

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

JASON STOLZER, AS ADMINISTRATOR )  
ON BEHALF OF THE ESTATE OF GARY )  
TINNENY, DECEASED, )  
 ) Civil Action  
Plaintiff, )  
 )  
vs. ) No. 03-CV-0098  
 )  
CITY OF PHILADELPHIA, )  
 )  
CITY OF PHILADELPHIA POLICE )  
DEPARTMENT FIFTH POLICE )  
DISTRICT, and )  
 )  
CITY OF PHILADELPHIA POLICE )  
DEPARTMENT, NORTHWEST )  
DETECTIVES, )  
 )  
Defendants. )

\* \* \*

APPEARANCES:

NATHANIEL E.P. EHRLICH, ESQUIRE  
On behalf of Plaintiff

JAMES M. DUCKWORTH, ESQUIRE  
ASSISTANT CITY SOLICITOR  
On behalf of Defendant,  
City of Philadelphia

\* \* \*

O P I N I O N

JAMES KNOLL GARDNER,  
United States District Judge

This matter is before the court on Defendant's, City of Philadelphia, Motion to Dismiss Pursuant to F.R.Civ.P. 12(b)(6) and (b)(1), filed January 31, 2003. Plaintiff filed his answer

in opposition to defendant's motion on February 20, 2003. For the reasons expressed below, we grant the City's motion and dismiss plaintiff's Complaint.

#### Procedural History

Plaintiff Jason Stolzer, as Administrator on Behalf of the Estate of Gary Tinneney, Deceased, filed a Complaint against defendants City of Philadelphia; City of Philadelphia Police Department Fifth Police District; and City of Philadelphia Police Department, Northwest Detectives.

The within civil action is a civil rights claim pursuant to 42 U.S.C. §1983 and is before the court on federal question jurisdiction. 28 U.S.C. §§1331, 1343. Plaintiff, on behalf of the estate of Gary Tinneney, initiated this action against the City of Philadelphia alleging that the City violated plaintiff's substantive due process rights under the Fourteenth Amendment when it released James Passalicqua from its custody, and Passalicqua subsequently killed Tinneney.

Plaintiff avers two alternative theories as to why the City is liable for Passalicqua's actions: (1) the City created the danger that Tinneney faced, and (2) a "special relationship" existed between the City and Tinneney which gave rise to a special duty owed by the City to protect Tinneney.

The parties agree that several parties and issues should be dismissed from the Complaint. Initially, the parties

agree that the City of Philadelphia Police Department Fifth Police District, and the City of Philadelphia Police Department, Northwest Detectives, are not separate legal entities from the City. 53 P.S. §16257; See Regalbuto v. City of Philadelphia, 937 F.Supp. 374 (E.D. Pa 1995), aff'd, 91 F.3d 125 (3d Cir. 1996), cert. denied 519 U.S. 982, 117 S.Ct. 435, 136 L.Ed.2d 333 (1996). Consequently, these defendants are dismissed with prejudice by agreement of counsel.

The parties also agree that Jason Stolzer's claim as stepson under the Pennsylvania Wrongful Death Act and plaintiff's state law claims under the Pennsylvania Wrongful Death Act and Survival statute should be dismissed. Consequently, Counts III and IV are dismissed with prejudice from the Complaint by agreement of counsel.

#### Standard for Motion to Dismiss

When considering a motion to dismiss, the court must accept as true all factual allegations in the complaint and construe all reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff. Shaev v. Saper, 320 F.3d 373, 375 (3d Cir. 2003). A Rule 12(b)(6) motion should be granted if it appears to a certainty that no relief could be granted under any set of facts which could be proved. But a court need not credit a complaint's "bald assertions" or "legal

conclusions" when deciding a motion to dismiss. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997).

#### Facts

Pursuant to the standard of review applicable to a motion to dismiss, defendant does not dispute any of plaintiff's factual averments at this stage. Accordingly, for purposes of this motion, the following averments of plaintiff's Complaint are considered true.

For approximately ten years prior to Tinneney's death he organized and ran the Annual Northwest Veterans/Saint Joseph's University Scholarship Golf Tournament at the Walnut Lane Public Golf Course. At the golf course Tinneney came into contact with Nancy Passalicqua, the wife of James Passaliqua. From approximately May 2000 until January 19, 2001, the date of the shooting, Mr. Passalicqua accused Tinneney of having an affair with his wife Nancy. During that time Mr. Passalicqua continuously stalked, harassed and threatened Tinneney.

In approximately October 2000 Mr. Passalicqua, armed with a gun, threatened to kill Tinney at a future date. Tinneney informed the City police department and the office of the District Attorney of Passalicqua's threats. On January 10, 2001 Tinneney obtained an Order of Protection against Passalicqua under Pennsylvania's Protection from Abuse Act, 23 Pa.C.S.A. §§6101-6117.

Despite the protection order, Passalicqua continued to stalk, harass and threaten Tinneney. Prior to January 19, 2001 Tinneney reported to the City police department that Passalicqua was in violation of the protection order. As a result, the police obtained an arrest warrant for Passalicqua.

On January 19, 2001 the police arrested Passalicqua and brought him into police headquarters for questioning. After holding Passalicqua in custody for for an unknown period of time, the police agreed to release Passalicqua so that he could go home, put his affairs in order and see his children once more before turning himself back into the police at 1:00 o'clock P.M. The police did not notify Tinneney that Passalicqua had been released.

At approximately 1:15 o'clock P.M. Passalicqua drove to Tinneney's place of employment and shot and killed him. Passalicqua then committed suicide.

#### Discussion

Section 1983 of the Civil Rights Act of 1964, 42 U.S.C. §1983, does not create any rights. It is a vehicle through which a plaintiff may assert an alleged Constitutional violation. In order to state a claim under 42 U.S.C. §1983 the plaintiff must not only present facts that establish a Constitutional violation, but also must indicate which Constitutional right possessed by plaintiff was violated. See

Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 1871, 104 L.Ed.2d 443, 454 (1989).

In this action, plaintiff asserts a substantive due process claim under the Fourteenth Amendment of the United States Constitution. "The touchstone of due process is protection of the individual against arbitrary action of government."

Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935, 952 (1974).

Substantive due process protects individuals from governmental actions that "shock the conscience", County of Sacramento v. Lewis, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) and interfere with rights "implicit in the concept of ordered liberty." United States v. Salerno, 481 U.S. 739, 746, 109 S.Ct. 2095, 2101, 95 L.Ed.2d 697, 708 (1987)(quoting Palko v. Connecticut, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292 (1937)). Because plaintiff avers that a state actor, as opposed to a federal actor, violated Tinneny's substantive due process rights, this action must be brought under the Due Process Clause contained in the Fourteenth Amendment. See e.g. Lewis, supra.

The Fourteenth Amendment provides that "[n]o State...shall...deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend XIV, §1. On its own terms the Due Process Clause neither provides protection from

private acts of violence, nor does it impose a duty on the state to prevent private acts of violence. The Constitution was neither intended to be a "font of tort law...superimposed upon...the States", Lewis, 523 U.S. at 848, 118 S.Ct. at 1718, 140 L.Ed.2d at 1059 (quoting Daniels v. Williams, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 669 (1986)), nor designed "as a guarantee of certain minimal levels of safety and security." DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 195, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249, 258-259 (1989).

To state a claim under the Due Process Clause a plaintiff must aver (1) some affirmative state action which violated plaintiff's Constitutional rights; (2) which the state was under some obligation to protect; (3) that the state failed to perform its obligation; and (4) some harm that resulted. See Lewis, supra.

#### State-Created Danger

Plaintiff argues that the City created the danger which Tinneney faced when it released Passalicqua. In support of his contention, plaintiff argues that the court should apply the four-part state-created danger theory enunciated in Kneipp v. City of Philadelphia, 95 F.3d 1199 (3d Cir. 1996).

Not only is the factual predicate of the Third Circuit Court of Appeal's decision in Kneipp distinguishable from those of the within matter, but an application of the Kneipp state-created danger test does not yield a favorable decision for plaintiff. 95 F.3d 1199.

In Kneipp, plaintiff averred a Section 1983 cause of action against the City of Philadelphia. The Constitutional violation averred was a violation of substantive due process. Plaintiff claimed that Samantha and Joseph Kneipp were walking home from a bar on January 23, 1993. Samantha was visibly intoxicated. She smelled of urine and was, at times, unable to walk without assistance. When Samantha and Joseph were a third of a block from home, Officer Wesley Tedder stopped the couple. The stop occurred shortly after midnight. 95 F.3d at 1201.

During the course of the stop Joseph asked permission to leave the scene and return home because there was a babysitter watching the couple's son, and it was late. One of the officers gave Joseph permission to leave the scene. At that point, not only were the officers in custody of Samantha, but there was no one to whom the officers could release Samantha at the conclusion of the stop. 95 F.3d at 1202.

Samantha did not return home that night. She was found unconscious at the bottom of an embankment not far from where the stop occurred at approximately 1:51 o'clock a.m. The temperature

that night was approximately 34 degrees Fahrenheit. As a result of the exposure, Samantha suffered hypothermia and anoxia. The anoxia resulted in permanent brain damage. 95 F.3d at 1203.

The predicate facts on which Kneipp is based are materially different from those presented here in two material aspects. First, in Kneipp the police had custody of the person who suffered harm. In the instant matter, there is no allegation that the police had Tinneney in custody. Second, in Kneipp the police abandoned the person who suffered harm in an area where harm was imminent. In the instant matter, there is no allegation that the police placed Tinneney in a situation where harm was imminent.

The four elements of the state-created danger test set forth in Kneipp are:

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) the state actor acted in willful disregard for the safety of the plaintiff;
- (3) there existed some relationship between the state and the plaintiff;
- (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

95 F.3d at 1208 (citing Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995)).

### Foreseeability

Next we apply the factual averments in plaintiff's Complaint to the four-part Kneipp test. The first element of the Kneipp state-created danger test is that the harm was foreseeable and fairly direct.

Plaintiff has made a number of allegations which establish that it was foreseeable that Passalicqua would kill Tinneney. Furthermore, plaintiff has averred that the City knew the danger that Passalicqua represented to Tinneney. Tinneney complained to the City numerous times about Passalicqua. The City was aware that Passalicqua had threatened Tinneney with death and had possessed a deadly weapon when Passalicqua had done so. Moreover, Tinneney obtained an Order of Restraint against Passalicqua. The police were prepared to enforce the Order of Protection against Passalicqua. The police had an arrest warrant for Passalicqua and took Passalicqua into custody upon the arrest warrant.

The problem with the foreseeability factor is that the only way it was directly foreseeable to the police that Passalicqua would kill Tinneney was in the glare of "20-20 hindsight". Prior to the killing, it was only foreseeable in the sense of statistical probabilities, not in the sense of legal causation.

Unfortunately, a certain small percentage of people who threaten to kill their spouses over domestic disputes actually carry out the threat. Fortunately, a very large percentage of people who make such threats never carry them out, including people who harass and stalk and are subject to protection-from-abuse orders. Despite the existence of domestic-abuse profiles and models, domestic abuse cuts across every stratum of American Society, and there is no reliable way for the police to predict who among the many potential abusers will carry out their threats.

Because the Constitution was not designed as a guarantee of certain minimal levels of safety and security, the police did not become the permanent guarantor of Tinneney's safety. To hold otherwise would require the police to lock up indefinitely all of the many thousands of potential abusers and to never let them out for fear of violating the Constitutional rights of some potential victim.

Accordingly, the City did not become the permanent guarantor of Tinneney's safety because Tinneney had obtained an Order of Protection against Passalicqua, because the police had a warrant for Passalicqua's arrest, or because the police had taken Passalicqua into custody and released him. See DeShaney, 489 U.S. at 201, 109 S.Ct. at 1006, 103 L.Ed.2d at 262-263.

When the police released Passalicqua, Tinneney was not at the police station. The police did not drop Passalicqua off in an area where Tinneney was known to be. According to Paragraph 21 of the Complaint the police released release Passalicqua so that he could settle his personal affairs and see his children one last time before turning himself back in to the police at approximately 1:00 o'clock p.m.

While the death of Tinneney is tragic and the actions of Passalicqua are repugnant, the causal connection between Passalicqua's release and Tinneney's death is too attenuated. See Morse v. Lower Merion School District, 132 F.3d 902 (3d Cir. 1997). There were too many intermediate, intervening acts by Passalicqua that cannot be attributed to the City. Ultimately, the City placed Tinneney in no worse position than that in which he would have been had it not acted at all. DeShaney, 489 U.S. at 201, 109 S.Ct. at 1006, 103 L.Ed.2d at 262-263.

In short, plaintiff has not averred such facts as to make the harm Tinneney suffered "foreseeable and fairly direct" from the City's perspective. Therefor, the absence of a "fairly direct" causal connection between the City's actions and Tinneney's death precludes any liability by the City. Kneipp, 95 F.3d at 1208.

### Willfulness

The second element of the Kneipp test is that the state actor acted in willful disregard for the safety of the plaintiff. Because plaintiff has not alleged facts sufficient to make Tinneney's death directly causally related to the City's release of Passalicqua, as a matter of law, plaintiff cannot establish that the City was willfully indifferent to Tinneney's safety. See Morse, 132 F.3d at 910.

Moreover, the City was clearly concerned for Tinneney's troubles with Passalicqua. Tinneney's complaints did not fall on deaf ears. Tinneney received an Order of Protection. Upon Tinneney's complaint that Passalicqua had violated that Order the police obtained an arrest warrant and executed it.

The police did allow Passalicqua to leave the station to put his affairs in order and say goodbye to his children, but this does not constitute willfull disregard of Tinneney's safety. The most that can be said of the City is that it released Passalicqua under circumstances that may have dictated a more active role for it. DeShaney, 489 U.S. at 203, 109 S.Ct. at 1007, 103 L.Ed.2d at 263.

Because "the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it

chosen to provide them. DeShaney, 489 U.S. at 196-197, 109 S.Ct. at 1004-1005, 103 L.Ed.2d at 259.

#### Special Relationship

The third element of the Kneipp test is that there existed some relationship between the state and the plaintiff. Plaintiff must aver facts supporting the contention that some relationship between the state and Tinneney existed. Kneipp, 95 F.3d at 1208.

Plaintiff avers that Tinneney and the City were specially bound by the Order of Protection. Plaintiff contends that this special relationship required the city to protect Tinneney from Passalicqua. Plaintiff asserts that the genesis of this relationship was Tinneney's receipt of an Order of Protection.

There is some support for plaintiff's position in Pennsylvania's Protection From Abuse Act, 23 Pa.C.S.A. §§6101-6117. The statute imposes the duty upon local law enforcement agencies to provide certain notifications to the victims of abuse. For instance, section 6105(b) requires each law enforcement agency to "provide the abused person with oral and written notice of the availability of safe shelter and of domestic violence services in the community, including the hotline for domestic violence services." 23 Pa.C.S.A. §6105(b). Section 6105(d) requires law enforcement agencies to "make

reasonable efforts to notify any adult or emancipated minor protected by an order...of the arrest of the defendant for violation of an order as soon as possible....not more than 24 hours after preliminary arraignment." 23 Pa.C.S.A. §6105(d).

Section 6114(c) of the Protection from Abuse Act provides that

[t]he appropriate releasing authority...shall use all reasonable means to notify the victim sufficiently in advance of the release of the offender from any incarceration imposed under subsection (b) [from a sentence for contempt of a protection order]. Notification shall be required for work release, furlough, medical leave, community service, discharge, escape and recapture. Notification shall include the terms and conditions imposed on any temporary release from custody.

23 Pa.C.S.A. §6114(c). While the City has a statutory obligation to provide certain information and notice to victims of physical abuse, this does not translate into the type of special relationship contemplated by Kneipp.

The logical extension of plaintiff's argument is that, from January 10, 2001 to an indefinite period in the future, the City had an affirmative duty to protect Tinneney from Passalicqua. If that were the case, then the City would have a special relationship with, and a duty towards, everyone of its citizens who is a victim covered by the protection of a court order, or who is a party to a civil or a criminal action and covered by the protection, or the requirements, of a court order.

Plaintiff's arguments fail as a matter of law. In order to meet the Kneipp "relationship" element, the plaintiff must allege some facts to show that the state exerted control over Tinneney. Morse, 95 F.3d at 1209. But the Order of Protection conferred to the City no ability to control Tinneney. Tinneney did not become a ward of the state. When the City released Passalicqua, it took no affirmative action regarding Tinneney.

Under the special relationship theory the state is responsible for preventing harms to an individual only when the state has taken away the power of that individual to defend himself.

When the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs - e.g. food, clothing, shelter, medical care, and reasonable safety - it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause.

D.R. v. Middle Bucks Area Vocational Technical School,  
972 F.2d 1364, 1370 (3d Cir. 1992)(quoting DeShaney,  
489 U.S. at 200, 109 S.Ct. at 1005, 103 L.Ed.2d at 261-262).

Such is not the case here. As explained above, the instrument that plaintiff claims created the special relationship between the City and Tinneney did not cause Tinneney to be taken into the City's custody and held against his will. The only effect of Tinneney's Order of Protection was the criminalizing of

any further contact that Passalicqua might have attempted with Tinneney. Therefore, as a matter of law Tinneney did not have a special relationship with the City that would render the City responsible for protecting Tinneney from Passalicqua.

#### Authority

Finally, the fourth element of the Kneipp test is that the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. But plaintiff has failed to aver any set of facts that the City used its authority to create an opportunity that otherwise would not have existed for Passalicqua to kill Tinneney. Kneipp, 95 F.3d at 1208.

While plaintiff maintains, and it is certainly true, that Passalicqua could not have killed Tinneney during the afternoon of January 19, 2001 if the City had not released Passalicqua from its custody, this does not establish that the City "created an opportunity that otherwise would not have existed." Kneipp, 95 F.3d at 1208. In order for the court to find that the City had created such an opportunity, plaintiff must aver some facts which establish that Tinneney "was in a worse position after the police intervened than [he] would have been if they had not done so." 95 F.3d at 1209. When the City released Passalicqua it did not increase the danger or risk of injury to Tinneney. Id. The risk of injury to Tinneney remained constant.

There is no allegation or inference in the Complaint to the contrary. Consequently, plaintiff fails to establish this prong.

Because plaintiff failed to aver sufficient facts from which the court might determine or infer that any of the Kneipp factors have been met, the state-created danger test does not save the Complaint from dismissal.

#### Failure to Train

Plaintiff alleges that the City is liable because the police officers, acting in accordance with their training, released Passalicqua. Since we decide that the City's police did not violate Tinney's Constitutional right to substantive due process when they released Passalicqua, the City cannot be liable for failing to train the police appropriately concerning such releases. The facts, even all the allegations in the Complaint are true, fail to establish that the City is a wrongdoer. See Collins v. City of Harker Heights, 503 U.S. 115, 124, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261, 272 (1992). Therefore, plaintiff is without a cause of action or a remedy against the City.

#### Conclusion

"Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society."

Daniels, 474 U.S. 327, 332, 106 S.Ct. 662, 665, 88 L.Ed.2d 662, 669. “[A] State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.” DeShaney, 489 U.S. at 197, 109 S.Ct. at 1005, 103 L.Ed.2d at 259. Because plaintiff has failed to aver any fact or inference that the City violated Tinneney’s Constitutional right to substantive due process under the Fourteenth Amendment of the United States Constitution, the Complaint is dismissed.

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JASON STOLZER, AS ADMINISTRATOR )  
ON BEHALF OF THE ESTATE OF GARY )  
TINNENY, DECEASED, )  
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DISTRICT, and )  
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CITY OF PHILADELPHIA POLICE )  
DEPARTMENT, NORTHWEST )  
DETECTIVES, )  
 )  
Defendants. )

O R D E R

NOW, this 30<sup>th</sup> day of September, 2003, upon consideration  
of Defendant's, City of Philadelphia, Motion to Dismiss Pursuant to

F.R.Civ.P. 12(b)(6) and (b)(1) filed January 31, 2003; upon consideration of Plaintiff's Answer in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint, which answer was filed February 20, 2003; and for the reasons expressed in the accompanying Opinion,

IT IS ORDERED, by agreement of counsel, that defendant City of Philadelphia Police Department Fifth Police District and defendant City of Philadelphia Police Department, Northwest Detectives are dismissed from this action with prejudice.

IT IS FURTHER ORDERED by agreement of the parties that Counts III and IV are dismissed with prejudice from plaintiff's Complaint.

IT IS FURTHER ORDERED that Defendant's, City of Philadelphia, Motion to Dismiss Pursuant to F.R.Civ.P. 12(b)(6) and (b)(1) is granted.

IT IS FURTHER ORDERED that plaintiff's Complaint is dismissed.

BY THE COURT:

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James Knoll Gardner  
United States District Judge