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

Christina Donahue, as Administratrix of the Estate of Angel McIntyre, deceased, et al.,	:	
Plaintiffs,	:	Civil Action No.: 22-1695
v.	:	JURY TRIAL DEMANDED
Borough of Collingdale, et al.	:	
Defendants.	:	

ORDER

AND NOW, this _____ day of _____, 2022, upon consideration of the Motion to Dismiss Plaintiffs' Complaint of Defendants, Borough of Darby and Darby Borough Police Officers Dante Lynch and Jake Lyons, pursuant to Fed. R. Civ. P. 12(b)(6), 12(f) and 8, and Plaintiffs' response thereto, it is hereby **ORDERED** that Defendants' Motion is **DENIED**. It is **FURTHER ORDERED** that Defendants shall answer Plaintiffs' Complaint within twenty (20) days of the date of this Order.

BY THE COURT:

_____
MICHAEL M. BAYLSON, U.S.D.J.

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v.	:	JURY TRIAL DEMANDED
Borough of Collingdale, et al.	:	
Defendants.	:	

RESPONSE OF PLAINTIFFS, CHRISTINA DONAHUE, AS ADMINISTRATRIX OF THE ESTATE OF ANGEL MCINTYRE, DECEASED, MATTHEW MUNAFO, AND KRISTYANNA DELLAVECCHIA, IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6), 12(f) AND 8

Plaintiffs, Christina Donahue, as Administratrix of the Estate of Angel McIntyre, deceased, Matthew Munafo, and Kristyanna Dellavecchia, by and through undersigned counsel, hereby respond in opposition to the Motion to Dismiss Plaintiffs' Complaint of Defendants, Borough of Darby and Darby Borough Police Officers Lynch and Lyons, under Fed. R. Civ. P. 12(b)(6), 12(f) and 8. Plaintiffs annex a Brief in support of their opposition and incorporate the same by reference herein.

For the reasons set forth herein, this Honorable Court should deny the Motion to Dismiss of Defendants Borough of Darby and Darby Borough Police Officers Lynch and Lyons. Oral argument is requested.

Respectfully submitted,

Dated: June 10, 2022

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BRIEF IN SUPPORT OF PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE COMPLAINT UNDER FEDERAL RULES OF CIVIL PROCEDURE 12(b)(6), 12(f) AND 8

Dated: June 10, 2022

On the Brief,

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I. INTRODUCTION

In the evening hours of July 15, 2020, and continuing into the early morning hours of July 16, 2022, Angel McIntyre ("Angel" or "Decedent"), Matthew Munafo ("Matthew"), Kristyanna Dellavecchia ("Kristyanna"), and Christopher Campetti ("Christopher"), spent an enjoyable summer night at Hog Island, near the Philadelphia Airport. Upon departing Hog Island, the lives of these young adults would forever change when Matthew's vehicle was involved in a fatal collision brought about by an improper and needless 90-mile-per-hour police pursuit of a suspected traffic offender. The collision killed Angel, seriously injured Matthew, and caused significant emotional distress and trauma to Kristyanna, Angel's sister and a helpless bystander to her sister's tragic death.

This litigation centers on alleged violations of Plaintiffs' civil rights and supplemental questions of state law, which arise from the improper police pursuit. Presently before the Court is the Motion to Dismiss Plaintiffs' Complaint of Defendants, Borough of Darby ("Darby"),Officer Dante Lynch ("Officer Lynch") and Officer Jake Lyons ("Officer Lyons") (collectively "Darby Officers") (Darby and Darby Officers collectively "Defendants"), under Fed. R. Civ. P. 12(b)(6), 12(f),[1] and 8 (the "Motion"). For the reasons set forth herein, Defendants' Motion should be denied in its entirety.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On July 16, 2020, sisters Angel (age 18) and Kristyanna (age 22) were on an outing to the historic riverside area of Hog Island with their friends, Matthew (age 20) and Christopher (age 19). Compl. at ¶ 12. The group drove to Hog Island that evening using two vehicles, a Honda driven

[1] Although titled as a Motion to Dismiss under Rule 12(f), Defendants' accompanying Memorandum of Law is clear that they move to strike, rather than dismiss, portions of Plaintiffs' Complaint under Rule 12(f). Therefore, Plaintiffs address Defendants' Rule 12(f) arguments in the context of a motion to strike.

by Matthew and another vehicle driven by Christopher. *Id*. at ¶ 13. Angel initially rode in Christopher's vehicle, while Kristyanna initially rode in Matthew's vehicle. *Id*.

By approximately 12:40 a.m., the group had left Hog Island and decided to stop at Wawa to use the restroom. *Id*. at ¶ 14. Upon their departure from Wawa, the group determined that Matthew and Christopher would drive Kristyanna and Angel back to Kristyanna's residence, where Angel planned to spend the night. *Id*. at ¶ 15. Angel rode with Matthew in his vehicle, and Kristyanna rode with Christopher in his vehicle. *Id*. at ¶ 16. Both Matthew and Christopher were the drivers of their respective vehicles. *Id*.

Around the same time that the group arrived at Wawa, at approximately 12:45 a.m., Officer Colin Richers ("Officer Richers"),[2] a police officer on duty for the Darby of Collingdale ("Collingdale"), [3] allegedly observed a 2002 Ford Escape (the "Escape") (Pennsylvania License No. KJK-4056) with a broken left brake light make a left turn at a red light located at MacDade Boulevard and Chester Pike. *Id*. at ¶¶ 21-22. Officer Richers also allegedly observed a black male driver in the Escape, later identified as Anthony Howard Jones ("Jones"), who was traveling with Lamaira Faust ("Faust"), Anaijah Solomon ("Solomon"), and three minor children. *Id*. at ¶¶ 22-23. One of the children was an infant sitting unrestrained on Faust's lap in the front passenger seat of the Escape. *Id*. at ¶ 24. The other two children, ages three (3) and five (5), were seated in the rear passenger seats of the Escape. *Id*. Only one of the minor children sitting in the rear of the Escape was seated in a child safety seat. *Id*.

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[2] Officer Richers, as well as John Does I-X, are additional defendants in this litigation. Collectively, Officer Lyons, Officer Lynch, Officer Richers, and John Does I-X are referred to as the "Police Officer Defendants" throughout this Brief and in Plaintiffs' Complaint.

[3] The Borough of Collingdale is an additional defendant in this litigation. Collectively, the Boroughs of Darby and Collingdale are referred to as the "Municipal Defendants" throughout this Brief and in Plaintiffs' Complaint.

When Officer Richers observed the vehicle make a left turn at the red light, he activated his emergency lights and initiated pursuit of the Escape. *Id*. at ¶ 25. In response, Jones slowed down the vehicle, crossed into the Borough of Darby, and pulled into the parking lot of a nearby McDonald's restaurant. *Id*. at ¶ 26. Officer Richers followed the Escape into the restaurant's parking lot. *Id*. at ¶ 27. Officer Richers exited his police vehicle and began to approach the front driver side window of the stopped Escape. *Id*. As Officer Richers instructed Jones to turn off the Escape's engine and exit the vehicle, Jones yelled to Officer Richers, "I got my kids in the car," and began to drive forward in the McDonald's parking lot. *Id*. at ¶ 30.

As the Escape exited the McDonald's parking lot, Officer Lyons and Officer Lynch, entered the McDonald's parking lot in separate vehicles to assist Officer Richers. *Id*. at ¶ 31. The Escape made contact with Officer Lyons' vehicle while traveling at a low rate of speed. *Id*. at ¶ 32. The Escape exited the McDonald's parking lot and headed down MacDade Boulevard, with Officer Lynch in pursuit. *Id*. at ¶ 34.

In response to the pursuit, Jones began to accelerate and travel at a high rate of speed. *Id*. at ¶ 35. Shortly after, Officers Richers and Lyons joined Officer Lynch in the pursuit of the Escape. *Id*. at ¶ 36. All three police vehicles were traveling at a high rate of speed. *Id.* The Police Officer Defendants continued to pursue the Escape at a high rate of speed despite knowing that there were unsecured children present in the vehicle and that they were endangering the lives of innocent bystanders. *Id*. at ¶ 42. The Police Officer Defendants also failed to keep a safe distance between their patrol cars and the Escape, which further exasperated Jones' desire to flee. The pursuit ended abruptly when the Escape struck the front end of Matthew's vehicle, crushing its front and Angel's body, and causing Matthew to be ejected 50 feet from the vehicle onto the pavement. *Id*. at ¶ 46-47. Kristyanna, who was in the vehicle directly behind Matthew's vehicle, witnessed the collision

between the Escape and Matthew's vehicle. *Id*. at ¶¶ 58-59. Upon seeing the collision, Kristyanna ran toward her sister, Angel. *Id*. at ¶ 60. As Kristyanna reached out to comfort her sister, one Police Officer Defendant yelled, "Back away, this is a crime scene!" *Id*. at ¶ 61. Angel was pronounced dead at the scene shortly after. *Id*. at ¶ 51.

At no point during the pursuit did the Police Officer Defendants have any indication that the driver of the Escape had committed any offense besides traffic offenses. *Id*. at ¶ 40. Jones was not the Escape's owner; the car was registered to a different individual named Tammy Harmon. *Id*. Thus, the Police Officer Defendants were unaware of the Escape driver's identity during the duration of the pursuit. *Id*.

Under Pennsylvania law, Municipal Defendants had to adopt and implement a vehicle pursuit policy that encompasses certain guidelines. *Id*. at ¶¶ 73-76. It is alleged that the Municipal Defendants, however, negligently failed to adopt or properly implement and enforce such a policy. *Id*. at ¶ 79. Moreover, even if adequate policies were established by the Municipal Defendants (which Plaintiffs contend were not), it is alleged that the Municipal Defendants had a custom and practice of disregarding the vehicle pursuit policy, as is most evident from the Police Officer Defendants' conduct during their pursuit of Jones. *Id*. at ¶ 80. Also evident from the Police Officer Defendants' conduct is the Police Officer Defendants' disregard for any pursuit policy, if such policy existed, established by the Municipal Defendants' police departments. *Id*. at ¶ 83.

On May 3, 2022, Plaintiffs Matthew, Kristyanna, and Christina Donahue, as Administratrix of the Estate of Angel, filed a ten-count Complaint alleging: (1) 14th Amendment Substantive Due Process Violations (All Plaintiffs v. The Police Officer Defendants); (2) *Monell* Liability (All Plaintiffs v. The Municipal Defendants); (3) Negligence (All Plaintiffs v. The Police Officer Defendants); (4) Reckless Disregard of Safety (All Plaintiffs v. The Police Officer Defendants);

(5) Negligence – Vicarious Liability (All Plaintiffs v. The Municipal Defendants); (6) Negligence – Direct Liability (All Plaintiffs v. The Municipal Defendants); (7) Wrongful Death (Christina Donahue v. All Defendants); (8) Survival (Christine Donahue v. All Defendants); (9) Negligent Infliction of Emotional Distress (Kristyanna v. The Police Officer Defendants); and (10) Outrageous Conduct Causing Severe Emotional Distress (Kristyanna v. The Police Officer Defendants). Defendants filed the Motion before this Court on May 27, 2022. A copy of the Complaint is annexed as **Exhibit A** to Defendants' Motion.

III. ARGUMENT

A. Standard of Review for Motions to Dismiss Under Rule 12(b)(6)

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) tests the sufficiency of the allegations contained in the plaintiff's complaint. *See Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). A court will not grant a motion to dismiss pursuant to Rule 12(b)(6) unless it is apparent that the plaintiff cannot prove any set of facts in support of the claim which would entitle relief. *See Seinfeld v. Becherer*, 461 F.3d 365, 367 n.1 (3d Cir. 2006).

Under Rule 12(b)(6), the court must accept all factual allegations as true and construe the complaint in the light most favorable to the plaintiff. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008) (quoting *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002)) (internal quotation marks omitted). *See also*, Fed. R. Civ. P. 8(a) (requiring the complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief"). Only if "the '[f]actual allegations . . . raise a right to relief above the speculative level'" has the plaintiff stated a plausible claim. *Id.* at 234 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 540, 555 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In deciding a Rule 12(b)(6) motion, a court must consider only the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complainant's claims are based upon these documents. *Mayer v. Belichick*, 605 F.3d 223, 230 (3d Cir. 2010). Additionally, "a document integral to or explicitly relied upon in the complaint may be considered." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (internal quotations omitted). The defendant bears the burden of proving that a plaintiff has failed to state a claim upon which relief can be granted. *See Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005) (citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991)).

B. The Complaint Sufficiently Pleads that Officers Lyons and Lynch violated Plaintiffs' 14th Amendment Substantive Due Process Rights

The Complaint sets forth a *prima facie* case against Officers Lyons and Lynch for substantive due process constitutional violations under a "state-created danger" theory of liability. The Due Process Clause of the 14th Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV § 1. The Due Process Clause includes both a procedural and substantive component. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 846-47 (1992). "The substantive component of the Due Process Clause 'protects individual liberty against certain government actions regardless of the fairness of the procedures used to implement them." ' *Gottlieb ex rel. Calabria v. Laurel Highlands Sch. Dist.*, 272 F.3d 168, 172 (3d Cir. 2001) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)) (internal citations and quotation marks omitted). "Substantive due process contains two lines of inquiry: one that applies when a party challenges the validity of a legislative act, and one that applies to the challenge of a non-legislative action." *Am. Exp. Travel Related Servs., Inc. v. Sidamon-Eristoff*, 669 F.3d 359, 366 (3d Cir. 2012) (citing *Casey*, 505 U.S. at 846-47). When the challenged conduct is non-legislative, a plaintiff "must show that the particular interest in question

is protected by the 14th Amendment and that the government's deprivation of that interest 'shocks the conscience.'" *Vargas v. City of Philadelphia*, 783 F.3d 962, 973 (3d Cir. 2015) (citations omitted).

42 U.S.C. § 1983 allows a party who has been deprived of rights, privileges, or immunities secured by the Constitution to seek damages and injunctive relief. Section 1983 is not in itself a source of substantive rights; it provides a remedy for violations of rights protected by other federal statutes or by the U.S. Constitution. *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). Therefore, in evaluating a § 1983 claim, a court must first "identify the exact contours of the underlying right said to have been violated" and determine "whether the plaintiff has alleged a deprivation of a constitutional right at all." *Id*. (*citing Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5 (1998)).

The state created danger theory of liability embodies the principle that the government has an obligation under the 14th Amendment's Due Process Clause "to protect individuals against dangers that the government itself creates." *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018) (quoting *Haberle v. Troxell*, 885 F.3d 170, 176 (3d Cir. 2018)). Establishing a claim under the doctrine requires a plaintiff to plead four elements:

> (1) the harm ultimately caused was foreseeable and fairly direct;
>
> (2) a state actor acted with a degree of culpability that shocks the conscience;
>
> (3) a relationship between the state and the plaintiff existed such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and
>
> (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.

Id. The Complaint clearly satisfies each of these elements.

Certainly, as to element (1), the harm caused — a catastrophic motor vehicle collision resulting in death and severe injury — was a foreseeable and direct result of the Darby Officers' decision to pursue Jones for two miles, at 1:00 a.m. while dark outside, at speeds that reached or exceeded 90 miles per hour down a stretch road with a posted speed limit of 25 miles per hour. The Darby Officers' decision to continue, rather than terminate, the pursuit when Jones ran a red light serves only to add to the foreseeability of harm. As to element (3), Plaintiffs, as a motorist and passengers in the vicinity of this improper pursuit, were foreseeable victims of the Darby Officers' actions. As to element (4), it is alleged that the Darby Officers' decision to pursue Jones, particularly his decision to pursue at a close range, increased Jones' desire to flee (thereby continuing the duration of the pursuit and the speed at which the vehicles involved in the pursuit were travelling), which thus created a risk of a catastrophic collision between the Escape and any other nearby vehicles and persons. Therefore, it is clear that the Darby Officers' decision to pursue Jones amounts to an affirmative use of authority in a way that created a risk of danger to Plaintiffs. Stated differently, this tragic incident would not have occurred but for the Police Officer Defendants' improper decision to pursue Jones over suspected traffic offenses.

Regarding element (2), the level of culpability required "to shock the contemporary conscience" falls along a spectrum dictated by the circumstances of each case. *County of Sacramento v. Lewis*, 523 U.S. 833, 847-49 (1998). With respect to the decision-making process of police officers, there are three distinct categories of culpability depending on how much time a police officer has to make a decision. *Haberle*, 885 F.3d at 177. In one category are actions taken in a "hyperpressurized environment[.]" *Id.* (citation omitted). They will not be held to shock the conscience unless the officer has "an intent to cause harm." *Id.* (citation omitted). Next are actions

taken within a time frame that allows an officer to engage in "hurried deliberation." *Id.* (citation omitted). When those actions "reveal a conscious disregard of a great risk of serious harm" they will be sufficient to shock the conscience. *Id.* (quotation marks and citation omitted). Finally, actions undertaken with "unhurried judgments," with time for "careful deliberation," will be held to shock the conscience if they are "done with deliberate indifference." *Id.* (citation omitted). This "shocks the conscience" analysis applies to police vehicle pursuit cases. *Brown v. Pa. Dep't of Health & Emergency Med. Servs. Training Inst.*, 318 F.3d 473, 480 (3d Cir. 2003).

In *Sauers v. Borough of Nesquehoning*, the Third Circuit held that similar conduct by a police officer defendant amounted to the officer acting with a degree of culpability that shocks the conscious, as required to establish a substantive due process violation. *Sauers v. Borough of Nesquehoning*, 905 F.3d 711, 717 (3d Cir. 2018). The *Sauers* plaintiff and his wife were driving southbound on Route 209 in the Borough of Nesquehoning, Pennsylvania. *Id.* at 715. At the same time, the police officer defendant was on patrol, traveling in the same direction as the plaintiff, when he observed the driver of a yellow Dodge Neon commit a summary traffic offense in the northbound lane. *Id.* Based on that observation, he turned around and began to pursue the Dodge. *Id.* At some point he took the time to radio ahead to the police in the neighboring borough to request that officers there pull the Dodge over when it reached their jurisdiction. *Id.* But rather than let the matter rest, he decided that catching the Dodge was important enough to warrant a chase at speeds of over 100 miles per hour. *Id.* During the pursuit, the police officer defendant lost control of his vehicle, and struck the plaintiff's car. The accident seriously injured the plaintiff and killed his wife. *Id.*

On appeal, the Third Circuit noted that the district court "rightly interpreted the complaint to allege [the police officer defendant] had at least some time to deliberate before deciding whether

and how to pursue the traffic offender." *Sauers*, 905 F.3d at 718. As a result, the Third Circuit concluded that *Sauers'* fact-pattern fell in the second category of culpability, requiring inferences or allegations of a conscious disregard of a great risk of serious harm. *Id.* The Third Circuit reasoned that the conclusion was supported, in part, by an obvious inference that there was no emergency arising from a ***simple traffic violation***. *Id.* The Third Circuit held that there was no difficulty in deciding that the pursuit of a potential summary traffic offender at speeds of over 100 miles per hour, after radioing for assistance from the neighboring jurisdiction where the potential offender was headed, demonstrates a conscious disregard of a great risk of serious harm. *Id.*

Here, the well-pled allegations set forth in the Complaint warrant the same conclusion with respect to the Darby Officers' conduct, and in any instance where there is open question, discovery is a clear and necessary next step. The allegations contained in the Complaint suggest that Officer Richers initiated a routine traffic stop and Jones was initially compliant. Jones ***began*** to drive forward in the Escape as the Darby Officers were entering the McDonald's parking lot to assist with the traffic stop. Compl. at ¶ 31. There is are open questions as to (1) when Darby Officers' first observed the Escape in the McDonald's parking lot, and (2) the time between those observances and the Darby Officers' independent decisions to initiate or join in the pursuit. At minimum, however, given the Darby Officers had time to contemplate the potential outcomes of a vehicle stop before arriving on the scene to assist and additional time to contemplate while the Escape was exiting the McDonald's parking lot, it is reasonable to infer that there was at least some time to contemplate the pursuit before it began after the Escape traveled onto MacDade Boulevard. *Id.* at ¶ 34.

The outcome is no different when factoring the allegation of low-speed contact between Officer Lyons' vehicle and the Escape. While Plaintiffs allege that Officer Lynch was the first

police officer to drive behind the Escape in pursuit, the allegation is that he did so ***only after*** seeing the Escape travel onto MacDade Boulevard. *Id.* Thus, as alleged the Darby Officers had time for deliberations before the Escape turned onto MacDade Boulevard. Specific to Officer Lynch, the Complaint is silent as to whether he even witnessed the contact between the Escape and Officer Lyons' vehicle. Specific to Officer Lyons, the Complaint is silent as to whether he witnessed or felt any impact from the contact, and there cannot be such an inference at the motion to dismiss stage because it is not self-evident that the impact of this low-speed collision would have been felt by Officer Lyons.[4] What is clear is that a reasonable reading of the Complaint in Plaintiffs' favor for the purpose of evaluating a motion to dismiss under Rule 12(b)(6) leads to the reasonable inference that there was time for deliberation before the initiation of the pursuit. *See Phillips v. County of Allegheny*, 515 F.3d at 231 (3d Cir. 2008) (explaining that all reasonable inferences must be drawn in the plaintiffs' favor). Given this time to contemplate, whether the Darby Officers' actions can be said to shock the conscious must be measured under "hurried deliberation" context. *Haberle*, 885 F.3d at 177 (setting forth three distinct categories of culpability with respect to police officer decision-making).

Like in *Sauers*, there was no obvious emergency justifying the pursuit of Jones, who was a suspected traffic offender. The facts of the alleged pursuit — a 90 mile-per-hour chase, in the early hours of the morning while it was dark outside, of a vehicle containing an unrestrained child and infant, on a road with 25 mile-per-hour speed limit, ***over simple traffic offenses*** — reveal the

[4] Plaintiffs understand that video of the contact between the two vehicles exists and demonstrates contact at minimal speed. This evidence, while neither in Plaintiffs' possession nor dispositive to resolving a motion to dismiss under Rule 12(b)(6), represents a classic example of why discovery is ultimately necessary in this litigation. Without discovery, the period of time for deliberation cannot be resolved with certainty. Discovery may also show that Officer Lyons bears responsibility for the collision, and Defendants do not argue, nor could they, that the pursuit would have been justified had Officer Lyons caused the contact.

conscious disregard of a great risk of serious harm and thus are sufficient to shock the conscience. *Id.* This is true even if Officer Lyons was aware of the low-speed impact, which is not conceded for the purpose of this Opposition, given what Plaintiffs believe the evidence will reveal, because there was at least some time for the Police Officer Defendants to deliberate before the Escape turned onto MacDade Boulevard. Plaintiffs thus sufficiently allege conscious, shocking behavior on the part of the Darby Officers.

Even if this Court imposed the heightened intent-to-harm standard, the Darby Officers' conduct should still be found to shock the conscious because Plaintiffs allege the Darby Officers acted with such intent. Specifically, in addition to the great risk of harm the pursuit posed to nearby motorists, Plaintiffs allege that the Darby Officers intended to cause physical and mental harm to the two children and one infant in the Escape (Compl. at ¶¶ 42-43), as continuing a needless, high-speed pursuit for no legitimate purpose was certain only to traumatize the children and/or had a high likelihood of causing the children and infant, some of whom were unrestrained in the vehicle, harm or injury. *See Lewis*, 523 U.S. at 854 (explaining that high speed chases with an intent to harm suspects physically or to worsen their legal plight gives rise to potential liability under the 14th Amendment, redressable by action under § 1983). In *Davis v. Twp. of Hillside*, the Third Circuit held that the critical factor in determining whether 14th Amendment liability for a high-speed chase may be imposed is whether the officer's conduct can be found to shock the conscience, for which the evidence must show intent to harm. *Davis v. Twp. of Hillside*, 190 F.3d 167, 171 (3d Cir. 1999).[5]

[5] Although *Davis* references intent-to-harm the pursued suspect, there is no reason why the intent-to-harm should not extend to others inside a pursued vehicle, such as the children and infant in this case.

Recently in *Clark v. Merrell*, a case with an on-point holding that Defendants do not address, Judge Surrick of this District Court found that an intent-to-cause harm could be inferred from a defendant police officer's dangerous pursuit of a suspect driving a dirt bike in defiance of a supervisor's order given earlier in the day not to pursue dirt bikes. No. CV 19-1579, 2021 WL 288791, at *5 (E.D. Pa. Jan. 28, 2021). Undeterred by the supervisor's order, the police officer defendant pursued a suspect on a dirt bike for eight to ten minutes, at 60 miles per hour, in the middle of the afternoon, near a major transportation center, and through densely populated areas with clearly marked pedestrian crosswalks. *Id.* There was no urgency to pursue the suspect, and the chase resulted in injuries to the uninvolved plaintiffs when the dirt bike crashed into them. *Id.*

Judge Surrick found a dangerous and unauthorized pursuit could support an inference that the police officer defendant acted with the requisite intent to harm. *Id.* (citing *Johnson v. Balt. Police Dep't*, 452 F. Supp. 3d 283, 301-02 (D. Md. 2020) (finding that plaintiffs had plausibly alleged a purpose to cause harm where, "without observing any suspicious or ongoing criminal conduct," officers intentionally misused a police vehicle to "spe[e]d after [plaintiffs] down residential streets, running stop signs in five different intersections, without ever activating their vehicles' emergency equipment"); *McGowan v. Cnty. of Kern*, No. 15-01365, 2018 WL 2734970 at *10, 2018 U.S. Dist. LEXIS 96236 at *28-29 (E.D. Cal. June 7, 2018) (finding that plaintiff had plausibly alleged a purpose to cause harm where officer drove through "an intersection against a red light travelling at 85 miles per hour" even though there was no "necessity and urgency" that the officer respond to the call in this manner and there was "virtual certainty that he would kill someone and for a reason other than a legitimate law enforcement objective.")).

Aside from allegations of specific intent to harm the children and infant present in the Escape, the same inference is warranted in this case, as Plaintiffs allege an array of factors that

suggest this pursuit was virtually certain to kill or injure another person (which it in fact did) for a reason other than a legitimate law enforcement objective. Plaintiffs allege that the Darby Officers intentionally failed to adhere to policies and guidelines established by his police department, and failed to follow the commands of his supervising officer during the pursuit. (*see* Compl., at ¶¶ 83, 107). The allegations in the Complaint, accepted as true for purposes of ruling on a motion to dismiss, are thus sufficient to withstand dismissal pursuant to Rule 12(b)(6) regardless of which standard the Court determines is required to show conscious-shocking conduct.

C. Officers Lyons and Lynch Are Not Entitled To Qualified Immunity

The Darby Officers' constitutional violations against Plaintiffs should not be dismissed based upon a theory of qualified immunity, as they are not entitled to immunity based upon the facts alleged in the Complaint. Qualified immunity "protects government officials '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.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Two interests are balanced by the rule: "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

A qualified immunity analysis requires consideration of two concepts. "First, a court must decide whether the facts that a plaintiff has alleged . . . make out a violation of a constitutional right." *Pearson*, 555 U.S. at 232. "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* The second prong is met when it would be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). That does not require a prior precedent with indistinguishable facts, "but existing precedent must

have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). Existing precedent is sufficient to place a constitutional question beyond debate and to defeat qualified immunity if it is "controlling authority in [the relevant] jurisdiction," *Wilson v. Layne*, 526 U.S. 603, 617 (1999), or if "a 'robust consensus of cases of persuasive authority' in the Court of Appeals" has settled the question, *Mammaro v. N.J. Div. of Child Prot. & Permanency*, 814 F.3d 164, 169 (3d Cir. 2016) (internal quotations omitted). As explained in the preceding section of this Brief, Plaintiffs sufficiently allege a substantive due process claim. Thus, the remaining issue is whether the Darby Officers had fair warning that they could be subject to constitutional liability for actions taken in conscious disregard of a great risk of harm during the course of a police pursuit.

The Third Circuit settled this question with its decision in *Sauers v. Borough of Nesquehoning*, which expressly held that police officers could be liable for vehicle pursuits undertaken with a conscious disregard of the great risk of harm when there is no compelling justification for the pursuit and where the officer has time to consider whether to engage in inherently risky behavior. 905 F.3d at 723 (3d Cir. 2018). Defendants, recognizing that *Sauers* clearly negates the Darby Officers' qualified immunity defense, argue that facts in "*Sauers* are totally inapposite" because, unlike the police officer in *Sauers*, the Darby Officers were not pursuing a suspect for a minor summary traffic violation, but because Jones' vehicle made contact with Officer Lyons' vehicle Doc. No. 8, p. 18. As explained above, these are impermissible inferences at the motion to dismiss stage that cannot be the basis for dismissal pursuant to Rule 12(b)(6).

Whether the pursuit was for a minor summary traffic violation or due to contact with Officer Lyons' vehicle is a question that must be answered through fact and expert discovery. The

extent of the incident as perceived by the Darby Officers, up until the point of the pursuit, consisted of communication regarding the minor traffic violation and observing Jones driving forward in the parking lot at a low rate of speed. Moreover, accepting the allegations as true, one cannot infer that the Darby Officers were pursuing for any reason other than following Officer Richers' lead on his decision to initiate a traffic stop. There was no pressing need to arrest Jones for suspected traffic violations, no allegation that Officer Lynch knew of the low-speed impact with Officer Lyons' vehicle, no allegation that Officer Lyons felt the impact of contact at a low rate of speed, and no allegation that Jones would have driven at an excessive speed absent the Police Officer Defendants' decision to pursue him. At the time they initiated the pursuit, all the Darby Officers knew was that Jones was driving forward in the McDonald's parking lot. Therefore, as alleged, there was no emergency or compelling justification for the Darby Officers' pursuit of Jones. The Darby Officers had time to consider the need to pursue Jones when traveling to assist Officer Richers and their conscious disregard of the great risk of harm is sufficient to defeat any claims of qualified immunity on a motion to dismiss under the allegations of Plaintiffs' Complaint.

In the alternative, if this Court finds *Sauers'* "conscious disregard" standard inapplicable to the Darby Officers' pursuit of Jones, Supreme Court precedent clearly establishes that a police pursuit of a dangerously fleeing suspect may give rise to a 14th Amendment constitutional violation where there is intent to harm. *Lewis,* 523 U.S. at 835; *Davis*, 190 F.3d at 171. As discussed above, Plaintiffs allege an intent to harm the children and infant present in the Escape and, as explained in *Clark v. Merrell*, a permissible inference of intent to harm can be drawn based when, as is the case here, there is virtual certainty that death or injury would result from a pursuit unrelated to any legitimate government interest. *See Clark*, No. CV 19-1579, 2021 WL 288791, at *5 (finding dangerous and unauthorized dirt bike pursuit could support an intent to cause harm).

Therefore, under either standard, Plaintiffs' well-pleaded allegations concern constitutional violations by the Darby Officers that were clearly established at the time of the improper, July 16, 2020 pursuit.

D. Plaintiffs Will Stipulate To The Dismissal Of The Section 1983 Official Capacity Claim Against Officer Lynch and Officer Lyons

Officer Lynch and Officer Lyons are currently named as defendants in their individual capacity and in their official capacity as police officers for Darby. To the extent this Court finds that dual status is redundant in a section 1983 claim where a constitutional claim is also asserted against a defendant's municipal employer, Plaintiffs do not oppose Section C of Defendants' Motion and thus will stipulate only to the dismissal of official capacity claims against Officer Lynch and Officer Lyons.

E. Plaintiffs Properly State A Municipal Liability Claim Under *Monell* Against Darby In Count II Of The Complaint

Contrary to the arguments contained in Defendants' Memorandum of Law, the well-pleaded allegations in Plaintiffs' Complaint far-exceed the level of specificity required to state an actionable, section 1983 municipal liability claim against Darby. Through section 1983, a municipality may be held liable when a plaintiff can demonstrate that the municipality itself, through the implementation of a municipal policy or custom, causes a constitutional violation. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 691-95, 98 (1978). Liability will be imposed when the policy or custom itself violates the Constitution or when the policy or custom, while not unconstitutional itself, is the "moving force" behind the constitutional tort of one its employees. *Polk County v. Dodson*, 454 U.S. 312 (1981). Where the policy concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to deliberate indifference to the rights of persons with whom the employees will come into contact." *Thomas v. Cumberland Cty.*, 749 F.3d 217, 222 (3d Cir. 2014) (citations and

internal marks omitted). Where the policy or custom does not facially violate federal law, causation can be established only by demonstrating that the municipal action was taken with deliberate indifference as to its known or obvious consequences. *Berg v. Cty. of Allegheny*, 219 F.3d 261, 276 (3d Cir. 2000).

Pursuant to *Monell*, a municipality can be held liable under section 1983 when it turns a "blind eye" to improper behavior by its employees. *Whichard v. Cheltenham Township*, 1996 WL 502281, at *5 (E.D. Pa. Aug. 29, 1996); *see also Natale v. Camden County Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003); *City of Canton v. Harris*, 489 U.S. 378, 390 (1989) ("[T]he failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury."). The Supreme Court has clearly stated that the unconstitutional acts of municipal employees can create municipal liability even where the acts have "not been formally approved by an appropriate decisionmaker." *Bd. of the Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 404 (1997); *see also, Natale*, 318 F.3d at 583-84. Moreover, courts have recognized that "custom can be established by other means, such as proof of knowledge and acquiescence" and that "[a p]laintiff may rely on a 'failure to train' theory.'" *Cortlessa v. County of Chester*, 2006 WL 1490145 at *7-8 (E.D. Pa. May 24, 2006).

The Third Circuit explains that a municipality can be liable under "section 1983 and the 14th Amendment for a failure to train its police officers with respect to high-speed automobile chases, even if no individual officer participating in the chase violated the Constitution." *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir. 1994). "The [municipality] is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty." *Id.* Under extraordinary circumstances, even a single incident can

implicate municipal liability where "the need for training can be said to be so obvious, that failure to do so could properly be characterized as deliberate indifference to constitutional rights even without a pattern of constitutional violations." *M.U. v. Downingtown High Sch. E.*, 103 F. Supp. 3d 612, 628 (E.D. Pa. 2015).

Here, Count II of the Complaint contains all of the requirements of a *Monell* claim: (1) a municipal policy or custom that results in constitutional infringement; (2) a widespread pattern of deliberate indifference or a failure to adequately and properly train or supervise defendant police officers; and (3) a resulting denial of plaintiff's constitutional rights. Specifically, Plaintiffs allege the following *Monell* based claim that, if proven true, subjects Darby to liability:

> 98. The Police Officer Defendants acted under the color of law, and under the authority of one or more interrelated de facto policies, practices, and/or customs of the Municipal Defendants' to violate Plaintiffs' rights as set forth herein.
>
> 99. Prior to July 16, 2020, it was a *de facto* policy, practice, and/or custom of the Municipal Defendants, through their respective police departments, chiefs of police, mayors, and borough counsels, to inadequately supervise and train their police officers, including the Police Officer Defendants, concerning adequate vehicle pursuit policies and practices, thereby failing to adequately discourage constitutional violations on the part of their police officers. Upon information and belief, the Municipal Defendants did not require appropriate in-service training or re-training of police officers who were known to engage in improper, intentional, willful, reckless, and/or negligent vehicle pursuits.
>
> 100. It was the *de facto* policy, practice, and/or custom of the Municipal Defendants, through their respective police departments, chiefs of police, mayors, and borough councils, to inadequately supervise and train their police officers, including the Police Officer Defendants, to intervene and/or report constitutional violations and misconduct committed by their fellow police officers.
>
> 101. The Municipal Defendants, acting through their respective police departments, chiefs of police, mayors, and borough councils, have adopted

> and continue to maintain a recognized and accepted policy, custom, and/or practice of systematically engaging in dangerous and improper vehicle pursuits, without regard to the model and accepted vehicle pursuit policies and guidelines, which conduct has resulted in subjecting other persons, including innocent bystanders like Plaintiffs, to unjustifiable risks of property damage, personal injury, and death.
>
> 102. The Municipal Defendants, acting through their respective police departments, chiefs of police, mayors, and borough councils, were fully aware of the dangers posed by vehicle pursuits and the resultant need for proper training and supervision of their police officers, but the Municipal Defendants were deliberately indifferent to those risks and failed to properly train and supervise their police officers regarding those risks.
>
> 103. As a result of the above-described practices, policies, and/or customs, the Municipal Defendants' respective police officers, including the Police Officer Defendants, believed that their actions would not be properly monitored by supervisory police officers and/or other employees of the Municipal Defendants, and that this improper conduct would not be investigated or sanctioned, but would be tolerated and condoned by the Municipal Defendants.
>
> 104. As a result of the above actions, the Municipal Defendants caused Plaintiffs to be deprived of life and/or liberty, and have therefore violated Plaintiffs' Fourteenth Amendment rights under the United States Constitution to substantive due process of law.

Compl. at ¶¶ 98-103. Moreover, Plaintiffs go further by pleading (1) the statutory requirements governing municipal police department vehicle pursuit policies and guidelines in Pennsylvania; and (2) setting forth examples of what an acceptable pursuit policy may have encompassed. *Id.* at ¶¶ 73-79.

While Plaintiffs will need a period of discovery to identify the specific policies and customs in place, it is self-evident that the Darby Officers' conduct, as alleged, ran far afoul of any acceptable Pennsylvania vehicle pursuit policy. It is alleged also that the Darby Officers communicated with Officer Richers, as well as other police officers and/or supervisors during the

course of the improper pursuit, yet the pursuit continued until its tragic conclusion. A reasonable inference is that there was/is widespread disregard for any policies and procedures in place. Another reasonable inference that follows is that if there was rampant disregard for the policies and procedures of Municipal Defendants, it is because the municipalities turned a blind eye to the egregious behavior of their officers. This is the basis of Plaintiffs' *Monell* claim, and accordingly, Defendants' Motion should be denied.

F. Plaintiffs' State Law Negligence Claims (Counts III and V) Are Properly Pleaded and Not Barred By Governmental or Official Immunity

Defendants are wrong to argue that Plaintiffs may not bring the supplemental, state law negligence claims raised in Counts III and V of the Complaint because, purportedly, because these claims are barred by governmental and official immunity. Liability is clear in light of the as there are clear, recognized exceptions to immunity in this instance. The necessary elements for a negligence claim under Pennsylvania law are "a duty or obligation recognized by the law, requiring the actor to conform to a certain standard of conduct; a failure to conform to the standard required; a causal connection between the conduct and the resulting injury; and the actual loss or damage resulting to the interest of another." *Matthews v. Konieczny,* 515 Pa. 106, 527 A.2d 508, 511–12 (1987) (internal quotation marks and citation omitted). Under the Pennsylvania Political Subdivision Tort Claims Act, local agencies are generally not liable "for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person," but an exception to this immunity exists for damages arising from "[t]he operation of any motor vehicle in the possession or control of the local agency" and caused by "the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties." 42 Pa. C.S.A. §§ 8541 and 8542(a)–(b).

The vehicle exception also contains an exception to the exception, which prevents those who flee from or aid those fleeing from police from recovering for injuries brought upon by a police officer's operation of a vehicle in the course of attempting to stop or apprehend fleeing wrongdoers. *Id.* The purpose of this language is to weed out wrongdoers from innocent bystanders injured in police pursuits and assure that wrongdoers do not get the benefit of the Commonwealth's tort protection for actions that may have endangered police officers and the public. *Lindstrom v. City of Corry,* 763 A.2d 394, 398 n. 3 (Pa. 2000) (citing Pennsylvania Legislative Journal–House, June 29, 1995, Reg. Sess. No. 60 at 1784). "[W]e believe the specific delineation of these two categories within the vehicle exception suggests that the General Assembly did not intend to remove all parties injured by the negligent operation of a police vehicle during a police pursuit from the class of individuals able to recover under the Tort Claims Act, but rather for innocent bystanders to remain eligible to recover from a local agency and its employees, if injured during a police pursuit due to the negligent operation of a vehicle in the possession or control of the local agency." *Cornelius v. Roberts,* 71 A.3d 345, 350 (Pa. Commw. 2013).

Here, Defendants simply ignore well-pleaded allegations to suit their argument. They suggest, without basis, that "none of the averments . . . involve the operation of the motor vehicle by the Officers which is a prerequisite for stating a cause of action under the motor vehicle exception to the Tort Claims Act but involve only claims of negligent decision making." Putting aside the fact that the entire incident, and thus the Complaint, centers on the Defendant Police Officers' improper use of vehicles to engage in a dangerous and unjustified pursuit, there are several allegations in Counts III and V that speak directly to Municipal Defendants' negligent, careless and reckless operation of motor vehicles. For example, and directly contrary to Defendants' claim that there is "no averment that Officers Lynch and Lyons were not using lights

and sirens", Plaintiffs allege Officer Lyons and Darby, through its agent Officer Lyons, were negligent, careless and reckless in "**[f]ailing to use all auditory and visual alert systems,** including vehicle horns, at the Police Officer Defendants' disposal to alert other vehicles nearby, including the vehicles that Plaintiffs were travelling in, of the pursuit." Compl. at ¶¶ 107, 120.[6] Plaintiffs allege Officer Lynch and Darby, through its agent Officer Lynch, were negligent, careless and reckless in failing to consider roadway conditions and time of day when initiating and continuing the pursuit. Id. Moreover, specific to the issue of vehicle control and contrary to Defendants' argument that the Complaint contains only instances of negligent decision making, there are allegations that the Darby Officers (1) failed to keep a proper lookout on the roadway; (2) drove at excessive speeds; (3) operated his police vehicle without due regard to the rights, safety, and position of surrounding vehicles; (4) failed to follow, adhere to, and apply police department policies and guidelines regarding pursuits during the pursuit; and (5) violated the statutes of the Commonwealth of Pennsylvania governing the operation of motor vehicles on streets and highways. *Id.* Plaintiffs allege these failures were the proximate cause of their damages. *Id.* at ¶¶ 108, 121. These allegations, read in the context of the entire Complaint, are more than sufficient to state plausible negligence claims against the Darby Officers and, under a *respondeat superior* theory of vicarious liability, Darby.

However, Plaintiffs acknowledge the general rule that a municipality and its employees share co-extensive liability. *See* 42 Pa. C.S.A. § 8545. In that regard, Plaintiffs do not seek double

[6] The Complaint is silent as to whether Officer Lyons ever activated his lights or sirens when he initiated the pursuit of Jones' vehicle. Drawing any inference to the contrary, as Defendants do, is impermissible at the motion to dismiss stage. While the Complaint does contain allegations that Officer Lynch activated lights and sirens, there no allegation that these remained on during the course of the pursuit. Further, there is no allegation that Officer Lynch used all auditory and visual alert systems at his disposal.

recovery to the extent Counts III and V are duplicative causes of action for the same **negligent conduct**. That said, the prohibition against affixing greater liability upon a municipal employee then attaches to his employer, is abrogated when "it is judicially determined that the act of the employee caused the injury and that such action constituted a crime, actual fraud, actual malice or willful misconduct. . . ." 42 Pa. C.S.A. § 8550. Here, in the context of the entire Complaint, Plaintiffs allege conduct on the part of the Darby Officers that, if proved at trial, would constitute willful misconduct and thus constitute waiver of Section 8545's official immunity provision. *See Lopuszanski v. Fabey*, 560 F.Supp. 3 (E.D. Pa. November 18, 1982); *Overstreet v. The Brgh. of Yeadon*, 475 A.2d 803 (Pa. Super. 1984). For example, and specific to Count III, Plaintiffs' allegation that the Darby Officers violated the statutes of the Commonwealth of Pennsylvania governing the operation of motor vehicles on streets and highways may amount to intentional or willful conduct. Compl. at ¶ 107. Both Federal and Pennsylvania rules of civil procedure specifically provide for the alternative and inconsistent pleading of causes of action. Fed. R. Civ. P 8(d)(2); Pa. R.C.P. 1020(c); Standard Pennsylvania Practice, § 16:59. Therefore, as amendment of a complaint is liberally allowed under Fed. R. Civ. P. 15(a), should the Court dismiss Count III as duplicative of Count V, Plaintiffs respectfully request leave to amend so that they may incorporate allegations that speak to willful or intentional conduct into other portions of the Complaint.

G. Plaintiffs' Reckless Disregard of Safety Claim (Count IV) Against Officers Lyons and Lynch Alleges Willful Conduct Distinct from Allegations of Negligence

Count IV of the Complaint contains allegations of intentional and willful conduct by the Darby Officers that are distinct, and alleged in the alternative, of the allegations of negligence contained in Count III. Compl. at ¶¶ 112, 115. While Pennsylvania does not recognize an independent tort of recklessness, it does recognize the principles of the Restatement (Second) of

Torts § 500. *See Krivijanski v. Union Railroad Co.*, 515 A2d 933 (Pa. Super. 1986) (discussing Section 500 while holding comparative negligence principles are inapplicable to reckless conduct and explaining "[o]ur primary reason for so holding is that the longstanding distinction Pennsylvania courts have made between willful or wanton conduct and negligent conduct."). In *M.U. v. Downingtown High Sch. E.*, which involved section 1983 claims stemming from an injury to a student athlete and, like the case here, involved supplemental state law claims alleged through separate counts of negligence and recklessness, the Hon. Gerald J. Pappert of this District Court evaluated the sufficiency of both claims. 103 F. Supp. 3d 612, 629 (E.D. Pa. 2015). Judge Pappert correctly noted that recklessness is a heighted standard of care required to potentially recover punitive damages. *Id.* Judge Pappert noted that, while claims of negligence and recklessness should be evaluated together, the Tort Claims Act's official immunity does not extend to an employee's individual liability for acts of willful misconduct. *Id.* at 630 (citing *Wade v. City of Pittsburgh*, 765 F.2d 405, 412 (3d Cir.1985) ("In this case the complaint clearly alleges conduct . . . amounting to 'willful misconduct.' Thus, there was no cause of action for which the city's immunity would be extended to an employee under § 8542.")).

Plaintiffs initiated this suit against the Darby Officers in their individual capacity and as police officers for Darby. If proven at trial, the allegations contained in Count IV of the Complaint would result in Officer Lynch's and Officer Lyons' individual liability for intentional and willful misconduct. Defendants fail to provide a justification for excusing the Darby Officers of individual liability for conduct that is suggestive of punitive damages, and thus dismissal of Count IV is improper.

H. The Tort Claims Act Does Not Preclude Plaintiffs' Municipal Liability Claim (Count VI) Because The Vehicle Liability Exception Applies

There is no basis for dismissing the entirety of Count VI of Plaintiffs' Complaint, as Defendants' suggest, where allegations contained therein easily fit within the motor vehicle exception to the Tort Claims Act. In order to come within the motor vehicle exception to sovereign immunity, the damages claimed must have arisen from the operation of a vehicle by a Commonwealth party. *North Sewickley Tp. v. LaValle*, 786 A.2d 325 (Pa. Commw. Ct. 2001). "Operation" of a vehicle, in the context of the Tort Claims Act, reflects a continuum of activity which entails a series of decisions and actions, taken together, that transport the individual from one place to another; the decisions of where and whether to park, where and whether to turn, whether to engage brake lights, whether to use appropriate signals, whether to turn lights on or off, and the like, are all part of the operation of a vehicle. *Williams v. City of Philadelphia Office of Sheriff*, 2020 WL 315594 (E.D. Pa. 2020); *Hernandez v. Independence Tree Service LLC*, 2019 WL 1773374 (E.D. Pa. 2019); *Balentine v. Chester Water Authority*, 191 A.3d 799 (Pa. 2018).

For example, in *Hernandez v. Independence Tree Service LLC*, the plaintiff, a tree service subcontractor, was working near and under train tracks when he was struck by a train owned and operated by defendant Southeastern Pennsylvania Transportation Authority ("SEPTA") and severely injured. 2019 WL 1773374 at *2. (E.D. Pa. 2019). The Plaintiff contended that SEPTA failed to timely alert him regarding the approaching train, and brought claims alleging failure to train, hire, supervise, and communicate with employees and contractors regarding the time and location of work being done at the accident site. *Id.* This District Court denied SEPTA's motion to dismiss under Rule 12(b)(6) insofar the allegations centered on alleged failures to communicate, and explained that communications intended to ensure the railway was clear and to alert works of the approaching trains fit under the Pennsylvania Supreme Court's broad interpretation of safely

operating of a vehicle and thus the motor vehicle exception to the Tort Claims Act. *Id.* (citing *Balentine*, 191 A.3d at 809).

Paragraph 124 of the Complaint, through subparagraphs a-n, sets forth the various ways in which the Municipal Defendants were negligent, careless, or reckless. Plaintiffs maintain that the following subparagraphs concern Defendants' conduct during the pursuit and align directly with the Supreme Court's broad interpretation of operating a motor vehicle: (g) failing to effectively intervene to terminate improper pursuits; (j) failing to have the tools and equipment necessary for safe and effective pursuits; and (n) failing to put an effective chain of command in place during the pursuit. These allegations concern the Municipal Defendants' responsibility to (1) intervene and terminate the pursuit as it was ongoing; (2) provide necessary vehicles and equipment to the Police Officer Defendants to ensure that the at-issue pursuit was safe and effective; (3) ensure effective communications during the pursuit; and (4) maintain control of the pursuing vehicles during the pursuit. Thus, while claims concerning failure to hire, train, supervise, and discipline police officers regarding effective pursuits can be analyzed in the context of the *Monell* Claim (Count II), the aforementioned subparagraphs cannot be dismissed pursuit to Rule 12(b)(6) where they plausibly relate to Municipal Defendants' liability for operating vehicles during the at-issue pursuit.

I. The At-Issue Wrongful Death and Survival Claims (Counts VII and VII) Are Valid Claims Governed by the Tort Claims Act

Christina Donahue brings Counts VII and VIII, respectively wrongful death and survival claims, as the administratrix of Angel's Estate. The claims arise under the Pennsylvania Wrongful Death Act, 42 Pa. C.S. § 8301, and the Pennsylvania Survival Act, 42 Pa. C.S. § 8302. Both claims sound in tort and are governed by the Tort Claims Act in this instance because the Defendants are municipalities and their respective police officers. It would be improper and manifestly unjust to

dismiss these claims and leave Angel's Estate without recourse where, as has already been discussed in detail, Christina's wrongful death and survival claims fall within the vehicle liability exception to the Tort Claim's Act. *See Costobile-Fulginiti v. City of Philadelphia*, 719 F. Supp. 2d 521, 525 (E.D. Pa. 2010) (dismissing plaintiff's wrongful death and survival claims only after concluding that the exceptions to Tort Claims Act immunity provision were not applicable); *Marks v. Philadelphia Indus. Corr. Ctr.*, No. CIV.A. 14-5168, 2014 WL 5298008, at *4–5 (E.D. Pa. Oct. 15, 2014) (same); *Sullivan v. Warminster Twp.,* No. 07–4447, 2010 WL 2164520, at *6 (E.D. Pa. May 27, 2010) (same).

J. The Present Emotional Distress Claims Fall Within the Tort Claim Act's Vehicle Exception

Emotional distress claims are properly evaluated under the Tort Claims Act and on this basis alone Defendants' motion should be denied. *See e.g., Regan v. Twp. of Lower Merion*, 36 F. Supp. 2d 245, 251 (E.D. Pa. 1999) (denying, in part, motion to dismiss plaintiff's supplemental emotional distress claims in section 1983 action where the defense argued that such claims were barred by the Act); *see also*, *United States v. Benish,* 5 F.3d 20, 26 (3d Cir.1993) (rejecting a party's claim where the party "provid[ed] no legal support for his argument or any persuasive reason" for the court to find in his favor). Instead, Defendants offer only the repetitive and conclusory argument, drawing numerous inferences impermissibly in their favor, that (1) Counts I through VI are not applicable as to Ms. Dellavecchia; and (2) the facts alleged do not suggest intentional conduct on the part of the Darby Officers (they do, as described throughout the Complaint and herein at section G). Defendants claim Kristyanna was not involved in the motor vehicle accident, despite the fact that she is alleged to have been in the intersection when and where the collision occurred. Accepted as true for the purpose of a motion to dismiss, it is clear from the Complaint that all of Kristyanna's injuries are a direct result of Police Officer Defendants'

improper conduct, which caused the underlying, at-issue motor vehicle collision. As a result, Defendants' Motion should be denied.

K. The Complaint Does Not Contain Any Redundant, Immaterial, Impertinent, or Scandalous Matter And Causes No Prejudice To Defendants

A district court "may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter," but "there appears to be general judicial agreement, as reflected in the extensive case law on the subject, that [motions to strike] should be denied unless the challenged allegations have no possible relation or logical connection to the subject matter of the controversy ***and*** may cause some form of significant prejudice to one or more of the parties to the action." Fed. R. Civ. P. 12(f) (emphasis added); *Trivedi v. Slawecki,* No. 11–cv–2390, 2013 WL 1767593 *2 (M.D.Pa. Apr. 24, 2013) (quoting 5C Charles Alan Wright & Arthur R. Miller, Federal Practice). "Content is immaterial when it has no essential or important relationship to the claim for relief. Content is impertinent when it does not pertain to the issues raised in the complaint. Scandalous material improperly casts a derogatory light on someone, most typically on a party to the action." *Lee v. Eddystone Fire & Ambulance*, No. 19-3295, 2019 WL 6038535, at *2 (E.D. Pa. Nov. 13, 2019) (quotation omitted). Moreover, a motion to strike is not a proper way to procure the dismissal of all or a part of a complaint. *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 972 (9th Cir. 2010); *Delta Consulting Group, Inc. v. R. Randle Const., Inc.*, 554 F.3d 1133 (7th Cir. 2009). And, "striking a pleading or a portion of a pleading '**is a drastic remedy to be resorted to only when required for the purposes of justice**.'" *Lee v. Dubose Nat'l Energy Servs.*, Inc., No. 18-2504, 2019 WL 1897164, at *4 (E.D. Pa. Apr. 29, 2019) (quotation omitted and emphasis added). Here, Defendants have failed to satisfy either prong of this test: they have both failed to show how any of the material in dispute is redundant, immaterial, impertinent, or scandalous, and they have

further failed to show any resulting prejudice from the paragraphs of the Complaint which they wish to strike.

Generally, Defendants seek to strike three categories of allegations in Plaintiff's Complaint: (1) factual information concerning children and an infant present in the fleeing vehicle police pursued (the "Escape") (paragraphs 23, 24, 28, 30, 38, 39, 42 and 43); (2) information regarding vehicle pursuit law in Pennsylvania (paragraphs 65-72); and (3) allegations describing the parameters of acceptable vehicle pursuit policies and guidelines and the Police Officer Defendants' violation thereof (paragraphs 74-78, 80-85). Plaintiffs address the sufficiency and purpose of each category in turn.

The Complaint's allegations concerning the children and an infant present in the Escape (*See* Motion Ex. A at ¶¶ 23, 24, 28, 30, 38, 39, 42 and 43), and the Police Officer Defendants' knowledge of same, is directly relevant ***factual*** information that informs Plaintiffs' claims against Defendants, including, among other things, supporting: (i) Plaintiffs' claims for negligence (Counts III, V and VI) and Reckless Disregard of Safety (Count IV), as these paragraphs evidence Defendants' improper decision to pursue a vehicle that young children and an infant were travelling within without being properly secured; (ii) Plaintiff's claims for Negligent Infliction of Emotional Distress (Count IX) and Outrageous Conduct Causing Severe Emotional Distress (Count X) as these allegations speak to the outrageousness and negligence of Defendants' conduct; (ii) Plaintiffs' *Monell* Claim pursuant to section 1983 (Count II), as these facts speak directly to the inadequate training and supervision of the Defendant Police Officers; and (iii) Plaintiffs' 14th Amendment Claim, insofar as the intent to harm someone inside the pursued vehicle is necessary to maintain such claim (which Plaintiffs' contend is not, as discussed *supra* in section B). In addition, these allegations simply set forth the factual events of what transpired the night of the

incident that forms the basis of all of Plaintiffs' claims. Defendants have therefore failed to establish how these allegations are redundant, immaterial, impertinent, or scandalous matter, as required by Rule 12(f). Moreover, Defendants have further failed to set forth why these allegations cause prejudice to Defendants. Thus, while Defendants may wish the facts were different, as the decision to ignore the safety of children and an infant and unnecessarily engage in a dangerous high-speed pursuit over mere traffic violations is inexplicable, Defendants have failed to carry their burden to strike Paragraphs 23, 24, 28, 30, 38, 39, 42 and 43 of the Complaint.

Similarly, Defendants have failed to carry their burden under Rule 12(f) to support striking of information concerning vehicle pursuit law in Pennsylvania, as contained in paragraphs 65-72 of Plaintiff's Complaint. These factual averments are relevant to Plaintiffs' claims, as the Municipal Defendants were statutorily obligated to adopt and implement vehicle pursuit policies that contained specific procedural elements. *See* 75 Pa. C.S.A. §§ 6341-6345. Similarly, these paragraphs, which explain the results of statutorily mandated pursuit reporting, is intended to provide context for Defendants' conduct. *See e.g., Harvard v. Inch*, 411 F. Supp. 3d 1220, 1233 (N.D. Fla. 2019) (denying motion to strike pursuant to 12(f) in prisoner civil rights case where cited authorities showed that various state correctional systems, whose conduct was not at issue, recognized a harm and implemented reform). For example, Defendants' pursuit was initiated over suspected traffic violations, which was the most common reason for officers to initiate a pursuit. *Id.* at ¶¶ 47, 68. However, while most pursuits that were initiated over a traffic stop did not end with suspect apprehension, here the Police Officer Defendants' pursuit continued, despite extreme danger, until a tragic but foreseeable end. *Id.* at ¶¶ 25, 68. Yet, again, not only have Defendants failed to show how these allegations are redundant, immaterial, impertinent, or scandalous, but Defendants have further failed to allege any prejudice stemming from Plaintiff's contentions.

Lastly, Paragraphs 74-78 and 80-85 of the Complaint describe the parameters of acceptable vehicle pursuit policies and guidelines, and the Police Officer Defendants' violation thereof.[7] The Philadelphia Police Department directives support Plaintiffs' allegations that the Police Officer Defendants' violated vehicle pursuit policies of their respective police departments. Plaintiffs consider this to be especially helpful because the Municipal Defendants' vehicle pursuit policies, if any, do not seem to be publicly available. Viewed in this context, there is a logical connection to the allegations in the Complaint and the subject matter of the controversy. Equally important, Defendants have failed to establish that they have or will sustain any prejudice from these averments. Accordingly, Defendants' Motion to Strike should be denied.

L. Plaintiffs' Complaint Contains Short and Plain Statements As Required by Rule 8(a)(2), Which Does Not Provide A Separate Mechanism for Dismissal

Fed. R. Civ. P. 8 does not provide a separate mechanism for dismissal of a complaint, and such motions are properly evaluated under Rule 12(b)(6). *Incubadora Mexicana, SA de CV v. Zoetis, Inc.*, 310 F.R.D. 166, 172 (E.D. Pa. 2015) (evaluating Rule 8(a) motion to dismiss under Rule 12(b)(6) standard). Rule 8(a)(2) requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). "[V]erbosity or length is not by itself a basis for dismissing a complaint" under Rule 8. *Bhatt v. Hoffman*, 716 F. App'x 124, 128 (3d Cir. 2017) (quotation omitted). In fact, in the context of a multi-party, multi-claim pleading "the entire pleading may prove to be long and complicated by virtue of the number of parties and claims." *Id.* (same). Rule 8 does not mandate the relevance of every piece of information included in the pleading, nor ensure that the reader understands all of the information presented in the pleading. *Zaloga v. Provident Life & Acc. Ins. Co. of Am.*, 671 F. Supp. 2d. 623,

[7] The Philadelphia Police Department pursuit directives are publicly available online. To be clear, Plaintiffs did not obtain this information through another pending, unrelated lawsuit (*Clark v. Merrell*, 19-1579) as Defendants suggest.

634 (M.D. Pa. 2009) (explaining that seemingly irrelevant information can be included to show background information connected to the claim).

The cases cited by Defendants as violative of Rule 8 are clearly inapposite to the Complaint brought by Plaintiffs in this action. *See Binsack v. Lackawanna Cty. Prison*, 438 App'x 158, 160 (3d Cir. 2001) (finding the complaint defied any attempt for defendants to meaningfully answer because the complaint consisted of over 200 pages and included details of unrelated allegations); *Scibelli v. Lebanon Cnty.*, 219 F. App'x 221, 222 (3d Cir. 2007) (finding the complaint failed to identify any constitutional or statutory basis for relief); *In re: Westinghouse Sec. Litig*., 90 F.3d 696, 702 (3d Cir. 1996) (finding the complaint of more than 600 paragraphs over 240 pages to be unnecessarily complicated and verbose).

Here, the Complaint contains 148 paragraphs, 30 pages, and is subdivided into clearly identified sections that, accepted as true, state a plausible claim for relief. Given the complexity of this matter, as well as the number of parties and counts, the Complaint is concise. Background information concerning the facts and law in Pennsylvania governing vehicle pursuits is included to provide notice to the Defendants and clarity to the Court. The Complaint complies with Rule 8 and Defendants' motion should be denied.

IV. CONCLUSION

For the reasons set forth herein, this Honorable Court should deny the Motion to Dismiss of Defendants Borough of Darby, Officer Lynch, and Officer Lyons.

Respectfully submitted,

Dated: June 10, 2022

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CERTIFICATE OF SERVICE

I, Adam J. Gomez, counsel for Plaintiffs, state that a true and correct copy of the within Response in Opposition to Motion of Defendants for Relief pursuant to Federal Rules of Civil Procedure 12(b)(6), 12(e), 12(f) and Rule 8 with supporting Brief was served upon all parties via ECF this 10th day of June, 2022.

/s/ Adam J. Gomez
ADAM J. GOMEZ