UNITED STATED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| NAISHIA E.DAVIS<br>PERSONAL REPRESENTATIVE FOR<br>THE ESTATE OF JAMES BRODUS<br>MILLER, SR.<br>2510 Pomeroy Street, S.E. # 403<br>Washington, D.C. 20002 | : | |
| NAISHIA E. DAVIS, AS NEXT FRIEND<br>FOR JAMES BRODUS MILLER, JR.<br>2510 Pomeroy Street, S.E. # 403<br>Washington, D.C. 20002 | : | |
| Plaintiffs | : | |
| v. | : | 1:10-cv-1756 RBW |
| DISTRICT OF COLUMBIA<br>Serve: Tabatha Braxton<br>John A. Wilson Bldg.<br>1350 Pennsylvania Ave. N.W. # 419<br>Washington, D.C. 20001 | : | |
| And | : | |
| Serve: Office of the Attorney General<br>Serve: Darlene Fields<br>441 4th St. N.W. 6th Fl. South<br>Washington, D.C. 20001 | : | |
| Defendants | : | |



**FIRST AMENDED COMPLAINT**
**FOR NEGLIGENCE, NEGLIGENT HIRING, ASSAULT AND BATTERY, AND VIOLATION OF CIVIL AND CONSTITUTIONAL RIGHTS**

Comes now Naishia E. Davis, Personal Representative for the Estate of James Brodus Miller, Sr, (Davis), and Naishia E. Davis, as next friend for James Brodus Miller, Jr. (Child), by and through undersigned counsel, and sues the District of Columbia Government, (District), stating:

## JURISDICTION

1. This court has jurisdiction because it involves a constitutional issue.

## PARTIES

2. Davis is the duly appointed Personal Representative for the Estate of James Brodus Miller, Sr. She was appointed on March 23, 2010. She was a resident of the District of Columbia at all times relevant to this cause of action. She, and James Brodus Miller, Sr., (Decedent), are the biological parents of: Child, who was born on February 14, 2006.

3. Davis was granted sole and physical custody, of Child, on May 25, 2010, by an order issued by Judge Clark, in the Family Division of the District of Columbia Superior Court.

4. The District is a sovereign government operating as the District of Columbia Government. It was operating in that capacity at all times relevant to this cause of action.

## FACTS

5. On October 21, 2009, two police officers with District's Metropolitan Police Department, (Officers), were dispatched to: 905 21st Street, Northeast, Apartment 10, Washington, D.C. 20011, by one of District's Dispatcher, who told the Officers that there was an "unwanted guest" at that location. When the Dispatcher dispatched the Officers there, she was working within the scope of their employment as District's agent, servant, and/or employee. When she dispatched the Officers, she willfully, wantonly, intentionally, and negligently gave them incorrect material information about what the reporting person told her. The radio run, from the reporting person, does not indicate that the person in the apartment was an "unwanted guest." That term was fashioned by the Dispatcher. This is verified by the radio run. It is as follows:

**Police** D.C. Emergency 911, Dispatcher 7988 police, fire or ambulance?
**Dana** Ah either one whichever that'll come the fastest

**Police** Hello

**Dana** 905 21st Apartment 10.

**Police** What's happening there?
**Dana** Northeast.

**Police** What's happening there? Hello

**Dana** Yes

**Police** What's happening there?

**Dana** Ah I have someone in the bathroom that will not come out.

**Police** Ok, are they any kin to you?

**Dana** Ah he lives here.

**Police** Ok

**Dana** He's running water and he's been in the bathroom and won't come out. I told him to come out and he said he's already called someone. So, I need to go in the bathroom and he won't come out. I don't know what suicidal whatever, I don't know paranoia. I don't know he needs to come out the bathroom. I have small children here.

**Police** Ok, Can I have your name?

**Dana** Dana

**Police** And your phone number

**Dana**…….

**Police** Ok is he any kin to you?

**Dana** Ah boyfriend and he lives in the house.

**Police** Has he put his hands on you?

**Dana** No, no domestic violence.

**Police** You OK though?

**Dana** Yes, I'm fine.

**Police** Ok, do you feel like you maybe in danger.

**Dana** No, ah maybe I don't know I have his small child here and my two teenagers in the back sleeping.

**Police** Ok, the next available unit will respond to 905 21st St. N.E. # 10.

**Dana** Yes sir.

**Police** I have your number as…….

**Dana** Yes, that's the number I'm calling from its his cell phone.

**Police** Is the front door to the building is it locked?

**Dana** Ah yes, I can come down and let whoever needs to open door and they can come in

**Police** Ok the next available unit will respond.

**Dana** Thank you so much.

**Police** You're welcome.

The Dispatcher willfully, wantonly, intentionally, and negligently failed to give the Officers the following correct material information: 1), that the reporting person said, her boyfriend was in the bathroom running water and he would not come out of it, 2), that the reporting person said, that the person, in the bathroom, lives in their apartment, 3), that the reporting person said, there was no domestic violence, 4), and the reporting person said, she did not know if this involved suicide or paranoia. If this material information had been given to the Officers, they would have had a different mind set when they arrived on the scene. Instead of a mind set designed to assist a person that might be suicidal and suffering from a mental condition, the Officers mind set was focused on the forceful removal of an unwanted trespasser from apartment 10, at: 905 21st Street, N.E. Washington, D.C., because the District's Dispatcher gave them misleading and incorrect information. If District's Dispatcher had given the Officers the correct information, they would have called for the assistance of a trained negotiator with the skill and training to negotiate with a barricaded individual suffering from a mental condition. A skilled negotiator is called, in this situation, in order to try and eliminate, and/or minimize, the risk of any resultant grievous bodily harm and/or death to anyone, on the scene.

6. The Dispatcher's negligence was done while she was working within the scope of her employment as the District's agent, servant, and/or employee. Her negligence began a chain of negligent acts that ultimately resulted in the Decedent's death.

7. According to the Officers' report, they arrived, on the scene, at exactly 0532 hours. In it they state, that they pushed open the door, to the bathroom, entered it, the Decedent had a gun pointed at them, and they discharged their service revolvers several times striking the Decedent. After the Officers left the apartment, the bathroom door, that they allegedly "pushed open", had to be put back on its hinges because it was tore off of them when the Officers allegedly said they "pushed open" the door to it. Their report does not state that they tried to do anything to get the barricaded individual to come out of the bathroom, nor did it indicate if they asked the barricaded individual if he had a gun, or anyone on the scene if the barricaded individual had a gun.

8. Davis alleges that the Officers arrived at: 905 21st Street, Northeast, Apartment # 10, Washington, D.C., at: 0532. According to the Officers, when they arrived, the Decedent was in the bathroom. The Officers lacked the required patience, compassion, and understanding toward the person, in the bathroom, because the Dispatcher incorrectly informed them that the person, in the bathroom, was an "unwanted guest", rather than the boyfriend of the reporting person, that he lived there, and she failed to inform them that the person, inside the bathroom, might be suffering from a mental condition. As a result, of the Dispatcher's negligence, the Officer's believed they were dealing with a trespasser, and they broke down the door, to the bathroom, entered it, and shot and killed the Decedent, without just cause and/or legal justification in violation of the Decedent's civil and constitutional rights, and the laws of the District of Columbia.

9. The Decedent was pronounced dead at: Howard University Hospital, by Dr. Siram, at exactly 0548. The time frame of sixteen (16) minutes, from the time the Officers arrived, to the time they shot and killed the Decedent, is consistent with Davis' allegations of what happened;

and is consistent with the Officers' mind set that they were dealing with an "unwanted guest", a trespasser, and that they had to use whatever force was necessary to extricate the trespasser from the apartment.

10. The Officers' report, of the incident, did not state that the radio run had warned them that the "unwanted guest" was possibly suffering from a mental condition, or if he had a gun, or a weapon of any kind, or if he was holding anyone, in the bathroom, against their will, or that he posed a threat to anyone. On the contrary, it only states that the Decedent was an "unwanted guest", in 905 21st St. N.E. Apartment, 10, Washington, D.C. When the Officers arrived, they escorted everyone out of the apartment, broke into the bathroom, done in absence of any exigencies that would have warranted breaking into the bathroom, because there was no threat of grievous bodily harm to anyone, when the Officers arrived on the scene, or when the radio run was received. Therefore, the Officers use of deadly force, to seize the Decedent, lacked probable cause, was unreasonable, unjustified, and so brutal that it shocks the conscience of those with hardened sensibilities.

11. When the shooting took place, District had a duty to the Decedent, and the residents of the District of Columbia, to train its police officer for situations involving barricades, hostages, and standoffs. This was a barricade situation. The Decedent locked himself, in the bathroom, in the apartment where he was living, and would not, according to the reporting person, come out of it. In this type of situation, District's Police Officers were supposed to have been trained, or should have been trained, that there are four options, that apply to this situation: **First**, amass officers, amass firepower, and assault. **Second**, selective use of sniper fire, **Third**, use chemical agents, and **Fourth**, contain the area and have a trained negotiator come in and try to talk the barricaded individual out. The first three options almost always result in bodily injury or death to

either the barricaded individual (s) or a police officer (s). The fourth option, given the facts of this case, was the best. As a rule, the District was obligated to train its police officers that in barricade situations, to: keep onlookers away, contain the barricaded individual, to the smallest location in the facility, restrict the barricaded individual's observation of police activities, and try to get the person to voluntarily come out. Officers were supposed to be trained that the average response time for a skilled negotiator, in domestic situations, arrives on the scene, in about an hour. They were supposed to be trained that it is therefore incumbent on the first responding officers to use their training and talents to insure that they do not inflame the situation and not take any actions that could result in serious bodily harm to themselves, others, and the barricaded individual. The District breached its duty, to the Decedent, and the residents, of the District of Columbia, when it failed to properly train its police officers, and as a direct and probable cause thereof, the Officers shot and killed the Decedent.

12. When the Officers broke into the bathroom, and shot and killed the Decedent, they did so in violation of District's Police Regulation, **6A DCMR § 207 Use of Firearms and Other Weapons.** That regulation reads, in pertinent part:

**"…..207.1 It is the police of the Metropolitan Police Department that each member of the department shall in all cases use only the minimum amount of force which is consistent with the accomplishment of his or her mission, and shall exhaust every other reasonable means of apprehension or defense before resorting to the use of firearms…."**

In this case, the Officers negligently failed to exhaust all reasonable efforts to apprehend the Decedent, without force, in the absence of any exigent evidence that the barricaded individual posed a threat to anyone, including the officers. The use of deadly force, in this case, would not have been used had the District properly trained the Officers, on its policies involving barricade situations, and in the absence of the Officers' negligent failure to apply their training to barricaded situations, and if District's Dispatcher had told the Officers: 1), That the person, in the bathroom, lived in the

apartment, 2), That the reporting person was his girlfriend, 3), That there was no domestic violence, and, 4), the person, in the bathroom, might be suicidal and suffering from paranoia.

13. When the shooting occurred, District had a duty to the Decedent, and the residents, of the District of Columbia, to: train its police officers in the proper use of their weapons, how to handle barricade situations, and the proper use of deadly force. The District breached this duty, when it failed to train its Officers to exhaust all reasonable means to apprehend a barricaded suspect before using deadly force, how to apprehend unarmed suspects, and when it failed to provide its police officers with training of the "shoot, don't shoot" type of scenario to help them decide which situations called for the use of deadly force and those that do not. Instead of instituting such a program, District merely required its Officers to go to the firing range to fire their weapons and qualify. District knew, or through the exercise of ordinary care, should have known, that enforcement of their policies, concerning apprehension of barricaded individuals, and their policies on the use of deadly force, violates the rights of potential barricaded individuals but they allowed this pattern to continue and District's Officers, while enforcing District's polices, resulted in the Decedent's death, while simultaneously breaching its duty to the Decedent, and the residents, of the District of Columbia, to train its police officers.

**COUNT I**
**NEGLIGENCE**

14. Davis incorporates, by reference, the allegations in paragraphs 1-13, into this count, as fully, as if pleading herein.

15. At the time of the shooting, District had a duty to, the Decedent, and the residents, of the District of Columbia, to train its police officers on how to handle barricade situations, when to use deadly force, to exhaust all reasonable means to apprehend a barricaded individual (s) before using deadly force to apprehend a barricaded individual, and to provide its officers with the

training of the "shoot, don't shoot" type of scenario to help them decide which situations called for the use of deadly force and those that do not. District had a duty to train its officers that their options, in barricade situations, are as follows: **First**, amass officers, amass firepower, and assault. **Second**, selective use of sniper fire, **Third**, use chemical agents, and **Fourth**, contain the area and have a trained negotiator come in and try to talk the barricaded individual out. The District was specifically obligated to train its police officers that in barricade situations, to: keep onlookers away, contain the barricaded individual to the smallest location in the facility, restrict the barricaded individual's observation of police activities, and try to get the person to voluntarily come out. Officers were supposed to be trained that the average response time for a skilled negotiator, in domestic situations, arrives on the scene in about an hour; and that it is therefore incumbent on the first responding officers, to use their training and talents to insure that they do not inflame the situation and not take any actions that could result in serious bodily harm to themselves, others, and the barricaded individual. In this case, the Officers were not trained, or they negligently failed to apply their training, and death of the barricaded individual was the proximate result thereof. The District breached its duty, to the Decedent, and the residents of the District of Columbia, when it failed to properly train its police officers and as direct and probable cause thereof, the Officers shot and killed the Decedent.

16. As a direct result and proximate cause of District's breach of its duty, to the Decedent, and the residents, of the District of Columbia, to properly train its police officers, and its Officers' negligent failure to properly apply any training they may have received, for barricade situations, the Decedent sustained bodily injuries, experienced pre-impact fright, fear, and anticipation of impending injury and death, psychic trauma, and mental anguish, prior to his death.

17. As a further direct result and proximate cause of the District's breach of its duty, the Officers' shooting and killing, of the Decedent, done while acting within the scope of their employment as the District's agents, servants, and/or employees, caused Child, the Decedent's sole heir, to suffer emotional distress, he has been deprived of his father's financial support and other benefits that he would have reasonably expected to have received from his father including: but not limited to: care, love, attention, society, companionship, guidance, comfort, services, and the Decedent's Estate will have to pay for the Decedent's medical, funeral, and burial expenses, as well as any other related expenses that were incurred as a result of the Decedent's shooting death.

**Wherefore the premises considered**, Davis, and Child demand $10,000,000.00 compensatory damages against the District of Columbia.

**COUNT II**
**NEGLIGENT TRAINING**

18. Davis incorporates, by reference, the allegations in paragraphs 1-17, into this count, as fully, as if pleading herein.

19. At the time of the shooting, District had a duty to, the Decedent, and the residents, of the District of Columbia, to train its police officers on how to handle barricade situations, when to use deadly force, to exhaust all reasonable means to apprehend a barricaded individual (s), before using deadly force to apprehend a barricaded individual, and to provide its officers with the training of the "shoot, don't shoot" type of scenario to help them decide which situations called for the use of deadly force and those that do not. District had a duty to train its officers that their options, in barricade situations, are as follows: **First**, amass officers, amass firepower, and assault. **Second**, selective use of sniper fire, **Third**, use chemical agents, and **Fourth**, contain the area and have a trained negotiator come in and try to talk the barricaded individual out. The District was specifically obligated to train its police officers that in barricade situations, to: keep

onlookers away, contain the barricaded individual to the smallest location in the facility, restrict the barricaded individual's observation of police activities, and try to get the person to voluntarily come out. Officers were supposed to be trained that the average response time for a skilled negotiator, in domestic situations, arrives on the scene, in about an hour; and that it is therefore incumbent on the first responding officers, to use their training and talents to insure that they do not inflame the situation and not take any actions that could result in serious bodily harm to themselves, others, and the barricaded individual. In this case, the Officers were not trained, or they negligently failed to apply their training, and death of a barricaded individual was the proximate result thereof.

20. As a direct result and proximate cause of District's breach of its duty, to properly train its police officers, and the Officers' negligent application of any training they may have received, for barricade situations, and the used of deadly force, the Decedent sustained bodily injuries, experienced pre-impact fright, fear, and anticipation of impending injury and death, psychic trauma, and mental anguish, prior to his death.

21. As a further direct result and proximate cause of the District's breach of its duty, the Officers shooting and killing, of the Decedent, was done while working within the scope of their employment as the District's agents, servants, and/or employees, caused Child, the Decedent's sole heir, to be deprived of his father's financial support and other benefits that he would have reasonably expected to have received from his father including: but not limited to: care, love, attention, society, companionship, guidance, comfort, services, and the Decedent's Estate will have to pay for the Decedent's medical, funeral, and burial expenses, as well as any other related expenses that were incurred as a result of the Decedent's shooting death.

**Wherefore the premises considered**, Davis, and Child demand $10,000,000.00 compensatory damages against the District of Columbia.

**COUNT III**
**ASSAULT AND BATTERY**

22. Davis incorporates, by reference, the allegations in paragraphs, 1 through 21, into this Count, as fully as plead herein.

23. Officers shot and killed the Decedent while working within the scope of their employment as, District's agents, servants, and/or employees. When the Officers shot and killed the Decedent, it was an unjustified assault and battery that lacked probable cause and legal justification.

24. As a direct and proximate cause of the actions of the District's agent's negligence, the Decedent was shot and killed on October 21, 2009, causing him to sustained bodily injuries, pre-impact fright, fear, and anticipation of impending injury and death, psychic trauma, mental anguish, prior to his death, and loss of earnings.

**Wherefore the premises considered**, Davis, and Child demands judgment in the amount of $10,000,000.00 compensatory damages against the District of Columbia.

**COUNT IV**
**VIOLATION OF CONSTITUTIONAL AND CIVIL RIGHTS**

25. Davis incorporates, by reference, the allegations, in paragraphs 1 through 24, into this count, as fully as if pleaded herein

26. Title 42 U.S.C. § 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

> For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

27. The Fourth Amendment of the United States Constitution provides that every citizen shall be free of unreasonably and excessive force in order to: seize, detain, subdue, or apprehend a person. The use of deadly force is measured in terms of the officer's safety and the belief that the suspect poses a threat of serious harm to the police officers and others. There is no evidence that the Decedent posed a threat to anyone when he was shot and killed. The use of deadly force to seize him lacked probable cause, was unreasonable, totally without justification, and so brutal that it shocks the conscience of those with hardened sensibilities; and it was in violation of the Decedent's rights under the Fourth Amendment to be free from unreasonable searches and seizures. The Fourth Amendment to the United States Constitution reads:

> "….The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

28. As a direct and proximate cause of Officers shooting and killing the Decedent, the Decedent was deprived of the rights, privileges, and immunities, guaranteed to him by the Constitution of the United States to be secure against unreasonable seizures under the Fourth Amendment to the United States Constitution.

29. The Decedent's constitutional rights would not have been violated but for District's agents, improper and illegal use of deadly force, while enforcing the District's long standing policy instituted and sanctioned, by the District, on the use of deadly force, and District's failure to properly train its police officers on the proper procedures involving barricade individuals. It's the District's long standing policies on the use of deadly force and on barricade individuals that caused the decedent's death.

30. As a further and direct result of District's Officers, shooting and killing of the Decedent, while enforcing the enforcement District's laws, rule(s), regulation(s) statute(s), ordinance(s), practice(s) and/or customs, governing District's police officers, the Decedent's Constitutional rights under the Fourth Amendment were violated. It is those policies that caused the Decedent's death, coupled with the other allegations, in this complaint, of the Districts' negligence, and the negligence of its agents, servants, and employees, who were working within the scope of their employment while performing the negligent acts alleged in this complaint.

**Wherefore, the premises considered,** Davis and Child demand $10 million dollars in compensatory damages against the District of Columbia.

**Jury Demand**

31. Davis and Child demand a trial by jury.

Respectfully submitted,

***Wendell C. Robinson***
Wendell C. Robinson, 377091
4308 Georgia Ave. N.W.
Washington, D.C. 20011
202-223-4470

**Certificate of Service**

I certify that a copy of this amended complaint was mailed, postage prepaid, this 15th day of November 2010, to Patricia Donker, Asst. Atty. General, 441 4th St. N.W. 6th Floor, South, Washington, D.C. 20001.

***Wendell c. Robinson***

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **NAISHIA E. DAVIS, *et al.*,**<br>Plaintiffs,<br>**v.**<br>**DISTRICT OF COLUMBIA,**<br>Defendant. | Civil Action No.10-cv-01756 (RBW)<br>(Oral Argument requested) |

**DEFENDANT'S RENEWED MOTION TO DISMISS THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

This Court should dismiss the claims of Plaintiff Naishia E. Davis, Personal Representative for the Estate of James Brodus Miller, Sr., and Naishia E. Davis, as Next Friend for James Brodus Miller, Jr.'s against the District of Columbia. Plaintiffs bring this action on behalf of decedent James Brodus Miller's estate and next of kin. Plaintiffs seek damages arising from the death of Mr. Miller, who was shot by Metropolitan Police Department officers after he barricaded himself in a room with a gun. As explained in detail in the attached memorandum, this Court should dismiss plaintiffs' common law claims because plaintiffs failed to 1) comply with the mandatory notice requirements of D.C. Code § 12-309 and 2) plead facts to support conclusory legal assertions of negligence, negligent training, and assault and battery. This Court should also dismiss plaintiffs' constitutional claims for failure to allege a policy or practice under *Monell v. Department of Social Services*, 436 U.S. 658, 690-695 (1978). A proposed order is also attached hereto.

Dated: November 30, 2010.

Respectfully submitted,

PETER J. NICKLES
Attorney General for the District of Columbia

GEORGE C. VALENTINE
Deputy Attorney General, Civil Litigation Division

*/s/ William B. Jaffe*
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Attorneys for the Defendant

[1] Patricia B. Donkor is not a member of the D.C. Bar. However, pursuant to Super. Ct. Civ. P. R. 101 (a)(5), "A State Attorney General or that official's designee, who is a member in good standing of the bar of the highest court in any State or of any United States Court, may appear and represent the State or any agency thereof. "

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**NAISHIA E. DAVIS, *et al,*.**
Plaintiffs,

**v.**

**DISTRICT OF COLUMBIA,**

Defendant.

Civil Action No.10-cv-01756 (RBW)

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**DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS RENEWED MOTION TO DISMISS THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

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This Court should dismiss this action. Plaintiffs bring the following claims: Count I, negligence; Count II, negligent training; Count III, assault and battery; and Count IV, violation of constitutional and civil rights. For the reasons detailed below, none of these claims are actionable against the District.

## FACTUAL BACKGROUND

On October 21, 2009, members of the Metropolitan Police Department ("MPD") were called to 905 21st Street, Apt. #10, Northeast, Washington, D.C., to respond to a complaint of a unwanted guest in the bathroom of the apartment. Amended Complaint ("Amend. Compl.") at ¶ 5. When officers arrived, they escorted everyone out of the apartment. *Id*. at ¶ 10. The officers then pushed the bathroom door open and entered it. *Id*. at ¶ 7. Upon entering the bathroom, the officers encountered the individual in question, later learned to be James Brodus Miller, Sr.,

("the decedent") pointing a gun at them. *Id*. The officers responded by fatally shooting the decedent. *Id*.

Plaintiffs claim that the District of Columbia ("the District") is liable for damages for constitutional and civil rights violations, and common law claims of negligence and negligent training because MPD failed to properly train the officers to handle barricade situations. Amend. Compl. at ¶¶ 14-21, and 25-30. According to plaintiffs, had MPD properly trained the officers, the officers would have called in a negotiator or utilized another tactic instead of entering the bathroom. *Id*. Plaintiffs also claim the District is liable for assault and battery because its officers shot and killed decedent without legal justification. *Id*. at ¶ ¶ 22-24.

Plaintiffs sent two purported notice letters in their effort to claim compliance with D.C. Code § 12-309's notice requirements. Plaintiffs sent their first letter via their attorney of record at the time, Stephen J. Bou on December 7, 2009. *See attached,* Defendant's Exhibit A (Def.'s Exh. A). In that letter, plaintiffs state decedent was fatally shot inside of his apartment due to the negligent and careless acts of police officers, Marshall Boykins (badge number 4563) and George Gray (badge number S0435). *Id*.

Plaintiffs sent their second letter, via plaintiffs' present attorney of record, Wendell C. Robinson on February 22, 2010, (Def.'s Exh. B). In that letter, plaintiffs state they intend to file a claim against the District for decedent's death. *Id*. They then state that at the time of the shooting, decedent did not pose a threat of grievous harm or death, and that the officers lacked probable cause to use deadly force in violation of decedent's rights. *Id*. Neither letter mentions potential claims for negligent training, supervision, or assault and battery. See Exhs. A-B.

On July 26, 2010, plaintiffs filed the instant lawsuit in the Superior Court for the District of Columbia. The Complaint contained seven counts including: 1) survival action; 2) wrongful

death; 3) violation of constitutional and civil rights; 4) assault and battery; 5) negligent infliction of emotional distress; and 6) negligence. Plaintiffs properly served the District of Columbia on October 5, 2010. On October 18, 2010, the District removed the instant case to the United States District Court for the District of Columbia. On October 26, 2010, the District filed a Motion to Dismiss the Complaint. On November 16, 2010, without leave from this Court, plaintiffs filed their First Amended Complaint against the District of Columbia. The Amended Complaint brings four claims against the District, 1) negligence; 2) negligent training; 3) assault and battery; and 4) violation of constitutional and civil rights. Plaintiffs claim that the District is liable for damages for violating decedent's civil and constitutional rights, negligence and negligent training because MPD failed to properly train the officers to handle barricade situations. Amend. Compl. at ¶¶ 14-21, and 25-30. Finally, plaintiffs claim the District is liable for assault and battery because its officers shot and killed decedent allegedly without legal justification. *Id*. ¶¶ at 22-25. As shown below, the District renews its Motion to Dismiss or in the alternative, requests that this Court grant summary judgment in favor of the District.

**STANDARD OF REVIEW**

"[T]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating the oft-quoted language from *Conley*, 355 U.S. at 45-56, instructing courts not to dismiss for failure to state a claim unless it appears beyond doubt that "no set of facts in support of his claim would entitle him to relief"). A claim is facially plausible when the pleaded factual content "allows the court to draw the reasonable inference that the defendant is liable for the misconduct." *Iqbal*, 129 S. Ct. at 1949. Although "detailed factual allegations" are

not required to withstand a Rule 12(b)(6) motion, a plaintiff must offer "more than labels and conclusions" to provide "grounds" of "entitle [ment] to relief." *Twombly,* 550 U.S. at 555. A complaint alleging facts which are "'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly* 550 U.S. at 557) (brackets omitted). The facts asserted in the Amended Complaint do not support plaintiffs' conclusory legal assertions. Consequently, this action should be dismissed.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment:

> [S]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law.

The moving party in a motion for summary judgment bears the initial burden of identifying evidence that demonstrates that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Once a movant has made the required showing under the rule, the burden shifts to the opposing party to "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587, (1986). In other words, "once the movant has supported a summary judgment motion by evidence of particular events, the court may properly look to the nonmovant for rebuttal evidence either from persons familiar with the events, or expect the nonmovant to otherwise cast more than metaphysical doubt on the credibility of the testimony." *Doe v. Gates*, 981 F.2d 1316, 1323 (D.C. Cir. 1993).

A trial court should enter summary judgment against a nonmoving party who fails to make a showing sufficient to establish the existence of an element essential to his case, and on

which the party will bear the burden of proof at trial. *Celotex, supra*, 477 U.S. at 322. For the following reasons, plaintiffs' claims should be dismissed. In the alternative, summary judgment should be granted in favor of the District.

## ARGUMENT

### I. Plaintiffs have not pled a viable constitutional violation against the District.

Plaintiffs contend that the District violated the decedent's Fourth Amendment rights under the United States Constitution because the officers use of deadly force to seize the decedent was unreasonable and totally without justification. Amend. Compl. at ¶ 27. Plaintiffs have failed to link this purported violation to a policy or custom of the District. Hence, they are not entitled to proceed on this claim.

The District cannot be held liable under a theory of *respondeat superior* for the constitutional torts of its employees. *Monell v. Department of Social Services*, 436 U.S. 658, 690-695 (1978). A single incident involving police officers is not sufficient to establish fault on the part of the District. *Id.* Instead, plaintiffs must prove that the District, through its policymakers, maintained a policy or custom that resulted in the violation of [decedent's] constitutional rights. *Id.* In order to prevail on a *Monell* claim against the District, plaintiff must prove the constitutional tort arose from "action pursuant to official municipal policy." *Triplett v. District of Columbia*, 108 F.3d 1450, 1453 (D.C. 1997) (alleged practice of excessive force was not part of policy).

The District's Motion to Dismiss argued that the Complaint was void of any allegation that the failure to train these officers was the result of a District-wide policy or custom of not training its officers how to manage barricade situations. In fact, plaintiffs did not even allege

that the course of action taken here is systematically used throughout MPD. Plaintiffs appear to have tried to rectify this deficiency in their Amended Complaint. However, plaintiffs still fail to meet the *Monell* standard.

The Amended Complaint now states that "the Decedent's constitutional rights would not have been violated but for District's [sic] agents improper and illegal use of deadly force, while enforcing the District's long standing policy instituted and sanctioned, by the District, on the use of deadly force." Amend. Compl. at ¶ 29. Plaintiffs have merely added a conclusory statement with buzz words. Plaintiffs' claim is based on an assertion that that the officers involved in this situation did not employ the best course of action. Their conclusions about deficiencies in the District's training programs are premised on the facts of this case only. At best, this is a claim of *respondeat superior* against the District. Plaintiffs fail to provide any factual support that the MPD has a policy, and that the policy is used throughout the department. This claim still does not meet the *Monell* standard.

Additionally, plaintiffs must show a connection, or "an affirmative link between the policy and the particular constitutional violation alleged." *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985). In *Tuttle*, plaintiff (Tuttle's widow) sued the city under §1983, claiming the city's police training was "grossly inadequate" and resulted in the use of excessive force which caused her husband's death. *Id.* at 812-813. The court reversed the lower court's finding that a single incident was enough to allow a jury to infer a policy of negligent training. *Id.* at 822-823. It reasoned that "where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the 'policy' and the constitutional deprivation." *Id.* at 824. Here, despite generally stating that the District

has a long standing policy, plaintiffs have only alleged that this deficient policy was utilized in the instant case without providing any support that what occurred here frequently happens throughout the District. This conclusory allegation is not sufficient under *Monell* and Count IV of the Complaint should be dismissed.

**II. Plaintiffs' common law claims against the District must be dismissed because plaintiffs failed to comply with D.C. Code § 12-309 and are now time barred from complying with § 12-309.**

This Court should dismiss plaintiffs' common law claims because plaintiffs failed to satisfy the mandatory notice requirement of D.C. Code § 12-309 (2001). § 12-309 states in pertinent part:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Mayor of the District of Columbia of the approximate time, place, cause and circumstances of the injury or damage.

§ 12-309 (emphasis added).

Compliance with the notice requirement of § 12-309 is "a mandatory prerequisite to filing a lawsuit against the District." *McRae v. Olive*, 368 F. Supp. 2d 91, 95 (D.D.C. 2005); *see also District of Columbia v. Dunsmore*, 662 A.2d 1356, 1359 (D.C. 1995). The purpose of § 12-309 is "to provide the District an opportunity to investigate claims while the circumstances giving rise to them are fresh and, secondarily, to provide an opportunity for settlement." *Dellums v. Powell*, 566 F.2d 216, 230 (D.C. Cir. 1977). Additionally, a letter notifying the Mayor under § 12-309 must provide enough information that the District "in the exercise of due diligence, should have been able to locate the offending defect." *Hardy v. District of Columbia*, 616 A.2d 338, 340 (D.C. 1992). Where a fact or a claim is inextricable with what is contained in the notice, the collateral detail may not be required to

satisfy the notice requirements of § 12-309. *See Romer v. District of Columbia*, 449 A.2d 1097, 1101 (D.C. 1982) (finding a notice letter sufficient where the letter stated that a wife was filing spousal claims against the City for the loss of her husband but did not explicitly state that plaintiff would file a loss of consortium claim because a loss of consortium claim is collateral to a spouse's claim for injuries.)

Plaintiffs sent two purported notice letters in this case. Plaintiffs sent their first letter via their attorney of record at the time, Stephen J. Bou on December 7, 2009. *See* Def.'s Exh. A Plaintiffs sent their second letter, via plaintiffs' present attorney of record, Wendell C. Robinson on February 22, 2010. *See* Def.'s Exh. B. Though plaintiffs timely sent letters to the Mayor, the letters were insufficient as a matter of law because they failed to give notice of the sustained injuries and potential claims as required by § 12-309.

First, although both plaintiffs' negligence and negligent training claims arise out of a claim of inadequate training, plaintiffs' letters fail to put the District on notice that plaintiffs are claiming that MPD's training procedures are flawed. Even though throughout plaintiffs' entire Amended Complaint, plaintiffs allege that the District improperly trained its officers and this improper training was the proximate cause of decedent's death, neither letter mentions officer training or MPD's policies. The letters mislead the District into thinking that plaintiffs' grievance is based on the use of excessive deadly force. Plaintiffs' second letter states three times that the officers use of "deadly force" was problematic. The letters imply that the potential claims will be based on actions and not policies. The letters fail to provide the District an opportunity to locate the alleged defect in its system, which according to the Amended Complaint, is its inadequate police training. Plaintiffs' omission of an allegation that turned out

to be the gravamen of the Complaint denied the District an opportunity to investigate plaintiffs' claims.

Moreover, plaintiffs' letters fail to put the District on notice of an impending assault and battery claim. Neither letter mentions assault and battery. Plaintiffs only state that decedent's constitutional and civil rights were violated by the officers' actions. Unlike in *Romer*, with a loss of consortium claim, a claim for assault and battery is not collateral to a constitutional action or civil rights claim. Relying on plaintiffs' facts, the District would not have had a reason to investigate a potential assault and battery claim.

Although plaintiffs supplied the Mayor with two purported §12-309 letters in this action, combined, the letters fail to satisfy the requirements of the statute. The letters fail to put the District on notice of plaintiffs' potential common law claims and fail to provide the District an opportunity to take appropriate investigatory action. Based on the foregoing, this Court should dismiss plaintiffs' common law claims, Counts I and II.

## III. Plaintiffs' common law claims against the District must be dismissed because plaintiffs have not pled sufficient facts to support their claims.

Even if this Court finds that plaintiffs' § 12-309 notice was adequate, the Amended Complaint still fails to satisfy the *Iqbal* pleading standard. For the following reasons, this Court should dismiss each of plaintiffs' common law claims.

**A. Plaintiffs' claim for assault and battery must be dismissed because the allegations of the complaint show that the officers had a reasonable belief that they were in danger of serious bodily harm.**

Plaintiffs allege that the District is liable because, the officers, acting within the scope of their employment shot and killed the decedent which was allegedly an assault and battery that lacked legal justification. Amend. Compl. at ¶ 29. This claim appears to be based solely on the officers shooting the decedent. Because plaintiffs have not made out a claim for assault and battery, this claim must be dismissed.

A police officer has a qualified privilege to use reasonable force to effectuate an arrest, and this privilege is a defense to a claim of assault. *Holder*, 700 A.2d at 741 (citing *Etheridge*, 635 A.2d at 916). "Use of 'deadly force,' however, is lawful only if the user actually and reasonably believes, at the time such force is used, that he or she (or a third person) is in imminent peril of death or serious bodily harm." *Etheridge*, 635 A.2d at 916.

Plaintiffs' own Complaint states that when the officers confronted decedent in the bathroom of the residence, decedent had a gun pointed at the officers. Amend. Compl. at ¶ 5. As stated above, deadly force is lawful when the user reasonably believes, at the time, that he or she is in imminent peril of death or seriously bodily harm. Plaintiffs have not alleged any reason why, the officers, facing an armed man, who was pointing his weapon at them, were unjustified in believing that they were in imminent peril of death or serious bodily harm. Therefore, plaintiff's assault and battery claim (Count III) should be dismissed.

B. **Plaintiffs' claims for negligence and negligent training must be dismissed because the allegations in the Complaint lack a factual basis.**

*i. Plaintiffs fail to make out a claim that the District improperly trained its officers.*

The Amended Complaint still fails to make out a claim for negligence and

negligent training against the District.[2] Plaintiffs plead the following:

> at the time of the shooting, District [sic] had a duty to, the Decedent, and the residents, of the District of Columbia, to train its police officers how to handle barricade situations, when to use deadly force, to exhaust reasonable means to apprehend a barricaded individual(s) before using deadly force to apprehend a barricaded individual, and to provide its officers with the training of the "shoot, don't shoot" type of scenario to help them decide which situations called for the use of deadly force and those that do not. District [sic] had a duty to train its officers that their options, in barricade situations, are as follows. . . . In this case, the Officers were not trained, or they negligently failed to apply their training, and death of the barricaded individual was the proximate result thereof. The District breached its duty, to the Decedent, and the residents of the District of Columbia, when it failed to properly train its police officers and as direct and probable cause thereof, the Officers shot and killed the Decedent.

Amend. Compl. at ¶¶ 15 and 19.

Plaintiffs' allegations lack a factual basis. Plaintiffs provide no facts showing that the District breached its duty to provide such training. Plaintiffs own Amended Complaint states that the District had a duty to train its officers that they had four options in barricade situations. Plaintiffs state that one of those options is to amass firepower. Here, where plaintiffs allege that the District used one of plaintiffs own enumerated options, it is unclear how plaintiff can then claim that the District failed to train its officers that these options were available.

Plaintiffs also may not argue that the District provided the adequate training but these individual officers deviated from the proscribed training because plaintiff has failed to allege that the District had knowledge that these officers were deviating from training principles and engaging in dangerous behavior. *See District of Columbia v. Tulin*, 994 A.2d 788, 794 (D.C. 2010) (stating that in order to invoke a claim for common law negligent supervision a party must show that an employer knew or should have known its employee behaved in a dangerous or

[2] Plaintiffs' pleadings for their negligence and negligent training claims are identical. Therefore, the District will treat the two counts as one in the same.

otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee). Thus, plaintiffs failed to make out a claim that the District improperly trained its officers.

b. *Plaintiffs fail to establish that the District's liability based on the 911 dispatcher's actions.*

Plaintiffs' claim that the 911 dispatcher's actions were negligent and contributed to decedent's death is barred by the public duty doctrine.[3] Amend. Compl. ¶¶ 5-8. This claim fails because plaintiffs have not established that the District had a special relationship with the plaintiffs/decedent which established a duty of care. Under the public duty doctrine, the District has no duty to provide public services to any particular citizen. *Allison Gas Turbine Div. of General Motors Corp. v. District of Columbia*, 642 A.2d 841, 843 (D.C. 1994). Rather, "the duty to provide public services is owed to the public at large and, absent a special relationship between the police and an individual, no specific legal duty exists." *Id*. at 843; *see also Joy v. Bell Helicopter Textron*, 999 F.2d 549, 561 (D.C. Cir. 1993). "A 'special relationship' may give rise to a 'special duty' if there is: (1) a direct contact or continuing contact between the victim and the governmental agency or official; and (2) a justifiable reliance on the part of the victim.'" *Id*.

"A request for aid is not in itself sufficient to create a special duty." *Warren*, 444 A.2d 1, 5 (D.C. 1981) (holding that no special relationship existed between the police and crime victims that called for police assistance where the officers either failed to take any action or failed to take proper action when they arrived on the crime scene). Dereliction in the performance of police

[3] Plaintiffs make this allegation in the Facts Section of the Amended Complaint. *See* Amend. Compl. ¶¶ 5-8. Neither of plaintiffs' negligence counts specifically allege negligence, by the District, on this ground.

duties may be redressed only in the context of a public prosecution and not in a private suit for money damages. *Id*. at 6. By becoming a police officer, an officer does not insulate himself from any of the basic duties which everyone owes to other people, but neither does he assume any greater obligation to others individually. *Id*. The only additional duty undertaken by accepting employment as a police officer is the duty owed to the public at large.

In the Factual Section of the Amended Complaint, plaintiffs state the following:

> When she dispatched the Officers, she willfully wantonly, intentionally, and negligently gave them incorrect material information about what the reporting person told her. If this material information had been given to the Officers, they would have had a different mindset when they arrived on the scene. Instead of a mindset designed to assist a person that might be suicidal and suffering from a mental condition, the Officers mind set was focused on the forceful removal of an unwanted trespasser . . . because the District's Dispatcher gave them misleading and incorrect information.

Amend. Compl. ¶ 5. Even if the 911 dispatcher incorrectly used the term "unwanted guest," which the District does not concede was wrongful, that mistake does not make the District civilly liable to plaintiffs. The dispatcher's job as an employee in public service is to take emergency calls from the public and dispatch police officers where appropriate. Therefore, when the dispatcher received the call about the decedent from the female caller, in this case, she was performing her public duty. When the dispatcher called for patrol assistance and relayed the call information to the officers, she was still engaged in a public duty. No special duty was established when the dispatcher happened to take the female caller's call or when she dispatched officers to the scene because the dispatcher had treated the caller no different than she would

have treated any other member of the public. For the foregoing reasons, plaintiffs' negligence and negligent training claims should be dismissed.[4]

## CONCLUSION

For the foregoing reasons, plaintiffs' claims against the District of Columbia should be dismissed in their entirety.

Dated: November 30, 2010.

Respectfully submitted,

PETER J. NICKLES
Attorney General for the District of Columbia

GEORGE C. VALENTINE
Deputy Attorney General, Civil Litigation Division

*/s/ William B. Jaffe*
WILLIAM B. JAFFE [DC Bar No. 502399]
Chief, General Litigation Section III

*/s/ Sarah L. Knapp*
SARAH L. KNAPP [D.C. Bar No. 470008]
Assistant Attorney General
441 Fourth Street, N.W., 6th Floor South
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(202) 724- 6528 (phone)
(202) 741-5906 (fax)
Email: sarah.knapp@dc.gov

*/s/ Patricia B. Donkor*
PATRICIA B. DONKOR*[5] [74834, Virginia State Bar]
Assistant Attorney General
441 Fourth Street, N.W., 6th Floor

[4] Because plaintiff does not set her allegations of wrongdoing by the 911 dispatcher separately as a count, the basis of liability is not entirely clear. Plaintiffs state that the dispatcher characterization of the call as one for removal of "an unwanted guest" as "willfully, wantonly, intentionally, and negligently." Compl. ¶ 5. Plaintiff cannot claim the same behavior to be both negligent and intentional. Intent and negligence are regarded as mutually exclusive grounds for liability. *District of Columbia v. Chinn*, 839 A.2d 701, 706 (D.C. 2003). To the extent that plaintiffs are arguing that the dispatcher's actions were intentional, any claims on this basis should be dismissed because plaintiff has provided any factually support that such actions were reckless wanton. For the foregoing reasons, if plaintiffs claim is one of negligence, this claim too must be dismissed.

[5] Appearance entered under D.C. App. 49(c)(4).

Washington, D.C. 20001
(202) 727-9624(phone)
(202) 741-0569 (fax)
Email: patricia.donkor@dc.gov

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

**NAISHIA E. DAVIS, *et al.***
Plaintiffs,

**v.**

**DISTRICT OF COLUMBIA**

Defendant.

Civil Action No.10-cv-01756 (RBW)

**ORDER**

Upon consideration of Defendants' Renewed Motion to Dismiss the Amended Complaint, or in the alternative Motion for Summary Judgment, filed on November 30, 2010, any response thereto and the entire record in this matter, it is hereby

ORDERED that plaintiffs' claims against the District of Columbia are dismissed with prejudice.

IT IS SO ORDERED.

Date:_____ _____

Judge Reggie B. Walton

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | |
|---|---|
| **NAISHIA E. DAVIS, *et al.*** Plaintiffs, **v.** **DISTRICT OF COLUMBIA** Defendant. | Civil Action No.10-cv-01756 (RBW) |

**DEFENDANT'S STATEMENT OF MATERIAL UNDISPUTED FACTS**

1. On October 21, 2009, members of the Metropolitan Police Department ("MPD") were called to 905 21st Street, Apt. #10, Northeast, Washington, D.C., to respond to a complaint of an unwanted guest in the bathroom of the apartment. Amended Complaint ("Amend. Compl.") at ¶ 5.
2. Upon arriving, the officers then pushed the bathroom door open and entered it. *Id*. at ¶ 7.
3. Upon entering the bathroom, the officers encountered the unwanted guest, later learned to be James Brodus Miller, Sr., ("the decedent") pointing a gun at them. *Id*. The officers responded by fatally shooting the decedent. *Id*.
4. Plaintiffs sent two purported notice letters in this case. Plaintiffs sent their first letter via their attorney of record at the time, Stephen J. Bou on December 7, 2009. *See attached,* Defendant's Exhibit A (Def.'s Exh. A).
5. Plaintiffs sent their second letter, via plaintiffs' present attorney of record, Wendell C. Robinson on February 22, 2010, (Def.'s Exh. B).

# EXHIBIT A

0901729-000

LAW OFFICES
**BOU & BOU**
1001 CONNECTICUT AVENUE N.W.
SUITE 204
WASHINGTON, D.C. 20036
TELEPHONE: (202) 223-1934
FACSIMILE: (202) 223-0086
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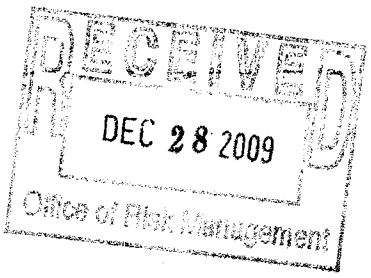
EDWARD C. BOU °
STEPHEN A. BOU °*
LAWRENCE K. BOU °*

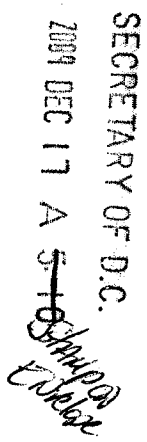
ALL COUNSEL LICENSED IN D.C.
° MEMBER OF THE MD BAR
* MEMBER OF THE VA BAR

EDWARD C. BOU, P.C.
VIRGINIA OFFICE
510 KING STREET
SUITE 416
ALEXANDRIA, VA 22314

REPLY TO D.C. OFFICE ONLY

December 7, 2009




**CERTIFIED MAIL**
**RETURN RECEIPT REQUESTED**

Mayor Adrian M. Fenty
Government of the District of Columbia
John W. Wilson Building
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: James B. Miller v. District of Columbia
Date of Incident: October 21, 2009

Dear Mayor Fenty:

Please be advised that this office represents the family of James B. Miller, deceased, who resided at 905 – 21st Street, NW, Apartment No.10, Washington, D.C. 20002.

On October 21, 2009 at approximately 5:20 a.m., at 905 – 21st Street, NE, Apartment No.10, Washington, DC 20002, James D. Miller was fatally shot inside his apartment while in the bathroom, due to the improper and/or negligent acts of police officers of the District of Columbia Metropolitan Police Department.

The purpose of this letter is to advise you, as provided by DC Code Section 12-309, that a claim is being made, on behalf of the Estate of James B. Miller for fatal personal injuries, against the District of Columbia, and/or the Metropolitan Police Department, due to the negligent and careless acts of employees/police officers by the name of Marshall Boykins (badge number 4563) and George Gray (badge number S0435), which resulted in the wrongful death of James B. Miller. I will assume all notice requirements under DC Code Section 12-309 have been met unless I am otherwise notified.

LAW OFFICES
**BOU & BOU**
1001 CONNECTICUT AVENUE N.W.
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STEPHEN A. BOU °*
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ALL COUNSEL LICENSED IN D.C.
° MEMBER OF THE MD BAR
* MEMBER OF THE VA BAR

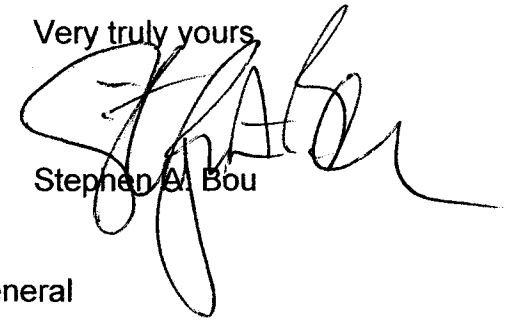
EDWARD C. BOU, P.C.
VIRGINIA OFFICE
510 KING STREET
SUITE 416
ALEXANDRIA, VA 22314

REPLY TO D.C. OFFICE ONLY



Please acknowledge receipt of this letter.

Very truly yours,



SAB/ig/az

Stephen A. Bou

Copies to: Mr. Peter J. Nickles
Office of the Attorney General
One Judiciary Square
441- 4th Street, N.W.
Suite 1060
Washington D.C. 20001

Mr. Robert Carter
Claims Bureau Manager
Claims Division, Office of Risk Management
441- 4th Street, N.W.
Suite 800-South
Washington, D.C. 20001

# EXHIBIT B

**Wendell C. Robinson**
**Attorney at Law**
**4308 Georgia Avenue, N.W.**
**Washington, D.C. 20011**
**202-223-4470**
**202-223-9060 Fax**
**Grindstonelaw@aol.com**



February 22, 2010

RC # 0901729

Adrian Fenty,
Mayor of the District of Columbia
1350 Pennsylvania Ave. N.W.
Washington, D.C. 20001
Attention: Tabatha Braxton

**Re: James Brodus Miller, Sr.**

Dear Mayor Fenty:

This office represents Ms. Naishia E. Davis, next friend for her minor son, James Brodus Miller, Jr., and the Estate of James Brodus Miller, Sr. This letter is written, on their behalf, pursuant to: D.C. Code § 12-309, to put the District of Columbia Government on notice that the Estate of James Brodus Miller, Sr., and Naishia E. Davis, as next friend for her minor child, James Brodus Miller, Jr., intend to file a claim against the District of Columbia for the death of James Brodus Miller, Sr.

James Brodus Miller, Jr.'s biological parents are: James Brodus Miller, Sr., and Naishia E. Davis. On October 21, 2009, at approximately, 5:20am, in the 900 Block of 21st Street, N.E. Washington, D.C., members of the District of Columbia Police Department shot and killed James Brodus Miller, Sr. At the time of the shooting, the decedent was unarmed, did not pose a threat of grievous harm or death, to the police officers who shot and killed him, the police officers lacked probable cause to use deadly force, and the use of deadly force violated James Brodus Miller, Sr's constitutional and civil rights.

As a direct and proximate cause of the District of Columbia's police officers, use of deadly force, under circumstances that did not warrant its use, James Brodus Miller, Sr, was killed and James Brodus Miller, Jr, is deprived of his father's care, maintenance, and companionship, for the rest of his life.

Sincerely,

Wendell C. Robinson

**UNITED DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**
**Civil Division**

| | | |
|---|---|---|
| Naishia E. Davis | : | |
| Plaintiff | : | |
| v. | : | 10-CV-1756 RBW |
| District of Columbia | : | |
| Defendant | : | |

## Opposition To Motion To Dismiss

Comes now Naishia E. Davis, (Plaintiff), by and through undersigned counsel, and opposes the motion to dismiss stating:

1. The Plaintiff filed this cause of action in the Superior Court of the District of Columbia, against the District of Columbia, (Defendant). On October 21, 2009, the Defendant's police officers responded to a radio run ordering them to: 905 21st Street, N.E., apartment # 10, Washington, D.C., because of an alleged unwanted guest was in that apartment. When the police officers arrived there, they escorted everyone out of the apartment and broke into the bathroom, where James B. Miller, (Decedent) had barricaded himself and shot him to death without probable cause and in violation of the Defendant's laws and in violation of the Decedent's constitutional rights.

2. The Defendant moves to dismiss, first, alleging the Plaintiff's complaint fails to establish a constitutional violation, second, that the Plaintiff's failed to comply with 12-309, third, that the common law claims, lack specificity. The Plaintiff will respond to the Defendant's arguments, as presented:

**The Defendant's Argument Against The Constitutional Claim**

3. The Defendant argues that the Plaintiff's claim must fail because they are not linked to a policy or custom of the Defendant. This is incorrect. The amended complaint alleges:

"When the Officers broke into the bathroom, and shot and killed the Decedent, they did so in violation of District's Police Regulation, **6A DCMR § 207 Use of Firearms and Other Weapons.** That regulation reads, in pertinent part:

**"…..207.1 It is the police of the Metropolitan Police Department that each member of the department shall in all cases use only the minimum amount of force which is consistent with the accomplishment of his or her mission, and shall exhaust every other reasonable means of apprehension or defense before resorting to the use of firearms…."**

The issue is, when the police officers broke into Decedent's bathroom, what policy did they believe allowed them to do so, when the barricaded individual lives there, and there is no evidence that the Decedent posed a danger to anyone, including the officers, prior to them breaking into the Decedent's bathroom. The evidence is that the above reference police regulation governed the police officers actions and it allowed them to break into the decedent's bathroom. This allegation raises a sufficient basis for the matter to proceed to discovery after which, the Defendant may move to dismiss, if the police officers testimony, during their depositions, provides the Defendant with a sufficient basis to re-file this motion.

**The Defendant's Argument on the 12-309 Claim**

4. The Defendant moves to dismiss alleging that the Plaintiff's 12-309 notice did not provide it with sufficient facts for it to exercise its due diligence. This is incorrect. The Court in **District of Columbia v. Dunmore,** 662 A.2d 1356 (D.C. 1995), resolved the issue about the content of the notice provisions of D.C. Code § 12-309, when it held:

**"….Although strict compliance observance of the statute's six-month time limit is essential, we have held that the actual content of the notice need not follow any rigid formula. See Romer v. District of Columbia, supra, 449 A.2d at 1101 (" 'precise exactness' is not absolutely essential with respect to the details" "citations omitted) ) ; Washington v. District of Columbia, 429 A.2d 1362, 1365-1366, (D.C. 1981) (en banc). The statute requires only that the notice include a statement "of the approximate time, place, cause, and**

**circumstances of the injury or damage." "We have held that a claimant satisfies the "cause" requirement by including "facts from which it could be reasonably anticipated that a claim against the District might arise." Pitts, supra, 391 A.2d at 809. The "circumstances" presented in the notice need only be "detailed enough for the District to conduct a prompt, properly focused investigation of the claim." Washington, supra 429 A.2d at 1356. "**

The Plaintiff's letter stated, in pertinent part, as follows:

**"….On October 21, 2009, at approximately, 5:20am, in the 900 Block of 21st Street, N.E. Washington, D.C., members of the District of Columbia Police Department shot and killed James Brodus Miller, Sr. At the time of the shooting, the decedent was unarmed, did ot pose a threat of grievous harm or death, to the police officers shot and killed him, the police officers lacked probable cause to use deadly force, and the use of deadly force violated James Brodus Miller, Sr's constitutional and civil rights.**

**At a direct and proximate cause of the District of Columbia's police officers, use of deadly force, under circumstances that did not warrant its use, James Brodus Miller, Sr, was killed and James Brodus Miller, Jr, is deprived of his father's care, maintenance, and companionship, for the rest of his life."**

The Plaintiff's letter specifically satisfies the "cause" requirement of 12-309 because it includes facts from which the Defendant can reasonably anticipate that a claim against it might arise. 12-309 does not require the potential claimant to state and prove the elements of the alleged cause of action. It only requires that the Defendant have sufficient information for it to conduct an investigation into the facts of the alleged claim against it. In this case, the Plaintiff allegations are sufficiently plead for the Defendant to focus its investigation. The Defendant, by virtue of this motion, admits that the "cause" requirement was met, because it has already began its investigation and it is alleging that the police officers actions, and those of the 911 dispatcher, were justified. This could only have been determined if the Defendant had sufficient information to conduct an investigation into the allegations in the Plaintiff's amended complaint.

**The Defendant's Argument Against The Assault Claim**

5. The Defendant argues that the officers have a qualified immunity to use reasonable force to effectuate an arrest. This is correct; however, the Defendant acknowledges it only applies when the officer(s) use of that force is reasonable to effectuate an arrest. They argue that

the amended complaint has not alleged any facts that would demonstrate that the police officers use of deadly force was unjustified when confronted with a subject pointing a gun at them. This is incorrect. The amended complaint states:

"10. The Officers' report, of the incident, did not state that the radio run had warned them that the "unwanted guest" was possibly suffering from a mental condition, or if he had a gun, or a weapon of any kind, or if he was holding anyone, in the bathroom, against their will, or that he posed a threat to anyone. On the contrary, it only states that the Decedent was an "unwanted guest", in 905 21st St. N.E. Apartment, 10, Washington, D.C. When the Officers arrived, they escorted everyone out of the apartment, broke into the bathroom, done in absence of any exigencies that would have warranted breaking into the bathroom, because there was no threat of grievous bodily harm to anyone, when the Officers arrived on the scene, or when the radio run was received. Therefore, the Officers use of deadly force, to seize the Decedent, lacked probable cause, was unreasonable, unjustified, and so brutal that it shocks the conscience of those with hardened sensibilities."

Whether the decedent had a gun, in his own bathroom, when the police officers broke into his bathroom, is a factual issue for the jury to decide. On the basis of the evidence, there was no evidence that the decedent had a gun, that he was threatening anyone, at the time the police were called. Whether the police officers use of deadly force was reasonable is a factual determination for the jury, not the court.

**Defendant's Arguments On Negligence and Negligent Training**

6. The Defendant argues that the Plaintiff has failed to make out a claim that the Defendant failed to train its officers. At trial, the Plaintiff will present an expert that will testify, that on the facts as stated, that Metropolitan regulations provide for certain conduct that should have been applied by its officers in this barricade situation. Based on the facts, of this case, the Plaintiff's expert will testify that either the officers were not properly trained, to handle this situation, or that they negligently failed to apply the training they were provided. This information will only be ascertainable after the officers are deposed; and questioned on the

training they received to handle barricaded situations. The Court should hold a decision, on this claim, until after the officers have been deposed.

**Defendant's Argument On The 911 Dispatcher's Actions**

7. The Defendant argues that the public duty doctrine prevents liability, based on the 911 Dispatcher's actions. While the Plaintiff agrees with the law, as cited, on the public duty doctrine, it is not the issue, in this case. The only issue is, whether the 911 Dispatcher was negligent, in her duties, in this case. In this case, when the 911 Dispatcher was made aware that a barricade situation existed, that the barricaded individual might be suicidal, that the barricaded individual was suffering from some other mental disease or defect, and that the barricaded individual lived in that location, the Plaintiff's expert will testify that the Defendant's police regulations required the dispatcher to inform the police officers of those facts and that those police officers were supposed to call and request the assistance of expert negotiators to assist with the barricaded situation, to avoid grievous bodily harm to them and to others, on the scene. The Court should reserve ruling, on this issue, until after the dispatcher, the police officers, and the Plaintiff's expert have been deposed.

**Wherefore the premises considered,** The Plaintiff prays that the Defendant's motion be denied.

Respectfully submitted,

***s/s Wendell C. Robinson***
Wendell Robinson, 377091
4308 Georgia Avenue, N.W.
Washington, D.C. 20011
202-223-4470

***Certificate of Service***

I certify that a copy of this motion was mailed, postage, prepaid, on this 15th day of December 2010, to: Virginia B. Donkor, 441 4th St. N.W. 6th Floor, South, Washington, D.C. 20001.

***s/s Wendell C. Robinson***

**UNITED DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**
**Civil Division**

| | | |
|---|---|---|
| Naishia E. Davis | : | |
| Plaintiff | : | |
| vi. | : | 10-CV-1756 RBW |
| District of Columbia | : | |
| Defendant | : | |

## Statement of Genuine Isues of a Material Fact in Dispute

The Plaintiff submits the following genuine issues of a material fact that are in dispute:

1. Whether the Dispatcher violated police regulations when she failed to inform the police officers, dispatched to the decedent's home, that he barricaded himself in his bathroom,

2. Whether the Disptacher violated police regulations when she failed to inform the police officers, dispatched to the decedent's home, that the barricaded individual was suicidal, and/or suffering from a mental disease or defect,

3. Whether the police officers, when they arrived, at the decedent's apartment had probable cause to break into his bathroom, to remove him from it,

4. Whether the police officers, had probable cause to break into the decedent's bathroom, and remove him from it, in the absence of evidence that he posed a threat of grievous bodily harm to the police officers and/or others.

5. Whether the police officers use of deadly force was based on they're belief that certain police regulations authorized them to break into the decedent's bathroom and remove him from it, in the absence of any evidence that he posed a threat of grievous bodily harm to the police officers, and/or others.

Respectfully submitted,

***s/s Wendell C. Robinson***
Wendell Robinson, 377091
4308 Georgia Avenue, N.W.
Washington, D.C. 20011
202-223-4470

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| NAISHIA E. DAVIS,<br><br>Plaintiff,<br><br>v.<br><br>DISTRICT OF COLUMBIA,<br><br>Defendant. | ) | Civil Action No. 10-1756 (RBW) |

**MEMORANDUM OPINION**

The plaintiff, Naishia Davis, acting as Personal Representative for the Estate of James Brodus Miller, Sr. ("Decedent") and Next Friend for James Brodus Miller, Jr., filed an amended complaint on November 15, 2010, claiming that the District of Columbia ("the District"), a municipal corporation and the defendant in this civil case, (1) negligently caused the Decedent's death, (2) is liable for an assault and battery sustained by the Decedent, and (3) is liable for damages under 42 U.S.C. § 1983 for violating the Decedent's Fourth Amendment rights. See Plaintiff's First Amended Complaint for Negligence, Negligent Hiring, Assault and Battery, and Violation of Civil and Constitutional Rights ("Am. Compl."). Currently before the Court is the defendant's Motion to Dismiss the Amended Complaint. See Defendant's Renewed Motion to Dismiss the Amended Complaint Or, In the Alternative, For Summary Judgment ("Def.'s Mot.") at 1. After carefully considering all of the relevant submissions made by the parties,[1] the Court will grant the defendant's Motion to Dismiss and dismiss the claim brought under 42 U.S.C. §

[1] In addition to the documents already referenced, in deciding this motion, the Court considered the following filings: the plaintiff's Opposition to Motion to Dismiss ("Pl.'s Opp'n"), and the defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss the Amended Complaint or, in the alternative, for Summary Judgment ("Def.'s Reply").

1983 because the plaintiff has failed to plead sufficient facts, as required by Federal Civil Rule 8(a), to show that a policy or practice of the defendant gave rise to the alleged constitutional violation. The remaining common law claims of negligence and assault and battery will be remanded, as they would be more properly adjudicated in the Superior Court of the District of Columbia ("Superior Court").

## I. BACKGROUND

On October 21, 2009, the plaintiff called 911 and informed the answering dispatcher that her boyfriend, the Decedent, had locked himself in the bathroom of the apartment they shared, located at 905 21st Street N.E., Washington D.C., and was refusing to come out. Am. Compl. ¶ 5. The plaintiff told the dispatcher that no violence had occurred, but that she was concerned about the Decedent becoming suicidal or "paranoi[d]," and feared that she or her children may be in danger. Id. The plaintiff alleges that the dispatcher failed to accurately convey this information to the responding officers and instead informed the two officers that an "unwanted guest" had locked himself in the bathroom. Id. When two officers from the Metropolitan Police Department arrived at the plaintiff's apartment at 5:32 a.m., they escorted the plaintiff and her children from the apartment, id. ¶ 10, whereafter they "pushed open the door to the bathroom" and entered the bathroom to find the Decedent pointing a gun at them,[2] id. ¶ 7. The officers then "discharged their service revolvers, striking the Decedent." Id. The Decedent was subsequently pronounced dead at Howard University Hospital at 5:48 a.m. Id. ¶ 9.

[2] The plaintiff's Amended Complaint seems to accept that the Decedent was holding a gun, as indicated in the police report, but in the plaintiff's Opposition to the Motion to Dismiss, and in the second notice letter sent to the Mayor of the District of Columbia, she states that the Decedent did not have a gun. Am. Compl. ¶ 7, Pl.'s Opp'n ¶¶ 3, 5. Because a motion to dismiss is intended to evaluate the validity of the pleadings themselves, Fed. R. Civ. P. 12(b)(6), the factual allegations made outside the complaint, particularly those that contradict the complaint, should not be considered in deciding a motion to dismiss. See Henthorn v. Dep't of Navy, 29 F.3d 682, 688 (D.C. Cir. 1994) (refusing to consider factual allegations made in a brief opposing a motion to dismiss that contradicted the factual allegations made in the complaint) (citing Fonte v. Bd. of Managers of Cont'l Towers Condo., 848 F.2d 24, 25 (2d Cir. 1988); Orthmann v. Apple River Campground, 757 F.2d 909, 915 (7th Cir. 1985).

On December 7, 2009, through her counsel at the time, the plaintiff sent a letter to the Mayor of the District of Columbia ("Mayor") notifying him that "[o]n October 21, 2009 at approximately 5:20 a.m., at 905 [] 21st St. N.E., Apartment No. 10, Washington D.C. 20002, [the Decedent] was fatally shot inside his apartment while in the bathroom, due to the improper and/or negligent acts of police officers of the District of Columbia Metropolitan Police Department." Def.'s Mot., Exhibit ("Ex.") A (plaintiff's first notice letter to the Mayor's office). The letter further stated that "a claim is being made, on behalf of the Estate of James B. Miller for fatal personal injuries, against the District of Columbia, and/or the Metropolitan Police Department, due to the negligent and careless acts of employees and/or police officers . . . [,] which resulted in the wrongful death of James B. Miller." Id. The letter stated that it was sent to the Mayor to provide the notice required by D.C. Code § 12-309, and that the plaintiff was making a claim against the District. Id. Finally, it stated that the notice requirements would be assumed satisfied unless "otherwise notified." Id. On February 22, 2010, the plaintiff sent another letter to the Mayor's office through her current attorney, again notifying him of her intention to file a claim against the District. Def.'s Mot. Ex. B (plaintiff's second letter to the Mayor's office). The letter again references the events that took place on October 21, 2009, stated that the responding officers lacked probable cause to use deadly force, and asserted that the use of deadly force violated the Decedent's constitutional rights. Id.

The plaintiff filed her amended complaint on November 15, 2010, claiming that the District negligently caused the Decedent's death, that the District is liable for the responding officers' alleged assault and battery of the Decedent, and that the District is liable under 42

U.S.C. § 1983 for the officers' violations of the Decedent's Fourth Amendment rights.[3] See Am. Compl. at 1. More specifically, the plaintiff claims that the District of Columbia is liable for the allegedly negligent act of the 911 dispatcher in incorrectly identifying the Decedent as an "unwanted guest," which, the plaintiff claims, prevented the officers from realizing the barricade situation involved a potentially mentally ill individual. Id. ¶ 8. The plaintiff also claims that the District is negligent because it improperly trains its officers to handle barricade situations, and that the District is liable for the officers' negligent application of their training. Id. ¶ 15. Next, the plaintiff claims that the responding officers, while working within the scope of their employment with the District, shot the Decedent without legal justification or probable cause, thus committing an assault and battery. Id. ¶ 22-24. Finally, the plaintiff claims the District is liable for the officers' alleged violation of the Decedent's Fourth Amendment rights because the officers were "enforcing the District's long[-]standing policy instituted and sanctioned, by the District, on the use of deadly force," when they shot the Decedent, and simultaneously that it was "the District's failure to properly train its police officers on the proper procedures involving [barricaded] individuals" that resulted in the Decedent's death. Id. ¶ 29.

The District moves to dismiss the plaintiff's Amended Complaint on the grounds that: (1) the plaintiff failed to comply with the statutory notice requirement of D.C. Code § 12-309, (2) the plaintiff failed to state claims of negligence on which relief can be granted, (3) the assault and battery claims are invalid because the officers were acting reasonably, and (4) the plaintiff failed to show that the incident occurred as the result of a policy or practice of the District as required to adequately plead a § 1983 claim. Def.'s Mot. at 1. Specifically, with regard to the § 1983 claim against the District, the defendant claims that the plaintiff has failed to plead any

[3] The plaintiff first filed her complaint in the Superior Court for the District of Columbia on July 26, 2010, which was removed to this Court on October 18, 2010 pursuant to 28 U.S.C. § 1441(d) when the defendant District of Columbia filed a notice of removal.

facts that indicate the officers were acting pursuant to a policy of the District, and that any suggested "deficiencies in the District's training programs are premised on the facts of this case only." Id. at 6. Similarly, the defendant maintains that the plaintiff has failed to show a causal link between any alleged policy of the District and the purported Fourth Amendment violations. Id.

The plaintiff, not surprisingly, challenges the defendant's arguments for dismissal, albeit mostly by simply reiterating the allegations in the Amended Complaint. Pl.'s Opp'n at 1. Although the Amended Complaint alleges that the District failed to properly train its officers, the plaintiff's opposition fails to make arguments in support of this allegation.

## II. STANDARD OF REVIEW

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests whether a complaint properly states a claim on which relief may be granted. Woodruff v. DiMario, 197 F.R.D. 191, 193 (D.D.C. 2000). For a complaint to survive a Rule 12(b)(6) motion, Federal Rule of Civil Procedure 8(a) requires that it contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Although "detailed factual allegations" are not required, to withstand a Rule 12(b)(6) motion a plaintiff is required to provide "more than an unadorned, the-defendant-unlawfully-harmed-me accusation," Ashcroft v. Iqbal, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-57 (2007)), in order to "give the defendant fair notice . . . of what the claim is and the grounds upon which it rests," Twombly, 550 U.S. at 555 (citation omitted). In other words, a "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 129 S. Ct. at 1949 (quoting Twombly, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw [a]

reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting Twombly, 550 U.S. at 556). "A complaint alleging facts which are merely consistent with a defendant's liability . . . stops short of the line between possibility and plausibility of entitlement to relief." Id. (internal quotation marks omitted) (citing Twombly 550 U.S. at 557).

In evaluating a Rule 12(b)(6) motion, the Court must "liberally construe" the complaint "in favor of the plaintiff, who must be granted the benefit of all inferences that can be derived from the facts alleged," Schuler v. United States, 617 F.2d 605, 608 (D.C. Cir. 1979) (internal quotation marks and citations omitted), and the Court "may consider only the facts alleged in the complaint, any documents either attached to or incorporated in the complaint[,] and matters of which [the Court] may take judicial notice," E.E.O.C v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624 (D.C. Cir. 1997) (footnote omitted). Although the Court must accept the plaintiff's factual allegations as true, any conclusory allegations are not entitled to an assumption of truth, and even those allegations pleaded with factual support need only be accepted to the extent that "they plausibly give rise to an entitlement to relief." Iqbal, 129 S. Ct. at 1950.

## III. LEGAL ANALYSIS

A. The plaintiff's § 1983 claim

Section 1983 of Title 42 of the United States Code creates a private cause of action as a remedy against constitutional violations. 42 U.S.C. § 1983 (2006). The act states, in relevant part, that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." Graham v. Cooper, 490 U.S. 386, 394 (1989) (citing Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

To survive a Rule 12(b)(6) motion, a complaint asserting municipal liability under § 1983 must plead facts alleging (1) a violation of a constitutional right or rights conferred by federal law and (2) facts alleging that the municipality's policy or custom caused that violation. Warren v. District of Columbia, 353 F.3d 36, 38 (D.C. Cir. 2004) (citing Collins v. City of Harker Heights, 503 U.S. 115, 123-24 (1992); Baker v. District of Columbia, 326 F.3d 1302, 1306 (D.C. Cir. 2003)).

Regarding the first of these two elements, the Fourth Amendment provides a proper constitutional predicate for claims of excessive force by police officers, and guarantees individuals the right to be secure from unreasonable searches and seizures. Graham, 490 U.S. at 394. Thus, whether the force applied by an officer violates an individual's Fourth Amendment rights turns on reasonableness. Tennessee v. Garner, 471 U.S. 1, 7 (1985). "Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." Graham, 490 U.S. at 396 (citation omitted). "This balancing test is both objective and fact-sensitive; it looks to the totality of the circumstances known to the officer at the time of the challenged conduct, and it accords a measure of respect to the officer's judgment about the quantum of force called for in a quickly developing situation." Martin v. Malhoyt, 830 F.2d 237, 261 (D.C. Cir. 1987).

As for the second element, while municipalities and local government entities are considered "persons" for the purposes of § 1983, they can be held liable for the constitutional

violations of their employees only if the employees are acting pursuant to a policy or practice of the municipality or local government. Monell v. Dept. of Social Servs. of City of New York, 436 U.S. 683, 689-694 (1978). Thus, as a municipality, the District cannot be held liable under a theory of respondeat superior, Triplett v. District of Columbia, 108 F.3d 1450, 1453 (D.C. Cir 1997), because it is only "[w]here the official policy of the city causes an employee of the city to deprive a person of such rights in the execution of that policy, [that] the city may be liable," City of Oklahoma City v. Tuttle, 471 U.S. 808, 814 (1985) (emphasis added). The policy itself must be the "moving force" behind the violation, Carter v. District of Columbia, 795 F.2d 116, 122 (D.C. Cir. 1986) (quoting Monell, 436 U.S. at 694), and there must be an affirmative link between that policy and the alleged violation, Tuttle, 471 U.S. at 823.

Additionally, only in limited circumstances can a municipality's failure to train employees constitute a policy or practice, and thus serve as the basis for municipal liability. Atchinson v. District of Columbia, 73 F.3d 418, 421 (D.C. Cir. 1996) (citing City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989)). Under the policy or practice framework for municipal liability set forth in Monell, a municipality's failure to adequately train can be considered a policy or practice only when the failure to train or supervise its employees amounts to "deliberate indifference toward the constitutional rights of persons in its domain." See Daskalea v. District of Columbia, 227 F.3d 433, 441 (D.C. Cir. 2000) (interpreting Monell and noting that a municipality's inaction can constitute a policy or custom); Harris, 489 U.S. at 389 (1989) (limiting § 1983 claims against municipalities based on the failure to train to cases only where the municipality consciously exhibited deliberate indifference). "Deliberate indifference is determined by analyzing whether the municipality knew or should have known of the risk of constitutional violations, [which is] an objective standard." Baker, 326 F.3d at 1307.

> [The deliberate indifference] standard involves more than mere negligence, and it does not require the city to take reasonable care to discover and prevent constitutional violations. It simply means that, faced with actual or constructive knowledge that its agents will probably violate constitutional rights, the city may not adopt a policy of inaction.

Robertson v. District of Columbia, 2010 WL 3238996 at *6 (D.D.C. Aug. 16, 2010) (internal quotation marks omitted) (citing Warren, 353 F.3d at 39; Baker, 326 F.3d at 1306); accord Smith v. District of Columbia, 674 F. Supp. 2d 209, 212 (D.D.C. 2009), Martin v. District of Columbia, 720 F. Supp. 2d 19, 23-24 (D.D.C. 2010). The most common and accepted means of demonstrating deliberate indifference is by showing "a pattern of similar constitutional violations by untrained employees." Connick v. Thompson, ___ U.S. ___ ,___ , 131 S. Ct. 1350, 1367 (2011). However, where the need for specific training, such as training police officers on the constitutional limits to the use of deadly force, reaches the level of "moral certainty," Harris, 489 U.S. at 390 n.10, the "unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a pre-existing pattern of violations." Connick, 131 S. Ct. at 1361. Finally, while it has been recognized that officers who have been adequately trained pursuant to a municipality's policy make mistakes, mistakes alone are not sufficient to subject the municipality to § 1983 liability, nor is the occasional misapplication of a sound policy a basis for finding § 1983 liability. See Harris, 489 U.S. at 391.

The defendant's motion to dismiss the plaintiff's § 1983 claim focuses on the second element of the two-element test—the requirement that the plaintiff show that the alleged violation occurred as a result of a policy or practice of the District—and the Court's analysis will therefore similarly focus on this second element. The plaintiff claims that it was "the District's long standing policies on the use of deadly force [] on barricaded individuals that caused the [D]ecedent's death." Am. Compl. ¶ 29. In her Amended Complaint, the plaintiff references two

policies in support of this assertion: she claims that the officers were acting pursuant to one, and she asserts that the officers should have been trained to comply with a second. See Am. Compl. ¶¶ 11-13.

The first policy the plaintiff relies upon in support of her § 1983 claim is the District of Columbia Municipal Regulation on the use of firearms and other weapons by its police officers, which states, in relevant part:

> [i]t is the policy of the Metropolitan Police Department that each member of the department shall in all cases use the minimum amount of force which is consistent with the accomplishment of his or her mission, and shall exhaust every other reasonable means of apprehension or defense before resorting to the use of firearms.

Am. Compl. ¶ 12 (citing D.C. Mun. Regs. Subt. 6-A, § 207). The plaintiff contends that the District should be liable for the alleged violations of the Decedent's Fourth Amendment rights because the responding officers were acting pursuant to this policy. Am. Compl. ¶¶ 12, 29. While the plaintiff has indeed succeeded in identifying an existing policy, she has asserted no facts which allege that this first policy upon which she relies was in any way causally connected to the alleged Fourth Amendment violation. In fact, this first policy cited by the plaintiff actually requires that officers "use only the minimum amount of force" needed to accomplish their objective and that they "exhaust every other reasonable means of apprehension or defense before resorting to use of firearms." Pl.'s Opp'n ¶ 3. The only facts the plaintiff has asserted in her complaint concerning the officers' use of force—that the District's policy required minimum force and exhaustion of non-violent alternatives—fall well within the reasonableness standard of the Fourth Amendment. Id.

Furthermore, through the facts contained in her complaint, the plaintiff seems to actually be arguing that the responding officers acted in violation of the cited policy, not in accordance

with it. Am. Compl. ¶ 12. Specifically, the plaintiff states that the officers' actions occurred "in violation of" the District's police regulations, id., indicating that the cited policy was not in any way the "moving force" behind the alleged violations. This distinction is crucial given Monell's foreclosure of respondeat superior as a theory for municipal liability for constitutional violations based on the acts of the municipality's employees. The plaintiff has therefore failed to adequately plead a basis for finding § 1983 liability against the District predicated on the first policy upon which she relies.

The plaintiff next seeks support for her § 1983 claim by asserting that the District failed to train its officers to properly address barricade situations. Id. ¶ 29. Arguing generally that the District should be liable for the Decedent's death, the plaintiff states that the

> District's [p]olice [o]fficers were supposed to have been trained, or should have been trained that there are four options, that apply to [a barricade] situation: First, amass officers, amass firepower, and assault; [s]econd, selective use of sniper fire; [t]hird, use chemical agents; and [f]ourth, contain the area and have a trained negotiator come in and try to talk . . . the barricaded individual out.

Id. ¶ 11 (emphasis omitted). The plaintiff adds that the District's officers should have been trained on when the use of deadly force is appropriate in "barricade situations." Id. ¶ 13. However, the plaintiff provides no authority for the proposition that the District should have adopted a policy that comports with what she proposes, nor is there any indication that this is a policy that has been adopted by the District or any other municipal police department. While the plaintiff alleges that the District "knew, or through the exercise of ordinary care, should have known, that enforcement of [its] policies, concerning apprehension of barricaded individuals, and their policies on the use of deadly force, violates the rights of potential barricaded individuals," id. ¶ 13, she fails to provide any facts indicating how the District knew or should have known that a failure to train for such situations was sufficient to "amount to deliberate indifference

toward the constitutional rights of persons in its domain." Daskalea, 227 F.3d at 441 (internal quotations omitted) (quoting Harris, 489 U.S. at 388-89 & n. 7). The plaintiff has referenced no similar occurrences showing the District's failure to properly train its officers for the situation they confronted in this case, but has based her allegations solely on this individual incident. Nor has she pleaded any facts to show that the District did not adequately train its officers to confront barricade situations. To survive the defendant's motion to dismiss under the standard set forth in Twombly and Iqbal, the complaint must contain facts demonstrating or showing the District's actual or constructive notice of deficiencies in its training, Robertson, 2010 WL 3238996 at *8, and it must include more than conclusory statements unsupported by any factual information, Martin, 720 F. Supp. 2d at 23. But that is exactly what the plaintiff has done here, having asserted nothing more than conclusory allegations of insufficient training, while failing to include facts to support her claim that the District failed to properly train its officers when confronting barricade situations.

Because the plaintiff has failed to plead facts which show that a policy or practice of the District was as a "moving force" behind any alleged constitutional violation by the responding officers, as required by Monell, or that the District acted with deliberate indifference in failing to train its officers, the plaintiff's § 1983 claim against the District cannot survive the District's motion to dismiss.

B. The plaintiff's common law claims

Section 1441 of Title 42 of the United States Code provides a mechanism for claims originally filed in state court to be removed to federal court. The act states, in relevant part, that:

> [e]xcept as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the

> district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a) (2006).

Additionally, where a complaint removed to federal court is composed of multiple claims, "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a) (2006). The Court may, however, decline to exercise jurisdiction over supplemental claims when the claims over which it has original jurisdiction are dismissed, 28 U.S.C. § 1367(c)(3), as supplemental jurisdiction is a "doctrine of discretion, not a plaintiff's right." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). Thus, if the federal claims in a case that has been removed to federal court are resolved before trial, the district court may dismiss the remaining claims or remand the claims to state court. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 352-53. By declining to exercise supplemental jurisdiction, the district court can ensure fairness to litigants and promote judicial economy. Gibbs, 383, U.S. at 726. Moreover, "needless decisions of state law" should be avoided by federal courts. Id.

In light of the dismissal of the plaintiff's § 1983 claim against the District, there are no remaining claims in the plaintiff's complaint over which this Court has original jurisdiction. Because the remaining common law claims against the District were before the Court pursuant to its supplemental jurisdiction under § 1367(c), the court may decline to entertain those claims if the claims over which the Court had original jurisdiction have been dismissed. 28 U.S.C. §

1367(3). Accordingly, the Court will remand the remaining common law claims to the Superior Court.[4]

## V. CONCLUSION

For the foregoing reasons, the Court concludes that the defendant's motion to dismiss the § 1983 claim should be granted. Accordingly, the Court will dismiss the plaintiff's § 1983 claim. Furthermore, as the common law claims made by the plaintiff were before the Court by virtue of its supplemental jurisdiction, the plaintiff's common law claims will be dismissed without prejudice.

**SO ORDERED** this 21st day of July, 2011.[5]

[4] Remanding state law claims after the dismissal of the federal claim is preferable to dismissal where proceeding in that manner will promote judicial efficiency and economy. Here, in addition to preserving judicial resources, by remanding the case to the Superior Court, the Court will relieve the plaintiff from having to pay her attorney to draft and re-file a new complaint and the filing fee she would have to again pay at the Superior Court. See Carnegie-Mellon, 484 U.S. at 353.

[5] An order will be issued contemporaneously with this memorandum opinion (1) dismissing the plaintiff's claim under 42 U.S.C. § 1983, (2) remanding this case to the Superior Court, and (3) closing this case.