

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION**

STEVEN SCOZZARI, as Personal
Representative of the Estate of WILLIAM
CHRISTI SCOZZARI, Deceased,

Plaintiff,

vs.

Case No. 2:08-cv-10997
Honorable Thomas Ludington

CITY OF CLARE, a municipal corporation,
KEN HIBL, a municipal agent of City of Clare,
CHIEF DWAYNE MIEDZIANOWSKI, as an
Agent for the municipal corporation and as an individual,
OFFICER JEREMY McGRAW, as an agent of the
municipal corporation and as an individual,
jointly and severally,

Defendants.

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**PLAINTIFF'S UNITARY RESPONSE TO DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT**

QUESTIONS PRESENTED AND CONTROLLING AUTHORITY

1. Where the officers illegally created the circumstances which they claimed required them to use deadly force, are they entitled to summary judgment or qualified immunity, where their version of the events is contradicted by independent witnesses and forensic evidence?

Controlling authority:

Kirby v. Duva, et al., 530 F3d 475 (6th Cir. 2008)
Yates v. Cleveland, 941 F2d 444 (6th Cir. 1991)
Sigley v. City of Parma Heights, 437 F3d 527, 534-35 (6th Cir. 2006)
Bletz v. Gribble, 640 F.Supp. 907 (WD Mich. 2009)

2. Did the officers violate Plaintiff's Fourth Amendment rights as a matter of law when they undertook to order him from his home for the purpose of submitting to arrest and broke his door, without warrant, exigent circumstances or probable cause?

Controlling authority:

Payton v. New York, 445 U.S. 573 (1980)
Welsh v. Wisconsin, 466 U.S. 740 (1984)
United States v. Morgan, 743 F2d 1158 (6th Cir. 1984)
United State v. Sarre, 272 F3d 804 (6th Cir. 2001)

3. Did the officers' aggressive pursuit of Plaintiff prior to the time that he went into his home constitute a seizure within the meaning of the Fourth Amendment?

Controlling authority:

United States v. Mendenhall, 446 U.S. 544 (1980)
LaFave, Search and Seizure, 3rd Ed., Sec. 9.3(a) Stop and Frisk and Lesser Intrusions,
Vol. 4, p. 98

4. Did Defendants unreasonable decision to delay treatment for twelve (12) minutes violate Plaintiff's rights?

Controlling authority:

Jones v City of Cincinnati, 521 F3d 555 (6th Cir. 2008)
Estate of Owensby v City of Cincinnati, 414 F3d 596, 602 (6th Cir. 2005)

5. Did the City of Clare violate the ADA by failing to perform any self-assessment or conduct any education or training, particularly including within the police department, regarding how to communicate and deal with handicapped persons, particularly mentally handicapped persons?

Controlling authority:

Johnson v City of Saline, 151 F3d 564, 569 (6th Cir. 1998)

Tucker v Tennessee, 539 F3d 526 (6th Cir. 2008)

Ability Center of Greater Toledo v City of Sandusky, 385 F3d 901, 907-908 (6th Cir. 2004)

6. Whether or not the City of Clare violated the ADA, did their complete failure to train their officers in how to deal with, particularly mentally, handicapped persons give rise to municipal liability?

Controlling authority:

Monell v. New York, 436 U.S. 658 (1978)

Canton v. Harris, 489 U.S. 378 (1989)

INTRODUCTION

Defendants' facts are in Plaintiff's view deficient, selective and contrary to the law respecting how summary judgment and qualified immunity questions are to be decided - construing all facts and inferences most favorably to the non-moving party (Plaintiff). Plaintiff's facts are an inclusive narrative of the evidence relevant to the issues before the Court

STATEMENT OF FACTS

According to the dispatch records, Exhibit 1, Jason Miller called the Clare County 911 at 11:05 p.m. on September 18, 2007, reporting that he thought he heard five shots fired from the area of a lake north of the Lone Pine Motel in the Clare, Michigan.

The Lone Pine Motel is a collection of different types of structures which provide everything from overnight stays to extended, even permanent, lodging. The configuration of the Lone Pine plays an important part in the analysis of the testimony. Because of their locations, only parts of the premises could be seen from their different vantages by the various witnesses. A map of the Lone Pine is Exhibit 2.

William Scozzari had lived in a small cabin at the north end of the Lone Pine property for 7-10 years before September 18, 2008. He was a diagnosed schizophrenic on disability under the care of the Clare County Mental Health Department. He was hard of hearing, blind in one eye (see eye patch from autopsy, Ex.3), had diminished sight out of the other eye and sometimes used a cane while walking. He was 5' 3" and weighed 113 pounds (Ex. 4, Autopsy). Scozzari was obsessively reclusive and impossible to engage in conversation. He would not even allow his own parents into his cabin (Gibbons Dep. Ex. 5, pp. 18, 19, 57, 83).

The possible “shots fired” complaint was first responded to by Defendant Clare Chief of Police Dwayne Miedzianowski (Chief). He arrived at the parking lot at McEwen and Wilcox Parkway within minutes, according to the dispatch log (Ex. 1). The Chief was acting in a regular patrol capacity. Defendant Clare Police Officer Jeremy McGraw (McGraw) was also assigned to respond to the scene. He was dispatched at 11:07 p.m., Ex. 1. He arrived on the scene at 11:14 p.m., Ex. 1. On the way, he was called 2 to 4 times on his cell phone by the Chief, who was becoming increasingly agitated (McGraw Dep., Ex. 6, p. 120).

INITIAL CONFRONTATION

It is highly questionable whether Scozzari committed any crime. According to the Chief (Dep. Ex. 7, p. 65), he saw a flashlight coming from around east of the VFW hall. When Scozzari was between 10 and 15 feet away, Scozzari appeared to have a brown colored stick carried on his left shoulder. The Chief ordered him to drop it and come over. Dropping the stick was for safety purposes (Ex. 7, pps. 67-68). The Chief indicated that he could tell it was a stick, but did not know that it was not a gun when he first ordered Scozzari to drop it. The Chief claimed not to have a flashlight because he had been working days. That testimony was contradicted by Jeff Morgan II who, minutes later, saw the Chief following Scozzari around the east side and front of cabin 19 carrying a flashlight (Jeff Morgan II Dep. Ex. 8, pps. 11-13). At Ex. 7, p. 69, the Chief remembered he had a flashlight in the car.

Scozzari’s first response, according to the Chief, was to say “Fuck you, boy” and keep on walking. As shown throughout, all of the other witnesses indicated that Scozzari never verbally responded to any communication. The Chief admitted that if an officer did not have probable

cause to believe a crime has been committed, a person can chose not to talk to the police and walk away. He claimed that Scozzari's response did not bother him at all (Ex. 7, p. 70).

But then the Chief claimed it became alarming to him that Scozzari might have committed the misdemeanor of being in the park after hours and there might be a gun in the backpack, which he thinks he saw Scozzari wearing. There is no evidence of a backpack or why Scozzari would carry one for a short walk. Inferentially, the Chief's claim is a *post facto* justification for his actions. He admitted that he had not seen Scozzari commit a misdemeanor (Ex. 7, pps. 70-71).

The Chief exited his vehicle 15-20 feet from Scozzari to ask him to drop the stick and talk (Ex. 7, p. 71). Scozzari walked past and he followed him at about 15 feet when he said "Stop. Police. Put the stick down." Scozzari yelled "Fuck you" and kept walking. The Chief again requested that he stop and Scozzari turned and said "Fuck you" and appeared to pull the stick back in his left hand (Ex. 7, p. 74). The Chief claimed to have gotten closer because he wanted to keep track of where Scozzari was. Then they were in the parking lot of the Lone Pine and the Chief lost sight of Scozzari for a minute as he went around the corner of the cabin (Ex. 7, p. 75). They were probably 10 feet apart when Scozzari drew the stick back. The Chief ran around a truck. Scozzari did not follow him. The Chief went around the truck some more yelling to drop the cane. Scozzari was cocking the cane. The Chief backed up, pulled his pepper spray, yelled "Drop the cane." Scozzari did not drop it, but came down with it. Scozzari's right hand began reaching to his waist and he was pepper sprayed, aimed at the face (Ex. 7, pp. 76-77). The Chief does not know if he hit Scozzari with the pepper spray (Ex. 7, p. 78). That is contradicted by his police report (Ex. 13) and his report to City Manager Hibl (Ex. 30), where the

Chief twice indicated hitting Scozzari with the pepper spray. When Scozzari walked toward him, reaching into his waistband, the Chief ran around the truck and then saw what he thought was a knife in the waistband (Ex. 7, p. 78). The Chief pulled his gun, pointed it at Scozzari and yelled to put the knife back. Scozzari turned around and walked into cabin 17, breaking off the incident and closing the door (Ex. 7, 80). The Chief thought he had been assaulted, but admitted that Scozzari only cocked the cane, but did not try to hit him with it. There were no verbal threats. Equivocating, the Chief says he was perhaps closer to 5 feet from Scozzari, but not less than 5. Even if Scozzari was coming toward him, he at all times was moving in such a way as to protect himself and Scozzari never rushed him. The Chief believed the mere fact that he cocked his arm back and reached for a knife constituted the assault (Ex. 7, pps. 80-82).

McGraw arrived a couple of minutes after Scozzari went into the cabin (Chief Dep., Ex. 7, p. 82). The Chief first saw McGraw on the west side of cabin 17. He briefed McGraw and then they walked around and did some investigation in the area. He did not remember encountering anyone while they were walking around. But McGraw did tell somebody to get back in their cabin (Ex. 7, pp. 85-86), arguably Jeff Morgan II (infra).

This claimed use of pepper spray by the Chief, never asserted anywhere until he generated his report some days later, is one of the first serious questions about the Chief's veracity in his description of the initial encounter, which had no other witnesses. All knowledgeable witnesses, including the Chief, agree that pepper spray has a distinctive, intense and lingering smell. No witness that was in proximity to Scozzari and his clothing at any time later ever reported or could remember any such smell. McGraw denied it (Ex. 6, pp. 230-231). Affidavits are being sought from the independent witnesses, Jeff Morgan II and Jeff

Reichardson. Two of the three med techs denied it. The other did not remember it (Kunik Dep., Ex. 9, p. 9). Carl Bryans Dep., Ex. 10, p. 10 - he did not smell pepper spray and he has been sprayed. The same testimony was given by his wife, who has also been sprayed (Winifred Bryans Dep., Ex. 11, p. 8).

On the present state of the record, there is a reasonable inference that this claimed use of pepper spray by the Chief on Scozzari in the unwitnessed initial encounter is a *post facto* confabulation designed to both amplify its seriousness and dangerousness, as well as an attempt to justify the elevation of the use of force through the continuum when, having determined to arrest Scozzari, he ordered McGraw to approach Scozzari's door with his taser at the ready. Plaintiff is still seeking from either Defendants or the manufacturer the specific characteristics of the type of Freeze+P that the Chief claimed to have used that night. The sealed evidence bag containing Scozzari's clothes has not yet been opened to determine whether or not there is evidence of either the smell or discoloration associated with the use of that particular pepper spray.

Parenthetically, there is no indication that Scozzari reacted in any way consistently with being pepper sprayed. After his alleged initial confrontation with the Chief, he turned and walked directly into his cabin. He had no time to change clothes or ameliorate the effects of pepper spray before the Chief and McGraw returned to arrest him.

On another factual issue, the report of MSP Trooper Amy Denher, who saw Scozzari at the hospital, indicated that Scozzari's pants were 4 or 5 times too large in size, making it unlikely that he could have a knife in the waistband (Ex. 33).

None of the independent witnesses claimed to have heard any confrontation, as described by the Chief, with Scozzari at any time prior to the events of the shooting itself, although they could clearly hear the final events. The exception is Jason Miller, the person who made the original “possible shots fired” call. He went out into the parking lot in front of his room (No. 5) in a motel portion of the Lone Pine, which ran perpendicular to the line of cabins containing No. 17, but with a full view of Scozzari’s cabin (Map, Ex. 2). He was curious to see what would come of his complaint. While he was in the parking lot, he heard from the north the following words “Get away kid” and “Knife” (Ex. 12, pps. 20, 22). After that, he saw the Chief running south toward him from the north end of the Lone Pine premises, then circling around the parking lot to the north (Ex. 12, pps. 25, 28). There was no loud or prolonged confrontation. The voice was unidentified.

SUBSEQUENT DEADLY ENCOUNTER

By the time McGraw had arrived, the “investigation” had focused on cabin 17. That was where he was supposed to find the Chief (Ex. 6, p. 203). He called the Chief on his cell phone and met him at cabin 17 (Ex. 6, p. 123). They then walked around the Lone Pine and other unspecified areas, purportedly investigating the “possible shots fired” complaint and then turned their attention to Scozzari. On the way, according to McGraw’s report (Ex. 13) and the independent witness Miller, the Chief said words to the effect “He’s a mental, he’s going to jail.” (Miller Dep. Ex. 12, p. 33)

The importance of this statement to Defendants’ ADA claims is briefed below. From the testimony of McGraw regarding ADA awareness/training, it is non-existent, (McGraw Dep., Ex. 6, p.150). The Chief’s motivation, in addition to his offended dignity, was transparently based

precisely on Scozzari's handicap. It supports both an ADA claim and a failure to train claim against the City. As the chief policy maker for law enforcement issues for the City, the Chief's actions bind them (Chief Dep., Ex. 7, p. 117). The lack of ADA assessment and training was confirmed by City Manager Hibl, who testified at his deposition (Ex. 14, pps. 12-13) that there were no specific policies, directives, training sessions, etc. regarding ADA assessment or compliance in his 12 years. That included the police department.

From that point on, McGraw was merely a pawn in the chain of command, acting on the orders of the Chief. According to McGraw, with the Chief standing off to the southwest, and with his taser at the ready, McGraw pounded on the door shouting "Open up. Police" (Ex. 6, p. 234). There is no doubt that the purpose of the action was to get Scozzari out of his cabin and arrest him, not merely question him about the "shots fired", complaint (Chief Dep., Ex. 7, p.89). After banging on the door three times and shouting, Scozzari opened the door and, according to McGraw, had weapons in his hands (Ex. 6, p. 235). McGraw admits that in addition to banging on the door, he also kicked it in order to push it open to see what Scozzari was doing inside (Ex. 6, pps. 263, 266; photo of footprint, Ex. 15). He successfully pushed it open a bit. Although the Chief denied any damage, the door jam was in fact broken (Chief Dep., Ex. 7, p.101; photographs, Ex. 16). There is a question about when McGraw kicked in the door. In his report (Ex. 13), he says it was after he fired the taser. But in his deposition, infra, he never got up before firing the shots.

McGraw backed off. A short sidewalk leads from the cabin to a common sidewalk which runs the length of the cabin area. Behind that is a retaining wall approximately a foot to 18 inches in height. Beyond the wall is the elevated parking lot. McGraw started shouting "Drop

the weapon.” As he backed off, he claimed to have tripped over the retaining wall and fallen backwards into the parking lot. According to him, as he went down, he fired the taser (Ex. 6, pps. 241-243). One barb went through the door and hit a cardboard box. Where the other barb went is not clear, but it hit some hard object because it broke the barb.

Scozzari closed the door after the tazing, but opened it again while McGraw was still down. This time he had 3 weapons in his hands, according to McGraw. Scozzari came over the threshold and the barrier, standing there with his arms out with the weapons in his hands. McGraw claims that Scozzari was 4 feet away from him and 6 feet away from the cabin (Ex. 6, pps. 244-246). McGraw heard 3 shots. Scozzari did not react, but kept advancing. McGraw scooted up on his side, but was still down on his back. He could not reload the taser, so he threw it away (Ex. 6, pps. 244-245). His right side was touching the ground. Scozzari was 3-5 feet away with his weapons in the air (Ex. 6, p. 247) (2-3 feet away in McGraw’s report - Ex. 13). McGraw tried to get up and move back, scooting backwards at the same time. Scozzari advanced even closer. McGraw shot. He did not see any bullets take effect. Scozzari stopped and turned toward the Chief and McGraw kept shooting because he thought the Chief was in danger. Scozzari turned toward the cabin, took 2 or 3 steps and fell over the embankment (Ex. 6, pps. 249-251, 175-176, 179, 181).

The Chief’s testimony was that he took a position 15-20 feet on the southwest angle from the door of cabin 17. He saw McGraw go down and Scozzari advancing with weapons. He fired first to protect McGraw. He later claimed to have been afraid that Scozzari was too close to McGraw and McGraw might get hit. He told ex-Chief Ryneerson that he was afraid he had put McGraw in danger (Ryneerson Dep., Ex. 18, p. 31). He fired 4 times (Chief Dep., Ex. 7, pps.

103-108). McGraw immediately started firing. Although McGraw thought he only shot twice, he fired 7 times. He hit Scozzari 5 times - 3 in the back (Autopsy - 3). The Chief did not hit Scozzari at all. One of the Chief's bullets went into Scozzari's cabin. One went into the next cabin over (No. 18) and was found a day or so later.

Aside from the fact that the officers had no right to kick in Scozzari's door, order him from his home or arrest him under the circumstances, their stories, as put into their reports 3-5 days later, is a perfect scenario for self-defense and justifiable homicide, which was what the City, the MSP and the Prosecutor concluded. Unfortunately for Defendants, it did not happen that way, as demonstrated by both eyewitness and forensic testimony.

There were 5 partial or complete eyewitnesses. Wanetta Gibbons, resided in cabin 20, which was in a row of cabins perpendicular to the row containing Scozzari's cabin. Jeff Richardson's cabin (18) and Jeff Morgan II and Sheryl Irwin's cabin (19) were to the east of 17. Gibbons could look directly west out of her door window and see down the sidewalk to Scozzari's cabin, including his front door.

Jeff Richardson looked out his door window at an angle towards No. 17, giving him a view of the officers, but not Scozzari or his cabin. Morgan II, occasionally popped open the door of No. 19 and looked in the direction of Scozzari's cabin and the officers, as did Sheryl Irwin. They had seen the Chief following Scozzari around the east side of 19 and towards Scozzari's cabin earlier. Jason Miller remained out in the parking lot in front of room 5, moving closer to or further away from Scozzari's cabin as the events unfolded. He saw or had the ability to see the entire incident. Strangely, he never saw McGraw during the shooting.

Because the Chief and McGraw refused to give statements to MSP Detective Jerry Carter the evening of the incident and cancelled a meeting with Carter the next morning at the direction of City Attorney and City Manager, the MSP had no idea what the critical points were and thus did not obtain the information about McGraw being down (or not) and the distances involved. That should cause the criminal investigation to be reopened.

Gibbons had lived in cabin 20 at the Lone Pine Motel since 1995 and cleans the rooms, including Scozzari's (Ex. 5, pps. 6-8). She and Scozzari had the same mental health worker, who would visit at the Lone Pine (Ex. 5, p. 14). The night of the incident she heard more than one person yelling "Drop the knife" more than once (Ex. 5, p. 30). She got up from bed and looked through the blinds of her front window (Ex. 5, p. 34). She saw 2 officers standing directly in front of Scozzari's cabin in the parking lot. They had their guns drawn. Scozzari was on the sidewalk. He started to step over the wood barrier with his hand extended in front of him. She did not see anything in his hand (Ex. 5, pps. 39-40). Scozzari got at least one foot over the railing. The officers backed up and shot (Ex. 5, p. 44). She saw Scozzari's body twisting and turning clockwise halfway back toward his door (Ex. 5, p. 58). Scozzari's right leg had stepped up to the railing, but she does not remember him getting all the way into the parking lot (Ex. 5, pps. 65-66). There was some distance between the two officers. Neither of the officers was down on the ground (Ex. 5, p. 78-79). She told Plaintiff's investigator that the distance between Scozzari and McGraw was 15-17 feet (Ex. 19). When asked to estimate the distance at the deposition, it was 5 paces (15 feet), (Ex. 5, p. 79). She did not hear any electronic buzzing sound (Ex. 5, p. 45). She helped the motel owner clean up the blood. It was on the cement at the doorway of Scozzari's cabin and there was a spot on the board barrier at the point where she saw

Scozzari start to step up the rail (Ex. 5, pps. 60, 64). She never heard Scozzari say anything. He did not appear threatening to her. She had never seen Scozzari undertake any threatening activity toward anyone. She did not hear any confrontation or argument between Scozzari or any officers earlier that evening (Ex. 5, pps. 81-82). When she took food to Scozzari, he would not swing the door all the way open because he could not. He had stuff piled up against it (Dep., Ex. 5, p. 83).

The second eyewitness was Richardson, a plumber, living in No. 18. He saw Scozzari a couple of times and waved to him once. But Scozzari would not talk to him. When Richardson waved, Scozzari gave him a look like he was growling and just looked away. Richardson assumed that Scozzari had some sort of mental disturbance. It was clear. He talked to the owner of the motel, who said that Scozzari was harmless and stayed to himself (Ex. 27, pps. 7-9).

Richardson was awakened by people running by his cabin. On the way over to his door, he heard the taser go off. Richardson did not know what a taser was before, but it is a weird crackling sound. He saw it after he stepped out. It was on the ground (Ex. 27, pps. 21-22). He looked out his front window and could see both officers. He heard yelling voices. He does not know whether the noise he heard at Scozzari's cabin was the slamming of the door or the officers trying to kick it in (Ex. 27, p. 10). He could see the two officers, but not Scozzari, before the shooting started (Ex. 27, p. 15). He heard the officers yelling at Scozzari to disarm. They had their guns drawn. Scozzari never stepped out far enough for Richardson to see him and could not have come out very far or he would have been able to see him. He could see the edge of the sidewalk. But from the way the officers' weapons were pointed, Scozzari might have stepped out of his door and to the left a little bit (Ex. 27, p. 16). The police were 12-15 feet apart.

McGraw was closest to him (Ex. 27, p. 23). He thinks the police were at least 10 feet away from the front of Scozzari's cabin. He saw McGraw step back and saw the Chief talking on his microphone (Ex. 27, p. 28). They both appeared to be nervous and they were stepping around in an "antsy" fashion (Ex. 27, p. 29). The officers were yelling at Scozzari to disarm (Ex. 27, p. 34). Neither of the officers ever left his view prior to the shooting (Ex. 27, p. 50). McGraw would be standing there, then he would back up and bring his gun up higher. Then he would relax and step forward (Ex. 27, p. 51). He never saw McGraw fall down (Ex. 27, p. 55).

McGraw was standing a number of minutes before the shooting. He thinks the officers were 10-12 feet from Scozzari when they shot (Ex. 27, p. 56).

Morgan II in No. 19 with his girlfriend Irwin and her mother first saw the flashlight being shined past the east window. He went to the door and when he opened it, the Chief, who did not have his weapon out but looked like he was chasing someone, said "Get back in there, boy", which he did (Ex. 8, pps. 18-19).¹ He continued looking out the front door (Ex. 8, p. 19). He saw the second officer come walking up from the west side of the parking lot. He could see them both (Ex. 8, p. 20). Then they disappeared (he thinks they were walking around the cabin trying to get Scozzari to come out). He knew they were booting the door down to get Scozzari to come out (Ex. 8, p.22). Then he heard them yelling at Scozzari "Come out with your hands up. Freeze. Come on out." He did not hear Scozzari say anything (Ex. 8, p. 22). He saw the officers in front of Scozzari's cabin before and after the taser was discharged. He saw Scozzari briefly in

¹ Jeff Morgan, II accurately described the sequence of events in general accordance with the other witnesses. However, he misidentified the Chief and McGraw, at times thinking them to be each other. Consequently, throughout the recitation of his testimony, Plaintiff's brief will identify the officers correctly, based on their own admissions and the testimony of the other witnesses.

the doorway of his cabin and then go back in (Ex. 8, p. 25). They were yelling “Drop the weapon.” McGraw had his taser out, pointed at the door. He thought the taser was in McGraw’s right hand. McGraw discharged it (Ex. 8, pps. 28-29).

He thought he heard 10 or 11 shots, although in his statement to the MSP he said 5 or 6 (Ex. 8, p. 31). When the shots started going off, he was in the front door. He could not see both officers because of the angle. One was too far over. McGraw was about 20 feet out from Scozzari’s cabin in the same spot he was when he had the taser. After the first shot, he jumped back to cover Sheryl and her mother (Ex. 8, pps. 34-35). Prior to the shooting, he opened the door slightly so that he could see down the front of the cabins. He could see one of the officers (Ex. 8, pps. 53-54). McGraw was a good 20 feet from Cabin 17 standing “in the position.” The taser was yellow or yellow and black. It was a shooting taser (Ex. 8, p. 55). He took another peek and saw the first shot fired by McGraw. He could see McGraw up front. The Chief was more to the side. At times, the Chief would pop up and then he could not see him. However, when McGraw fired he was standing straight in front of the cabin (Ex. 8, p. 56). He could not see Scozzari. The officer was in the same position he had been when he fired the taser (Ex. 8, p. 57). Significantly at Ex. 8, p. 57, l. 14, Morgan II said:

- Q: At any time did you ever see the officer who fired the taser and fired the first shot, fall down or go down or be on the ground?
- A. No.
- Q. Are you sure he was standing up when he fired the shot?
- A. Yes.

Jason Miller was another eyewitness to the shooting. After the Chief ran down the length of the motel toward him after the first alleged contact with Scozzari, the Chief made a circle around the parking lot back to the north. Then McGraw showed up (Ex. 12, p. 25). The Chief

and McGraw walked along cabins 17 and 18 and he lost sight of them. They were at an angle away from 17. They then walked behind and beside the cabins (Ex. 12, pps. 25-30). Miller walked up to the end of the motel near cabin 17. He was approximately 30 feet away from the entrance (Ex. 12, p. 31). The officers came back around from the Gateway Apartment area. McGraw saw him, shined his light on him and asked him if he had seen anybody running. The Chief walked up and said "He is going to jail tonight." They began to walk away and he heard something that sounded like mental problems or mental issues (Ex. 12, p. 33). He did not know who they were talking about, but he backed off about 10 feet because of the jail comment (Ex. 12, p. 34).

Miller said the officers banged on the door of cabin 17, which you could see in because of the window in the door (Ex. 12, p. 34). The officers appeared to be standing on opposite sides of the door (Ex. 12, p. 38). The officers started to shout "Put down the knife" and the Chief backed up about 10 feet in a southwesterly direction. The door began to open, but not very wide. He could not see the individual inside (Ex. 12, pps. 40-43). He heard "Drop the knife" again and then he heard a pop. It looked like a blue spark and the curtain came down, showing the entire window. He could see light inside, but not much (Ex. 12, p. 44). He could not see McGraw. He could see the Chief, whom he knows. The Chief did not fire the taser (Ex. 12, p. 45). He kept hearing "Drop the knife" even after the door was closed (Ex. 12, p. 47). The door opened again. He could still see the Chief, but not McGraw. The Chief was 10 to 15 feet away from No. 17 (Ex.12, p. 48). He heard them say "Drop the knives." He heard another voice say "Put your gun down", a request which the officers did not accept or acknowledge, even to the point of lowering

their guns (Ex. 12, p. 49). The little bit of light that came from the doorway was gone. He did not see anybody standing there.

Then the shots were fired. Miller saw a figure in the threshold of the door (Ex. 12, p. 50). There was something in the figure's left hand, maybe 6 or 7 inches. It would have been angled up. The left hand was extended in front of the body (Ex. 12, pps. 51-52). He heard 11 or so shots. The silhouetted figure in front of 17 fell to the ground. He had still not seen McGraw. A couple of minutes later, McGraw walked up to the front of 17 (Ex. 12, pps. 53-54). There is no way that he can tell where McGraw was (Ex. 12, p. 57). He knows exactly where the Chief was (Ex. 12, pps. 74-75). He never saw McGraw fall down or hear him say anything about falling down (Ex. 12, p. 78).

Irwin testified that the first knowledge she had was that a person with a cigarette passed by the window on the east side of her cabin (19) and there were cops with lights coming after him (Ex. 34, pps. 14-15). They were chasing the guy. They were walking trying to get him to stop and he would not. She does not know how they got from the east side of her cabin over to Scozzari's cabin (Ex. 34, pps. 58-59). Looking out the front window, she could see 1 or 2 officers in front of Scozzari's cabin (Ex. 34, p. 25). She could hear the officers using the taser, but they had gone closer to the cabin and she could not see it. When she saw them again it looked like they were holding a gun (Ex. 34, pps. 25-26). In her statement (Ex. 35) she said it appeared that police were 15 to 20 feet away from the victim, but that was just a guess (Ex. 34, p. 66). At Ex. 34, pps. 67-68, she did not recall being asked or saying anything about seeing either one of the officers down. As of the date of the deposition (August 3, 2009), she did not know. She thinks it was approximately 5 minutes before the officer summoned her and Jeff to the

scene. (Scozzari still alive?) She remembers a knife in the victim's hands, set in the hand pointing up perfectly (Ex. 34, pp. 68-69). In her statement she said she thought it was staged. She said "It didn't look like it would be normal" (Ex. 34, p.69).

Thus, the 5 eyewitnesses make it clear that the Chief and McGraws' reports are not true in two critical respects - McGraw was not down when he fired the shots and Scozzari was not near him. Because these crucial false assertions by the involved officers were not made until they handed their written reports over to Carter on September 24, 2007, the MSP officers who interviewed the witnesses immediately after the shooting and the next day did not know to ask the eyewitnesses whether McGraw fell down or how close Scozzari was to either of the officers when the shots were fired. All of that testimony came either through Plaintiff's investigator or the depositions.

In addition to the eyewitness testimony, the analysis of the scene by MSP ballistics technician Reinhart Pope belies the claim that McGraw was down on the ground when he shot Scozzari. In Pope's deposition, he described the gunshot evidence at the scene. There is a list of the materials taken from the scene by the 2 MSP lab techs (Ex. 20). Items 7 through 10 are fired cartridge cases from the Chief's gun (Ex. 21, p. 6). Items 11 through 17 are fired cartridge cases from McGraw's gun (Ex. 21, p.7). Items 21 and 22 are fired bullets recovered inside Cabin 17, one on the floor and one in a dresser drawer (Ex. 21, pps. 7-8). Bullet hole A is shown in a photograph. It went through the front of the cabin wall and hit the east side (Ex. 21, p. 8; photographs). Bullet hole A came from the southwest, which is where they found the fired cartridges cases from the Chief's gun (Ex. 21, p.16; Photo-Bullet Hole A, Ex. 36). Bullet hole B was 39½ inches from the ground on the southeast side of the front of Cabin 17 (Ex. 21, p.14;

Photo-Bullet Hole B, Ex. 37). Bullet hole C was 10½ inches from the ground on the east side of Cabin 17 (Ex. 21, p.13; Photo-Bullet Hole C, Ex. 38). Both bullets are to the right of the door looking into the cabin (Ex. 21, p. 16). Bullet hole C is coming slightly from the southeast, which is consistent with where McGraw was firing from, based on the cartridge case locations (Ex. 21, p.19). It is not conclusive, but with the groupings of cartridge cases, it is consistent with one officer being from the area of the vehicle toward the southwest (the Chief) and the other being in the area of the end of the perpendicular motel building (McGraw) (Ex. 21, p. 21).

There is a retaining wall between the sidewalk in front of Cabin 17 and the parking lot which is a foot to 18” tall. Bullet hole C is about the same height as the parking lot itself (Ex. 21, p. 24). Photographs of the retaining wall are Exhibit 39.

At Ex. 21, p. 33, Pope testified as follows:

- Q: With respect to holes A, B and C in the cabin wall were you able to . . . make any determination as to the relative angle of entry?
A: I didn't actually measure the angle.
Q: In terms of whether it was coming more from the ground, more from the top or flat.
A: They were at slight downward angles.
Q: Slight downward?
A: It wasn't upward from the ground up.
Q: As to all three holes?
A: Yes sir.

[Emphasis added.]

Further Pope said at Ex. 21, p. 69:

The bullet tracks were not in an upward path, but a downward path or a slightly downward path which means that, assuming there is no intervening object, then that's consistent with a bullet having been fired with a person standing rather than a person lying on the ground . . . if the shot was in an upward angle, then that would be consistent . . . with a person maybe lying on the ground shooting up. But because they were . . .

relatively level or slightly downward trajectory, then that's consistent with perhaps a person not lying on the ground.

[Emphasis added.]

Pope said at Ex. 21, p. 70:

To me, it's consistent with the two officers in a relatively stationary position firing at - in the direction of the cabin . . .

Exhibit 40 shows the taser probe in a cardboard box. They did not measure the height, but it appears to be a few inches taller than the end of a mop or broom handle (Ex. 21, pps. 47-48). The photographs (Ex. 22) shows the taser probe which is bent which is consistent with hitting a hard object of some kind (Ex. 21, p. 51). There is a chair behind the door of the cabin, but he cannot remember how much stuff they had to push out of the way to get into the cabin. The door could not be opened all the way (Ex. 21, pps. 48-50).

Scott Hrcka was the other MSP evidence technician on the scene. His specialty is latent print work (Ex. 23, p.4). He collected a knife and a hatchet. He found an identifiable fingerprint on the knife with a black handle which he identified as a right ring finger print (Ex. 23, p. 4). He identified it as a print from Scozzari from those taken in the autopsy (Ex. 23, p.6). The print came off of the blade and was pointing up toward the end of the blade (Ex. 23, pp. 9, 13), which means that Scozzari was not holding the knife by the handle when the print was made.

ABOUT WILLIAM (BILLY) SCOZZARI

Some further idea of what Scozzari was like can be gleaned from the testimony of Timothy Rynearson. Fortuitously, he was both the prior owner of the Lone Pine Motel and the prior police chief. He inherited the motel when he married his wife in 1980. At some point, Mark Turner from County Mental Health asked him if they had a cabin that could put up a young man. That was when Scozzari moved in (Ex. 18, p.13). Scozzari was a pack-rat. When they

cleaned out his cabin, it was back in the same condition a week later (Ex. 18, pps. 18, 20). In the absence of someone going in to clean out Scozzari's cabin, things would be against the door and it would be difficult to get in and out (Ex. 18, p. 93).

Scozzari loved to collect knives and hatchets. He kept them in the cabin. He never carried them outside (Ex. 18, pps. 24-25). Officer Pedjac called Ryneanson the day after the shooting asking about Scozzari because they could not find him in the computer. Ryneanson told him he was not in there because he had never been in trouble. He was benign (Ex.18, pps. 57, 59). He never heard Scozzari yelling or threatening anybody (Ex. 18, p. 61). He never saw Scozzari engage people in arguments or heard him curse or engage in any threatening behavior (Ex. 18, pps. 99-100). Scozzari was a night roamer because he was a loner and stayed away from people. Over the years as he worked on or in Scozzari's cabin, Ryneanson tried to get him to talk and he would not do it. He would just grunt (Ex. 18, pps. 25-26). Everybody in the department knew Scozzari. He was a walker. He stuck out like a sore thumb - short in stature, wore winter coats in the summer, his boots unlaced and disheveled (Ex. 18, pps. 54-55, 101).

Thus, the Chief, if he is to be believed, managed to see and hear Scozzari do things which no one else who had been around him for 7-10 years had ever seen or heard - respond immediately to a verbal address, curse, carry a knife outside the cabin and act in a threatening manner. Again, the Chief is the only witness to those alleged events.

AFTER THE SHOOTING

No one will ever reconcile all of the varying observations of the stunned residents of the motel in the immediate aftermath of the shooting. But a few threads of testimony can be established.

First, although Scozzari turned and tried to get back to his cabin, collapsing at the threshold, the officers did not approach him for some period of time, shouting at him to drop the weapons with their guns trained on him. Ultimately, McGraw stepped on his wrists and claimed to have removed a knife and a hatchet, throwing them off to the side.

Two witnesses, Jeff Morgan Sr. (Morgan Sr.) and Jacob Morgan (Jacob), claim that one of the officers went into the cabin and brought the knife and the hatchet out, placing them beside Scozzari's hands. Morgan II's parents and brother were staying on the second floor of the motel section of the Lone Pine. The second floor has an outside balcony which runs north up to the area in front of the cabins. The balcony is situated perpendicular to the middle cabin (No. 18 - Richardson), but by looking over the end railing all three of the cabins in the east-west row (17-19) could be seen.

When they heard the shots, Morgan Sr. and Jacob, ran on to the balcony and north up to end overlooking the scene. According to Jacob, he saw a bald officer (McGraw) standing over Scozzari with his gun shouting "Drop the knives, drop the knives." He did not see any weapons (Ex. 24, p. 15). As McGraw covered Scozzari, the other officer grabbed a hatchet and a knife from the cabin and set them by the police car, which was about 20 feet away from the door to Scozzari's cabin on the parking lot surface (Ex. 24, p. 15). His father (Morgan Sr.) had brought a baseball bat out when they first exited their room and, seeing no danger, he and his father took the bat back into the room. When they got back to the end of the balcony, he did not see the weapons in the parking lot, but right in front of the body. He did not see who moved them (Ex.24, 16). Jacob saw them walk his brother Morgan II over to the body from cabin 19 to confirm that there was a knife in Scozzari's hand (Ex. 24, p. 50). Morgan Sr. testified that the

guy that handcuffed Scozzari entered the cabin and came out the door with 2 objects which he put on the sidewalk past the body, a knife and a hatchet in a sheath (Ex. 25, p. 16). Then the bald officer handcuffed Scozzari in back and flipped the body over.

Second, there was a delay in the medical treatment. Both Morgans were mystified by the lack of medical treatment, which Jacob placed at 20 minutes after the EMS truck arrived (Ex. 24, p. 34). Morgan Sr. had the same criticism (Ex. 25, pps. 108-113). In fact, from the EMT dispatch logs it was 12 minutes before any medical assistance was rendered by the EMTs. The EMT and dispatch logs show that the call for medical did not go out for 2 minutes 37 seconds after the reports of the shooting were dispatched (EMT log, Ex. 26)(Dispatch Log, Ex. 1). Scozzari did not receive treatment until 11:38. MMR took Scozzari to the hospital at 11:56 (Ex. 26).

It is not clear that quicker treatment would have made any difference, but Scozzari was clearly alive for some time after the shooting. Richardson testified (Ex. 27, p. 35) that when the officers called him out to witness the weapons, Scozzari was still alive and breathing. He was not moving much, just groaning. It looked like he was crawling, trying to get back to his cabin door. (Ex. 27, pps. 35-36). McGraw's testimony is that he does not recall how much time elapsed after he shot Scozzari that he heard him still making noises. But at some point, he did not hear them anymore (Ex. 6, p. 157). McGraw said that after they shot Scozzari, the Chief said to wait a minute or two to be sure that he was not faking (Ex. 6, p. 158). The Chief told him to step on Scozzari's hands and throw away the weapons, which he did (Ex. 6, p. 162). He then checked Scozzari's pulse and is not sure whether or not he had one. Before he checked pulse he turned Scozzari over and cuffed him (Ex. 6, pps. 163-165). Parenthetically, the Chief denied that

they ever turned the body over or handcuffed it (Ex. 7, p. 113). McGraw did not believe that Scozzari was dying, but affirmed the 2 minute 37 second gap between the report of the shots and the call for the med techs. He does not know why it took so long (Ex. 6, pps. 171-172).

Regardless, it is undisputed from the ambulance dispatch records and the testimony of the Defendants and the witnesses that the paramedics and the med techs were held off of the scene for some period of time and that Scozzari did not receive any medical attention until 11:38, 12 minutes after the shooting (Dispatch, Ex. 1 and EMT Log, Ex. 26). The Clare MMR office is one mile from the scene.

Third, it is clearly established by the testimony of Richardson, Morgan II (Ex. 8, p.58), Irwin, Morgan Sr., Jacob and McGraw, that at some point after the shooting, before any medical attention was rendered to Scozzari, the Chief ordered McGraw to get Richardson out of cabin 18 and Jeff Morgan II out of cabin 19, to come over and look at the body and confirm that there were weapons in or near Scozzari's hands, specifically a knife and a sheathed hatchet. The Chief denied it (Ex. 7, p. 111).

THE INVESTIGATION

Clare police, County deputies, the Sheriff, the Prosecutor and the MSP began arriving at the scene in a somewhat unclear and not particularly important sequence. Regional MSP Commander Lt. Stolicker assigned MSP Detective Carter from the Mt. Pleasant post to lead the investigation. Carter arrived about an hour later. McGraw called his union representative, Officer David Saad, who came and took McGraw to the Clare police station. After the investigation got underway, the Chief went to the station. There he and McGraw remained for several hours, allegedly not communicating with each other, as various persons came and went.

Through some process, Saad and McGraw decided that McGraw would not make a statement that night (Saad, Ex. 28, p. 13; Carter, Ex. 29, p. 49). Saad was relatively unsophisticated regarding the procedures that could be employed under Garrity v. New Jersey, 385 U.S. 493 (1967) to compel the officers to make statements. But at some unspecified time, Saad approached the Chief, either that night or within the next day or so, having filled out Garrity paperwork. But the Chief indicated that, because he was involved, he would not be requiring McGraw to give a Garrity statement. Hibl never asked McGraw to give a Garrity statement (Saad, Ex. 28, p. 23).

By the time Detective Carter got to the Clare police station at 4 or 5:00 a.m., the Chief had also decided that he was not going to give a statement (Carter, Ex. 29, p. 44). Carter arranged to meet with the Chief and McGraw the following morning at 10:00 a.m. But, according to Carter, the Chief and McGraw cancelled on the advice of City Attorney Hoerauf and City Manager Hibl (Carter, Ex. 29, p. 45-46). The Chief denied cancelling a meeting (Chief, Ex. 7, p. 27). The Chief refused to give a statement to Hibl (Chief, Ex. 7, p. 29).

Carter took their guns before he left the station that night. He never told McGraw and the Chief not to communicate with each other about the incident because he believed that they had already had ample opportunity by the time he got to the station (Carter, Ex. 29, pps. 127, 132). Hibl never required the Chief or McGraw to give a Garrity statement (Ex. 29, p. 20-22).

City Manager Hibl and City Attorney Hoerauf decided that it would be sufficient for McGraw and the Chief to make out their reports and give written statements to Carter (Chief, Ex. 7, p. 32). A meeting was set for the morning of September 24, 2007 at Hoerauf's office, which was attended by Hoerauf, Hibl, the Chief, McGraw, Carter, Saad and the Chief's lawyer. Carter

was given to understand that he would not be allowed to interview the Chief and McGraw. He was given their written reports. He read them in another room (Carter, Ex. 29, pps. 65, 124). According to the Chief and McGraw, the first time they were ever substantively interviewed about the incident was at their depositions in June of 2009. The Chief denied that Carter tried to talk to him on the evening of the incident (Ex. 7, p. 27).

The production of the reports by the Chief and McGraw (Ex. 13) is a mystery. They consist of 8 pages, with McGraw's report tacked on the back of the Chief's report. The Chief's portion of the report is undated. He claims to have written it 2 or 3 days after the incident at the station (Chief, Ex. 7, pps. 19-20). McGraw's is dated September 24, 2007, the day of the meeting. He said he wrote it at the station. Saad helped him with it (Ex. 7, pps. 21-22). It was treated as a supplemental report and the machine apparently merged it with the Chief's report. No one can say when it was done. According to the Clare police, the computer company which provided the machine told them that there is no computer code or program which will show when the reports were actually generated and/or merged.

The Chief and McGraw disclaim any substantive communication with each other from September 18, 2007 until the meeting on September 24, 2007. Both officers testified to only passing communications out of concern for each other's state of mind in the interim. They disclaim any knowledge of the other's report writing (Chief, Ex. 7, p. 21). That is inferentially untrue. Apart from the 5 or 6 hours at the station immediately after the shooting, the telephone records of the two (Exs. 31 & 32), clearly show a long conversation on September 20, 2007, with some contemporaneous communications with Saad by McGraw at about the same time. They were asked to obtain their telephone records and were required to maintain them by the initial *ex*

parte order by Judge Tarnow (Dkt.____). They both report that they were told by their respective cell phone companies that they could not get their records because they were “too old.” The suit was filed on March 7, 2008, 6 months after the incident. Plaintiff issued a subpoena for the records after the Defendants’ depositions and obtained what was then available. Notably, the Chief’s cell phone records for September 2007 stop completely on the 20th, implying that he switched phones.

ARGUMENT I

THE DEFENDANT POLICE OFFICERS VIOLATED THE 4TH AMENDMENT IN THEIR USE OF FATAL FORCE AGAINST WILLIAM SCOZZARI, MISCONDUCT FOR WHICH THEY ARE NOT ENTITLED TO QUALIFIED IMMUNITY. THE EVIDENCE ALSO SHOWS THAT THEY VIOLATED THE 4TH AMENDMENT WHEN THEY TRIED TO ARREST HIM INSIDE HIS HOME WITHOUT A WARRANT AND WHEN THEY TRIED TO FORCE HIM TO STOP AND SUBMIT TO AN INTERVIEW.

Although these 4th Amendment violations are separate, they are addressed together because the circumstances for each and their inter-relationship demonstrate the objective unreasonableness of their actions in fatally shooting William Scozzari. They also inform the issue of whether the officers violated the ADA (creating liability as to the Defendant City of Clare, their employer discussed *infra*) in disregard of the patent disability that accounted for his behavior towards them.

The exhaustive recitation of facts above is the proper way to approach summary disposition and qualified immunity. The Court considers the pleadings, depositions, answers to interrogatories, admissions, affidavits and exhibits, construing them most favorably to the non-moving party along with all reasonable inferences Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

It is error to rely on a defense-favorable version of the facts over that offered by the non-movant Sova v. City of Mt. Pleasant, 142 F3d 898 (6th Cir. 1998). For the purpose of qualified immunity, the defendants must accept the plaintiff's facts, Johnson v. Jones, 515 U.S. 304 (1995).

Graham v. Connor, 490 U.S. 386 (1989) established that excessive force claims are to be analyzed under the Fourth Amendment objective reasonableness "standard." The problem is that the Defendants equate any situation where the officer perceives himself to be in danger as justifying the use of deadly force without analyzing the totality of the circumstances or the role that the officer played in creating the danger. But the Sixth Circuit decided in Kirby v. Duva, et al., 530 F3d 475 (6th Cir. 2008) that:

"Where an officer unreasonably places himself in harms way, his use of deadly force may be deemed excessive." See Sigley v. City of Parma Heights, 437 F3d 527, 534-35 (6th Cir. 2006) and Estate of Starks v. Enyart, 5 F3d 230, 233-35 (7th Cir. 1993).

Kirby is instructive because, as here, the officers chose the time and place of the confrontation.

How were the officers unreasonable? First, as set forth above, it is questionable whether Scozzari committed any crime. Only the Chief knows and his facts do not appear to make out the elements of assault - the offer, threat or attempt to make an unwelcome bodily contact coupled with the apparent ability to do so. He was violating Scozzari's right not to talk to him and to go peaceably on his way. He chose to continue pressing the encounter and illegally ordered Scozzari to put his cane down. The Chief had the ability to break off the encounter (which he did not) or to keep himself out of danger (which he did). Had the Chief written up a report describing the facts as adduced in this case and an investigation undertaken, it would have been determined that Scozzari was a paranoid schizophrenic recluse, who would not speak to

anyone and was not threatening, but could be expected to react defensively to being set upon by a stranger at night. He had a right of self-defense in his home. Whether he could have had the requisite state of mind to commit the specific intent crime of assault is questionable.

Background investigation with County Mental Health and the motel owner would have almost certainly discouraged a prosecution in an incident where no physical contact actually occurred.

Second, it was obvious to everyone, including the Chief that night, that Scozzari had mental problems. Even if the Chief was determined to write up the incident and seek a warrant, the attempt to effect a nighttime arrest without a warrant at the home was calculated to cause confrontation. The Chief sought it, rather than attempting to avoid it.

Third, they had no right to arrest Scozzari unless he would consensually leave his home and submit. If that had been their purpose, then the reasonable thing to have done would be to go to the motel office, get the manager, find out if there was a telephone in the cabin or have the manager accompany them to the cabin with a key and presumably some knowledge of the occupant. Instead, the Chief chose to have McGraw bang on the door and order the occupant out with the taser already unholstered. McGraw himself apparently came up with the idea of the completely illegal act of kicking the door in so that he could have a better view.

Fourth, when Scozzari appeared at the door with some weapon in his hand (which he had a right to do), McGraw backed off and, on his own accord, fell down. Rather than merely gathering himself and getting up, he recklessly fired the taser as he fell at Scozzari, naturally missing and further heightening Scozzari's fears. Please remember that Scozzari had not threatened McGraw, nor stepped across his threshold.

Finally, based on the testimony of Gibbons, Richardson, Morgan II, Irwin and Miller, McGraw did get up and was out of harms way when Scozzari apparently came out of his doorway a few feet and the Chief started firing. As in Kirby, when one officer starts firing, the other officers assume that there must be danger and they also start firing. That is what McGraw did. He thought he fired twice. He fired seven shots. He hit Scozzari five times, three in the back.

This is a situation like Kirby and Bletz v. Gribble, 640 F.Supp. 907 (WD Mich. 2009), where the officers needlessly initiated, prolonged and escalated an incident, creating the very danger that they claimed required them to shoot. In Kirby, the driver of the vehicle was unarmed. In Bletz, the homeowner was lowering his gun. Here, Scozzari was physically incapable of actually posing a danger to the more heavily armed officers, and could not effectively run from or chase them in unlaced boots. In Starks v. Enyart, the court denied qualified immunity because of questions of fact regarding whether the suspect's vehicle actually presented a danger and whether the officer unreasonably created an encounter that would require or permit him to use deadly force.

The right of self-defense in the home is as solidly grounded as any common law/constitutional principle. It was recently reaffirmed in the landmark case of District of Columbia v. Heller, 128 S.Ct. 2083 at 2118-19:

As the quotations earlier in this opinion demonstrate, the inherent right of self-defense has been central to the Second Amendment right . . . the prohibition extends, moreover, to the home, where the need for the defense of self family and property is most acute.

FATAL FORCE

The use of fatal force by police officers against citizens is a subject regularly addressed by federal trial and appellate courts with a comprehensive set of principles for assessing civil rights violations. A very recent trial court opinion that thoroughly evaluated these questions was issued by in Bletz v Gribble *supra*.

The question of whether the 4th Amendment has been violated -- the decision to use deadly force to seize a person -- is determined by consideration of the “nature and quality” of the State’s intrusion upon a citizen’s constitutional rights balanced against the State’s countervailing interests.

Scozzari’s privilege of remaining in his small home, particularly as a reclusive hermit with schizophrenia whose mental and resulting communication problems were obvious, clearly outweighed the officers’ interest in kicking his door late at night, demanding his submission to them and immediately arresting without a warrant, a person who was wanted, if at all, for earlier cursing an officer.² The Chief admitted in his deposition testimony that this was not a “hot pursuit” or emergency situation - the decedent had gone inside his small cabin after the exchange with Miedzianowski. Miedzianowski waited for McGraw and then the two walked around the grounds of the motel compound before deciding to arrest Scozzari.

Bletz, *id.* at 917, held that it is only in “rare instances” that an officer may use fatal force. And even though a subject had a weapon in his hands at the moment the officers shot him, a

² In a conversation shortly after the events with Tim Rynearson, Clare’s ex-police chief, Miedzianowski reported a verbal confrontation with Scozzari, whom he said raised his walking cane, but did not describe any other weapon. (Rynearson, Ex. 18, pps. 32-33.)

court must evaluate the totality of the circumstances that led to the shooting in determining whether the use of deadly force violated the constitution by being objectively unreasonable (*Id.*):

“The Fourth Amendment certainly accommodates a police officer’s need to protect himself from serious bodily harm, but it does not grant the officer a license to kill with impunity whenever he encounters an armed person, regardless of the circumstances of the encounter.

Thus, it is not enough for Defendants simply to assert that, at the precise moment Sergeant Gribble pulled the trigger, Fred Bletz held a weapon in his hand. Rather, the Court must analyze the facts and circumstances present in the moments leading up to the shooting to determine whether, under “the totality of the circumstances,” Defendants’ actions were objectively reasonable.” (slip opinion, pps. 9-10)

Bletz, *id.* at 918 observed that the intrusion into the victim’s home was illegal, another factor to consider in the overall assessment of the officers’ use of fatal force (*Id.* at 12).

In the case at bar, the actions of the Chief and McGraw in demanding Scozzari’s immediate arrest and in forcing the door to his home were illegal since they had no warrant and there were no exigent circumstances excusing the absence of a warrant (see, infra).

Further, Scozzari was shot multiple times in the back, an objective circumstance that shows he was retreating when fatally wounded.³ Like Bletz’s lowering of his weapon, that circumstance alone warrants the conclusion that the use of deadly force was unreasonable. The “segmenting” analysis presented by the defense motions affords no contrary conclusion especially as it offers a one-sided view of the evidence, never mentioning that the victim was

³ Although the sequence of the 5 bullets that struck the victim cannot be conclusively determined, it is apparent that the 3 in the back (autopsy report A, D &E, Ex. 3) hit him virtually “straight on”, meaning the shooter (McGraw) was directly behind him. The ballistics evidence (Sgt. Pope) says the shooter was standing. We know that the fatal shot struck the victim at an unusual angle that belies any notion that Scozzari was attacking McGraw and standing over him when shot (Ex. 17, medical drawings).

shot in the back or that Sgt. Pope opines based on the ballistics-evidence that the shooter fired while standing.

On the issue of qualified immunity, since there is a factual dispute over the events leading up to the shooting and the manner of the shooting itself, the defendant officers are not entitled to immunity. Dickerson v McClellan, 101 F3d 1151, 1165 (6th Cir. 2008) See also Bletz v Gribble, *supra* (at 917): “If the legal question of immunity is completely dependant upon which view of the facts is accepted by the jury, the district court should not grant immunity from a deadly force claim.” Further at Bletz, *id.* at 919::

Defendant cannot claim the protection of qualified immunity when their own objectively unreasonable actions created the very risk that generated the eventual use of deadly force. Duva, 530 F.3d 475, 482 (6th Cir. 2008) (“Where a police officer unreasonably places himself in harm’s way, his use of deadly force may be deemed excessive.”) [Emphasis supplied.]

Bletz commented on other issues equally germane to the case at bar, *id.*:

Defendants’ qualified immunity argument largely ignores all facts preceding the shooting, and instead focuses only on the precise moment that Sergeant Gribble pulled the trigger. This argument attempts to justify Defendants’ entire course of unreasonable conduct by reference to one split-second decision during which Defendants may legitimately have feared for their lives. And even this argument fails to acknowledge the factual record in the light most favorable to Plaintiff. The Sixth Circuit’s “segmenting approach” to excessive force claims does not call for such a narrow inquiry. See, e.g., Claybrood v. Birchwell, 274 F.3d 1098, 1003-05 (6th Cir. 2001) (discussing the proper segmentation analysis)/. **At the very least, the Court must consider the “moments preceding the shooting” and any other facts conceptually intertwined with the killing of Fred Bletz.** [Citations omitted; emphasis supplied.]

One of the progeny of Yates v. Cleveland, 941, F2d 444 (6th Cir. 1991), relied on in Bletz: Chappell v Cleveland was reversed by the 6th Circuit on November 4, 2009 (WL

3617475). In that case the officers had a valid search warrant and were sweeping the house for occupants. When they got to the suspect's room, after announcing themselves, they entered and saw him in a closet with a knife. They ordered him to drop it, but he advanced toward them with the knife out in a threatening manner. They could not retreat. There was no barrier between them. At a distance of approximately 7 feet, they fired, killing him. Whatever one thinks of Judge McKeague's opinion in Chappell, the distinctions are obvious - the officers were legally within the home with a duty to carry out the execution of the search warrant; the individual was a healthy, young male; they were in a confined space with no ability to retreat; they fired when the potential assailant was within 7 feet of them and closing. There were no eyewitnesses to contradict their story. There was no forensic evidence to contract their story. Yates, supra, is still good law.

The defendant-officers violated the 4th Amendment in two respects, first in their warrantless attempt to arrest William Scozzari inside his cabin and then when they used deadly force against him when he would not yield to them. They do not enjoy qualified immunity for these unlawful acts.

INITIAL ENCOUNTER

Chief Miedzianowski had no right to detain Scozzari or require that Scozzari put down his cane or talk to him. United States v. Mendenhall, 446 U.S. 544 (1980) established the definition of a seizure as when a reasonable person would believe that they were not free to leave.

Ordinarily, an officer may question without bringing about a seizure not only when the interrogation is carried on without interrupting movement, but also when the officer overtakes a pedestrian and asks him to halt or

summons him to where the officer is located. LaFave, Search and Seizure, 3rd Ed., Sec. 9.3(a) Stop and Frisk and Lesser Intrusions, Vol. 4, p. 98.

On the other hand:

An encounter becomes a seizure if the officer engages in conduct which a reasonable man would view as threatening or offensive, even if performed by another private citizen. This would include such tactics as pursuing a person who has attempted to terminate the contact by departing, continue to interrogate a person who has clearly expressed a desire not to cooperate . . . calling on such a person to halt, blocking the path of the suspect . . . LaFave, op. cit., pp. 102, 104.

Here, Scozzari was merely walking, was carrying no weapon, was not apparently involved in any suspicious activity, did not respond affirmatively to the Chief's attempts to stop and question him, made it clear that he did not wish to be disturbed, broke off and moved away from the initial encounter and headed toward the safety of his cabin. The Chief followed shouting for him to halt and ordering him to drop his cane, which by that time the Chief knew was not a gun. According to Morgan II and Irwin, the Chief was clearly chasing Scozzari when he came around the east side of cabin 19.

Observed suspicious activity may give rise to a permissible "stop", but:

A stopping is permissible when a pedestrian's route is such that it would not be likely be taken one who intended merely to pass by the area, as where a person was found at night by a laundry mat door inside a walkway well removed from the main sidewalk and where a person appeared not be taking a shortcut because is route was less convenient than using the sidewalk." LaFave, op. cit., Sec. 9.4(d), p. 164. "But presence on the public streets at a late hour. . . does not itself constitute cause for detention; there must be other suspicious circumstances, LaFave, op. cit., Sec. 9.4(f), p. 188 and collected cases at footnote 243 on that same page.

Scozzari was walking down a public road next to a public park and a VFW hall on one side, with apartments and the Lone Pine Motel on the other. It was definitely not a high crime area and the crime being investigated was not one of property. Once it was clear to the Chief

that the cane was not a gun, there was no basis on which to undertake even the briefest stop, particularly in light of Scozzari's obvious reluctance and mental condition.

Under the circumstances of this case, the Chief's pursuit, attempt stop and interrogate Scozzari was a separate Fourth Amendment violation. That the Chief could pursue it so aggressively that Scozzari felt compelled to draw back his cane (if he did); that the Chief would pepper spray him (if he did) and that the Chief would then draw his weapon and point it at Scozzari (if he did), is an example of how agitated, unreasonable and out of control the Chief was that night. The alleged crime (possible shots fired) was thought by the Chief to be firecrackers, according to ex-Chief Rynearson (Ex. 18, p. 33), but that was denied by the Chief (Ex. 7, p. 65). Whether any of this happened at all is a matter of speculation, inasmuch as the Chief, according to McGraw's report and testimony, never mentioned the pepper spray and the gun in the initial encounter when he told McGraw that he was going to arrest Scozzari for assaulting him (McGraw, Ex. 6, pps. 145-149). That appeared for the first time in the Chief's report days later. Where the only witness to an event is the survivor, the court looks with particular askance at his account.

ATTEMPT TO ARREST

The kicking in of Scozzari's door and ordering him out of the house to be arrested was a patent Fourth Amendment violation on which Plaintiff should be granted summary judgment. The facts and legal conclusions on this point were admitted by the Chief at Ex. 7, p. 89. He said "Yes. Absolutely", when asked if he went to cabin 17 to arrest Scozzari for the earlier encounter. He believed he had the right to require Scozzari to open his door and submit to arrest for felonious assault (Ex. 7, p. 90). He agreed that an officer who does not have knowledge that

a citizen has committed a felony or is a danger to the public does not have the right to arrest. He acknowledged that if the citizen retreats into their home, the officer can only enter under certain circumstances without a search warrant, such as hot pursuit (Ex. 7, p. 93). He admitted that it was not hot pursuit (Ex. 7, pps. 93-94). Other exceptions are emergencies, such as where the officer knows or has reasonable suspicion that someone inside the home is being hurt, is suffering, is in danger or needs immediate help. He admitted that he had no such knowledge regarding Scozzari (Ex. 7, p. 95, l. 3):

Q. Then can we agree that unless William Scozzari was willing to open his door, leave his home to talk to you or voluntarily submit to arrest, you did not have a right to go into his home and arrest him, did you?

Ex. 7, p. 95, l. 14:

A. No. I'm agreeing with you. No. I directed McGraw to knock on the door and have his taser at the ready. McGraw knocked on the door and shouted police. Opened the door. It could have been taken as a request or an order.

At Ex. 7, p. 96, the Chief agreed that saying "Police. Open the door" is something you say when you have a right to enter or arrest. He again admitted that his purpose was to arrest. He admitted McGraw ordered Scozzari to come out and Scozzari did not respond.

In addition to the Chief's admissions, the law is clear. Payton v. New York, 445 U.S. 573 (1980), established that the Fourth Amendment prohibits the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The court expanded that doctrine the next year in Steagald v. United States, 451 U.S. 204 (1981), holding illegal a police entry into a third party's residence for a person for whom they had an arrest warrant.

The law is well-settled that the police may not effect a warrantless intrusion into a person's home absent consent or exigent circumstances, Dickerson v McCellan, 101 F3d 151 (6th Cir. 1996); Bates v Harvey, 518 F3d 1233 (11th Cir. 2008), regarding mitigating circumstances that are absent here.

Warden v. Hayden, 387 U.S. 294 (1967) is the seminal hot pursuit case. The police went in after an armed robber who had just entered a certain house. They did not have to break the door. Given the circumstance that delay in the investigation could endanger their lives or that of others or that evidence could be destroyed, then entry was justified. The doctrine was developed in Welsh v. Wisconsin, 466 U.S. 740 (1984) - because there was no immediate or continuous pursuit of the petitioner from the scene of the crime, the entry was illegal. In United States v. Morgan, 743 F2d 1158 (6th Cir. 1984), there was no hot pursuit because the officers assembled at a local coffee shop and assessed the situation and waited for the sheriff to arrive before proceeding to the defendant's house. Generally, under Welsh, in order to enter the home, there must be both hot pursuit and exigent circumstances. Here, there was no exit but the front door and there was no issue of the destruction of evidence. The police had to and did use force to enter the premises.

Even if they had not entered the premises, they had no right to order Scozzari from the premises in order to arrest him. United States v. Sarre, 272 F3d 804 (6th Cir. 2001) stands for the proposition that the refusal of an individual in his home to exit on the order of a law enforcement officer does not amount to a crime because the officer had no right to issue the order.

ARGUMENT II

THE DEFENDANTS DID NOT AFFORD WILLIAM SCOZZARI TIMELY MEDICAL CARE AS REQUIRED UNDER THE MANDATE OF THE SUBSTANTIVE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT.

As a pretrial detainee who was in dire need of medical treatment, he was entitled to timely medical care. Instead, the Defendants chose to parade a series of civilian witnesses into the crime scene to view his body, as he lay in front of his cabin, bleeding to death.

The victim was shot shortly before 11:26 p.m., but the first treatment he received took place at 11:38 p.m. -- a 12 minute delay -- as the medical first responders were prevented from entering the crime scene and delayed in providing care by the defendants' actions in stage-managing the scene for their own calculated purposes.⁴

As a pretrial detainee, William Scozzari was entitled to medical care under the mandate of the substantive due process clause of the 14th Amendment. Jones v City of Cincinnati, 521 F3d 555 (6th Cir. 2008) and Estate of Owensby v City of Cincinnati, 414 F3d 596, 602 (6th Cir. 2005). In the latter case, the 6th Circuit sustained such a claim where there was a 6 minute delay between the time of injury and the actual arrival of medical care.

The evidence is undisputed that William Scozzari was shot no later than 11:26 p.m. (the shots fired report to dispatch is timed at 11:26:09 p.m.) and dispatch records show medical care first responders -- who were held "staged" nearby the scene -- were told to attend to him no sooner than 11:34:50 p.m. The EMS records (MMR) confirm that there was a delay in actually

⁴ One or more civilian witness testified the body appeared "staged" in the manner the victim held a knife in one hand. Others have questioned his possession of any weapon. The only finger-print taken from the knife, according to the testimony of MSP fingerprint expert Sgt. Scott Hrcka, is of the victim's right index finger which is an impression on the blade of the knife, in front of the hilt, at a right angle to the top of the blade, a very curious way for an attacking individual to wield a knife.

getting to the victim due to the police. The report notes: “Scene Delay: Law Enforcement” and additionally notes a delay in patient transport because the “Crew Staged Off Scene”. Thus the first vitals obtained from the victim were at 23:38:00 p.m. according to MMR records, a delay of 12 minutes.

During this critical time, when EMS was held outside the scene, the Chief and McGraw took their time in arranging for three civilian witnesses (Richardson, Morgan and Irwin) to view the victim lying on his bloody doorstep.

The Defendants assert that no harm was produced, no described resulting injury. As shown above, McGraw and Richardson prove that Scozzari was still alive. However, the primary injury is to the constitutional right itself: medical care should not be delayed when the need is so obvious. The victim was not pronounced dead until after his arrival at the hospital, which was around midnight. The defendants are quite bold in saying there was no harm from this delay – whatever chance the victim had was lost. He is dead now.

They chose to delay care and they should be held accountable.

ARGUMENT III

THE DEFENDANT POLICE OFFICERS ARRESTED WILLIAM SCOZZARI BECAUSE OF HIS MENTAL DISABILITY AND IN THEIR INVESTIGATION PRIOR TO THEIR FATAL ARREST OF HIM THEY FAILED TO PROVIDE EFFECTIVE COMMUNICATION TO HIM, A COMPLETE FAILURE OF ANY ACCOMMODATION OF HIS OBVIOUS LIMITATIONS, LET ALONE ANY REASONABLE ACCOMMODATION OF HIS READILY APPARENT DISABILITY.

THE DEFENDANT CITY OF CLARE IS RESPONSIBLE FOR THE MISCONDUCT OF THE DEFENDANT OFFICERS IN THE PARTICULAR ASPECTS AND IT IS RESPONSIBLE, AND LIABLE, IN ITS OWN RIGHT FOR FAILING TO ENSURE THAT ITS POLICE SERVICES WOULD BE CARRIED OUT WITH ‘EFFECTIVE’ COMMUNICATION, A DIRECT OBLIGATION UNDER TITLE II OF

THE ADA, WHICH MAY BE REMEDIED UNDER ITS PROVISIONS OR AS A STATUTORY VIOLATION OF FEDERAL LAW THAT MAY BE REDRESSED UNDER THE CIVIL RIGHTS STATUTE.

The Court's order of June 11, 2009 (D/E 50) authorized Plaintiff's filing of an amended complaint to allege an ADA violation⁵ and, relying on Title II's broad coverage to all municipal services as noted in Johnson v City of Saline, 151 F3d 564, 569 (6th Cir. 1998), determination that the City of Clare could be vicariously liable for intentional disability-discrimination by its police officers, finding that theories involving wrongful arrest or failure of reasonable accommodation have been recognized in ADA jurisprudence, *e.g.*, Gohier v Enright, 186 F3d 1216, 1220 (10th Cir. 1999).

However, as the discussion in Tucker v Tennessee, 539 F3d 526 (6th Cir. 2008) outlines, there may be practical limitations on the ADA's application in specific arrest situations when police act under real emergency conditions and their conduct is circumscribed by an immediate need to protect themselves or others; thus, the particular arrest may be deemed to have occurred because of criminal conduct and not disability-behavior or the nature of the prescribed response for the "accommodation" prong is mitigated/affected by those truly public safety, emergency, conditions.

In this lawsuit, it is apparent there was no public safety emergency, that the events spiraled out of control from an encounter involving at most swear words and up-raised walking stick to a fatal shooting because of the two officers' own misjudgment or misconduct; that they

⁵ Facts and circumstances for the ADA claim were documented in Plaintiff's Reply Brief (D/E 49) for the motion to file an amended complaint, which the June 11, 2009 order granted. That filing is incorporated by reference. It demonstrates William Scozzari's mental disability due to schizophrenia for which he was receiving social security disability benefits.

arrested William Scozzari because of his perceived⁶ and obvious disability, as Defendant Chief's express words clearly indicate (he's mental; he's going to jail tonight);⁷ and, they utterly failed to provide any accommodation to his obvious inability to communicate with them during the tragic encounter, not only in the investigatory phase immediately before they went to his cabin door but also in their ham-handed actions in demanding his immediate surrender – although they lacked an arrest warrant and this was not any kind of a hot-pursuit or emergency situation -- as they first pounded on and then kicked at his cabin door to force him to yield to them as he hovered inside his small home, in his even more confined mental state.

Given the significance of the ADA and explication of the contours of its “broad” coverage in this lawsuit, it is appropriate to underscore its general applicability to police encounters with disabled individuals in relation to particular objectives that the ADA strives to achieve, namely, the twin goals that public services should be delivered in a non-discriminatory manner and, regardless of discriminatory effect, the responsibility of public entities under Title II to make certain accommodations when they provide public services to the disabled. Ability Center of Greater Toledo v City of Sandusky, 385 F3d 901, 907-908 (6th Cir. 2004).

⁶ Conduct due to the “perception” of a disability, even where the perception is wrong, is an ADA violation. Moorer v Baptist Memorial Health Care, 398 F3d 469 (6th Cir. 2005); Milholland v Sumner County Bd. Of Education, 569 562, 567 (6th Cir. 2009).

⁷ Circumstances beyond the night in question support the conclusion that the City of Clare, its chief of police and patrol officers, knew of the Lone Pine Motel, the place of William Scozzari's cabin 17, as a location where the County Mental Health Department placed disabled individuals to live. The City of Clare's former chief of police, Tim Rynearson, so testified at his deposition regarding the Mental Health Department's use of the Lone Pine for residential placement of disabled individuals.

Thus, it is Plaintiff's position that the protections of the ADA are activated, and may be redressed in a lawsuit, when a municipality fails its primary duty to provide reasonable accommodation to the disabled and not just vicariously when one or more of its agents are guilty of intentional discrimination.

The mandate to afford reasonable accommodation is emphasized by specific regulations that require public entities to ensure that communication with the disabled be as "effective" as with the non-disabled, Robertson v Los Animas County Sheriff's Department, 500 F3d 1185, 1195-1196 (10th Cir. 2007), with the only limitation being that accommodation is not required which would fundamentally alter a service/activity or create undue financial/administrative burdens.

This kind of program "accommodation" flows from the ADA's self-assessment mandate inasmuch as program/service deficiencies cannot be brought in line unless the municipality evaluates them for ADA compliance. It is apparently this kind of municipal failure that is said to be actionable as a statutory violation under the civil rights statute, as remarked upon in Tucker v Tennessee, *supra*, n 6. Although it is Plaintiff's view that such a failure must also be actionable directly under the ADA since the violation involves one of its core requirements, namely, the duty of a public entity under Title II to accommodate the disabled whenever it delivers services. Ability Center of Greater Toledo v City of Sandusky, *supra*.

So, one properly asks, what "accommodation" did Clare and its two officers make in their dealings with an obviously disabled individual on the night of September 18, 2007, whose mental disability prevented ordinary, effective, communication. as was readily apparent in his described reactions to them; the Chief says he swore at him, raised a walking stick and walked

away from him as if he did not hear/understand or would otherwise tolerate him; the Chief also claims that Scozzari did other bizarre things that were more threatening and certainly strongly indicative of the absence of “effective” communication prior to McGraw’s arrival at the scene. These reactions were so strong and so clear that Miedzianowski labeled him “mental”. There was no effective communication. McGraw’s arrival, and the decision to arrest Scozzari because he was mental, both compounded and was a product of the complete failure of the defendants to accommodate communication with mentally disabled individuals on par with the non-disabled generally and the obviously mentally unfit Scozzari in particular.⁸

While it is true that most of the “effective” communication cases involve persons with physical disabilities, *i.e.*, deafness, *e.g.*, Delano-Pyle v Victoria County, Texas, 302 F3d 567 (5th Cir. 2002) and Salinas v New Braunfels, 557 FSupp2d 777 (WD Tex, 2008) the mandate for effective communication exists as to all the disabled, however a “communication” deficit may arise.

The record in this case, demonstrated by the absence of documentary evidence, shows that the City of Clare did not conduct any ADA self-assessment, that it did not give its officers any instruction in assuring “effective” communication with the disabled, whether impaired physically or mentally, and that the two officers on the fatal night in question conducted themselves in complete disregard of Scozzari’s obvious mental limitations, precluding any

⁸ The persistent problem of police encounters with the mentally disabled is one addressed over the past decade and thus well known to police agencies with the management goal being how to reduce the number of fatal outcomes. A recent comprehensive report on the problem, titled “Improving Responses to People With Mental Illness” was issued by the Council of State Governments Justice Center in partnership with the Police Executive Research Forum, under a grant from the United States Department of Justice. It is available online.

effective communication, and that they arrested him because of his disability and without any reasonable accommodation for it.

The Defendant City of Clare⁹ is liable for these ADA violations, both vicariously and directly for its own lapses as may be actionable under the ADA itself or through the civil rights statute.

The complete failure of the City of Clare to train its officers in how to deal with handicapped persons, particularly those with mental disorders, gives rise to municipal liability under Monell v. New York, 436 U.S. 658 (1978) because it represented the conscious policy of the City, particularly in light of the duty to assess City policy under the ADA. No municipal employees are more likely than the police to encounter persons with mental handicaps under stressful conditions.

As in Canton v. Harris, 489 U.S. 378 (1989), it was foreseeable, indeed inevitable, that such interaction/confrontations between the police and mentally ill people would occur. The actions of the officers in this case indicate that the lack of training was not only causally linked to the manner in which the officers acted or failed to act, it was one of the reasons that they acted as they did.

⁹ The municipality's summary judgment brief tacitly acknowledges the absence on its own part of any training materials for police encounters with mentally disabled persons or any materials for the ADA self-assessment; the defendant attempts to hide its shortcomings by saying officers get a training "module" through the basic police academy under MCOLES, the Michigan Police Commission that sets minimal standards for persons who wish to obtain initial certification for police work. Such training does not address the municipality's Title II responsibilities nor does *de minimus*, cursory, training satisfy even a deliberate indifference standard in related contexts. See Russo v City of Cincinnati, 953 F3d 1036, 1046-47 (6th Cir. 1992).

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2009, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

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