

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

DONNA ROBERSON, et al. : CIVIL ACTION  
 :  
 v. :  
 :  
 CITY OF PHILADELPHIA, et al. : NO. 99-3574

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

March 1, 2001

Donna Roberson ("Roberson"), Crystal Garrison, Tameka Roberson, LaTonya Goode, and Helene Roberson, both individually and as a parent and guardian of Carleshia Roberson, brought this action alleging a violation of 42 U.S.C. §1983 and pendent state claims of intentional and reckless infliction of emotional distress against the City of Philadelphia ("the City"), former Police Commissioner Richard Neal ("Neal"), Officer Patrick Pelosi ("Pelosi"), Officer Staton ("Staton"), Officer Johnson ("Johnson"), individually and in their official capacities,<sup>1</sup> and against other officers who have since been dismissed.<sup>2</sup> The remaining defendants (the City, Neal, Pelosi, Staton and Johnson) have all moved in limine to preclude and/or limit the testimony of plaintiffs' police practices expert and for summary judgment.

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<sup>1</sup>All claims against Neal in his individual capacity were withdrawn by order of this court dated September 17, 1999.

<sup>2</sup>Officers M. Moore and S. Davis were dismissed with prejudice by order of this court dated January 4, 2000.

## FACTS

Roberson made a complaint against members of the Daniels family after an incident on August 6, 1997, in which Roberson and two of her friends were harassed and then physically assaulted by her neighbors, Sharmonique, Yoyo and Patricia Daniels.<sup>3</sup> Compl. at ¶12. After Roberson became a complaining witness against them, their threats against her escalated in hostility and frequency. Compl. at ¶16. As a result, Roberson filed a complaint alleging witness intimidation against members of the Daniels family with the District Attorney's office ("D.A.'s office"). Compl. at ¶17. Roberson was advised that the Daniels would be arrested. Compl. at ¶ 18. Pelosi did not execute the arrest warrants he obtained for the three Daniels, but informed them the warrants had issued and requested that they turn themselves in. Compl. ¶19. Between the time she filed the witness intimidation complaint and September 23, 1997, Roberson contacted Detective Pelosi regarding continuing threats by the Daniels. Compl. at ¶21.

The Daniels' threats and intimidation against Roberson and her family increased as a result of Pelosi's actions.<sup>4</sup> Compl. ¶ 20. The intimidation and harassment culminated on September 23,

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<sup>3</sup>Patricia Daniels is the mother of Sharmonique and Yoyo Daniels.

<sup>4</sup>Defendants agree for the purposes of summary judgment. Defendants' Memorandum of Law in Support of Their Motion for Summary Judgment ("Def.'s Memo") at 4.

1997, when the Daniels called the police and complained that Roberson and the co-plaintiffs were harassing them; at the time, Roberson was moving from the neighborhood to avoid the Daniels. Officers Staton and Johnson arrived at the scene, spoke first with the Daniels and then with the plaintiffs; the plaintiffs advised the officers of the Daniels' continuing threats and asked for police protection while Roberson and the co-plaintiffs removed Roberson's belongings from her house. Compl. at ¶ 22. The officers did not remain and shortly after they left, the plaintiffs were assaulted with bats and fists by the Daniels and their friends. Compl. at ¶25.

The Daniels were arrested the next day, prosecuted and convicted for this assault, as were two of their friends who had participated. Compl. at ¶26. The plaintiffs seek relief under 28 U.S.C. §1983 against all defendants and under state law for intentional or reckless infliction of emotional distress and punitive damages against defendants Pelosi, Staton and Johnson. In support of their claims, plaintiffs retained a police practices expert, Joseph C. Waters ("Waters"); defendants seek to preclude his testimony in whole or in part.<sup>5</sup> In addition, the

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<sup>5</sup>Defendants' motion in limine is based on the revised expert report of Waters. Plaintiffs initially submitted a report, without an attached C.V., as an addendum to their memorandum in opposition to defendants' motion for summary judgment. Plaintiffs were given leave to submit Waters' resume. On December 18, 2000, a Daubert hearing was held to determine the admissibility of Waters' testimony; after that hearing, plaintiffs were given leave to submit a revised expert report.

defendants have moved for summary judgment on the following grounds: (1) plaintiffs cannot meet the standard of proof for §1983 claims based on a "state-created danger;" (2) there is no underlying constitutional violation, so plaintiffs' §1983 claim against the City must fail; (3) there is no evidence of municipal liability; and (4) plaintiffs' state law claims are barred by the Political Subdivision Tort Claims Act. The motions will be granted in part and denied in part.

## **DISCUSSION**

### **I. EXPERT TESTIMONY**

#### **A. Standard of Review**

In considering a motion in limine to preclude expert testimony under Rule 702 of the Federal Rules of Evidence ("FRE"), the trial judge must first determine, pursuant to Rule 104(a) of the FRE, "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 592 (1993). The court then "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Id. at 589.

In making its assessment whether the proposed testimony of the expert is based on scientific knowledge, the following factors may be considered: (1) whether the theory or technique

can be (and has been) tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) what is the known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the theory or technique is generally accepted within the relevant community. Id. at 593-94.

Additional factors that may be considered are: (1) "the existence and maintenance of standards controlling the technique's operation;" (2) "the relationship of the technique to methods which have been established to be reliable;" (3) the qualifications of the expert; and (4) "the non-judicial uses to which the method has been put." In re Paoli R.R. Yard PCB Litigation, 35 F.3d 718, 742 n.8 (3d Cir. 1994). These factors are non-exclusive and no one of the factors weighs more heavily than another; the approach to determining the admissibility of expert testimony is a flexible one. Daubert, 509 U.S. at 594; see also Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 152 (1999) (trial judge must have "considerable leeway" in determining the reliability of expert testimony); Heller v. Shaw Indus., Inc., 167 F.3d 146, 152 (3d Cir. 1999)(plaintiff alleged a carpet caused respiratory illness; the court affirmed the district court's exclusion of a doctor's expert testimony in light of Daubert and In re Paoli factors as "simply useful signposts, not dispositive hurdles that a party must overcome in order to have expert testimony admitted."); In re Paoli, 35 F.3d at 742 ("a

district court should take into account all of the factors listed by Daubert . . . as well as any others that are relevant.").

The reliability of the proffered expert testimony is determined by a lower standard than the "merits standard of correctness." In re Paoli, 35 F.3d at 744. "[A] judge should find an expert opinion reliable under Rule 702 if it is based on 'good grounds,' i.e., if it is based on the methods and procedures of science . . . .[This standard may be met] even though the judge thinks the opinion to be incorrect." Id.; see also Heller, 167 F.3d at 152-53 (same). "[A] district court must, [nevertheless], examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used." Id. at 153. If there are good grounds, "[t]he analysis of the [expert's] conclusions themselves is for the trier of fact when the expert is subject to cross-examination." Kannankeril v. Terminix Internat'l, Inc., 128 F.3d 802, 807 (3d Cir. 1997).

The testimony is considered by the jury only if it is first determined that the testimony will assist the trier of fact; in other words, that there is a "valid scientific connection to the pertinent inquiry." Daubert, 509 U.S. at 592; see also In re Paoli, 35 F.3d at 743 (same). This connection has been described as a "fit" between the testimony offered and the facts of the case. Daubert, 509 U.S. at 591.

Since the evidence sought to be precluded here is non-

scientific in nature, the factors of Daubert and In re Paoli provide insufficient guidance for the court to perform its gatekeeping function. In this instance, "[t]he relevant reliability concerns [will] focus upon personal knowledge [and] experience." Kumho, 526 U.S. at 149. The expert here relied on his professional experience, training and skills to reach his conclusions and the court tested the reliability of these opinions based on an examination of the expert's professional background and experience, training, methods used, and the non-judicial uses of opinions derived from these methods; the Daubert and In re Paoli factors were used as applicable. See id. at ("the gatekeeping inquiry must be 'tied to the facts' of a particular 'case.'").

B. Waters' Expertise

Waters was a Philadelphia police officer from 1977 through 1998. He has supervised detectives and uniformed officers and directed investigations of alleged police misconduct. He published strategies and action plans for the Internal Affairs Division of the Philadelphia Police Department and received awards and commendations for his exemplary service while with the Department. Waters is currently a member of the Pennsylvania Attorney General's Law Enforcement Advisory Panel; in this capacity he helps develop strategies for addressing critical law enforcement issues.

Waters earned his bachelor's degree from Temple University,

magna cum laude, and has taken police training courses at Pennsylvania State University, Northwestern University and Harvard University. In addition, he was a recipient of a Fulbright Scholarship; he studied police policy and procedures at the University of Exeter, England. In 1994, Waters graduated from Temple University School of Law; he is now a partner in a general litigation firm and teaches Criminal Justice Administration at Delaware Valley College. He has also taught as an assistant professor or guest lecturer at Rowan University, University of Exeter, University of Pennsylvania and Temple. He has been a member of six professional organizations and conducted research on police use of force.

Rule 702, as amended December, 2000, provides that a witness may be qualified as an expert "by knowledge, skill, experience, training, or education."<sup>6</sup> Waters so qualifies.

C. Waters' Method

Waters reaches his conclusions by applying his significant experience, training and skills to the facts provided to him. In formulating his opinions and making his report, Waters reviewed numerous materials, including deposition transcripts of all the parties, Pelosi's case file, various Philadelphia Police Department memoranda and directives, bail guidelines, and

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<sup>6</sup>"[E]xperience alone - or experience in conjunction with other knowledge, skill, training or education - may [] provide a sufficient foundation for expert testimony." Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendment.

relevant case law. See Waters Report at 1-2. While not a formal, testable method, it is the one used by police practices experts and accepted by the courts.<sup>7</sup> In light of Waters' considerable experience, his method is reliable.

D. Fit

In order for Waters' testimony to be admissible, he must apply his experience reliably to the facts; his opinions must be well-reasoned, grounded in his experience, and not speculative. See Fed. R. Evid. 702 & Advisory Committee Notes, 2000 Amendment.

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<sup>7</sup>"Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise." Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendment. The Advisory Committee gives the following example of an acceptable method for Rule 702 purposes: "[W]hen a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations." Id. By analogy, Waters' method is to apply his experiences as a police officer to shed light on the propriety of the conduct of the police officer defendants. See also United States v. Hankey, 203 F.3d 1160, 1169-70 (9th Cir. 2000), cert. denied, 120 S. Ct. 2733 (2000)(affirming the district court's admission of testimony by a police gang expert whose opinions were based on his "street intelligence" about gang behavior when the expert demonstrated "that the information upon which he relied is of the type normally obtained in his day-to-day police activity."); United States v. Alatorre, 222 F.3d 1098, 1104 (9th Cir. 2000)(affirming the district court's admission of expert testimony by a customs service special agent on narcotics smuggling and sale based on his twelve years' experience as a special agent, specialized training and extensive knowledge); Schieber v. City of Philadelphia, No. 98-5648, 2000 WL 1843246 (E.D. Pa. Dec. 13, 2000)(Shapiro, S. J.)(two police practices experts permitted to testify based on their expertise and experience).

Waters contends "Pelosi, by informing the Daniels of the outstanding arrest warrants and failing to effectuate an arrest, increased the risk of physical harm to plaintiffs. \* \* \* Had the arrest been made . . . the assaults . . . would not have occurred."<sup>8</sup> Waters Report at 3. This conclusion was based, in part, on Waters' review of bail guidelines for a charge of witness intimidation. See id. However, Waters does not append the guidelines or quote them; it is unclear from his report what the guidelines are and whether they support his conclusion. He opines that the D.A.'s office "would certainly request a high bail" and that usually, the bail commissioner honors the D.A.'s request; the Daniels, unable to meet the high bail imposed, would have been incarcerated and unable to harm the plaintiffs. See id. Waters provides no basis for his speculation as to what the D.A. or the bail commissioner would have done. He bases his conclusion that the Daniels could not have posted the (unspecified)<sup>9</sup> high bail on Roberson's testimony that "the Daniels were always home and appeared not to have any visible

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<sup>8</sup>This is one of several "subconclusions" Waters draws under his larger conclusion that "Pelosi's actions increased the risk of harm and danger to plaintiffs." Waters Report at 2.

<sup>9</sup>Although Waters does not quantify what "high bail" would be imposed on a witness intimidation charge, he notes that after the attack on the plaintiffs, bail in the amount of \$8,000 was imposed on Eldrice Gaither, the Daniels' friend who assaulted the plaintiffs with a baseball bat. He does not mention the crime with which Gaither was charged; it might have been a crime other than witness intimidation with different bail guidelines.

means of support." Roberson's statement is an insufficiently reliable basis for a conclusion whether the Daniels had the means to post bail.

Waters' conclusion that notifying the Daniels of the arrest warrants but failing to arrest them increased the risk of harm to the plaintiffs is also based on his speculation that "[t]he lack of consequences on the criminal complaint led the Daniels to believe that the police were unconcerned with their actions."

Id. He further theorized the Daniels' psychological reaction if Pelosi had arrested them: "[T]he fact of the arrest would have been a deterrent to further violence and threats against plaintiffs because there would have been a recognition on their part that their threats of violence and intimidation toward the plaintiffs would have a criminal consequence." Id. Waters is not a psychologist; he has no basis for his conclusions regarding the Daniels' reaction to Pelosi's actions or their arrest.

Members of the Daniels family had been arrested for the prior August 6, 1997 assault on Roberson and two of her friends; the complaint by Roberson and their consequent arrest had increased, not deterred, the Daniels' threats and hostility.

Waters' conclusion that Pelosi's failure to arrest the Daniels after notifying them of arrest warrants increased the risk of harm to the plaintiffs is not properly grounded or well-reasoned. It is speculative and inadmissible.

Waters concludes that "Pelosi's cavalier and laissez-faire

approach to the rules and procedures of the Philadelphia Police Department . . . contributed to plaintiffs' being physically assaulted by their neighbors."<sup>10</sup> Id. at 4. In particular, he concluded Pelosi increased the risk of harm to plaintiffs by: (1) not working with officers in Roberson's district to arrest the Daniels; (2) not providing Roberson and her family adequate protection; and (3) failing to notify the patrol supervisor of the situation. Id. at 4-5.

Police Department Directive 77 requires a police officer to: (1) make an effort to apprehend the subject of the arrest warrant; and (2) enter the arrest warrant into the Philadelphia Crime Information Center and the National Crime Information Center. See id.<sup>11</sup> Waters states Pelosi failed to meet these

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<sup>10</sup>Waters states that in his professional opinion, Pelosi was deliberately indifferent. Waters Report at 4. Waters may not testify to a legal conclusion. See Whitmill v. City of Philadelphia, 29 F. Supp.2d 241, 246 (E.D. Pa. 1998)("'As a general rule an expert's testimony on issues of law is inadmissible.'")(quoting United States v. Bilzerian, 926 F.2d 1285, 1294 (2d Cir. 1991)). See also Nieves-Villaneuva v. Soto-Rivera, 133 F.3d 92, 100 (1st Cir. 1997)("Fed. R. Evid. 704(a) . . . does not vitiate the rule against expert opinion on questions of law."); Berry v. City of Detroit, 25 F.3d 1342, 1353 (6th Cir. 1994)("When the rules speak of an expert's testimony embracing the ultimate issue, the reference must be to stating opinions that suggest the answer to the ultimate issue or that give the jury all the information from which it can draw inferences as to the ultimate issue. \* \* \* It is the responsibility of the court, not testifying witnesses, to define legal terms."); Schieber, 2000 WL 1843246, at \*8(precluding a police practices expert from testifying that the City's failure to train its police caused a violation of the victim's constitutional rights).

<sup>11</sup>Directive 77 was submitted to the court in the appendix to plaintiffs' opposition to defendants' motion for summary

requirements. Further, he asserts that if Pelosi had acted in accordance with the Directive, the Daniels would have been arrested prior to the assault and Roberson would have moved while the Daniels were incarcerated. Id. at 6. What would have occurred if Pelosi had acted in accordance with the Directive is purely speculative and inadmissible. Waters may testify to the content of the Directive and Pelosi's inaction, but the jury must draw its own conclusions based on the evidence presented at trial.

Waters asserts that Pelosi intentionally failed to abide by Directive 77 out of self-interest; he claims Pelosi, holding the warrants, waited to execute them so that he could make overtime pay associated with court appearances. Id. There is an inadequate basis for this theory. While Waters may have experience with other detectives failing to refer arrest warrants to other officers so that they could make the arrests themselves and earn overtime, there is no record evidence to support Pelosi's alleged intention to do so. Waters may testify to his experience with this practice but he may not opine whether Pelosi engaged in it.

Philadelphia Police Department Memorandum 88-9 established a procedure for protecting victims of, and witnesses to, threats of

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judgment. Police Department Directive 139, which Waters also cites in support of his conclusions was not submitted for the court's review.

harm. See Memorandum 88-9; Waters Report at 7. At his deposition, Pelosi testified that he considered this Memorandum a guide rather than a mandate. Id.; Pelosi Depo. at 39. Waters contends it was a mandate and Pelosi's failure to abide by it (by not notifying the patrol supervisor of the situation and not preparing a complaint and incident report), increased the risk of harm to plaintiffs. Waters Report at 7.<sup>12</sup> If patrol supervisors had been advised, Waters contends a police presence would have provided a safe environment for the plaintiffs. Waters Report at 7-8. Waters also states that if the appropriate members of the police department had been notified of the warrants, the Daniels would have been arrested shortly thereafter. Id. at 8.

Waters may testify to the content of the Memorandum and explain why he believes it is mandatory. He may not testify what other members of the police department would have done or that the arrests would have been made earlier and the plaintiffs would not have been harmed if Pelosi had followed the Memorandum; such conclusions are speculative and inappropriate under Rule 702.

Waters also concludes that Staton and Johnson "in failing to provide protection for the Roberson family while Donna Roberson moved, created the opportunity for the Daniels to commit their violent attack." Id. at 9. Waters states the officers "had a duty to provide a degree of safety and protection" to the

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<sup>12</sup>Waters characterizes Pelosi's inaction as "intentional." He is not qualified to testify as to Pelosi's state of mind.

plaintiffs. Id. Police have no affirmative constitutional duty to protect when they have not created the danger; police officers are permitted to take on "the role of inert spectator to an unfolding tragedy," Brown v. Grabowski, 922 F.2d 1097, 1116 (3d Cir. 1990). See generally DeShaney v. Winebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). Waters may not testify to his mistaken view of the officers' duty to the plaintiffs.

As a basis for his conclusion that Staton and Johnson created an opportunity for the attack to occur, Waters refers to "counterpunching," a police term to describe a situation where an assailant calling the police accuses the victim. Waters Report at 9. Waters contends Staton and Johnson should have been aware of this strategy; their decision to leave in light of that experiential knowledge and the facts they learned at the scene "showed a reckless and callous attitude to [sic] the safety of plaintiffs, leaving them vulnerable to foreseeable injury." Id. Applying his experience as a police officer to the facts of this case, Waters may testify to explain "counterpunching" and state his opinion that Staton and Johnson should have been aware of this technique. Under Rule 703,<sup>13</sup> Waters may also testify to his opinion that in light of that knowledge, the officers acted recklessly and carelessly. Waters may not testify to the legal

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<sup>13</sup>Fed. R. Evid. 703 permits an expert to give opinion testimony based on facts or data reasonably relied on by experts in that field.

conclusion that the officers exhibited deliberate indifference by leaving.<sup>14</sup>

Waters states that "Philadelphia police officers have an obligation to run a check on everyone with whom [they] come[] into contact when they have information that those persons are wanted." Waters Report at 10. Waters provides no basis for such an obligation and that testimony is inadmissible. Waters also states that in his opinion, based on the information given to the officers at the scene, they should have checked to see if warrants or stay-away orders were in effect for the Daniels. Based on his experience, that opinion is admissible.<sup>15</sup> He also states that the officers demonstrated deliberate indifference by leaving without conducting a background check. Waters may not testify to that legal conclusion.

Waters states that the officers' leaving the scene, emboldened the Daniels, who perceived the officers as providing no safety or protection to the Robersons . . . .The Daniels were able to physically attack the Robersons because they saw no action[] being taken by the police to stop [them]. The Daniels and their friends did not fear being arrested or prosecuted since they saw nothing happening to them to deter or stop their behavior [].

Waters Report at 10. Waters is without the psychological or

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<sup>14</sup>See supra, note 10.

<sup>15</sup>At trial, Waters "must explain how [his] experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 Advisory Committee Notes, 2000 Amendments.

other relevant background or expertise to testify to the state of mind of the Daniels or their friends; such testimony is inadmissible.

Waters concludes his report with the assertion that the "[d]efendants' failure to provide protection and safety to the plaintiffs makes [them] constitutionally liable for plaintiffs' injuries and damages." This legal conclusion is inadmissible.

## V. **SUMMARY JUDGMENT**

### A. Standard of Review

Summary judgment is appropriate if there are no genuine issues of material fact and the evidence establishes that the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A defendant moving for summary judgment bears the initial burden of demonstrating that there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue of material fact. See id. at 322-24. The non-movant must present evidence to support each element of its case for which it bears the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986). A genuine issue of material fact exists when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The court must draw all justifiable

inferences in the non-movant's favor. See id. at 255.

B. §1983 Liability of Individual Defendants

Plaintiffs claim that the individual defendants violated their substantive due process rights by failing to protect them from the Daniels family. Ordinarily, a state actor has no affirmative obligation to protect a person from injuries caused by others. DeShaney, 489 U.S. at 195-96 (state not liable for injury to young child while in his father's custody even if on notice of likelihood of severe injury). However, there is an exception for a "state-created danger." See id. at 201. If a state actor creates the danger that causes harm to an individual, that individual may recover. See Kneipp v. Tedder, 95 F.3d 1199, 1205, 1211 (3d Cir. 1996). See also Morse v. Lower Merion School Dist., 132 F.3d 902, 907 (3d Cir. 1997); Cannon v. City of Philadelphia, 86 F. Supp.2d 460, 465 (E.D. Pa. 2000)(Brody, J.).

A plaintiff must prove four elements to recover for harm from danger created by the state: (1) the harm caused was foreseeable by the state actor and fairly direct; (2) the state actor's conduct "shocks the conscience"; (3) there existed some relationship between the state and the plaintiff; and (4) the state actor used state authority to create an opportunity that otherwise would not have existed for the harm to occur. Kneipp, 95 F.3d at 1208; Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995).

1. Foreseeable and Direct Harm

a. Plaintiffs v. Staton and Johnson

Staton and Johnson were expressly asked to remain at the scene on September 23, 1997, because plaintiffs believed they were in danger. Staton and Johnson left the scene even though they were not responding to another call. All plaintiffs were foreseeable victims of an attack by the Daniels and their friends and the harm that resulted after the officers left was direct. Summary judgment cannot be granted in favor of Staton and Johnson on this prong.

b. Plaintiffs v. Pelosi

i. Roberson

With regard to defendant Pelosi, Roberson has evidence that the harm was foreseeable and direct; Pelosi was made aware of threats made to Roberson by the Daniels and he did nothing to prevent this harm. Instead of effecting the arrests of the three Daniels, he informed the Daniels of the warrants issued against them but held the arrest warrants that had been issued. Defendants, for the purposes of summary judgment, concede that Pelosi's actions resulted in the Daniels' increased harassment of Roberson. Additionally, after the first arrest of members of the Daniels family (subsequent to their August 6, 1997 assault on Roberson), Roberson filed a witness intimidation complaint because of harassment and threats by the Daniels; a jury could reasonably infer that Pelosi's informing the Daniels of the arrest warrants issuing on Roberson's witness intimidation

complaint additionally angered them, and foreseeably increased the risk of harm to Roberson. Summary judgment cannot be granted in Pelosi's favor with regard to Roberson's claims against him for this reason.

ii Co-Plaintiffs

Pelosi was not aware of threats to the other plaintiffs; the harm they suffered might have befallen anyone with Roberson at the time of the assault, but Pelosi could not have clearly foreseen that these particular individuals would be with Roberson at the time of the assault and harmed by the Daniels. See Mark, 51 F.3d at 1153 (state-created danger theory did not apply because hiring a firefighter who set fire to plaintiff's business was not an "act[] by the state . . . leaving a discrete plaintiff vulnerable to foreseeable injury.")(emphasis added).

Co-plaintiffs' claims do not establish this element. Summary judgment will be granted with regard to the co-plaintiffs' §1983 claims against Pelosi.

2. Mens Rea

The standard for liability is conduct that "shocks the conscience." See County of Sacramento v. Lewis, 523 U.S. 833, 847 (1998) (police officers held not liable for the death of a suspect they pursued in a high-speed chase because the officers did not intend to harm the suspects; their conduct did not "shock the conscience")(quoting Collins v. Harker Heights, 503 U.S. 115, 128 (1992)); Miller v. City of Philadelphia, 174 F.3d 368, 376

(3d Cir. 1999)(social worker's decision to examine plaintiff's children, leading to a removal order, upon a day care personnel's report that child abuse was suspected did not shock the conscience). "[B]ecause state-created danger is a subset of substantive due process, Lewis and Miller require that, in a state-created danger case, the actions of the state actor must shock the conscience to trigger liability." Cannon, 86 F. Supp.2d at 469.

What "shocks the conscience" depends on the circumstances. See Miller, 174 F.3d at 375 ("'deliberate indifference that shocks in one environment may not be so patently egregious in another,' and the circumstances of each case are critical.") (internal citation omitted). A key factor is whether the state actors were acting in a pressurized situation. See id. ("A much higher fault standard is proper when a government official is acting instantaneously and making pressurized decisions without the ability to fully consider their risks."); see also Cannon, 86 F. Supp.2d at 470 ("in evaluating whether [an] officer's actions shock the conscience, [the judge] must analyze whether the officers . . . were acting in a pressurized situation, inhibiting their ability to act in a deliberate fashion.").

a. Plaintiffs v. Staton and Johnson

Staton and Johnson's conduct might shock the conscience. There is no evidence Officers Staton and Johnson were acting in a pressurized situation; there was no urgent need for the officers

to leave after plaintiffs told them why they were asking them to stay. The officers admit that when they left the scene, they drove around the block to complete some paperwork.

What was said to the officers when they arrived at Roberson's house is in dispute. The parties do not agree whether plaintiffs fully informed the officers of the conflict between Roberson and the Daniels and the prior assault. Defendants Staton and Johnson admit only that the plaintiffs "informed [them] that the Daniels were harassing them . . . and that Criminal Complaints were pending against the Daniels." Defendants' Final Pretrial Memorandum at 2, #16; Plaintiffs' Final Pretrial Memorandum at 4, #16. There is also a dispute whether "the Daniels and their friends stood on the opposite side of the street making threatening gestures the entire time the police were speaking to plaintiffs." Plaintiffs' Memorandum in Opposition to Summary Judgment at 4.

What the officers were told while at Roberson's home on September 23, 1997 before the assault is important in determining whether their failure to act shocks the conscience. The material facts in issue prevent granting summary judgment for defendants for this reason.

b. Roberson v. Pelosi

Pelosi's decision to inform the Daniels of Roberson's witness intimidation charge and the resultant arrest warrants but not arrest them might "shock the conscience" of the factfinder.

The decision was not made hurriedly in a pressurized situation and it was made in violation of Philadelphia Police Department guidelines. Police Directive 77 (dated May 10, 1982) states that an attempt to apprehend the subject of an arrest warrant must be made "immediately upon obtaining the warrant." Thereafter, an attempt to arrest must be made "at least once a week" and the officer making the attempt must "document each attempt;" the Directive explicitly states that "[m]aximum efforts [should] be made to apprehend []." This protocol was not followed. Pelosi went to the Daniels' home, informed them of Roberson's complaint and the arrest warrants, but did not arrest them at that time or at any time prior to the September 23, 1997, assault.<sup>16</sup> Pelosi Depo., April, 12, 2000, at 32-33. Summary judgment will not be granted on Roberson's claim against Pelosi for this reason.

### 3. Relationship with the State

There must be sufficient state contact with the plaintiff so the harm from the defendants' acts was foreseeable in a tort sense. See Morse, 132 F.3d at 912 (quoting Kneipp, 95 F.3d at 1209 n.22). It is not clear that the plaintiff must be a "specific individual [who] has been placed in harm's way" or "part of an identifiable and discrete class of persons subject to harm the state allegedly has created." Id. at 914. "The ultimate test is one of foreseeability." Id.

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<sup>16</sup>Pelosi denies knowledge of any police directive regarding the execution of an arrest warrant. Id. at 34.

a. Plaintiffs v. Staton and Johnson

Staton and Johnson responded to the Daniels' call on August 23, 1997. Roberson and the co-plaintiffs told them of Roberson's troubles with the Daniels and requested them to stay and protect them from the Daniels. This created a relationship with the plaintiffs that entitled them to protection from the foreseeable harm. See Kneipp, 95 F.3d at 1209 n.22 (the requisite relationship "contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense."); Henderson v. City of Philadelphia, No. Civ. 98-3861, 1999 WL 482305, at \*10 (E.D. Pa. July 12, 1999)("[b]ecause [victim's] injuries resulted from foreseeable harm and because the officers were warned that he may injure himself in precisely the same manner he did, [the victim] was clearly a foreseeable victim of the officers' inaction."). But see White v. City of Philadelphia, 118 F. Supp.2d 564, 571 (E.D. Pa. 2000)(victim who was the subject of a 911 call by third parties was not a "foreseeable victim" of defendant police officers' inaction "in a tort sense."). Summary judgment as to plaintiffs' claims will not be granted for this reason.

b. Roberson v. Pelosi

With regard to Pelosi, there existed the requisite relationship between him and Roberson; Pelosi admits Roberson communicated with him about the Daniels. Pelosi Depo., April 12,

2000, at 36; Pelosi Depo., January 5, 2000, at 15-16. Pelosi was aware of her witness intimidation complaint against them, the arrest warrants for the Daniels he obtained based on her complaint, and her continuing communications with him about the Daniels' harassment; the harm to Roberson was foreseeable. Summary judgment will not be granted as to Roberson's §1983 claims against Pelosi for this reason.

4. State Creation of Opportunity for Harm

a. Plaintiffs v. Staton and Johnson

There is a significant history of conflict between Roberson and the Daniels family; there was a prior assault on Roberson by three members of the Daniels family and subsequent harassment. It is argued that by leaving the scene, Staton and Johnson left Roberson and the other plaintiffs in the same position they would have been in had the officers not been called:<sup>17</sup> at risk of an assault by the Daniels.

State-created danger has been addressed in a number of

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<sup>17</sup> In Reed v. Gardner, 986 F.2d 1122 (7th Cir. 1993), the court found that the defendant police officers increased the risk of a drunk driving accident by removing a sober driver from the car and leaving a drunk passenger to drive the car home, id. at 1125, but if the officers had arrested an inebriated driver and left another inebriated passenger to drive the car, the risk of an accident would not have increased because the drunk driving risk would have remained the same. Id.

By analogy, the officers' decision to leave the scene after talking both to the Daniels and the plaintiffs, left the plaintiffs no worse off than if the officers had not arrived on the scene prior to the assault and left because the assault would have occurred nevertheless.

cases. In Kneipp, the first Third Circuit case to recognize the state-created danger exception, the police stopped an inebriated couple, allowed the husband to leave, detained the wife but then failed to escort her home; she was found later that night unconscious at the bottom of an embankment. The court found that it was "conceivable that, but for the intervention of the police, [the victim's husband] would have continued to escort his wife back to their apartment where she would have been safe. \* \* \* As a result of the affirmative acts of the police officers, the risk of injury to [the victim] was greatly increased." Kneipp, 95 F.3d at 1209.

Here, there was no affirmative act by Staton and Johnson greatly increasing the risk of harm to the plaintiffs. Their decision to leave (despite having no other calls to which to respond), placed the plaintiffs in a situation no worse than if they had not arrived at all. The officers did nothing to alter an already hostile environment; while it is disturbing that the officers chose to do nothing in the face of a clearly acrimonious and explosive situation, they did not create that situation and were under no constitutional duty to intervene or protect.

In Morse v. Lower Merion School Dist., 132 F.3d 902 (3d Cir. 1997), a teacher was killed in a day care center located in a public high school. Id. at 904. The assailant entered the building through an unlocked entrance; he was later convicted and incarcerated in a psychiatric hospital. Id. In an action

against the school district for creating the dangerous condition that led to the death, the court found a "dispositive factor" in state-created danger is "whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or omission." Id. at 915. The plaintiff did not meet his burden of proving these defendants placed the victim in harm's way. See id. at 916.

Here, harm to plaintiffs could have been foreseen by Staton and Johnson because they were told of the harassment by the Daniels and the criminal complaints pending against them, but the officers did not place the plaintiffs in a dangerous position that would not otherwise have existed. The officers' decision to leave the scene under those circumstances was negligent, and even reprehensible, but not violative of the Constitution.

Subsequent case law reflects that the state-created danger exception is increasingly more difficult to prove.<sup>18</sup> In Estate

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<sup>18</sup>See the recently decided district court cases, Jones v. City of Philadelphia, Civ. No. 00-5569 (E.D. Pa. Jan. 9, 2001), White v. City of Philadelphia, 118 F. Supp.2d 564 (E.D. Pa. 2000) and Henderson v. City of Philadelphia, Civ. No. 98-3861, 1999 WL 482305 (E.D. Pa. July 12, 1999). In Jones, Judge Bartle dismissed a §1983 action alleging that two officers observed plaintiff pulled from a car, sexually assaulted and robbed, but failed to intervene or otherwise come to her aid. In finding that the officers did not participate in the wrongdoing or place plaintiff in a worse position than if they had not been nearby (and inert), Judge Bartle declared the officers' conduct was "unconscionable" but non-violative of plaintiff's substantive due process rights under the Constitution. In White, Judge Dubois dismissed a §1983 action alleging that officers responding to a

of Burke v. Mahanoy City et al., 40 F. Supp.2d 274 (E.D. Pa. 1999), aff'd without opinion, 213 F.3d 628 (3d Cir. 2000), two visibly inebriated party-goers approached two police officers, informed them that they had been assaulted at a party and requested the police officers to arrest their assailants; whether the defendant officers had observed the fight and whether the two partygoers were respectful to the officers or "angry and irate"<sup>19</sup> was disputed. Id. at 276-77. One of the men told their

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911 call reporting screams from decedent's apartment, failed to force decedent's door, and allowed her assailant the opportunity to kill her; the judge rejected the plaintiffs' argument that the failure to force the door "caused [decedent's] murder by giving the killer the opportunity to hold her hostage and commit various criminal acts which caused her death." Id. at 571 (quoting from the complaint). Quoting Burke, the court noted that "[t]he Officers in the instant case . . . did not exert any control over [the decedent's] environment or interfere with any source of private assistance. Rather, the Officers 'simply let the events unfold as they stood idly by[.]'" Id. at 572. In Henderson, Judge Yohn granted summary judgment in favor of defendants in an action alleging violation of plaintiff's son's Fourteenth Amendment rights in failing to prevent him from jumping out a window when the defendants were at his home to oversee his involuntary commitment. Judge Yohn held that the officers did not create the danger; they "did not 'use[] their authority as police officers' to change the dangers that [the victim] faced" and they could not be held liable for "the fact that their presence increased [the victim's] agitation and his desire to escape." Id. at \*12. These decisions are non-binding on this court, but are reflective of the increasingly high burden a plaintiff alleging state-created danger must meet. Cf. Schieber v. City of Philadelphia, No. Civ. A. 98-5648, 1999 WL 482310, \*4 (E.D. Pa. July 9, 1999)(Shapiro, S.J.)(denying defendants' motion to dismiss plaintiffs' state-created danger action based in part on defendant officers' exercise of authority preventing third parties from attempting to rescue neighbor heard screaming in her apartment and enhancing the danger Schieber faced).

<sup>19</sup>The plaintiff claimed that one of the two men told the officers, "If you don't do your job, I'll take care of it

assailants that he was "going to kill [them] . . . blow [their] f'ing heads off." Id. at 277. Whether the officers were present to hear this threat was disputed. Id. Later that night, one of the two men returned to the party, shot and killed the plaintiff's decedent and injured several others. Id.

The district court cited three Third Circuit cases,<sup>20</sup> where the state actors did not "perform some overt, affirmative act which created or worsened the dangerous conditions that eventually led to injury or death." Id. at 281. The court found that the officers "simply let the events unfold as they stood

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myself." Id.

<sup>20</sup>One of these cases was Morse. Also referred to were two pre-Kniepp cases: D.R. v. L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992)(en banc) and Brown v. Grabowski, 922 F.2d 1097 (3d Cir. 1990). In D.R., two female high school students sued the school for repeated physical, verbal and sexual molestation by several male students in a unisex bathroom and darkroom which were part of a classroom. The court held, "'[t]he most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.'" Id. at 1376 (quoting DeShaney, 489 U.S. at 203). In Brown, Deborah Evans' body was found in the trunk of her car. Her murderer had previously abducted, threatened and sexually assaulted her, after which Evans and her family related the story to local police and begged them to file criminal charges; this was not done. Id. at 1100. Evans' personal representative, suing the borough and the police department, alleged that "but for the sloth and callousness of the department in general and of [one detective] in particular, Evans' death would not have occurred." Id. The court held that the individual officers in no way "acted to create or exacerbate the danger that [her murderer] posed to Evans, thereby triggering a possible constitutional duty to assist her . . ." Id. at 1116. Noting that "the role of inert spectator to an unfolding tragedy" is "extremely disturbing," the court nevertheless reversed the district court's denial of defendants' motion for summary judgment. Id.

idly bye [sic]" and they took no affirmative acts required by Third Circuit and Supreme Court case law. Burke, 40 F. Supp.2d at 282.

Unlike Burke, the plaintiffs here were not intoxicated, visibly or otherwise, when they asked the officers to intervene on their behalf. In addition, there is no contention that they were angry or irate. What is in dispute is whether the Daniels and their friends were across the street taunting the plaintiffs as they informed Staton and Johnson of their continuing trouble with the Daniels and the outstanding criminal complaint filed against them. As in Burke, the officers' decision to leave did not create the danger the plaintiffs faced at the hands (and bats) of the Daniels and their friends. Summary judgment will be granted with regard to Roberson's and co-plaintiffs' §1983 claims against Staton and Johnson.

b. Roberson v. Pelosi

Pelosi's telling the Daniels about Roberson's complaint against them and the arrest warrants resulting from that complaint created a foreseeably dangerous situation for Roberson. Unlike in Brown, where the court held that the individual officers in no way "acted to create or exacerbate the danger that [her murderer] posed to Evans, thereby triggering a possible constitutional duty to assist her . . . ," Brown, 922 F.2d at 1116, Pelosi did exacerbate a foreseeable danger to Roberson. In Brown, the defendant officers neglected to arrest the eventual murderer. Pelosi did not just fail to arrest; he also arguably

instigated the assault at issue by aggravating a known contentious situation. See Schieber, 1999 WL 482310, at \*4 (denying defendants' motion to dismiss plaintiffs' state-created danger action based in part on defendant officers' exercise of authority preventing third parties from attempting to rescue decedent heard screaming in her apartment and enhancing the danger faced by decedent). Summary judgment will be denied with regard to Roberson's §1983 claim against defendant Pelosi.

C. Municipal Liability<sup>21</sup>

"Local governing bodies . . . can be sued under §1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Monell v. Dept. of Social Servs. of the City of New York, 436 U.S. 658, 689 (1978). Inadequate police training "may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388 (1989). A municipality may be held liable for

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<sup>21</sup>Although plaintiffs have alleged two separate counts, one against Neal in his official capacity, and one against the City, they will be treated as the same; a claim against a (former) Police Commissioner in his official capacity is the same as a claim against the City.

a violation of a plaintiff's constitutional rights even where there is no individual liability. See Fagan v. City of Vineland, 22 F.3d 1283, 1292 (en banc), aff'd in part, 22 F.3d 1296 (3d Cir. 1994)("If it can be shown that the plaintiff suffered [an] injury, which amounts to deprivation of life or liberty, because the officer was following a city policy reflecting the city policymakers' deliberate indifference to constitutional rights, then the City is directly liable under section 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights.").

Plaintiffs allege, without citing any supporting evidence, that "[i]t is common practice of the Philadelphia Detective Bureau to telephone the individuals sought under an arrest warrant to notify them of the warrants and ask them to turn themselves into [sic] the assigned detective." Pl.'s Memo. in Opp. to Summ. J. at 41. They further allege that this "commonplace practice and procedure of detectives was a known policy and procedure in the Philadelphia Police Department, and fostered a permissive attitude toward violence against civilians, particularly violence directed a complaining witnesses." Id. at 41-42. Without a foundation in the record, this allegation cannot be the basis of liability.

Plaintiffs police practices expert, Joseph C. Waters, wanted to testify that "defendant Neal, as supervisor and policymaker, was deliberately indifferent to training and supervising police officers, including defendant officers, Pelosi, Staton and

Johnson."<sup>22</sup> Id. at 31. Plaintiffs also cite their expert's legal conclusion that "[t]he egregious and criminal conduct to which [Roberson] was subjected was a direct and proximate result of the Philadelphia Police Department's gross failure to adequately train and supervise members of the department." Id. Without a factual basis in the record to support the expert opinion, it cannot be relied upon.

Plaintiffs rely on Bielevicz v. Dubinon, 915 F.2d 845, 851 (3d Cir. 1990), for the proposition that "the municipal policy causation issue should normally be left to the jury." Pl.'s Memo at 34. However, plaintiffs have the burden of showing that "an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." Bielevicz, 915 F.2d at 850. "[P]roof of the mere existence of an unlawful policy or custom is not enough to maintain a §1983 action [against a municipality]. A plaintiff bears the additional burden of proving that the municipal practice was the proximate cause of the injuries suffered." Id. In order to do this, "plaintiff must demonstrate a 'plausible nexus' or 'affirmative link' between the municipality's custom and the specific deprivation of constitutional rights at issue." Id.

Plaintiffs have not pointed to any portion of the record

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<sup>22</sup>Plaintiffs submitted their memorandum in opposition to summary judgment before they submitted the revised expert report in which Waters makes no such statement.

evidencing the existence of a custom, policy or practice, or a "plausible nexus" between such a custom and the constitutional harm suffered. They aver, without reference to any deposition testimony or any other document, that "[s]upervisors evidenced a deliberate indifference to the safety of victim/witnesses and failed to discipline officers for not following mandated procedures regarding 'arrest warrants, 'wanted persons' and calls for protection from victim witnesses, subjects of violence and harassment." Pl.'s Memo. at 35. Because there is no record evidence to support plaintiffs' assertions, summary judgment will be granted in favor of the City and Neal.

D. Immunity for pendent state claims under the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. §8541-8564

Defendants assert that they "enjoy absolute immunity against [all pendent state claims, grounded in negligence or otherwise,] by virtue of the Political Subdivision Tort Claims Act, 42 Pa. C.S.A. Section 8541." Def.'s Mot. for Summ. J. at 25. That statute provides governmental immunity "for any damages on account of any injury to a person or property caused by the act of the local agency or an employee thereof or any other person" with certain exceptions. 42 Pa. C.S.A. §8541 (West Supp. 2000). Eight exceptions laid out in §8542 of the Act are inapplicable to plaintiffs' case.<sup>23</sup>

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<sup>23</sup>The eight exceptions are: (1) vehicle liability; (2) care, custody or control of personal property; (3) care, custody or control of real property; (4) dangerous conditions of trees, traffic signs, lights, or other traffic controls, street lights or street lighting systems under the care, custody or control of

However, 42 Pa. C.S.A. §8550, provides:

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted . . . actual malice or willful misconduct, the provisions of section[] 8545<sup>24</sup> . . . shall not apply.

This abrogation of immunity applies only to the government employees (the officers).<sup>25</sup>

"[W]illful misconduct means that the actor desired to bring about the result that followed, or at least that he was aware that it was substantially certain to ensue." Evans v. Phila. Transp. Co., 212 A.2d 440, 443 (Pa. 1965)(denying JNOV because jury could have found willful misconduct on the part of a motorman who saw an unusual object on the tracks and failed to stop with sufficient time to do so). See also Keating v. Bucks County Water and Sewer Auth., Civ. No. 99-1584, 2000 WL 1888770, \*14 (E.D. Pa. Dec. 29, 2000)(Shapiro, S.J.)(denying summary judgment on plaintiff's defamation claim against his superiors

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the local agency; (5) a dangerous condition of utility service facilities owned by the local agency; (6) a dangerous condition of streets owned by the local agency; (7) a dangerous condition of the sidewalks owned by the local agency; and (8) the care, custody or control of animals. 42 Pa. C.S.A. §8542 (West Supp. 2000).

<sup>24</sup>Section 8545 confers immunity on employees of local agencies acting "within the scope of [their] office or duties" to the same extent that the local agency itself is immune. 42 Pa. C.S.A. §8545 (West Supp. 2000).

<sup>25</sup>This section of the Act does not waive governmental immunity on behalf of the municipality itself. See Dudosh v. City of Allentown, 629 F. Supp. 849, 856 (E.D. Pa. 1985)("[s]ection 8550 does not waive governmental immunity on behalf of the municipal entity itself").

for naming him as a saboteur because their willful misconduct abrogated immunity under the Political Subdivision Tort Claims Act). But see Renk v. City of Pittsburgh, 537 Pa. 68 (Pa. 1994)(police officer could be indemnified for assault and battery and false imprisonment absent a judicial determination that his acts constituted "willful misconduct," because it is improper to equate "willful misconduct" with intentional torts; "willful misconduct" was not defined).

"[W]illful disregard" in the police misconduct context has been defined as "misconduct which the perpetrator recognized as misconduct and which was carried out with the intention of achieving exactly that wrongful purpose." Owens v. City of Philadelphia, 6 F. Supp.2d 373, 394 (E.D. Pa. 1998)(granting summary judgment on wrongful death state law claims based on a finding that plaintiffs did not prove the requisite mens rea to abrogate defendants' immunity under the Political Subdivision Tort Claims Act).

For the plaintiffs to survive summary judgment, they would have to show that officers Staton and Johnson in leaving the scene, knew that to do so was wrong and intended that the Daniels, in the officers' absence, attack Roberson and the co-plaintiffs. Plaintiffs would need to show that Pelosi, by informing the Daniels of the outstanding arrest warrants intended them to escalate their reign of terror over Roberson and that he knew such action was wrongful. Plaintiffs have not met their burden of establishing an exception to the Political Subdivision

Torts Claim Act immunity for failure of evidence defendants' conduct was willful or intentional. Summary judgment will be granted on the state tort law claims.

### **CONCLUSION**

Defendants' motion in limine to preclude in whole or in part the expert testimony of Joseph C. Waters will be granted in part and denied in part. Waters' testimony will be limited to conclusions based on his experience and training; he will not be permitted to testify to legal conclusions or speculate as to other parties' states of mind or what would have occurred had Pelosi arrested the Daniels. He may testify to the content of police directives as they pertain to Pelosi's inaction and his experience that some police officers fail to refer arrest warrants for execution in order to serve them themselves and obtain the associated overtime pay.<sup>26</sup> Defendants' motion for summary judgment will be granted in favor of defendants Johnson, Staton, Neal and the City. Summary judgment will be granted in favor of Pelosi with respect to all plaintiffs other than Roberson on the §1983 claims. Summary judgment will be granted in favor of Pelosi with respect to all plaintiffs on the pendent state law claims.

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<sup>26</sup>Because summary judgment will be granted in favor of Staton and Johnson, the court will not rule on which parts of Water's report pertaining to them would have been admissible.

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

DONNA ROBERSON, et al. : CIVIL ACTION  
 :  
 v. :  
 :  
 CITY OF PHILADELPHIA, et al. : NO. 99-3574

ORDER

AND NOW, this 1st day of March, 2001, for the reasons stated in the foregoing memorandum, it is **ORDERED**:

1. Defendants' motion in limine is **GRANTED** in part and **DENIED** in part. Waters' may not testify as to legal conclusions

or speculate as to other parties' states of mind or what would have occurred had Pelosi arrested the Daniels. He may testify to the content of police directives as they pertain to Pelosi's inaction and his experience that some police officers fail to refer arrest warrants for execution in order to serve them themselves and obtain the associated overtime pay.

2. Summary judgment in favor of defendant Pelosi is **GRANTED** with regard to plaintiffs' Crystal Garrison, Tameka Roberson, LaTonya Goode, and Helene Roberson, both individually and as a parent and guardian of Carleshia Roberson, on their §1983 claims.

3. Summary judgment is **DENIED** with regard to plaintiff Donna Roberson's §1983 claim against defendant Pelosi.

4. Summary judgment in favor of defendants City of Philadelphia and former Police Commissioner Richard Neal is **GRANTED** with regard to all plaintiffs' claims against them.

5. Summary judgment in favor of defendant Pelosi is **GRANTED** on all plaintiffs' state law claims against him.

6. Summary judgment with regard to all plaintiffs on all §1983 and state law claims is **GRANTED** in favor of defendants Staton and Johnson.

7. The following count remains: Count I (42 U.S.C. §1983 -- Deprivation of Fourteenth Amendment rights) plaintiff Donna Roberson against defendant Patrick Pelosi.

8. All other parties having been dismissed, this action shall be recaptioned Donna Roberson v. Detective Patrick Pelosi.

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S.J.