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

HELEN MURPHY	:	CIVIL ACTION
v.	:	
C.W., et al.	:	NO. 03-5641

MEMORANDUM

Dalzell, J. November 4, 2004

During her first airplane trip, CW, a troubled girl, spit in the face of Helen Murphy, one of the flight attendants. Murphy brought this suit against the child and those whom she believes could have prevented the attack. The parties' cross-motions for summary judgment are now before us.[1]

Factual Background

CW was born on March 16, 1987, nearly three months premature. She weighed less than two pounds and had severe digestive and respiratory problems requiring multiple surgeries.

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[1] Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In ruling on a motion for summary judgment, the Court must view the evidence, and make all reasonable inferences from the evidence, in the light most favorable to the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The moving party bears the initial burden of proving that there is no genuine issue of material fact in dispute. Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585 n.10 (1986). Once the moving party carries this burden, the nonmoving party must "come forward with 'specific facts showing there is a genuine issue for trial.'" Id. at 587 (quoting Fed. R. Civ. P. 56(e)). The task for the Court is to inquire "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Lobby, 477 U.S. at 251-52; Tabas v. Tabas, 47 F.3d 1280, 1287 (3d Cir. 1995) (en banc).

As a result, CW spent almost the entire first year of her life in a hospital. When she was three years old, the City of Philadelphia's Department of Human Services ("DHS") first assumed legal custody of CW because her mother had been neglecting her while partaking in alcohol and drug binges.[2] DHS shuffled CW among several foster homes over the next five years,[3] until she was returned to her mother's care in 1995. Unfortunately, CW's mother continued to neglect her and was ultimately incarcerated, apparently because she threatened to throw CW onto the railroad tracks. See generally Belmont Mot. Summ. J. Ex. B at 2. Without a biological parent to care for her, DHS placed CW in a therapeutic foster home with Maddie Simiril.

Simiril and CW developed a close and caring relationship over the five years that they lived together, but CW began to exhibit more difficult behavior when Simiril fell ill and DHS transferred her to a new therapeutic foster home in late 2001. See Pitts-Devine Dep. at 33-34, 40. For example, CW would refuse to follow instructions from her new foster mother, Charlotte Hill, and she would purposefully spill food and drink on the floor. Id. at 38-39. In December of 2001, CW was described as "Aggressive/Assaultive/Destructive."[4] Lee Dep. Ex.

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[2] The record contains no information about CW's father.

[3] When a fire broke at one of these homes, CW suffered third-degree burns on her forearms. Belmont Mot. Summ. J. Ex. B at 2-3.

[4] The record does not indicate what behavior might have (continued...)

1, at 146. Unable to handle this behavior, Hill twice requested that DHS remove CW from her care. Lee Dep. Ex. 2.

On the night of January 3, 2002, CW scratched herself until she bled, explaining that "I wanted to kill myself because these people don't like me." Belmont Center Mot. Summ. J. Ex. B at 1; see also Rabinowitz Dep. Ex. 1. Hill immediately took CW to the emergency room at Albert Einstein Medical Center and explained to the hospital staff that CW was "assaultive when irritated." Id.; Rabinowitz Dep. at 26-27. The next day, a DHS child advocate took CW to Belmont Center for Comprehensive Treatment ("Belmont Center"), a crisis intervention facility that designs and implements short-term treatment programs.[5] Rabinowitz Dep. at 24; Rabinowitz Dep. Ex. 2. The DHS child advocate told Randi Rabinowitz, a clinical social worker in Belmont Center's adolescent unit, that CW had an irritable temperament and poor impulse control. Id.; Rabinowitz Dep. at 33.

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[4](...continued)
inspired this description. Although there is a document that indicates that a child was "suspended for fighting," see Lee Dep. Ex. 1, at 142, that child was not CW. The case number of the suspended child was "148090.C," and other records demonstrate that the child with that case number was male. See Lee Dep. Ex. 1, at 146.

[5] Although Mary Pitts-Devine was the DHS social worker with primary responsibility for CW's case, she was not the person who took CW to Belmont Center. See Pitts-Devine Dep. at 44. Moreover, the DHS child advocate who took CW to Belmont Center did not commit CW against her will. CW voluntarily admitted herself to Belmont Center. Rabinowitz Dep. at 47.

When CW arrived at Belmont Center, she was fourteen years old, but appeared much younger. Rabinowitz Dep. at 18. In addition to her short stature, see Murphy Dep. at 46-47, CW has an IQ of only 44, placing her among the "profoundly retarded." Rabinowitz Dep. at 19. CW spoke loudly and was hyperactive, though Belmont Center staff found her cooperative. Belmont Mot. Summ. J. Ex. B at 2. Dr. Fayez El-Gabalawi, a psychiatrist, diagnosed CW with attention deficit hyperactivity disorder, pervasive developmental disorder, and post traumatic stress disorder.[6] Id. at 5.

While she was adjusting to life at Belmont Center in January of 2002, CW remained hyperactive and "difficult to redirect." Belmont Mot. Summ. J. Ex. B at 3. She continued to scratch herself until she bled and displayed "periods of agitation and anger outbursts." Id. Although she remained loud and occasionally exhibited bouts of behaviorally related incontinence, CW seemed less agitated and generally well-adjusted after a few days at Belmont Center. Id. at 4; Rabinowitz Dep. at 35-36, 46. CW never assaulted the staff or other patients at Belmont Center. Pitts-Devine Dep. at 81-83; El-Gabalawi Dep. at 22, 48; Rabinowitz Dep. at 78.

In short, CW's behavior stabilized after her first few weeks at Belmont Center. See El-Gabalawi Dep. at 34, 47; Pitts-

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[6] John Spychalski, plaintiff's expert psychologist, contends that CW also should have been diagnosed with oppositional defiant disorder. See Spychalski Report at 1.

Devine Dep. at 49. As a short-term treatment facility, however, Belmont Center was not equipped to care for CW indefinitely, so Rabinowitz began to investigate residential treatment facilities where CW could stay on a more permanent basis. This task proved difficult because few residential facilities have expertise with the mentally retarded and the local facilities with that expertise had long waiting lists. Rabinowitz Dep. at 42; Pitts-Devine Dep. at 105-06. After many weeks of searching, Rabinowitz finally found a residential facility in Texas, the Brown School, that would accept CW.

On April 16, 2002, CW's DHS social worker, Mary Pitts-Devine, made the arrangements for CW's trip to Texas through the Rosenbluth travel agency. Pitts Devine Dep. at 55, 97. Rosenbluth booked CW on an American Airlines flight departing from Philadelphia at 6:00 a.m. on April 26, 2002 and stopping in Chicago before continuing on to Austin, Texas. Although Pitts-Devine ordinarily transported her own clients in situations like this one, she had taken ill and told her supervisor, Larita Lee, that "she preferred not" to fly. Lee Dep. at 35; Pitts-Devine Dep. at 63, 68. Lee approved an informal arrangement that Pitts-Devine had made with another DHS social worker, Joseph Slotnick, to take her place as CW's escort during the trip to Texas.[7]

[7] It appears that Lee had at least a general understanding of CW's case because she met with Pitts-Devine every two weeks to discuss all of her cases. Pitts-Devine Dep. at 15.

To prepare Slotnick for the trip, Pitts-Devine initiated an informal conversation in which she explained the "ins and out [sic] of the child" to him. Pitts-Devine Dep. at 87. Slotnick remembers Pitts-Devine telling him generally that CW had "behavioral problems" but not going into great detail on the subject.[8] Slotnick Dep. at 16-17, 65. Though Slotnick assumed that CW would be extremely difficult to manage, would not follow instructions, and might become highly aggressive, he neither asked Pitts-Devine for more detailed information about CW nor reviewed CW's DHS file for himself. Id. at 16, 65-66. Lee also met with Slotnick to discuss CW's case, and she gave him the "[i]nformation that [she] knew regarding past behavioral incidents."[9] Lee Dep. at 40. Slotnick also spoke with Rabinowitz to coordinate the logistical aspects of his trip, but they did not discuss CW's behavior. Rabinowitz Dep. at 53.

Just as DHS prepared Slotnick for the trip, Belmont Center prepared CW. On multiple occasions, Rabinowitz explained to CW that she would be moving to Texas, and CW was "excited" and

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[8] When asked at her deposition whether she gave special instructions to Slotnick about CW's behavior, Pitts-Devine responded that she could "only go by [her] observations" and proceeded to explain that she had had no problems with CW. Pitts-Devine Dep. at 88-89, 93. From this exchange and Slotnick's account, no reasonable jury could doubt that Pitts-Devine generally described CW's misbehavior but she did not alert Slotnick to any of CW's specific deeds because she had not observed them personally.

[9] Lee did not review CW's file before meeting with Slotnick and she did not have the file at the meeting. Lee Dep. at 41, 76-77.

"looking forward" to the plane trip, though she did not want to leave Belmont Center. Rabinowitz Dep. at 43. Dr. El-Gabalawi also found CW to be "happy" and "excited" about the trip. El-Gabalawi Dep. at 34. Similarly, CW was "pretty excited" and not anxious about the trip when she spoke to Pitts-Devine about it. Pitts-Devine Dep. at 120; see also id. at 56.

On the evening of April 25, 2002, Slotnick left work around 5:00 p.m. and went to bed around 10:30 p.m. He awoke around midnight, and a chauffeured DHS vehicle picked him up at his apartment at 1:00 a.m. the following morning. Slotnick Dep. at 18-21. After arriving at Belmont Center around 2:00 a.m., Slotnick observed CW loudly saying that she did not want to leave. Id. at 23. She wanted to say good-bye to the other patients, all of whom were asleep. Rabinowitz Dep. at 51-52. Belmont Center staff eventually pacified CW, and Slotnick does not recall introducing himself to her. Slotnick Dep. at 24-25.

Belmont Center discharged CW into Slotnick's custody between 3:15 a.m. and 4:00 a.m. Slotnick Dep. at 73. Though Belmont Center had taken care to outfit CW with a diaper "to be safe," Rabinowitz Dep. at 52, it did not administer CW's medications on April 26, 2002, and it did not provide the

medications to Slotnick to administer.[10] Slotnick did not even know that CW was on medication. Slotnick Dep. at 41.

From Belmont Center, Slotnick and CW proceeded to Philadelphia International Airport. Slotnick never spoke to CW. Id. at 26-27. At the airport, CW became loud while waiting thirty to forty-five minutes to pass through a security checkpoint. Id. at 29. Once inside the main terminal, CW began to use more vulgarities and to distance herself from Slotnick. Id. at 31. CW told Slotnick that she did not want to board the plane because she was afraid to fly, but he was able to cajole her onto the flight by using a soothing tone of voice. Id. at 32-33.

When CW and Slotnick entered the plane, Helen Murphy, one of the three flight attendants, showed CW to her seat. Murphy Dep. at 49. At first, Murphy thought that CW was an unaccompanied minor because Slotnick seemed so "distant and aloof," id. at 123-24, but Murphy realized that they were

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[10] For purposes of this case, only three of CW's medications are relevant: Risperdal, Ritalin, and Benadryl. CW received prescription Risperdal twice a day to reduce agitation and improve impulse control. El-Gabalawi Dep. at 18. Because Risperdal becomes effective only after it builds up slowly in the blood, missing her 9:00 a.m. dose would not have any impact on CW's behavior. Dackis Report at 8. Ritalin, another prescription drug, enhances attention and reduces hyperactivity, El-Gabalawi Dep. at 18, but CW's morning dose was not due until 10:00 a.m., Dackis Report at 8. Finally, Belmont Center used non-prescription Benadryl on an "as needed" basis to reduce agitation or to facilitate sleep. El-Gabalawi Dep. at 23-24. Between February 1, 2002 and CW's discharge, Belmont Center administered Benadryl to CW thirty-four times, thirty-three of which occurred "at the hour of sleep." Dackis Report at 7.

together when CW loudly objected to sitting in her assigned seat, which was next to Slotnick. Id. at 52-53. There were six seats in each row, separated by a central aisle into two groups of three seats each. Slotnick Dep. at 76-77. Because the early-morning flight was not full, Murphy was able to move CW to a middle seat with no passengers seated on either side of her. Slotnick sat in the aisle seat directly across from CW. Murphy Dep. at 53-54. Immediately after she was seated, CW asked for food and drink, but Murphy explained that she could not serve any until after the plane had taken off. Id. at 54.

Murphy began serving snacks and beverages to the passengers when the flight was in the air. CW asked for a ginger ale and two Cokes, and Murphy gave her a cup of ginger ale, a can of Coke (half of which Murphy poured into a cup and the other half of which remained in the can), and granola mix. Though CW loudly voiced her displeasure at receiving a single Coke, Murphy successfully placated her. Murphy Dep. at 56-57. Murphy claims not to have served Slotnick any food or beverage because he was asleep and she did not want to disturb him.[11] Id. at 60-61. When Murphy returned to CW's seating area, she saw that CW's drinks and granola were spilled on the floor. Id. at 58.

Around the time that the plane began its descent into Chicago, CW left her seat and ran through the aisle while waiving her arms and yelling obscenities. Murphy Dep. at 65. As Murphy

[11] Slotnick insists that he did not sleep during the flight. Slotnick Dep. at 39.

attempted to corral CW back to her seat, CW turned around and spit a mouthful of saliva into her face. Id. at 65, 69. Then CW spat a second time. Id. at 65. There was a large volume of saliva, and it entered Murphy's eyes, nostrils, and mouth. Id. at 166. Immediately after the incident, Murphy told Slotnick that CW had spit in her face and then ran to the bathroom to wash the saliva away. Id. at 65-66, 68, 72. At some time before the plane landed, Murphy asked Slotnick for details about the nature of his trip and inquired, "What is the problem with [CW]?"[12] Id. at 122; see also id. at 121.

After the plane landed and the passengers deplaned, Slotnick, CW, Murphy, Captain Randy Wood, and other American Airlines personnel gathered near the gate to discuss the incident. Murphy Dep. at 75-76. Murphy began to cry uncontrollably and then went to American's medical department to receive attention. Id. at 77-78. An airline representative told

[12] The record is exquisitely unclear about when Murphy asked what CW's "problem" was. Murphy explained that she asked the question because she "wanted to have an idea of what it was to describe to the . . . resolution officer locally and at the corporate level," Murphy Dep. at 122, and this explanation strongly suggests that she asked the question after the spitting incident because there would have been no reason to make a formal report until after the incident occurred. Still, Murphy elsewhere stated that she asked the question "earlier," when Slotnick woke up and walked to the back galley to ask for a drink and something to eat. Murphy Dep. at 121. For his part, Slotnick claims that Murphy asked the question either shortly before or shortly after takeoff when she noticed CW rocking back and forth in her seat and using profanity. Slotnick Dep. at 78-81. Lee reports that Slotnick told her that Murphy asked the question when he and CW were boarding the plane in Philadelphia. Lee Dep. at 53.

Slotnick that he and CW would not be permitted to continue on to Austin until they provided information about whether CW was infected with any communicable diseases. Lee Dep. at 56-57.

To get this information, Slotnick called Pitts-Devine, and she transferred his call to Lee. Pitts-Devine Dep. at 113-14. Lee, in turn, contacted Rabinowitz at Belmont Center. Lee Dep. at 57. Rabinowitz faxed a letter to American Airlines indicating that CW was not infected, and she also recommended that Benadryl would calm CW for the second leg of the trip. Id. at 58-59; Rabinowitz Dep. at 80. Slotnick obtained Benadryl and gave it to CW. American permitted them to travel to Austin, and the flight was uneventful. Slotnick Dep. at 60-61.

Murphy received immediate treatment in American's medical department, and the nurses there determined that she could not continue working that day. Murphy Dep. at 81-82. She was aghast when she learned that American had allowed CW to board the flight to Austin. Id. at 79. A few days later, Murphy's doctor diagnosed her with infectious conjunctivitis, sinusitis, and an upper respiratory infection, but these conditions abated by early June, 2002. Dackis Report at 8. The mental health professionals who examined Murphy found that she suffered from post traumatic stress disorder as a result of the incident with CW. Id. at 8-9. Murphy was so depressed and concerned that she might have been infected with hepatitis or HIV that she could not

return to work until May of 2003.[13] Rieger Report at 3. To this day, Murphy's eyes are easily irritated. Murphy Dep. at 98-99.

In an attempt to recover for her injuries, Murphy initiated this action against CW[14], Slotnick, DHS, and Belmont Center. Although the amended complaint includes six counts against each of the defendants, we concentrate on only two of the claims.[15] First, Murphy alleges in Count I that Belmont Center acted negligently.[16] Second, Count VI[17] seeks recovery under 42

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[13] Murphy received worker's compensation and a partial long-term disability benefit while she was not working.

[14] CW has never appeared to defend this suit, but we may not enter a default judgment against her because she is a minor and an incompetent. Though fully aware of this difficulty, Murphy has not suggested how she intends to proceed against CW in the many months since the complaint has been filed. In view of Murphy's failure to prosecute her claims against CW, we shall dismiss them without prejudice. Should Murphy, within five business days of entry of this Memorandum, show good cause for her lack of prosecution, we may reconsider our dismissal of the claims against CW.

[15] We shall dismiss Count III against DHS (negligent hiring of employees) without prejudice because it is duplicative of the more general negligence count against DHS in Count I. Though we shall not summarily dismiss Count IV (negligent infliction of emotional distress), neither shall we discuss it separately because the principles that we apply in our analysis of Count I apply with equal force to Count IV.

We shall enter summary judgment in the defendants' favor on Count V, which is titled "fear of contracting a communicable disease," because Murphy has offered no authority recognizing such a tort. Similarly, we shall enter summary judgment in the defendants' favor for their alleged violation of 14 C.F.R. § 91.11 because Murphy has failed to adduce any authority establishing a private right of action under that regulation.

[16] The amended complaint also seeks recovery from Slotnick and DHS for their alleged negligence and negligent infliction of emotional distress, but Pennsylvania law shields

(continued...)

U.S.C. § 1983 because Slotnick and DHS allegedly violated Murphy's Fourteenth Amendment due process rights.[18] Murphy has moved for summary judgment on these issues, and the defendants have also filed motions for summary judgment.

Legal Analysis

A. Count I: Negligence

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[16](...continued)
them from liability. See 42 Pa. Cons. Stat. § 8541 (2004) (exempting local agencies from civil liability "on account of any injury to a person . . . caused by any act of the local agency or an employee thereof"); 42 Pa. Cons. Stat. § 8545 (2004) (exempting an employee of a local agency from civil liability "to the same extent as his employing local agency"). While Slotnick could be liable if he engaged in "willful misconduct," see 42 Pa. Cons. Stat. § 8550 (2004), Murphy has not argued that Slotnick acted in such a manner and no record evidence suggests that he did so. Thus, we shall enter judgment in favor of Slotnick and DHS on Counts I and IV.

[17] Murphy's amended complaint includes two counts that are titled "Count VI." Because we discuss only the constitutional claim at any length, we shall refer to it as "Count VI."

[18] On its face, Count VI also claims that Belmont Center violated Murphy's constitutional rights, but she cannot recover from Belmont Center under 42 U.S.C. § 1983 unless Belmont Center is a "state actor." The Supreme Court recently reiterated that "state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'" Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 930 (2001) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351, 95 S. Ct. 449, 453 (1974)). Here, Murphy has failed to articulate any reason why any of Belmont Center's actions "may be fairly treated" as state actions, and the record does not suggest any reasonable basis on which a fact-finder could conclude that Belmont Center is a state actor. Thus, we shall grant summary judgment in favor of Belmont Center on Count VI.

Pennsylvania law[19] provides that:

> In the absence of willful misconduct or gross negligence, . . . any . . . authorized person who participates in a decision that a person be examined or treated under [Pennsylvania's Mental Health Procedures Act, 42 Pa. Stat. Ann. §§ 7101-7503 (2004)], or that a person be discharged, . . . or that the restraint upon such person be otherwise reduced . . . shall not be civilly . . . liable for such decision or for any of its consequences.

50 Pa. Stat. Ann. § 7114 (2004). The Pennsylvania Supreme Court has interpreted this language to cover "institutions charged with providing treatment to the mentally ill," Farago v. Sacred Heart General Hosp., 562 A.2d 300, 303 (Pa. 1989), and the parties do not dispute that Belmont Center would be entitled to summary judgment unless it engaged in "willful misconduct or gross negligence."

Because the record contains no evidence of willful misconduct, we concentrate solely on whether a reasonable fact-finder could conclude that Belmont Center was grossly negligent. The Pennsylvania courts have explained that the term "gross

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[19] We apply Pennsylvania law because Pennsylvania has the most significant contacts with the issues involved in this case. See Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 1021 (1941) ("The conflict of laws rules to be applied by the federal court . . . must conform to those prevailing in . . . courts [of the state where the federal court sits]."); see also In re Estate of Agostini, 457 A.2d 861, 871 (Pa. Super. Ct. 1983) (explaining that Pennsylvania choice-of-law rules "call for the application of the law of the state having the most significant contacts or relationships with the particular issue"). Pennsylvania has the most significant contacts here because Belmont Center does business in Pennsylvania and treated CW in Pennsylvania. Moreover, the parties implicitly concede that Pennsylvania law applies because their briefs rely almost exclusively on it.

negligence" in § 7114 means "a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care." Bloom v. Dubois Regional Medical Ctr., 597 A.2d 671, 679 (Pa. Super. Ct. 1991); see also Albright v. Abington Memorial Hosp., 696 A.2d 1159, 1164 (Pa. 1997) (approving of Superior Court's interpretation).

Based on the reports of licensed social worker Victor Alberigi and psychologist John Spychalski, Murphy argues that Belmont Center was grossly negligent because it should have taken more care in preparing CW for the trip. See Pl.'s Mem. Supp. Summ. J. at 15-16. With the benefit of hindsight, Murphy's experts offer suggestions about how Belmont Center might have better prepared CW for her trip. In view of CW's lack of experience with flying, Belmont Center could have made a "practice run" to the airport so that CW would be familiar with Slotnick and her surroundings. See Spychalski Report at 2. Belmont Center also might have discussed with CW the specific details of the trip more thoroughly. See Alberigi Report at 10 (concluding that the "lack of effort in preparing C.W. for the flight . . . constitute[s] gross negligence"). If mere negligence sufficed to expose Belmont Center to liability, these possibilities might raise a material issue of fact for a jury. Here, however, the relevant inquiry is not whether Belmont Center was negligent, but whether it was grossly negligent.

Relying on psychiatrist Charles Dackis's conclusion that "CW was more than adequately prepared for the trip," Dackis Report at 6, Belmont Center insists that it did not act with gross negligence. Though it knew or should have known that Hill described CW as "assaultive when irritated," Rabinowitz Dep. Ex. 1, this vague remark is the only evidence that could have suggested to Belmont Center that CW had assaulted others before April 26, 2002.[20] Belmont Center reasonably could have discounted this stray reference after directly observing CW's behavior for nearly four months. During that time, it is undisputed that she never threatened or assaulted Belmont Center's staff or patients in any way. In fact, CW had been stable for nearly two months before she traveled to Texas, and she seemed "excited" about the trip on the many occasions when Rabinowitz and Dr. El-Gabalawi discussed it with her. With her recent, successful adjustment to its facility, Belmont Center had no reason to obsess about the lone reference in CW's file to past behavioral problems. If anything, it could reasonably expect a trained social worker like Slotnick to protect the public adequately from any threat that CW may have posed.

For these reasons, no reasonable fact-finder could conclude that Belmont Center flagrantly and grossly deviated from the standard of care in preparing CW to fly to Texas. Thus, we

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[20] Another record noted that CW could be "Aggressive/Assaultive/Destructive," Lee Dep. Ex. 1, at 146, but that record was part of CW's DHS file and there is no evidence that anyone at Belmont Center had occasion to review it.

hold as a matter of law that Belmont Center did not act with gross negligence, and we shall enter summary judgment in its favor on Count I.[21]

B. Count VI: Section 1983

Section 1983 creates a civil cause of action for violations of constitutional rights, see 42 U.S.C. § 1983 (2004), including the Fourteenth Amendment right not to be deprived of liberty without due process of law, see U.S. Const. amend XIV, § 1. In this case, Murphy suggests that DHS and Slotnick deprived

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[21] A few other points deserve mention. First, Murphy has argued that Belmont Center's failure to diagnose CW with oppositional defiant disorder was gross negligence. Pl.'s Resp. Mot. Summ. J. at 15. Even if that were true, the alleged failure to diagnose could not have caused Murphy's injuries. There is no evidence that Slotnick familiarized himself with CW's precise, formal diagnosis, so Slotnick would not have known of the diagnosis even if Belmont Center had made it. In addition, Slotnick independently determined that CW suffered from oppositional defiant disorder, see Slotnick Dep. at 41-42, so Belmont Center's alleged failure to inform him of the condition should not have encouraged him to relax his vigilance.

Murphy also contends that Belmont Center was grossly negligent by failing to inform DHS that CW continued to use profanity because Slotnick might have been more attentive had he known that CW was prone to outbursts of obscene language. See Pl.'s Resp. Mot. Summ. J. at 17-19. While creative, there is no evidence in the record that Belmont Center failed to inform DHS of CW's affinity for the vulgar.

Finally, Murphy contends that "[a]t the very least" Belmont Center should have given Slotnick instructions regarding the administration of Benadryl. See Spychalski Report at 1. This argument rests on the opinion of a psychologist who is not qualified to offer an admissible opinion about the proper administration of medication. See F.R.Evid. 104(a) and 702; Kumho Tire Co. v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999). On the other hand, Dr. Dackis, a psychiatrist with medical training, concluded that it was not unreasonable for Belmont Center not to provide Slotnick with Benadryl for CW. See Dackis Report at 7-8. In short, there is no competent evidence that Belmont Center's failure to provide Slotnick with Benadryl constituted gross negligence.

her of her liberty interest in "free[dom] from . . . unjustified intrusions on personal security," Ingraham v. Wright, 430 U.S. 651, 673, 97 S. Ct. 1401, 1413 (1977), when they failed to prevent CW from spitting on her. We consider the potential liability of each of the defendants separately.

1. DHS

In Monell v. New York City Dept. of Social Services, 436 U.S. 658, 98 S. Ct. 2018 (1978), the Supreme Court held that "a municipality cannot be held liable under § 1983 on a respondeat superior theory," id., 436 U.S. at 691, 98 S. Ct. at 2036, but it may be directly subject to § 1983 liability as a result of an official policy or custom, id., 436 U.S. at 694, 98 S. Ct. at 2037-38. As a threshold matter, therefore, a § 1983 plaintiff must identify the municipal policy or custom that allegedly caused a violation of constitutional rights. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 403, 117 S. Ct. 1382, 1388 (1997) ("[W]e have required a plaintiff seeking to impose liability on a municipality under § 1983 to identify a municipal 'policy' or 'custom' that caused the plaintiff's injury.").

In this case, Murphy argues that "the mountain of negligent acts and omissions of Mary Pitts-Devine . . . and . . . Larita Lee" renders DHS liable under § 1983, see Pl.'s Mem. Opp'n Summ. J. at 8, but this reasoning attempts to hold DHS vicariously liable for the acts of its employees, a result that Monell plainly forbids. Because Murphy has failed even to

identify a DHS policy or custom that might have deprived her of due process, DHS is entitled to summary judgment on her § 1983 claim.

2. Slotnick

Unlike municipalities, individual state actors face § 1983 liability for isolated acts and omissions that do not rise to the level of policy or custom. Still, a state actor's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney v. Winnebago County DSS, 489 U.S. 189, 197, 109 S. Ct. 998, 1004 (1989). Because Murphy claims not that Slotnick directly violated her constitutional rights, but only that he failed to prevent CW from injuring her, DeShaney appears to foreclose her § 1983 claim against him. Nevertheless, federal courts have recognized two exceptions to DeShaney's general rule, and we must consider whether they apply here.

a. Special Relationship Exception

DeShaney recognized that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Id., 489 U.S. at 199-200, 109 S. Ct. at 1005 (1989). Thus, our Court of Appeals concluded that "when the state restrains an individual so as to expose the individual to harm," that "special relationship" creates potential liability under § 1983. See Brown v.

Pennsylvania Dept. of Health, 318 F.3d 473, 478 (3d Cir. 2003). The special relationship exception does not apply here because Murphy was not in the custody of any governmental entity when CW spat at her.[22]

b. State-Created Danger Exception

In DeShaney, the Court noted that "[w]hile the State may have been aware of the dangers that [the victim] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." DeShaney, 489 U.S. at 201, 109 S. Ct. at 1006. From this language, our Court of Appeals inferred that a § 1983 plaintiff could recover from a municipality under a "state-created danger" theory of liability. See Kneipp v. Tedder, 95 F.3d 1199, 1211 (3d Cir. 1996). As originally articulated, this theory required a plaintiff to show that:

> (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; [and] (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.

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[22] Although CW was in DHS custody at the time of the assault, we are aware of no case applying the special relationship exception when the tortfeasor was in state custody but the victim was not. Indeed, courts invoke the special relationship exception only to assist those victims who rely totally on government custodians for protection. The exception was never intended and has never been applied to allow the emancipated, such as Murphy, to recover under § 1983.

Id. at 1208 (quoting Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995)). Since Kneipp, our Court of Appeals has reformulated at least two of these elements, and we address those changes below.

To recover under a state-created danger theory, Murphy must first show that the harm that CW caused was "foreseeable and fairly direct." CW's DHS file vaguely described her as "Aggressive/Assaultive/Destructive," Lee Dep. Ex. 1, at 146, but this tidbit does not conclusively establish that CW had assaulted others before April 26, 2002. She may have merely spoken loudly and aggressively or she may have destroyed property. In short, although Slotnick should have known that CW had been called "Aggressive/Assaultive/Destructive," that fact alone does not make the assault on Murphy foreseeable to him.[23] Yet there is no other evidence even remotely suggesting that the assault was foreseeable. On the contrary, CW's stable adjustment to Belmont Center and the total absence of assaultive behavior over four months rendered her April 26, 2002 actions unforeseeable.

Apart from foreseeability, the first prong of the Kneipp test requires Murphy to show that Stlotnick's conduct caused her injury "fairly direct[ly]". Kneipp, 95 F.3d at 1208; see also Morse v. Lower Merion School Dist., 132 F.3d 902, 908-09

[23] Another record here documents that Hill told staff at the Albert Einstein Medical Center that CW became "assaultive when irritated." Rabinowitz Dep. Ex. 1. Because there is no evidence that Slotnick had access to this record, it could not have made the assault foreseeable to him.

(3d Cir. 1997) (discussing the causation requirement). We will return to the issue of causation after identifying the precise conduct of which Murphy complains.

As originally formulated, the second Kneipp factor requires analysis of whether Slotnick acted in willful disregard of Murphy's safety. In the wake of the Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708 (1998), however, our Court of Appeals recognized that a plaintiff cannot recover under the state-created danger theory unless the state actor's behavior "shocks the conscience." See Schieber v. City of Philadelphia, 320 F.3d 409, 419 (3d Cir. 2003). The "shocks the conscience" test is far from precise because "the standard of culpability for a substantive due process violation can vary depending on the situation." Rivas v. City of Passaic, 365 F.3d 181, 195 (3d Cir. 2004). Nevertheless, our Court of Appeals has consistently held that "negligence is not enough to shock the conscience under any circumstances" and "more culpability is required to shock the conscience to the extent that state actors are required to act promptly and under pressure." Schieber, 320 F.3d at 419.

Here, Murphy argues that Slotnick's behavior shocks the conscience because he fell asleep during the flight without alerting Murphy to CW's behavioral issues. Pl.'s Mem. Opp'n Summ. J. at 7. Although Slotnick denies having slept on the flight, Slotnick Dep. at 39, Murphy claims that he did, Murphy Dep. at 60-61. A reasonable jury could resolve this dispute in

Murphy's favor and find it conscience-shocking for the escort of a "profoundly" disabled child to fall asleep while on duty.

Having identified Slotnick's nap as the egregious conduct of which Murphy complaints, we must now return to the first prong of the Kneipp test to consider whether his slumber was a "fairly direct" cause of CW's assault on Murphy. While Murphy claims that Slotnick slept for part of the flight to Chicago, she also admits that he woke up before landing. See Murphy Dep. at 60-61. Moreover, her account of CW's assault suggests that Slotnick was awake during the crucial moments of the assault. Id. at 65-66, 68, 72. Because Slotnick was awake at the critical time, his earlier nap did not cause the assault on Murphy. We hold therefore that Murphy has failed to satisfy the first prong of the Kneipp test because Slotnick's conscience-shocking behavior was not a foreseeable and fairly direct cause of the assault.

The Kneipp test's third prong focuses on whether a relationship existed between the state actor and the plaintiff. While recognizing that there can be no liability under a state-created danger theory when "the state actor creates only a threat to the general population," our Court of Appeals has allowed a plaintiff to recover under that theory if she "was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions." Morse, 132 F.3d at 913. Moreover, "[t]he primary focus when making this determination is foreseeability." Id. Here, Murphy has suggested that she

satisfies this third prong because it was foreseeable that CW would harm "the people around [CW]," including Murphy. See Pl.'s Mem. Supp. Summ. J. at 14. That claim, however, states only that CW is a threat to the "general population," which is insufficient to satisfy the third prong of the Kneipp test.

Finally, Kneipp permits the imposition of § 1983 liability under a state-created danger theory only if a state actor uses his authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. In other words, we must consider whether Slotnick "has in some way placed the plaintiff in a dangerous position that was foreseeable." Morse, 132 F.3d at 915. Murphy asserts that Slotnick created an opportunity for CW to assault her by "perform[ing] a level of service so lacking that it most certainly triggered C.W.'s worst fears." Pl.'s Mem. Supp. Summ. J. at 15. Because a reasonable jury could find that Slotnick's alleged negligence in supervising CW foreseeably made Murphy's job more dangerous, we cannot conclude that Murphy has failed to satisfy the fourth Kneipp prong.

Still, Murphy has failed to satisfy the first and third prongs of the Kneipp test, so she may not recover from Slotnick under a state-created danger theory of § 1983 liability. We may, therefore, enter summary judgment in Slotnick's favor on Murphy's § 1983 claim even without considering whether the doctrine of qualified immunity would have shielded him from liability had his behavior been more egregious. See generally Anderson v.

Creighton, 483 U.S. 635, 638, 107 S. Ct. 3034, 3038 (1987) (recognizing precedents that "provid[e] government officials performing discretionary functions with a qualified immunity, shielding them from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated").

Conclusion

Although the record clearly establishes that CW unjustifiably assaulted Murphy, Murphy chose to pursue deeper pockets. In the various ways that we have discussed above, the law imposes liability on parties not directly responsible for such assaults only if they are more than simply negligent. On the basis of this record, no reasonable jury could find that Belmont Center, DHS, or Slotnick acted with the requisite culpability, so we shall grant their motions for summary judgment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HELEN MURPHY	:	CIVIL ACTION
	:	
v.	:	
	:	
C.W., et al.	:	NO. 03-5641

ORDER

AND NOW, this 4th day of November, 2004, upon consideration of defendant Belmont Center's motion for summary judgment (docket entry # 38), the Municipal Defendants' motion for summary judgment (docket entry # 39), plaintiff's response to the defendants' motions for summary judgment, plaintiff's motion

for summary judgment (docket entry # 42), and defendants' responses to plaintiff's motion for summary judgment, and in accordance with the accompanying Memorandum, it is hereby ORDERED that:

1. Belmont Center's motion for summary judgment is GRANTED;

2. The Municipal Defendants' motion for summary judgment is GRANTED;

3. Plaintiff's motion for summary judgment is DENIED;

4. Plaintiff's claims against CW are DISMISSED WITHOUT PREJUDICE FOR LACK OF PROSECUTION; and

5. The Clerk shall CLOSE this civil action statistically.

BY THE COURT:

/s/ Stewart Dalzell, J.