IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MICHAEL W. ROGERS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N15C-07-259 WCC
	)	
MATTHEW MORGAN, individually and in his official capacity as a DELAWARE STATE TROOPER, the STATE OF DELAWARE, and the DEPARTMENT OF PUBLIC SAFETY – DIVISION OF STATE POLICE	)	
	)	
Defendants.		

Submitted: June 13, 2017
Decided: November 9, 2017

Defendants' Motion for Summary Judgment
GRANTED IN PART, DENIED IN PART

MEMORANDUM OPINION

Stephen P. Norman, Esquire, The Norman Law Firm, 30838 Vines Creek Road, Unit 3, Dagsboro, DE 19939. Attorney for Plaintiff.

Michael F. McTaggart, Esquire, Deputy Attorney General, 820 North French Street, Wilmington, DE 19801. Attorney for Defendants.

CARPENTER, J.

Before the Court is Corporal Matthew Morgan's ("Corporal Morgan"), the State of Delaware's, and the Delaware State Police's ("DSP") (collectively "Defendants") Motion for Summary Judgment. For the reasons set forth below, Defendants' Motion is **GRANTED IN PART** and **DENIED IN PART.**

I. FACTUAL BACKGROUND

On August 1, 2013, Corporal Morgan responded to a complaint for a hit and run accident that occurred at Riverside Bar & Grill around 9:13 p.m.[1] Corporal Morgan spoke to witnesses as a part of his investigation and determined the other vehicle in the accident belonged to Michael W. Rogers ("Plaintiff"). Corporal Morgan then drove to Plaintiff's listed residence in Georgetown, Delaware to question the Plaintiff.[2] He arrived at Plaintiff's residence around 10:03 p.m. and Plaintiff's mother Lorraine Rogers ("Ms. Rogers"), the owner of the residence, answered the door and invited Corporal Morgan inside.[3] Ms. Rogers told Corporal Morgan she would get Plaintiff and went into his room to wake him up. Plaintiff emerged from his bedroom wearing minimal clothing, so Corporal Morgan requested that he get dressed. Corporal Morgan immediately noticed that Plaintiff smelled strongly of alcohol and appeared to be very confused,[4] which made Corporal Morgan begin to doubt his mental stability. Corporal Morgan asked Ms.

[1] Defs.' Mot. for Summ. J. ¶ 6.
[2] Compl. ¶ 21.
[3] *See* Trial Tr. vol. A, 36:4–17, June 23, 2015.
[4] *See id.* at 50:1–15.

Rogers if Plaintiff "had any mental issues,"[5] and she stated that Plaintiff "was mentally stable."[6]

Plaintiff returned from his bedroom about a minute later fully dressed and approached the front door where Corporal Morgan was standing.[7] Corporal Morgan told Plaintiff he was there to investigate a hit and run accident.[8] Plaintiff, still in a disheveled state, told Corporal Morgan he needed to get his insurance card from his bedroom.[9] Because it appeared Plaintiff was intoxicated, Corporal Morgan decided to follow the Plaintiff to his bedroom to ensure his own safety. In the bedroom, Plaintiff began walking in circles and mumbling, Corporal Morgan told Plaintiff that they needed to go outside multiple times.[10] Each time Plaintiff refused and eventually, Corporal Morgan touched "his left tricep to help guide him outside because he wasn't willing to go out on his own."[11] Plaintiff immediately became combative and Corporal Morgan attempted to call for backup.[12]

In the exchange that subsequently occurred, Plaintiff threw Corporal Morgan on the bed, got on top of him, and began striking him.[13] Corporal Morgan fought

[5] *See id.* at 50:19–22.
[6] Defs.' Mot. for Summ. J. ¶ 6. Ms. Rogers' deposition in 2016 verifies a similar exchange. However, she thought he was asking if Plaintiff was "mentally retarded." *See* Ms. Rogers Dep. 46:8–15.
[7] *See id.* at 36:20–22.
[8] *See id.* at 51:2–4.
[9] Trial Tr. vol. A, 51:11–12.
[10] *See id.* at 57:15–23.
[11] *Id.* at 58:1–5.
[12] *Id.* at 58: 7–12.
[13] *Id.*

back, and soon Plaintiff and Corporal Morgan ended up on the floor. During this physical altercation, Plaintiff bit and placed Corporal Morgan in a headlock.[14] While Plaintiff had Corporal Morgan in a headlock, he repeatedly told the Corporal Morgan "[d]on't go for your gun."[15] Eventually when Ms. Rogers entered the bedroom, Plaintiff released his grip on Corporal Morgan so he could free himself from Plaintiff's control. Corporal Morgan stated that Ms. Rogers did nothing to help him, however, Ms. Rogers states that she hit the Plaintiff and told him to release Corporal Morgan.

Corporal Morgan then retreated into the kitchen area and took out his Taser for protection. As Plaintiff ran toward Corporal Morgan, he activated his Taser and used it against Plaintiff.[16] Corporal Morgan then "switched out [T]aser cartridges, throwing away the spent cartridge" and proceeded to the front door.[17] Plaintiff briefly went to his bedroom before entering the living room and charging at Corporal Morgan with a large coffee table.[18] Corporal Morgan accessed his gun and shot several bullets at the charging Plaintiff.[19] Corporal Morgan radioed that

[14] *See* Trial Tr. vol. A, 61:4–12.
[15] *Id.* at 61:18–21.
[16] *See* Trial Tr. vol. A, 64:8-12; 68:19-23.
[17] *See id.* at 74.
[18] *See id.* at 75:9–13.
[19] *See id.* at 77:15–23.

'shots [were] fired' at 10:11:16 p.m."[20] Corporal Morgan and the backup officers were able to handcuff the Plaintiff who was taken to the hospital for treatment.

The facts above are from the Plaintiff's criminal trial, as these facts provide the most reliable rendition of the events that occurred on August 1, 2013. The facts provided in the Plaintiff's Complaint and Response to Defendants' Motion for Summary Judgment contrast significantly with the facts stated above. Plaintiff admits his recollection is inconsistent due to his intoxication on that night.[21] However, Plaintiff has consistently stated he never charged at Corporal Morgan with the coffee table, and Corporal Morgan's use of his gun was completely unwarranted.[22] Additionally, Plaintiff stated that after initially speaking with Corporal Morgan he "walked away from Defendant Morgan [to his bedroom] and attempted to end the encounter."[23] He asserts the shooting was unprovoked and unjustified.

Plaintiff was indicted for resisting arrest and assault and filed a Motion to Suppress all evidence.[24] The Court denied his Motion to Suppress and found that Corporal Morgan had consent to enter the residence. At the Plaintiff's initial trial,

[20] Defs.' Mot. for Summ. J. ¶ 9.
[21] Pl.'s Resp. to Defs.' Mot. for Summ. J. at 17.
[22] *See id.* at 18.
[23] Compl. ¶ 48. Corporal Morgan recalls a different set of events. After Plaintiff emerged from his bedroom, Corporal Morgan informed him why he was there. Plaintiff told Corporal Morgan that "he needed to get his insurance from his bedroom" and Corporal Morgan followed. *See* Defs.' Mot. for Summ. J. ¶ 6.
[24] *See* Defs.' Mot. for Summ. J. ¶ 2.

the jury was unable to reach a unanimous verdict and a mistrial was declared. Eventually, Plaintiff pled no contest and was sentenced to a period of incarceration followed by probation.[25]

In July 2015, Plaintiff filed a civil suit against Defendants for two counts of invasion of privacy, unlawful detention, excessive force, negligence, gross negligence, fabrication of evidence, defamation, and a violation of the Americans with Disability Act ("ADA") (the "Complaint"). Plaintiff also requests damages, injunctive relief, and costs.[26] After discovery, Defendants filed a Motion for Summary Judgment pursuant to Superior Court Civil Rule 56. In Plaintiff's response, he did not contest granting summary judgment for Counts II, VI, and VIII. This is the Court's decision on the arguments that remain.

II. STANDARD OF REVIEW

In reviewing a motion for summary judgment pursuant to Superior Court Civil Rule 56, the Court must determine whether any genuine issues of material fact exist.[27] The moving party bears the burden of showing that there are no genuine issues of material fact, such that he or she is entitled to judgment as a matter of law.[28] In reviewing a motion for summary judgment, the Court must

[25] *State of Del. v. Michael W. Rogers*, ID No. S1308000623, Graves, T. (Oct. 18, 2016) (ORDER).
[26] *See* Compl. 18–19.
[27] Super. Ct. Civ. R. 56(c); *see also Wilm. Trust Co. v. Aetna*, 690 A.2d 914, 916 (Del. 1996).
[28] *See Moore v. Sizemore*, 405 A.2d 679 (Del. 1979).

view all factual inferences in a light most favorable to the non-moving party.[29] Where it appears that there is a material fact in dispute or that further inquiry into the facts would be appropriate, summary judgment will not be granted.[30]

III. DISCUSSION

Defendants contend that all nine claims are entitled to summary judgment. Specifically, Defendants contend that Counts I and IX, invasion of privacy, are barred by the collateral estoppel doctrine; Counts II and III fail to demonstrate any facts that suggest Corporal Morgan used excessive force to unlawfully detain or arrest Plaintiff; Count IV is unsupported by any factual evidence that Corporal Morgan fabricated testimony in Plaintiff's criminal trial or sentencing hearing; Counts V and VI are barred by the Tort Claims Act and Defendants are protected by sovereign immunity; Count VII fails to meet the minimum requirements for an ADA claim; and finally, Defendants contend that Count VIII fails to establish a prima facie claim of defamation.

Unsurprisingly, Plaintiff argues that there are material factual disputes regarding the actual shooting by Corporal Morgan and the events leading up to it. As a result, Plaintiff asks the court to deny Defendants' Motion for Summary Judgment. As previously indicated, Plaintiff's Response in Opposition to

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[29] *See Alabi v. DHL Airways, Inc.*, 583 A.2d 1358, 1361 (Del. 1990).
[30] *See Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. Super. 1962), *rev'd in part* on procedural grounds and *aff'd in part*, 208 A.2d 495 (Del. 1965).

Defendants' Motion for Summary Judgment is completely silent regarding Counts II, VI, and VIII (unlawful detention, negligence, and defamation). By not contesting Defendants' Motion for Summary Judgment regarding Counts II, VI, and VIII, the Plaintiff has conceded the merits of those claims and Defendants' Motion for Summary Judgment regarding these counts is **GRANTED**.[31] The Court will now address the remaining counts individually.

a. Counts I and IX. Invasion of Privacy Claims against Morgan

Defendants move for summary judgment on both of Plaintiff's invasion of privacy claims, Count I §1983 invasion of privacy and Count IX state invasion of privacy, based on the collateral estoppel doctrine. Collateral estoppel "is designed to provide repose and put a definite end to litigation"[32] by preventing a party from relitigating an issue previously decided.[33]

A federal claim is barred by the collateral estoppel doctrine if "(1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action."[34] The courts have also "considered whether the party being precluded had a full and

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[31] *See Kraft Foods Group Brands LLC v. TC Heartland, LLC d/b/a Heartland Food Products Group, et al.*, C.A. No. 14-28-LPS (D. Del. Jan. 12, 2017) (granting partial summary judgment for pre-suit damages because the non-moving party failed to contest this claim).
[32] *Columbia Cas. Co. v. Playtex FP, Inc.*, 584 A.2d 1214, 1216 n.4 (Del. 1991).
[33] *See id.*
[34] *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 249 (3d Cir. 2006).

fair opportunity to litigate the issue in question in the prior action, and whether the issue was determined by a final and valid judgment."[35] Delaware utilizes a similar four-part test to determine whether a state law claim is barred by collateral estoppel. The test requires "(1) a question of fact essential to the judgment, (2) [be] litigated and (3) determined (4) by a valid and final judgment."[36] The party raising collateral estoppel for both federal and state law claims "bears the burden of showing that the issue whose relitigation he seeks to foreclose was actually decided in the first proceeding."[37]

Defendants assert that Plaintiff's §1983 invasion of privacy claim was previously litigated in Plaintiff's criminal trial and Plaintiff has attempted to repackage the same claim in a civil context.[38] As such, Defendants argue the elements of collateral estoppel are satisfied as Plaintiff was a party in both proceedings, the Court decided the current consent issue in the Motion to Suppress hearing ("Suppression Hearing"), the Court's judgment was final, and Plaintiff "filed his suppression motion as a necessary part of the criminal case."[39] Similarly, Defendants claim Plaintiff's state invasion of privacy claim, Count IX, satisfies the

[35] *Id.*
[36] *See HealthTrio, Inc. v. Margules*, 2007 WL 544156, at * 9 (Del. Super. Ct. 2007) (quoting *Taylor v. State*, 402 A.2d 373, 375 (Del. 1979).
[37] *CompuCom Sys., Inc. v. Getronics Fin. Hldgs. B.V.*, 2012 WL 4963314, at * 2 (D. Del. 2012).
[38] *See* Defs.' Mot. for Summ. J. ¶ 17.
[39] *See id.* (citing several cases including *Procknow v. Curry*, 26 F. Supp. 3d 875, 881–82 (D. Minn. 2014) (conspiracy claim of illegal search barred by adverse ruling in Wisconsin criminal case) and *McDowell v. Delaware State Police*, 1999 WL 151873, at *1, 4 (D. Del. 1999) (denial of state court suppression motion precluded subsequent civil rights claim for wrongful search)).

four requirements listed above. More specifically, they assert the Court has found that Corporal Morgan had consent to enter the premises and that he did not violate any constitutional provisions by entering Plaintiff's bedroom, ultimately leading to a final judgment and Plaintiff's plea of no contest.[40] Defendants contend Plaintiff's consent argument against Corporal Morgan is identical to what was raised in Plaintiff's Motion to Suppress.[41]

Plaintiff responds with several arguments. First, collateral estoppel is not proper because the consent issue determined at the Suppression Hearing is not identical to the consent issue at hand. Specifically, "the issue of [Corporal] Morgan recognizing that Plaintiff had either never granted consent or revoked consent [to enter his bedroom] never came before the Court in the criminal proceeding."[42] If Corporal Morgan had acknowledged Plaintiff's express refusal, there would be no justification or basis for consent to remain in the residence.[43] Second, Plaintiff argues that the legality of Corporal Morgan's entry was not essential to Plaintiff's conviction,[44] and he could have been found to be guilty of resisting arrest regardless of Corporal Morgan's status in the home.[45]

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[40] *See* Defs.' Mot. for Summ. J. ¶¶ 4, 16.
[41] *See id.* at 18.
[42] Pl.'s Resp. in Opp. To Def's for Summ. J. at 10.
[43] *See id.* at 11.
[44] Pl.'s Resp. in Opp. To Def's for Summ. J. at 14 (citing the Supreme Court's holding in *Bobby v. Bies*, 556 U.S. 825, 834 (2005)).
[45] *Id.* at 16.

Finally, counsel presents the usual argument that Plaintiff's criminal trial did not result in a final judgment on the merits. Plaintiff asserts that because his criminal trial initially resulted in a mistrial, it erased all evidentiary rulings previously made in the matter.[46] Plaintiff states that Defendants fail to recognize "the break in proceedings" which differentiates it from precedent cases.[47] Specifically, Plaintiff suggests that the instant case is most similar to *Holmes v. City of Wilmington*. In *Holmes*, the defendant filed a motion to suppress which the court denied.[48] The defendant's case went to trial and the jury was unable to reach a verdict. While the State prepared to retry the defendant, a major witness withdrew his testimony forcing the State to drop all charges.[49] The Court in *Holmes*, found there was no final judgment and plaintiff's claims were not barred by collateral estoppel.[50] Plaintiff argues that the break in proceedings due to the mistrial and eventual second trial for Plaintiff are crucial and make collateral estoppel inapplicable. The Court disagrees and the dismissal of the indictment in *Holmes* makes that case entirely distinguishable.

Here all the elements of collateral estoppel are present in this case, barring Plaintiff's invasion of privacy claims. In the Suppression Hearing, the Court found

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[46] *See id.* 14 (citing *State v. Harris*, 198 N.C. App. 371, 376 (N.C. Ct. App. 2009).
[47] *Id.* at 13.
[48] *Holmes v. City of Wilmington*, 79 F. Supp. 3d 497, 510 (D. Del. 2015).
[49] *See id.*
[50] *See id.* at 510.

that Ms. Rogers expressly gave Corporal Morgan consent to enter the home and that no constitutional provisions were violated when he entered Plaintiff's bedroom.[51] The Court stated "there is nothing [on the record] that says that at that point in time Mr. Rogers says leave my house, I don't want to talk to you or anything of that nature."[52]

Nothing has been discovered to suggest that Ms. Rogers clearly revoked her initial consent. Thus, Plaintiff has presented the exact same issue of consent. Plaintiff suggests he revoked Ms. Rogers' consent by telling Corporal Morgan "this is a private matter."[53] However, the Court is not persuaded. The Court has previously found there to be valid consent when "an occupant who shares, or is reasonably believed to share, common authority over the property [provides consent], and no present co-tenant objects."[54] Refusal or revocation of consent by a co-occupant must be clear and express.[55] For example, courts have previously found express consent when a co-occupant says "stay out" or the co-occupant "object[s] [] at the door."[56] In this case, Plaintiff did not expressly refuse or revoke consent. His statement of "this is a private matter" could suggest many things and

[51] Suppress Tr. 4:8–12, March 13, 2014.
[52] *See id.* at 6:2–5.
[53] Trial Tr. vol. B, 113:17–23, June 24, 2014.
[54] *U.S. v. Matlock*, 415 U.S. 164, 170 (1974).
[55] *United States v. Stabile*, 633 F.3d 219, 231 (3d Cir. 2011) (quoting *Georgia v. Randolph*, 547 U.S. 103, 120, 126 S. Ct. 1515, 164 L. Ed. 2d 208 (2006)). *Donald v. State*, 903 A.2d 315 (Del. 2006) (Officers must stop a warrantless search of a residence based upon the consent of a co-occupant when another co-occupant of the premises expressly objects to the search).
[56] *See Georgia v. Randolph*, 547 U.S. 103,104–05 (2006).

it requires too large of an inferential gap to suggest it is a refusal or revocation of consent.

The Court also disagrees with Plaintiff's break in proceedings argument. It is true that other jurisdictions such as North Carolina and New Jersey have previously held that after a mistrial previous evidentiary rulings are erased, but Delaware has not done so.[57] Plaintiff unsuccessfully cites *Holmes v. Wilmington* as support for this argument because he ignores the basic facts. After the mistrial, the State's key witness recanted his testimony destroying the State's entire case. Holmes was never retried or indicted because the State no longer had a case.[58] This differs significantly from the instant case, where the State intended to retry the Defendant and he pled after his mistrial.

Collateral estoppel aims to "preclude[] a *redetermination of facts actually litigated* and *determined* in a prior proceeding."[59] If the Court were to allow Plaintiff's invasion of privacy claims to continue, it would be acting contrary to the public policy surrounding collateral estoppel. Plaintiff had a full opportunity to present all of the facts relevant to the consent issue at his Motion to Suppress hearing. Because the Court held that Corporal Morgan had obtained consent to

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[57] *See State v. Harris*, 198 N.C. App. 371, 376 (N.C. Ct. App. 2009); *see State v. Hale*, 317 A.2d 731 (N.J. Super. Ct. App. Div. 2001) (holding that after a mistrial the admissibility of evidence is not binding on a subsequent judge at retrial).

[58] *Holmes v. City of Wilmington*, 79 F. Supp. 3d 497, 504 (D. Del. 2015).

[59] *See Belfint, Lyons, & Shuman v. Potts Welding & Boiler Repair, Co.*, 2006 WL 2788188, at * 3 (Del. Super. Ct. 2006).

enter the residence, Defendants' Motion for Summary Judgment for Counts I and IX based on the doctrine of collateral estoppel is **GRANTED**.

b. Count III. Excessive Force against Morgan

To succeed on a claim pursuant to 42 U.S.C. § 1983, "a plaintiff must show: (1) the conduct complained of was committed by a person acting under color of state law and (2) the conduct deprived the plaintiff of a federally secured right."[60] "Claims that law enforcement officers have used excessive force…should be analyzed under the Fourth Amendment and its [objective] 'reasonableness' standard."[61] The Court must determine "whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[62]

Defendants assert that Corporal Morgan did not use excessive force when he fired his weapon at the Plaintiff.[63] Defendants argue that Corporal Morgan only acted in response to Plaintiff's behavior which initially was uncooperative and later extremely combative and aggressive. In fact, prior to discharging his weapon, Corporal Morgan attempted to control the Plaintiff's conduct by using his Taser and retreating to the front door.[64] It was only when the Plaintiff charged at

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[60] *Davidson v. Dixon*, 386 F. Supp. 482, 487 (D. Del.1974), aff'd, 529 F.2d 511 (3d Cir. 1975).
[61] *Graham v. Connor*, 490 U.S. 386, 395 (1989).
[62] *Id.* at 397; *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir. 2004).
[63] *See* Defs.' Mot. for Summ. J. ¶ 23.
[64] *See id.*

Corporal Morgan did he discharge his weapon until "the threat [created by Plaintiff] subsided."[65] Plaintiff argues that despite the physical altercation in the bedroom, Corporal Morgan was not in any reasonable imminent fear of death or serious bodily harm when he began firing his weapon.[66] Plaintiff denies ever charging at Corporal Morgan after he had retreated to the living room. [67] Plaintiff contends that Corporal Morgan fired his weapon without provocation and thus used excessive force.

In addition, Defendants argue the major inconsistencies present in Plaintiff's statements at his criminal trial, suppression hearing, in his Complaint, and during his depositions are reason alone to dismiss Count III because such claim is "based on perjury…clearly impossible [and] contrary to the physical [objective] evidence."[68] Plaintiff's counsel admits that Plaintiff's testimony is objectively flawed but suggests his mental illness caused him to be delusional.[69] Similarly, any inconsistencies with Ms. Rogers' testimonies are likely because she was traumatized by the events of the night.[70] Plaintiff argues, however, Corporal Morgan's testimonies also conflict, and even more so with the objective evidence.

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[65] *See id.*
[66] Pl.'s Resp. in Opp. to Defs.' Mot. for Summ. J. at 17.
[67] *See id.*
[68] *See* Defs.' Mot. for Summ. J. ¶ 29 (citing *Turner v. Assoc. of Owners of Bethany Seaview Condo.*, 2013 WL 186930, at *3 (Del. Super. 2013).
[69] *See id.* at 7.
[70] *See* Pl.'s Resp. in Opp. to Defs.' Mot. for Summ. J. at 18.

Specifically, Corporal Morgan "testified Plaintiff was shot near the door by the pool of blood, yet the table ended up closer to the couch then it began."[71] Additionally, Corporal Morgan stated that Plaintiff charged at him with the coffee table parallel to the front wall, however, the bullet holes and shell casings suggest a different trajectory.[72]

Despite the inconsistencies in Plaintiff's statements throughout both the criminal and civil case, the Court cannot grant Defendants' Motion for Summary Judgment at this time. The Court concludes there are material issues of disputed fact, and that a jury could decide Plaintiff did not pose a serious threat to Corporal Morgan. While Corporal Morgan testified that Plaintiff charged at him with the coffee table, Plaintiff and Ms. Rogers consistently testified Plaintiff did not charge at him or act combatively towards Corporal Morgan when he began to fire his weapon. If a jury believed Plaintiff's testimony, it could reasonably determine that he did not pose a threat to Corporal Morgan. Thus, that testimony, if believed, could support a finding that Corporal Morgan fired his gun several times at Plaintiff without recent provocation from Plaintiff.

A jury could also believe that even if Plaintiff did charge at Corporal Morgan with the coffee table, Corporal Morgan acted unreasonably and used

[71] *See id.*

[72] *See id.* Plaintiff's expert David Balash stated that "[t]he evidence does not support the position of Tpr. Morgan that Rogers was charging toward him when the shooting took place." Defs.' App. Report of David Balash, at A-753.

excessive force under the circumstances by firing his weapon several times. The Court believes that a jury could determine that if Plaintiff did charge towards Corporal Morgan with a coffee table, it was not severe enough to warrant Corporal Morgan's actions.[73] In sum, the Court holds that there are material issues of disputed fact and credibility determinations that cannot be decided on a motion for summary judgment. Thus, Defendants' Motion for Summary Judgment for Count III is **DENIED**.

c. Count IV. Fabrication of Evidence against Morgan

For a plaintiff to succeed on a fabrication of evidence claim, he must demonstrate there was a reasonable likelihood that previously as a "defendant [he] would not have been convicted absent the fabricated evidence."[74] The plaintiff must also demonstrate the fabricated evidence "was so significant that it could have affected the outcome of the criminal case."[75] Mere "testimony that is incorrect or simply disputed should not be treated as fabricated merely because it turns out to have been wrong."[76] There must be actual persuasive evidence. In previous cases, the Court has stated "it will be an unusual case in which a police officer

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[73] *See Glover v. City of Wilmington*, 966 F. Supp. 2d 417, 427 (D. Del. 2013) (citing *Groman, v. Township of Manalapan*, 47 F.3d 628, 634 (3d Cir.1995)).
[74] *Black v. Montgomery County*, 835 F.3d 358, 371 (3rd Cir. 2016).
[75] *Halsey v. Pfeiffer*, 750 F.3d 273, 295 (3rd Cir. 2014).
[76] *Id.*

cannot obtain a summary judgment in a civil action charging him with having fabricated evidence used in an earlier criminal case."[77]

Defendants argue that Plaintiff does not have a federal or state law fabrication of evidence claim against Defendant Corporal Morgan. Plaintiff has failed to provide any evidence of the alleged fabricated statements and has also failed to show that he would not have been convicted without such statements. Defendants also argue that Corporal Morgan's testimonies at trial and at the sentencing hearing are protected by absolute privilege, preventing Plaintiff from suing based on false testimony at trial.[78]

Plaintiff contends that Corporal Morgan fabricated evidence in multiple court proceedings to prevent facing disciplinary action.[79] Specifically, that Corporal Morgan falsely claimed Plaintiff charged at him with a coffee table in order to justify firing his weapon several times.[80] Plaintiff asserts the fabrication of evidence has caused him undue hardship in his criminal trial and sentencing.[81] Plaintiff also asserts that his fabrication of evidence claim need not be brought with a malicious prosecution claim as it would create "a mockery of... the protection of due process of the law and fundamental justice."[82]

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[77] *Id.* at 295.
[78] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).
[79] *See* Compl. ¶ 127.
[80] *See id.*
[81] *See id.* at ¶ 129.
[82] *Halsey v. Pfeiffer*, 750 F.3d 273, 293 (3rd Cir. 2014).

Even though the Court agrees with Defendants that Plaintiff has failed to demonstrate the existence of fabricated testimony, the Court disagrees with Defendants' assertion of absolute privilege. The Court finds that Defendants have read the recognition of absolute privilege in *Nix v. Sawyer* out of context. In their Motion for Summary Judgment, Defendants cite *Nix v. Sawyer* as support for finding that "absolute privilege [] attaches to statements of witnesses made in judicial proceedings"[83] preventing Plaintiff from filing a false testimony claim against Corporal Morgan. However, upon a closer reading of *Nix,* this Court finds there to be no such conclusion. The Court in *Nix* found absolute privilege is only offered as protection in defamation cases. Specifically, "[t]he privilege affords absolute protection [only] upon a showing that: 1) statements issued as part of a judicial proceeding; [and] 2) the alleged defamation is relevant to a matter at issue in the case."[84] Thus, Defendants' claim of absolute privilege in regards to Plaintiff's fabrication of evidence claim is flawed.

As stated above, the Court finds the Plaintiff has failed in both the Complaint and the Response to Defendants' Motion for Summary Judgment to provide actual, specific evidence of Corporal Morgan's bad faith and fabrication of evidence. Additionally, Plaintiff has failed to provide evidence to suggest that his conviction for resisting arrest would not have occurred if Corporal Morgan did not

[83] *Nix v. Sawyer*, 466 A.2d 407, 410 (Del. Super. 1983).
[84] *Id.*

testify that Plaintiff charged at him with the coffee table. Plaintiff fails to recognize that his admissions about being combative and striking Corporal Morgan, as well as his admission to the trial court that the incident with Corporal Morgan was his fault,[85] likely impacted the outcome of his criminal case. Under the circumstances here it is not surprising that the testimony of the events leading to Plaintiff's arrest is different. That does not mean the testimony is false or fabricated but is simply the recollection of events from the perspective of that party. There is nothing to suggest otherwise and thus Defendants' Motion for Summary Judgment for Count IV is **GRANTED**.

d. Count V. Gross Negligence against all Defendants

Plaintiff's Complaint asserts gross negligence claims against all Defendants: Corporal Morgan, the State of Delaware, and DSP. Specifically, Plaintiff argues Corporal Morgan breached several duties of care, was grossly negligent, and acted with reckless indifference when he fired his gun several times at Plaintiff instead of retreating.[86] Plaintiff also asserts that Defendants, DSP and the State of Delaware, are liable for Corporal Morgan's grossly negligent conduct under the doctrine of respondeat superior.[87] In their Motion for Summary Judgment, Defendants argue that Corporal Morgan did not breach any duty of care and used appropriate force to

[85] Plaintiff admitted that he "got shot because [he] got drunk and went berserk." Sentencing Tr. 20:22–23,21:1–3, July 24, 2015.
[86] Compl. ¶ 137; *see* Pl.'s Resp. to Defs.' Mot. for Summ. J. at 17.
[87] *See id.* at ¶ 156.

address the threatening and combative behavior of the Plaintiff. Defendants also assert that Plaintiff has made a futile attempt to repackage his original negligence claim as a gross negligence claim,[88] by providing no additional evidence to suggest there was a gross deviation from the ordinary standard of care. As a result, Defendants contend that Corporal Morgan, DSP, and the State of Delaware are immune from suit under the State Tort Claims Act, 10 Del. C. §4001.[89]

"The [] [State] Tort Claims Act provides sovereign immunity where the acts of the State and its agents were discretionary acts, done in good faith, in the course of performance of official duties and without gross and wanton negligence."[90] In order to avoid immunity pursuant to the State Tort Claims Act, a plaintiff must show that the state employee or official engaged either in actions taken in bad faith and not in the public interest or actions of gross or wanton negligence.[91] Additionally, if a plaintiff brings an action against the state itself, "they must show that: (1) the State has waived the defense of sovereign immunity for the actions mentioned in the complaint; and, (2) the State Tort Claims Act does not bar the action."[92] If sovereign immunity has been waived, the State and its agencies may be sued under legal theories such as negligent hiring, training, and supervision as

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[88] *See* Defs.' Mot. for Summ. J. ¶ 32.
[89] *See id. See also J.L. v. Barnes*, 33 A.3d 902, 913 (Del. Super. Ct. 2011).
[90] *See Lovett v. Pietlock*, 2011 WL 2086642, at *3 (Del. Super. Ct. 2011).
[91] *Id.*
[92] *Pauley v. Reinoehl*, 848 A.2d 569,573 (Del. 2004)

well as respondeat superior. To do so, the Plaintiff must show some factual allegations to support its claims.[93]

Generally, "[q]uestions of gross negligence and willful or wanton conduct are [left] for the jury and are not susceptible of summary adjudication." Thus, at this time the Court cannot grant the Defendants' Motion for Summary Judgment. Plaintiff's gross negligence claim is a question for the jury as it hinges on a factual determination of whether Corporal Morgan used excessive force.[94] The Court believes that a jury could find that Corporal Morgan breached his duty of care when he did not retreat and acted with reckless indifference when he fired his gun several times at Plaintiff. A jury could also reasonably believe the Plaintiff was not acting in a threatening manner and find that Corporal Morgan used an unreasonable amount of force against the Plaintiff.[95] Such findings could be considered gross negligence and "an extreme departure from the ordinary standard of care."[96] If the jury was to find Corporal Morgan was grossly negligent, Corporal Morgan would not be immune from suit under the State Tort Claims Act.

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[93] *Montgomery-Foraker v. Christina Sch. Dist.*, 2013 Del. Super. LEXIS 528, at *7 (Del. Super. Ct. 2013).

[94] Gross negligence is "a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'" *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990) (quoting W. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955)). It is often referred to as the equivalent of criminal negligence or "...as the failure to perceive a risk of harm of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of conduct a reasonable person would observe." *Brown v. United Water Delaware Inc.*, 2010 WL 2052373 at *4 (Del. Super. Ct. 2010).

[95] Compl. ¶ 137.

[96] *Browne v. Robb*, 583 A.2d 949, 953 (Del. 1990).

Because the State Defendants have waived their defense of sovereign immunity by procuring a liability insurance policy, the State of Delaware and DSP may also be liable for gross negligence. The Court finds that the State and DSP cannot be found liable for gross negligence based on its supervisory capacity, because the Plaintiff has failed to assert such a claim or provide any factual support for negligent hiring, training or supervision of Corporal Morgan in his pleadings. However, the State of Delaware and DSP may be liable for gross negligence under the doctrine of respondeat superior, if Corporal Morgan's conduct is found by a jury to be grossly negligent.

This is because Section 4001 of the State Tort Claims Act does not include a "statutory preclusion to applying the doctrine of respondeat superior."[97] In fact, this Court has previously held that under Section 4001 "assuming [] [all] other essential preconditions are also present, the State or any agency of the State can be liable where the act was done with gross or wanton negligence."[98] Thus, if an employee is shown to be liable for gross negligence, under respondeat superior so can his/her employer.[99]

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[97] *Montgomery-Foraker v. Christina Sch. Dist.*, 2013 Del. Super. LEXIS 528, at *12 (Del. Super. Ct. 2013).
[98] *Schueler v. Martin*, 674 A.2d 882, 888 (Del. Super. Ct. 1996).
[99] *Montgomery-Foraker v. Christina Sch. Dist.*, 2013 Del. Super. LEXIS 528, at *14 (Del. Super. Ct. 2013) (citing *Greco v. Univ. of Del.*, 619 A.2d 900, 903 (Del. 1993) (citation omitted)).

Having determined that Corporal Morgan's alleged gross negligence is a question for the jury and that a respondeat superior claim against the State of Delaware and DSP may survive under the State Tort Claims Act, the Court cannot grant the Defendants' Motion for Summary Judgment. Should Corporal Morgan be found liable for his individual actions, then all Defendants may be liable for gross negligence. Thus, summary judgment is not appropriate at this time. Defendants' Motion for Summary Judgment for Count V is **DENIED**.

e. Count VII. Americans with Disability Act against all Defendants

The ADA prohibits discrimination against individuals with disabilities in all areas of public life. Title II of the ADA specifically prevents an individual with a qualified disability from being denied or excluded "the benefit of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[100] Public entity includes "any department, agency, special purpose district, or other instrumentality of a State or States or local government."[101] Similarly, Section 504 of the Rehabilitation Act states "no otherwise qualified individual with a disability...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to

[100] 42 U.S.C.A. § 12132.
[101] 42 U.S.C. § 12131(1).

discrimination under any program or activity receiving federal financial assistance."[102]

Plaintiff asserts that Defendants violated Title II of the ADA and Section 504 of the Rehabilitation Act when Corporal Morgan failed to provide accommodations for Plaintiff's disabilities. For a party to succeed on an ADA Title II claim, he must prove:

> 1) He or she is a qualified individual with a disability; 2) He or she has been excluded from participation in or denied the benefits of services, programs, or activities provided by a public entity or was otherwise discriminated against by the public entity; and 3) That such exclusion, denial or discrimination was because of the person's disability.[103]

The ADA defines an individual with a disability as a person who "has a physical or mental impairment that substantially limits one or more major life activities,[104] ...has a history or record of such an impairment, or...is perceived by others as having such an impairment."[105]

Defendants argue that the ADA does not apply to "on the scene" police officer arrests and investigations. Delaware courts have previously held "[t]o require the officers to factor in whether their actions are going to comply with the

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[102] 29 U.S.C. § 794(a).
[103] 42 U.S.C. § 12131(2); *see Shultz v. Carlisle Police Dept.*, 706 F. Supp. 2d 613, 626 (M.D. Pa. 2010).
[104] Major life activities include but is not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S. Code § 12102(2)(A).
[105] 42 U.S.C. §12102(1)(A)-(C).

ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents."[106] Defendants argue that in the case at hand, Plaintiff was combative and attacked Corporal Morgan creating exigent circumstances and the immediate need for Corporal Morgan to secure safety for himself and others. Additionally, Defendants argue that "[i]t is difficult to imagine how the police were supposed to accommodate the violent acts of the [P]laintiff."[107]

Defendants also assert that Plaintiff's claim fails to satisfy the essential elements of an ADA Title II claim. Specifically, there was no evidence to suggest that Plaintiff has ever suffered from an ADA disability, which "substantially limits one or more major life activities of such individual."[108] In fact, "Plaintiff testified that he has lived by all accounts a normal life and has had a stellar work history in the construction field."[109] Plaintiff's temporary commitments from alcohol abuse are not enough to consider his alcoholism a disability because voluntary and "frequent intoxication [is] not physically disabling under the ADA definition of disability."[110] However, Plaintiff argues that his Major Depressive Disorder with Recurrent, Severe Psychotic Features and Alcohol Dependence with physiological

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[106] *Glover v. City of Wilmington*, 966 F. Supp. 2d 417, 429 (D. Del. 2013).
[107] Defs.' Mot. for Summ. J ¶ 35.
[108] 42 U.S.C. §12102(2)(A).
[109] *See* Rogers Dep. 15: 8–11, 21:11–16, 34: 5–19, 37: 8–21.
[110] Defs.' Mot. for Summ. J. ¶ 36; *see Burch v. Coca-Cola Co.*, 119 F.3d 305, 316 (5th Cir. 1997).

dependence are ADA disabilities because they substantially interfere with his ability to perceive reality and form significant relationships.[111]

Plaintiff contends that Title II of the ADA is applicable because of the "reasonable accommodation during arrest theory."[112] The reasonable accommodation theory requires "that once the police have a situation under control, the police have a duty to accommodate a disability."[113] Plaintiff asserts that Corporal Morgan recognized almost immediately that Plaintiff was mentally unstable, and continued to ignore the signs of Plaintiff's mental illnesses throughout the entire encounter on August 1, 2013.[114] Plaintiff suggests that once Corporal Morgan retreated to the living room after the physical altercation, the situation was under control and Corporal Morgan had secured safety. However, Corporal Morgan's actions of firing his gun at Plaintiff failed to accommodate and "take into account Plaintiff's serious disability in effectuating the arrest."[115] Plaintiff also alleges without support that Defendants, DSP and the State of Delaware, violated Title II of the ADA by failing to properly train police officers to recognize and handle persons with disabilities.[116] More specifically, that Corporal Morgan had "received no training in disengaging with a mentally

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[111] *See* Pl.'s Resp. in Opp. to. Defs.' Mot. for Summ. J. at 20.
[112] *Glover v. City of Wilmington*, 966 F. Supp. 2d 417, 429 (D. Del. 2013).
[113] *See id.*
[114] *See* Pl.'s Resp. in Opp. to. Defs.' Mot. for Summ. J. at 19.
[115] Pl.'s Resp. in Opp. to. Defs.' Mot. for Summ. J. at 19.
[116] *Id.* at 19.

unstable person and that the only time trooper[s] are trained to 'disengage is for tactical retreat.'"[117]

The Court finds Plaintiff's ADA claim to be completely without merit. Plaintiff has failed to provide evidence to demonstrate that Corporal Morgan had any inclination that Plaintiff had an ADA disability and was not just severely intoxicated. When Corporal Morgan first encountered Plaintiff, he stated that Plaintiff smelled very strongly of alcohol and was mumbling, all signs consistent with being intoxicated. Corporal Morgan even asked Ms. Rogers if he was mentally stable, which she stated he was and Corporal Morgan had no reason to believe otherwise. As Defendants properly stated, voluntary intoxication is not generally considered a disability under the ADA. In the infrequent circumstance where it is, Plaintiff's own testimony prevents such characterization. Specifically, Plaintiff testified that he has had a steady work history, maintained a small group of friends, and has been able to support his mother when he can.[118] He also stated in his deposition his drinking did not interfere with his ability to go to work or ability to drive.[119]

As evidenced by the hit and run accident, there is nothing to suggest to this officer anything other than the Plaintiff was drunk and his actions reflected an

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[117] *Id.* at 20–21.
[118] Rogers Dep. 19:1–5; 35:1–13.
[119] *See id.* at 37:8–15.

intoxicated state. Such events occur frequently in the handling of police matters particularly involving automobiles and to require some ADA accommodation for a plaintiff who is voluntarily intoxicated is simply ridiculous and would turn the intent of ADA on its head. Even though the Plaintiff has provided the Court with a psychiatric diagnosis by a licensed professional, the Court finds that Plaintiff has not satisfied the necessary requirements of the ADA Title II claim.

Regardless of whether Plaintiff had an ADA disability, Corporal Morgan had no duty to reasonably accommodate Plaintiff prior to securing the scene and protecting himself from Plaintiff's combative and threatening behavior. As Defendants stated, Title II of the ADA "does not apply to an officer's on-the-street responses to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's securing the scene and ensuring that there is no threat to human life."[120] In the instant case, the scene was not secured before the shooting took place. Corporal Morgan had just escaped from Plaintiff's headlock; had retreated to the living room near the front door to protect himself and even tried to unsuccessfully subdue the Plaintiff with his Taser. Even if the Plaintiff did not charge at Corporal Morgan with the coffee table, Plaintiff still followed Corporal Morgan into the living room and was acting in an aggressive and unpredictable manner. The Court is unwilling to find that

[120] *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir.2000).

requiring Corporal Morgan to consider other possible actions in the course of making such split-second decisions is the type of "reasonable accommodation" contemplated by Title II. Such a ruling would unreasonably place officers in life threatening circumstances that are unacceptable. Here the Plaintiff is simply attempting to use his alleged disability to justify his conduct.

Thus, because Plaintiff has failed to provide any evidence to suggest there is a factual dispute about whether Plaintiff had an ADA disability that Corporal Morgan recognized or should have recognized, Defendants' Motion for Summary Judgment for Count VII is **GRANTED**.

IV. CONCLUSION

For the reasons stated above, Defendants' Motion for Summary Judgment is granted as to Counts I, II, IV, VI, VII, VIII and IX and denied as to Counts III and V.

Finally, the Court believes the circumstances of this event were unfortunate. Because of Plaintiff's conduct, he turned a simple hit and run investigation into a much worse situation. As such, while the Court has not totally dismissed the litigation, the evidence suggests Plaintiff will have a significant hill to climb to convince the jury that Corporal Morgan's actions were not justified. This Complaint here is also surprising when the background of the Plaintiff's family includes a grandfather who was a Delaware State Trooper and Troop

Commander.[121] As such, the Plaintiff should recognize the difficult decisions made when an officer approaches an uncooperative individual.[122] The Court suggests that Plaintiff consider this as he attempts to resolve the matter. Otherwise, the trial scheduled for January 8, 2018 will go forward on the remaining counts.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.

[121] Suppress Tr. 54:1–8 (Ms. Rogers cross-examination).
[122] *Id.* at 54:10–13 (Ms. Rogers stating on cross-examination that she has trust in Delaware State Troopers).