendment. *See, e.g., Henry v. Purnell* ("*Henry II*"), 652 F.3d 524 (4th Cir. 2011) (en banc) (fleeing suspect shot when officer mistakenly fired handgun instead of Taser); *Watson v. Bryant*, 532 Fed. Appx. 453 (5th Cir. 2013) (arrestee accidentally shot during attempted handcuffing); *Tallman v. Elizabethtown Police Dept.*, 167 Fed. Appx. 459 (6th Cir. 2006) (suspect accidentally shot when officer reached into vehicle); *Pleasant v. Zamieski*, 895 F.2d 272 (6th Cir. 1990) (gun accidentally discharged when officer grabbed suspect); *McCoy v. City of Monticello*, 342 F.3d 842 (8th Cir. 2003) (suspect shot when officer fell on ice and gun accidentally discharged); *Torres v. City of Madera*, 524 F.3d 1053 (9th Cir. 2008) (arrested suspect in patrol car shot when officer mistakenly fired handgun instead of Taser); *Speight v. Griggs*, 13 F. Supp. 3d 1298 (N.D. Ga. 2013) (suspect accidentally shot while being subdued and handcuffed), *vacated in part on other grounds*, 579 Fed. Appx. 757 (11th Cir. 2014).

The relevant inquiry is not whether Duncan intended to injure Stamps, and thus whether it was an accidental or an intentional shooting; the officer's subjective intent is not the issue. Instead, it is whether Duncan's conduct leading up to the discharge of the gun was objectively reasonable under the circumstances. *See, e.g., Watson*, 532 Fed. Appx. at 457-58 (finding that an undisputedly accidental shooting can lead to Fourth Amendment liability if the officer "acted objectively unreasonably by deciding to make an arrest, by drawing his pistol, or by not reholstering it"); *Tallman*, 167 Fed. Appx. at 463-66 (focusing reasonableness inquiry on officer's actions leading up to unintentional discharge of the weapon); *McCoy*, 342 F.3d at 848 ("[T]he relevant inquiry is not whether [officer's] act of firing his gun was 'objectively reasonable,' but whether, under the totality of the circumstances, the act of drawing the gun was

'objectively reasonable.'"); *Pleasant*, 895 F.2d at 276 (explaining that the relevant inquiry is whether officer's decision to draw gun at scene and decision to not return gun to holster were reasonable).

It is undisputed that Duncan entered the apartment with his gun drawn, moved the safety from "safe" mode to "semi-automatic," pointed the weapon at Stamps, and placed his finger inside the guard on the trigger. He then shot him in the head, albeit unintentionally. Although there is apparently no issue with respect to the reasonableness of drawing the weapon, there are substantial issues as to the reasonableness of Duncan's conduct as a whole.

First, Stamps posed no actual threat. He was an elderly man. There was no struggle of any kind when the police encountered him. He immediately cooperated with the police and lay down on this stomach, with his hands visible. He made no movement or sound of any kind to indicate any type of resistance, force, or flight.

Second, Stamps was not a suspected threat. The police were not surprised by his presence at the scene (which was his own home). He was not a criminal suspect. He had no history of violence. Indeed, the police officers had been told that Stamps posed no known threat to the police.

Third, the potential harm posed to Stamps from the form of restraint used by Duncan was high—indeed, extremely high. Duncan did not use his hands, or a nightstick, or a chokehold. He did not restrain Stamps with handcuffs. Instead, he pointed a semi-automatic firearm in apparent close proximity to Stamps's head. The likely harm to Stamps, should a misstep occur, was not a mere bruise or broken bone, but death or serious injury.

Fourth, Duncan's intentional actions greatly increased the risk of accidental harm. By

turning off the safety and putting his finger on the trigger, he created the very real possibility that any bump or jolt—or nervous twitch—would result in Stamps's death.[4]

Fifth, there was no obvious justification or need for Duncan to have turned off the safety and put his finger on the trigger, inside the trigger guard. The placement of his finger apparently violated police department policy, and possibly proper police practice. *See Sorenson v. McLaughlin*, 2011 WL 1990143, at * 6 (D. Minn. 2011) (officer's placement of finger inside trigger guard that led to accidental shooting violated police training). There is no reason to believe that Duncan could not have quickly moved the safety, and put his finger inside the guard, had any actual threat materialized.

Under the circumstances, a reasonable jury could find that Duncan's actions leading up to the shooting were objectively unreasonable, and therefore that he employed excessive force in violation of the Fourth Amendment.

**(2) Clearly Established Law**

Defendants contend that even if a jury could find an unreasonable seizure giving rise to an excessive force claim, Duncan is nonetheless entitled to qualified immunity. For purposes of the second step of the qualified-immunity analysis, "[a] right is clearly established only if it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Soto-Torres v. Fraticelli*, 654 F.3d 153, 158 (1st Cir. 2011). Put another way, the court must determine "[1] whether the contours of the right, in general, were sufficiently clear, and [2] whether, under the specific facts of the case, a reasonable defendant would have understood that he was violating the right." *Ford v. Bender*, 768 F.3d 15, 23 (1st Cir. 2014)

[4] Defendants concede that Duncan did not comply with police protocol by placing his finger on the trigger. The parties dispute whether switching off the safety contravenes safe firearm-handling procedures.

(citing *Maldonado*, 568 F.3d at 269). Although a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011).

The inquiry starts by "defining the right at issue at 'an appropriate level of generality.'" *Hunt v. Massi*, __ F.3d __, No. 14-1379, slip op. at 10 (1st Cir. Dec. 10, 2014). "The clearly established inquiry must be undertaken 'in a more particularized, and hence more relevant, sense.'" *Id.*, slip op. at 11 (quoting *Saucier v. Katz*, 533 U.S. 194, 202 (2001)). The court "must analyze whether the law is clearly established 'in light of the specific context of the case, not as a broad general proposition.'" *Id.* (quoting *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004)).

As a starting point, it was clearly established at the time of the incident that the unintentional or accidental use of deadly force during a seizure can give rise to a constitutional violation if the officer has acted unreasonably in creating the danger. In *Brower*, the Supreme Court made that point clear. There, the police had set up a roadblock intending to capture (but not kill) a fleeing felon; the roadblock was situated behind a curve, at night, and a police vehicle was positioned so that its headlights would shine at the oncoming driver. 489 U.S. at 594. Brower drove into the roadblock at high speed and was killed. The precise issue before the court was whether a "seizure" had occurred; the court concluded that it had. 489 U.S. at 598-99. The court went on, however, to observe:

> This is not to say that the precise character of the roadblock is irrelevant to further issues in this case. "Seizure" alone is not enough for § 1983 liability; the seizure must be "unreasonable." Petitioners can claim the right to recover for Brower's death only because the unreasonableness they allege consists precisely of setting up the roadblock in such a manner as to be likely to kill him. . . . Thus, the circumstances of this roadblock, including the allegation that headlights were used to blind the oncoming driver, may yet determine the outcome of this case.

*Id.* at 599. In other words, it was clear that the petitioners could recover—even though the death was accidental—if they could establish that the police had acted unreasonably in creating the danger.

That principle was reinforced in *Scott v. Harris*, 550 U.S. 372 (2007), a case involving a high-speed police chase of a fleeing suspect that ended in an accident, severely injuring the suspect. The court held that the claim of excessive force must be judged according to the objective reasonableness standard, and that the question turned on the police officer's actions leading up to the accident. 550 U.S. at 381-83. "Whether or not [the officer's] actions constituted application of 'deadly force,' all that matters is whether [his] actions were reasonable." *Id.* at 383.

Since *Brower*, every circuit court to consider the issue has concluded or at least suggested that the unintentional discharge of a firearm during a seizure can give rise to a Fourth Amendment claim if the officer's actions leading up to the shooting were objectively unreasonable. *See Henry v. Purnell* ("*Henry I*"), 501 F.3d 374, 382-83 (4th Cir. 2007); *Henry II*, 652 F.3d at 531-37 (4th Cir. 2011) (en banc); *Watson*, 532 Fed. Appx. at 457-58 (5th Cir. 2013); *Pleasant*, 895 F.2d at 276 (6th Cir. 1990); *Tallman*, 167 Fed. Appx. at 463-66 (6th Cir. 2006); *McCoy*, 342 F.3d at 848 (8th Cir. 2003); *Torres*, 524 F.3d at 1056 (9th Cir. 2008); *Bleck v. City of Alamosa*, 540 Fed. Appx. 866, 876-77 (10th Cir. 2013); *see also Speight*, 13 F. Supp. 3d at 1319 (N.D. Ga. 2013); *Owl v. Robertson,* 79 F.Supp. 2d 1104, 1114 (D. Neb. 2000); *Johnson v. City of Milwaukee*, 41 F. Supp. 2d 917 (E.D. Wis. 1999); *Sorenson*, 2011 WL 1990143 (D.

Minn. 2011).[5] The First Circuit has not considered the precise issue, but has made a similar statement in dicta. *See Landol-Rivera*, 906 F.2d at 796 n.9 (noting that "unintentional conduct triggering Fourth Amendment liability may occur when a police officer accidentally causes more severe harm than intended to an individual" during a seizure).

Although many of those decisions resulted in summary judgment for the police officer, in each case the court focused on the police officer's use and handling of the weapon under the circumstances presented. *See Henry II*, 652 F.3d at 534-35 (mistaken use of firearm instead of Taser); *Watson*, 532 Fed. Appx. at 458 (decision not to reholster weapon before attempting handcuffing); *Pleasant*, 895 F.2d at 276-77 (decision not to reholster weapon before grabbing suspect); *Tallman*, 167 Fed. Appx. at 464-68 (decision to approach automobile passenger with weapon drawn and then to reach into vehicle); *McCoy*, 342 F.3d at 848-49 (decision to draw weapon); *Torres*, 524 F.3d at 1056-57 (mistaken use of firearm instead of Taser); *Bleck*, 540 Fed. Appx. at 871-73 (decision to attempt to restrain suspect with hands while holding weapon in one hand); *Speight*, 13 F. Supp. 3d at 1321-23 (decision to draw gun and not reholster weapon); *Owl*, 79 F. Supp. 2d at 1112-14 (decision to draw the weapon and act of forcing suspect to the ground); *Johnson*, 41 F. Supp. 2d at 930 (decision to wrestle suspect to ground with weapon in hand); *Sorenson*, 2011 WL 1990143 (decision to wrestle suspect to ground with weapon in hand and finger insider trigger guard).

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[5] A recent one-page unpublished Ninth Circuit opinion arguably provides the only exception. *See Powell v. Slemp*, 2014 WL 5139243 (9th Cir. Oct. 14, 2014). In *Powell*, the Ninth Circuit held that a police officer who unintentionally discharged a gun while attempting to restrain a suspect was entitled to qualified immunity. The court did not address whether an unintentional discharge of a firearm could lead to Fourth Amendment liability. Instead, it jumped to the second prong of the qualified immunity analysis. In finding qualified immunity, the court ruled that the case law must be clear that the officer's use of a firearm in the course of the restraint violated the Fourth Amendment, and concluded that "no such case law exists." *Id.* The court did not mention any of the relevant case law, including the prior published decision from the Ninth Circuit itself. *See Torres*, 524 F.3d at 1056. Accordingly, the *Powell* opinion, which was issued more than three years after the events at issue here, is in any event unpersuasive.

It is true that in 1987, the Second Circuit had ruled to the opposite effect, holding that an accidental discharge of a firearm during the handcuffing of a suspect could not, as a matter of law, lead to liability under § 1983. *Dodd v. City of Norwich*, 827 F.2d 1, 7-8 (2d Cir. 1987) ("It makes little sense to apply a standard of reasonableness to an accident.").[6] But it is highly doubtful whether *Dodd* remains good law. Most importantly, it was decided before both *Brower* (in which the Supreme Court made clear that unreasonable conduct in the course of a seizure that results in an accidental death can give rise to liability, 489 U.S. at 599) and *Graham* (in which the Supreme Court held that all claims of excessive force in the course of a seizure should be analyzed under the Fourth Amendment and its "reasonableness standard," 490 U.S. at 395).[7] After *Graham*, the law has been clear that it does not matter whether the police officer subjectively intended no harm—that is, whether it was an "accident," as opposed to an intentional infliction of harm.[8] Instead, the question is whether the police officer's conduct was objectively reasonable.

In summary, in light of the Supreme Court precedent and the overwhelming weight of appellate authority, it was clearly established as of January 5, 2011, that an unintentional

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[6] The *Dodd* court therefore did not consider whether the officer's actions leading up to the accident might have been unreasonable under the Fourth Amendment (although it did find those actions reasonable for purposes of a claim under state tort law).

[7] The *Dodd* court also concluded that the shooting was "not for the purpose of seizing [the suspect]," because for "all intents and purposes," the seizure of the suspect had "already taken place" by the time the police officer had begun to handcuff him, and before the firearm discharged. 827 F.2d at 7. While it is clearly true that the firing of the weapon was not intended to effect the seizure, it is difficult to see how the court concluded that the seizure was over by the time the weapon discharged.

[8] Prior to the incident in this case, several district courts, mostly in the Third Circuit, had followed *Dodd* in cases involving police shootings, notwithstanding the Supreme Court's intervening opinions in *Brower* and *Graham*. *See Brice v. City of York*, 528 F. Supp. 2d 504 (M.D. Pa. 2007); *Clark v. Buchko*, 936 F. Supp. 212 (D.N.J. 1996); *Troublefield v. City of Harrisburg, Bureau of Police*, 789 F. Supp. 160 (M.D. Pa. 1992). To the extent those decisions turn on the officer's subjective intent (that is, whether the shooting in question was an "accident") rather than the objective reasonableness of the officer's actions (that is, whether the officer's conduct, from an objective viewpoint, resulted in excessive force) they appear to be wrongly decided.

shooting during an intentional seizure can constitute excessive force if the officer's conduct leading to the accident was objectively unreasonable.[9] Furthermore, it was well-established that the unsafe handling of a firearm during a seizure could constitute unreasonable conduct.

The remaining question is whether the law was clearly established "in light of the specific context of this case." *Hunt v. Massi*, slip op. at 11. In particular, the question is whether an objectively reasonable officer would know that his failure to observe safety precautions when pointing a loaded firearm at an innocent person who posed no threat could lead to a constitutional violation if the gun discharged as a result.

As noted, there are multiple cases holding that an officer can be found liable for an accidental shooting in the course of a seizure where the officer acted unreasonably while handling a firearm in the course of a seizure. Nearly all of the reported cases involve a physical struggle with a criminal suspect who was resisting arrest, failing to comply with police orders, or attempting to flee. *See, e.g., Henry II*, 652 F.3d at 524 (suspect was fleeing from police); *Watson*, 532 Fed. Appx. at 455 (suspect had refused to comply with police command and was resisting handcuffing); Speight, 13 F. Supp. 3d at 1304 (suspect had fled from police and was in the process of being handcuffed); *McCoy*, 342 F.3d at 842 (suspect, who was apparently intoxicated, had failed to stop for police); Pleasant, 895 F.2d at 273 (suspect was fleeing from police); *Torres*, 524 F.3d at 1054-55 (arrestee was becoming violent in back of patrol car). Even in the *Tallman* case, which involved the shooting of an apparently innocent automobile passenger after a high speed car chase, the passenger had not responded to police commands, leading the officer to attempt a physical seizure that resulted in an accidental discharge of the

[9] While some of the opinions noted were issued after 2011, the date of the incident, there were five relevant appellate opinions, in addition to *Brower*, *Scott*, and *Landol-Rivera,* by that point.

firearm. 167 Fed. Appx. at 461.

The parties and the Court have not found a case precisely identical to the present facts. That does not, however, preclude a finding that qualified immunity does not apply. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances."); *Johnson*, 41 F. Supp. 2d at 930. Here, the target of the seizure (Stamps) was not resisting arrest, refusing to obey orders, fleeing, or otherwise posing a threat to anyone. Duncan's conduct was therefore, if anything, less justified than the conduct of the officers in the other reported cases. An objectively reasonable police officer in Duncan's position would therefore have known that the decision to point the weapon at Stamps's head, with the safety off and his finger on the trigger and inside the guard, could result in a constitutional violation if he discharged the weapon without cause.

Perhaps the most appropriate way to frame the issue is to consider the principle that the objective reasonableness of an exercise of force is determined according to a balancing test—a test that weighs a variety of factors, such as the level of force used, the severity of the suspected offense, the danger posed by the subject, and whether the suspect is resisting arrest. *See Graham*, 490 U.S. at 396-97. Of course, every reported case involving excessive force turns on its own variable set of facts or circumstances, and therefore an individualized striking of the balance. And officers making real-time decisions in the field will sometimes make honest mistakes or miscalculations as to how that balance ought to be struck, and the law provides considerable leeway for them to do so. Nonetheless, there are surely instances where the balance tips so far in one direction that a reasonable police officer would clearly know that the force (or threat of force) was excessive. Where the danger or threat posed by the subject—and as reasonably perceived by the police officer—is virtually non-existent, and the conduct of the

officer in the handling of a firearm creates a very high risk of death or serious injury, an objectively reasonable officer would know that his conduct was unreasonable. Put another way, at the extremes—an extremely low danger posed by the subject coupled with an extremely high risk created by the officer—any reasonable officer would know his conduct violated the Fourth Amendment.[10]

This is such a case. As noted above, Stamps presented no threat, whether actual, suspected, or perceived. He had not committed a crime, and he was not believed or suspected to be dangerous.[11] When Duncan encountered him, Stamps was in a vulnerable position, lying down on the floor with his hands up. He made no movement, sudden or otherwise. He was not resisting arrest or attempting to flee. Duncan nonetheless pointed a loaded firearm at his head—with the safety off and his finger inside the guard on the surface of the trigger. By doing so, he greatly increased the danger to Stamps with relatively little (if any) law enforcement justification. Thus, while it is true that each case turns on its own balancing of facts, none of those cases involved the relative extremity of factors presented here.

Under the circumstances, an objectively reasonable officer would have known that the combination of the lack of serious threat posed by the subject, the extremely high risk of harm from the firearm, and the unnecessary or unjustified nature of the police action rendered the officer's conduct unreasonable. The legal contours of the constitutional right in question had

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[10] Suppose, for example, a police officer at a school crossing wanted to restrain a six-year-old girl from crossing the street when the traffic light was red. If he did so by pressing a loaded and cocked firearm against her temple, it would be clear that the display of force was excessive under the circumstances, because the proper balance of factors under *Graham* would be so obvious. That would be true even if no case had ever so held. If the police officer were jostled or bumped by another child and accidentally shot the girl, surely no court would find the officer immune on the ground that no case with similar facts had ever been brought.

[11] Again, the Framingham police had been advised that he posed no known threat during the execution of the warrant. (Pl. SMF ¶¶ 2, 6-7; *see* Duncan Dep. 21-25).

been clearly established at the time of the episode. Therefore, the Court finds that defendant is not entitled to qualified immunity, and the motion for summary judgment with respect to Counts 2 and 3 will be denied.

**b. Fourteenth Amendment (Count 5)**

Count 5 alleges violation of the Fourteenth Amendment Due Process Clause. "[A]ll claims that law enforcement officers have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach." *Graham*, 490 U.S. at 395. Here, the excessive force claim arises in the context of Duncan's seizure of Stamps. Therefore, the Fourteenth Amendment Due Process Clause does not apply, and defendant's motion for summary judgment as to Count 5 will be granted.

**c. Punitive Damages (Count 6)**

Count 6 alleges that plaintiffs are entitled to punitive damages predicated on the Fourth Amendment excessive-force violation. To make a claim for punitive damages, plaintiff must show that defendant's actions were "motivated by evil motive or intent" or involved "reckless or callous indifference to the federally protected rights of others." *Smith v. Wade*, 461 U.S. 30, 56 (1983). "Lack of intent to cause harm" does not automatically bar a claim for punitive damages. *Hernandez-Tirado v. Artau*, 874 F.2d 866, 868 (1st Cir. 1989). However, "[p]unitive damages are reserved for instances where the defendant's conduct is 'of the sort that calls for deterrence and punishment over and above that provided by compensatory awards.'" *Id.* at 869 (quoting *Smith*, 461 U.S. at 54). "The Supreme Court, in articulating the standard for punitive damages in § 1983 actions, also referred to common law standards using such terms as 'injury . . . inflicted

maliciously or wantonly,' 'criminal indifference to civil obligations,' 'willful misconduct' or 'conscious indifference to consequences,' and 'outrageous conduct.'" *Id.* (citations omitted). Several courts have required a showing of "bad faith" by defendant or "ill will" or "malice" toward plaintiff. *Id.* (collecting cases).

Plaintiffs concede that Duncan accidentally fired his weapon. Therefore, his actions were not "motivated by evil motive or intent." In addition, plaintiff has presented no evidence that defendant acted outrageously, in bad faith, or with criminal indifference to civil obligations. Therefore, plaintiffs cannot prove that defendant acted with "reckless or callous indifference to the federally protected rights of others." Accordingly, defendant's motion for summary judgment with respect to Count 6 will be granted.

**2. Wrongful Death (Count 8)**

Count 8 alleges wrongful death under Mass. Gen. Laws ch. 229 § 2 on the basis that "[o]fficer Paul Duncan's shooting of Mr. Stamps was intentional in that he intended to pull the trigger and intended to cause physical harm to Mr. Stamps." (Am. Compl. ¶ 171).

Mass. Gen. Laws ch. 229 § 2 provides that a "person who (1) by his negligence causes the death of a person, or (2) by willful, wanton or reckless act causes the death of a person under such circumstances that the deceased could have recovered damages for personal injuries if his death had not resulted, . . . shall be liable in damages." As noted, Count 8 alleges intentional conduct on the part of defendant. However, that count fails because the undisputed evidence shows that defendant did not intend to shoot Stamps. (Def. SMF ¶ 27; Pl. SMF ¶ 32).

If Count 8 were construed to be a claim for negligence or recklessness instead, it would be barred because Duncan was a public employee. Under Mass. Gen. Laws. Ch. 258 § 2, "public employees are immune from suit based on allegedly negligent conduct. Rather, liability for the

negligent acts of a public employee committed within the scope of employment is visited upon the public employer, and not the employee." *Farrah ex rel. Estate of Santana v. Gondella*, 725 F. Supp. 2d 238, 246 n. 9 (D. Mass. 2010). For the purposes of this statute, "recklessness is considered negligent, rather than intentional conduct." *Id.* (quoting *Parker v. Chief Justice for Admin & Mgmt. of the Trial Court*, 67 Mass. App. Ct. 174, 180 (2006)). Count 9 alleges wrongful death against the City of Framingham based on Duncan's negligence. Therefore, defendant's motion for summary judgment with respect to Count 8 will be granted.

**B. Claims Against City of Framingham**

Defendants have moved for summary judgment on plaintiffs' claims against the City of Framingham for negligent training.

**1. Section 1983 Failure To Train (Count 7)**

Count 7 alleges that the Town of Framingham is liable under section 1983 for failing to train and supervise its officers. To establish municipal liability, a plaintiff must show that "the municipality itself causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 387 (1989); *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 694-95 (1978). Thus, plaintiffs are required to demonstrate both the existence of a policy or custom and a "direct causal link" between that policy and the alleged constitutional deprivation. *City of Canton*, 489 U.S. at 385; *see also Monell*, 436 U.S. at 694 (policy must be the "moving force [behind] the constitutional violation"); *Santiago v. Fenton*, 891 F.2d 373, 381-82 (1st Cir. 1989). "Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law." *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011).

It is uncontested that the City of Framingham is a municipal entity subject to potential liability under section 1983. The claim for municipal liability rests principally on the city's alleged failure to train Duncan. A claim against a municipality under § 1983 is "most tenuous where [it] turns on a failure to train." *Id.* at 1359. To give rise to liability in such an action, "a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'" *Id.* (quoting *Canton*, 489 U.S. at 388); *see also Young v. City of Providence*, 404 F.3d 4, 26-27 (1st Cir. 2005) (holding that, under *Monell*, "any proper allegation of failure to train . . . must allege that [the officer's] lack of training caused him to take actions that were objectively unreasonable and constituted excessive force" and that "the identified deficiency in [the training program was] closely related to the ultimate injury"). "[D]eliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Id.* at 1360 (quoting *Board of County Commissioners of Bryan County, Okl. v. Brown*, 520 U.S. 397, 410 (1997)). As a result, in order for plaintiff to demonstrate deliberate indifference for purposes of a failure to train claim, a "pattern of similar constitutional violations by untrained employees is ordinarily necessary." *Id.*

Plaintiffs contend that the Framingham Police Department's policies with respect to the use of a weapon's safety were grossly deficient and caused the fatal shooting of Stamps. (Pl. Opp. 30). Plaintiffs contend that "modern, up-to-date, and established law enforcement procedures require police departments to train their officers that weapons are to remain on safe until the officer is ready to fire at an object." (*Id.*). Framingham Police Department policy required that Duncan keep his weapon on safe unless he perceived a threat or was actively clearing a room. (PSMF ¶¶ 38, 78). Plaintiffs further contend that the policy was inadequate

because officers were not trained as to what constitutes a perceived threat. (*Id.* at ¶ 78). Plaintiffs contend that Stamps was not a threat, perceived or otherwise, and thus the failure to properly train Duncan caused him to turn his gun off safe mode. (*Id.* at ¶¶ 38-39, 78-80).

The bar for establishing "deliberate indifference" in connection with a failure-to-train claim is quite high, and plaintiffs have not met it here. Plaintiffs have put forth no evidence of any other incidents of police misconduct. Absent such evidence, the Court cannot find that failure to have a written policy as to what constitutes a perceived threat amounts to deliberate indifference. There is no evidence that the police department was on notice of the possible flaws in its policy. The issue is not whether the Framingham Police Department's policy is wise or sensible, or whether the Court might adopt something different. It is whether the policy, under the circumstances, amounted to deliberate indifference, and therefore a constitutional violation. With only one reported incident of misconduct related to the policy, any flaws do not rise to that level. Accordingly, defendant's motion for summary judgment with respect to Count 7 will be granted.

**2. Mass. Gen. Laws ch. 258 § 2 (Count 10)**

Count 10 alleges that the Town of Framingham is liable under Mass. Gen. Laws. ch. 258 § 2 for negligent training and supervision of Duncan. The Massachusetts Torts Claims Act provides that "[p]ublic employers shall be liable for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment." Mass. Gen. Laws. ch. 258 § 2. "Massachusetts cases have only allowed supervisory negligence claims against municipalities where the municipality knew or should have known about an underlying, identifiable tort, which was committed by named or unnamed public employees." *Kennedy v. Town of Billerica*, 617

F.3d 520, 533 (1st Cir. 2010). As noted, there is no evidence that the City of Framingham knew or should have known that Duncan was committing any kind of tort. Furthermore, the Massachusetts Torts Claims Act creates a cause of action based on the negligence of public employees. In Count 9, plaintiffs base a claim under this statute on Duncan's negligence. Here, there are no facts supporting a finding of negligence of public employees other than Duncan that can be imputed upon the City of Framingham.

Accordingly, defendant's motion for summary judgment with respect to Count 10 will be granted.

## IV. Conclusion

For the foregoing reasons, defendant's motion for summary judgment is:

1. GRANTED with respect to Counts 1, 4, 5, 6, 7, 8, and 10.

2. DENIED with respects to Counts 2 and 3.

**So Ordered.**

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: December 26, 2014

**CERTIFICATE OF COMPLIANCE UNDER FED. R. APP. P. 32(a)(7)**

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: (1) this brief contains 10,762 words excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point proportionally spaced using Times New Roman font.

/s/ Leonard H. Kesten

LEONARD H. KESTEN

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of July, 2015, this document was filed through the Electronic Case Filing system, and that copies will be sent electronically to the registered participants identified on the Notice of Electronic Filing:

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# United States Court of Appeals
## For the First Circuit

No. 15-1141

EURIE A. STAMPS, JR., Co-administrator of the Estate of Eurie A. Stamps, Sr.; NORMA BUSHFAN-STAMPS, Co-administrator of the Estate of Eurie A. Stamps, Sr.

Plaintiffs - Appellees

v.

TOWN OF FRAMINGHAM; PAUL K. DUNCAN, individually and in his official capacity as a police officer of the Framingham Police Department

Defendants - Appellants

**APPELLEE'S BRIEFING NOTICE**

Issued: July 7, 2015

Appellee's brief must be filed by **August 3, 2015**.

The deadline for filing appellant's reply brief will run from service of appellee's brief in accordance with Fed. R. App. P. 31 and 1st Cir. R. 31.0. Parties are advised that extensions of time are not normally allowed without timely motion for good cause shown.

Presently, it appears that this case may be ready for argument or submission at the coming **November, 2015** session.

The First Circuit Rulebook, which contains the Federal Rules of Appellate Procedure, First Circuit Local Rules and First Circuit Internal Operating Procedures, is available on the court's website at www.ca1.uscourts.gov. Please note that the court's website also contains tips on filing briefs, including a checklist of what your brief must contain.

**Failure to file a brief in compliance with the federal and local rules will result in the issuance of an order directing the party to file a conforming brief and could result in the appellee not being heard at oral argument. See 1st Cir. R. 3 and 45.**

Margaret Carter, Clerk

UNITED STATES COURT OF APPEALS

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