

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

JENNIFER WACKER MARTIN and)	
ANNELIESE I. WACKER,)	Civil Action
)	No. 03-CV-06793
Plaintiffs)	
)	
vs.)	
)	
TYRONE COMUNALE and)	
JOHN DOE,)	
)	
Defendants)	

* * *

APPEARANCES:

ARNOLD DRANOFF, ESQUIRE
On behalf of Plaintiffs

LYNELLE A. GLEASON, ESQUIRE
On behalf of Defendant Tyrone Comunale

* * *

M E M O R A N D U M

JAMES KNOLL GARDNER,
United States District Judge

This matter is before the court on a motion for summary judgment. The motion is entitled Defendant Constable Tyrone Comunale's Motion for Summary Judgment and was filed on July 29, 2005.¹

¹ On August 24, 2005 plaintiffs timely filed their response to Defendant Constable Tyrone Comunale's Motion for Summary Judgment. Additionally, on August 26, 2005, plaintiffs filed their certificate of service for their response.

Although plaintiffs' response was due by August 15, 2005 pursuant to Fed.R.Civ.P. 6(e) and Rule 7.1(c) of the Rules of Civil Procedure for the United States District Court for the Eastern District of Pennsylvania, plaintiffs response was timely filed because on August 17, 2005 plaintiffs

(Footnote 1 continued):

For the reasons expressed below, we grant defendant's motion for summary judgment.

SUMMARY OF DECISION

Defendant's Summary Judgment Motion

Defendant Constable Tyrone Komunale moves for dismissal of all of plaintiffs' federal and state law claims. Specifically, he contends that he is entitled to summary judgment on plaintiffs' 42 U.S.C. § 1983 claim. Additionally, Constable Komunale argues that he is entitled to qualified immunity from plaintiffs § 1983 claim. Lastly, Constable Komunale states that he is entitled to summary judgment on plaintiffs' claims for negligent and intentional infliction of emotional distress because plaintiffs have not articulated a cognizable claim.

42 U.S.C. § 1983

Title 42 United States Code § 1983 provides a means for redress to plaintiffs "depriv[ed] of any rights, privileges, or immunities secured by the Constitution and laws". We grant defendant's motion for summary judgment on plaintiffs' § 1983 claim because we find that plaintiffs have not cited facts in the

(Continuation of footnote 1):

filed a motion to extend the deadline to answer defendant's motion for summary judgment. On August 19, 2005, defendant Komunale opposed plaintiffs' motion. Nevertheless, on August 30, 2005, we granted plaintiff's motion to extend their deadline for plaintiff to answer until September 2, 2005.

record that, taken with all reasonable inferences drawn in favor of the plaintiff, would establish a § 1983 claim.

Qualified Immunity

Qualified immunity shields state officials performing discretionary functions from federal suits alleging violation of a constitutional right, provided that their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. DeBellis v. Kulp, 166 F.Supp.2d 255 (E.D.Pa. 2001) (Van Antwerpen, J.).

Therefore, each defendant constable would be entitled to qualified immunity unless he violated a clearly established statutory or constitutional right of plaintiffs. In other words, there is a two-part test. If the constable did not violate such a right, he will have qualified immunity.

However, even if he did violate such a right, the constable would have qualified immunity if the constitutional or statutory right were not clearly established. The dispositive inquiry is whether it would be clear to a reasonable constable that his conduct was unlawful in the situation he confronted. Debellis, supra.

We grant defendant's motion for summary judgment because plaintiffs' facts, if believed, would not establish that defendants violated plaintiffs' constitutional or statutory rights. Alternatively, we would grant defendant's motion for

summary judgment because, even if plaintiffs had articulated facts that, if believed, would have established that defendants violated plaintiffs' statutory or constitutional rights, we find that it would not be clear to a reasonable constable that his conduct was unlawful.

Intentional Infliction of Emotional Distress

Under Pennsylvania law, in order to state a claim under which relief can be granted for the tort of intentional infliction of emotional distress, the plaintiffs must allege physical injury. Rolla v. Westmoreland Health System, 438 Pa.Super. 33, 38, 651 A.2d 160, 163 (1994). Also, a plaintiff must support the claim of emotional distress with competent medical evidence, in the form of expert medical evidence. DeBellis v. Kulp, 166 F.Supp.2d 255, 281 (E.D.Pa. 2001) (VanAntwerpen, J.).

Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on the defendant's "outrageousness" without expert medical confirmation that the plaintiff actually suffered the claimed distress. Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 197, 527 A.2d 988, 995 (1987).

Defendant seeks summary judgment on plaintiffs' claims for intentional infliction of emotional distress. Plaintiffs do not contest defendant's contention that plaintiffs have produced

evidence of neither physical injury nor medical evidence of treatment of such injury. Further, we have found evidence of neither in the record. Thus, we conclude that both plaintiffs have failed to produce sufficient evidence to establish a cause of action for intentional infliction of emotional distress. Accordingly, we grant defendant's motion for summary judgment concerning plaintiffs' intentional infliction of emotional distress claim.

Negligent Infliction of Emotional Distress

Under Pennsylvania law, "except in limited, compelling circumstances . . . a claimant may not recover damages for negligently inflicted emotional distress in the absence of attendant physical injury." Rolla, supra.

We grant defendant's motion for summary judgment on plaintiffs' claim for negligent infliction of emotional distress because plaintiffs do not contest that they have not produced evidence of physical injury. Further, we have not found evidence of physical injury in the record. Moreover, plaintiffs have not articulated any authority that would allow them to recover without physical injury. Accordingly, we grant defendant's motion for summary judgment concerning plaintiffs' negligent infliction of emotional distress claim.

JURISDICTION AND VENUE

Jurisdiction is based upon federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court has supplemental jurisdiction over plaintiffs' pendent state law claims. See 28 U.S.C. § 1367. Venue is proper pursuant to 28 U.S.C. § 1391(b) because the events giving rise to plaintiffs' claims allegedly occurred in this judicial district.

PROCEDURAL HISTORY

Plaintiffs, Jennifer Wacker Martin and Anneliese I. Wacker, filed their Complaint on December 18, 2003. Initially, plaintiffs' Complaint contained six counts and averred claims against four defendants.² Those defendants were Tyrone Komunale, the City of Allentown Parking Authority, the City of Allentown and John Doe.³

By Order of the undersigned dated May 5, 2004 and filed May 7, 2004, we dismissed with prejudice plaintiffs' Complaint against defendant City Allentown Parking Authority because

² Count I of plaintiff's Complaint was against defendants Tyrone Komunale and John Doe for Civil Rights Violations. Count II was against City of Allentown Parking Authority and City of Allentown for Civil Rights Violations. Count III was against defendants City of Allentown Parking Authority and City of Allentown for Negligence, Gross Negligence & Negligence Per Se. Count IV was against defendants City of Allentown Parking Authority and City of Allentown for Negligent Supervision. Count V was against City of Allentown Parking Authority, City of Allentown, Tyrone Komunale and John Doe for Punitive Damages. Finally, Count VI was against defendants Tyrone Komunale and John Doe for Negligent and Intentional Infliction of Emotional Distress.

³ John Doe is a fictitiously-named, unidentified individual who has not entered an appearance in this action.

plaintiffs did not oppose defendant Allentown Parking Authority's motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) filed on February 20, 2004. On August 9, 2005, defendant City of Allentown was dismissed with prejudice by Order of the undersigned, which Order approved a stipulation by counsel filed on May 13, 2005.

On July 29, 2005, Tyrone Comunale filed Defendant Constable Tyrone Comunale's Motion for Summary Judgment.

REMAINING CLAIMS IN PLAINTIFFS' COMPLAINT

Because the City of Allentown Parking Authority and City of Allentown have been dismissed, only three counts remain in plaintiffs' Complaint. Those counts are Count I against Tyrone Comunale and John Doe for Civil Rights Violations; Count V against defendants Tyrone Comunale and John Doe for Punitive Damages arising from plaintiffs' state and federal law claims;⁴ and Count VI against defendants Tyrone Comunale and John Doe for Negligent and Intentional Infliction of Emotional Distress.

Count I is brought under 42 U.S.C. § 1983. Count I avers that the defendants Tyrone Comunale and John Doe violated plaintiffs' Constitutional rights under the Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

⁴ We note that punitive damages are not an independent cause of action. Rather, punitive damages are a remedy. See Waltman v. Fanestock & Co., Inc., 792 F.Supp. 31, 33 (E.D.Pa. 1992).

Plaintiffs' allege that these violations caused them to suffer injuries.

Specifically, Count I alleges that defendants Comunale and Doe violated the above constitutional rights when the defendants unlawfully detained and seized \$800.00 from the plaintiffs, while "acting under the color of their authority as Constables working with the minor judiciary of the County of Lehigh and the City of Allentown Parking Authority".⁵ Further, plaintiffs allege that the defendants exercised unlawful restraint and abuse of authority over the plaintiffs, which alleged conduct was grossly disproportionate to the execution of the defendants' duties as Constables.⁶ Additionally, plaintiffs assert that the defendants not only detained but also refused to leave the residence of plaintiff Anneliese I. Wacker and that this refusal to leave constituted cruel and unusual punishment and deprived plaintiff of her constitutional rights of the "forth [sic], fifth, eighth and fourteenth amendments."⁷

Count V alleges that the acts and omissions of defendants Tyrone Comunale and John Doe were malicious, wanton, willful, reckless and intentionally designed to inflict grievous bodily harm and mental distress upon the persons of the

⁵ Complaint at para. 35.

⁶ Complaint at para. 36.

⁷ Complaint at para. 37.

plaintiffs.⁸ Because of this alleged behavior, plaintiffs claim that they are entitled to punitive damages for plaintiffs' state and federal law claims.

Count VI alleges two causes of action, Negligent Infliction of Emotional Distress and Intentional Infliction of Emotional Distress by negligently or intentionally subjecting the plaintiffs to arrest/detention or the threat thereof.⁹ Further, plaintiffs assert that, as a result of the defendants' "negligent and outrageous conduct", the plaintiffs have suffered "substantial damages, plus the cost of this suit".¹⁰

STANDARD OF REVIEW

In considering a motion for summary judgment, the court must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). See also, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10,

⁸ Originally, Count V applied to all four defendants, but, because we have dismissed two defendants, the City of Allentown and the City of Allentown Parking Authority, Count V is only against defendants Constable Tyrone Comunale and Constable John Doe.

Additionally, as noted in Footnote 6 above, punitive damages are not a cause of action. Punitive damages are a remedy.

⁹ Complaint para. 61.

¹⁰ Complaint para. 62.

91 L.Ed.2d 202, 211 (1986); Federal Home Loan Mortgage Corporation v. Scottsdale Insurance Company, 316 F.3d 431, 443 (3d Cir. 2003). Only facts that may affect the outcome of a case are "material". Moreover, all reasonable inferences from the record are drawn in favor of the non-movant. Anderson, supra, at 255.

Although the movant has the initial burden of demonstrating the absence of genuine issues of material fact, the non-movant must then establish the existence of each element on which it bears the burden of proof. See Watson v. Eastman Kodak Company, 235 F.3d 851, 857-858 (3d Cir. 2000). A plaintiff cannot avert summary judgment with speculation or by resting on the allegations in his pleadings, but rather must present competent evidence from which a jury could reasonably find in his favor. Ridgewood Board of Education v. N.E. for M.E., 172 F.3d 238, 252 (3d Cir. 1999); Woods v. Bentsen, 889 F.Supp. 179, 184 (E.D.Pa. 1995).

FACTS

Based upon the record produced by the parties in support of their cross-motions for summary judgment motions, including depositions, affidavits and exhibits, the following facts are undisputed or nonmaterial.

The events in controversy occurred on the evening of December 18, 2001. On December 18, 2001, plaintiff Jennifer

Wacker Martin was single and her name was Jennifer Wacker.¹¹ On the evening of December 18, 2001, she resided at 8111 Halstead Street, Philadelphia, Pennsylvania on the second floor of her grandmother's home. Her grandmother is co-plaintiff Anneliese I. Wacker. Also on December 18, 2001, defendant Tyrone Comunale was a Pennsylvania constable.

Before the events that precipitated this lawsuit, during 2000 and 2001 a light-colored Lincoln with a Pennsylvania vehicle registration number DGH5578 was parked illegally in various locations around Allentown, Pennsylvania. As a consequence, the Allentown Parking Authority issued at least 19 Traffic Citations for parking violations. Those citations were not paid, and arrest warrants were issued.

District Justice Michele Varricchio of Magisterial District Number 31-1-03 issued at least 21 arrest warrants.¹² At least 20 of the arrest warrants named Jenniter Wacker of 628 North 6th Street, Apartment 2, Allentown, Pennsylvania as the defendant.

Four of those warrants were issued on March 4, 2001; eight were issued on August 2, 2001; and the remaining eight

¹¹ Subsequently, she married and changed her name.

¹² There is a nonmaterial discrepancy regarding the number of warrants issued. Specifically, defendant states that 22 warrants were issued. Additionally, although Plaintiffs' Exhibit B includes a total of 21 warrants, plaintiffs alternate between alleging 22 warrants were issued and 21 warrants were issued. Nevertheless, this discrepancy is not material because it does not affect judgment in this case.

warrants were issued on September 28, 2001. Also, on September 12, 2001, one warrant was issued for Jennifer Wacker of 628 North 6th Street, Apartment 2, Allentown, Pennsylvania as the defendant. The warrant control number for the warrant issued in the name of Jennifer Wacker was 0315489.

Additionally, the underlying parking citations which prompted the issuance of the arrest warrant for Jennifer Wacker contained the same license plate number as the underlying citation for the warrants for Jenniter Wacker. That license plate number was Pennsylvania plate DGH5578.

These warrants were put into Constable Comunale's bin. Constable Comunale brought the name discrepancy to the attention of District Justice Varricchio.

District Justice District Varricchio used JNET, a driver's license computer check used by Pennsylvania district courts for identification purposes, to determine the identity of the vehicle's owner and told Constable Comunale that the address for Jennifer Wacker was 40 Daffodil Drive, P.O. Box 55, Churchville, PA 18966. Constable Comunale also received the driver's license number and the driver's date of birth.

Constable Comunale knew that, although the post office box may have been a postal address, Jennifer Wacker of course did not reside in the postal box. He took this information and, on his home computer, used the name of Jennifer Wacker, the driver's

license number, and her date of birth to obtain a social security number. He then ran a credit check with the name and social security number and located plaintiff Jennifer Wacker's Halstead street address.

On December 18, 2001, Constable Comunale asked another Pennsylvania Constable to assist him in arresting Jennifer Wacker.¹³ Finally, although Constable Comunale initially intended to arrest Jennifer Wacker, neither Jennifer Wacker Martin nor Anneliese Wacker were arrested during the course of these contested events.

Defendants' Factual Contentions

Defendant's factual contentions are as follows.¹⁴ First, the defendant delineates his factual contentions regarding the experience of the plaintiff Anneliese I. Walker. Then the defendant delineates his factual contentions regarding the

¹³ As noted above, on December 18, 2003 plaintiff Jennifer Wacker Martin's name was Jennifer Wacker.

¹⁴ In this court's Rule 16 Conference Order dated February 3, 2005 and filed February 8, 2005, this court mandated that "any party filing a motion for summary judgment or partial summary judgment shall file and serve, in addition to a brief, a separate short concise statement, in numbered paragraphs, of the material facts about which the moving party contends there is no genuine dispute. The moving party shall support each such material fact with specific citations to the record....Failure to submit such a statement may constitute grounds for denial of the motion." The defendant, who is the movant for summary judgment, failed to follow this court's Order because, although the defendant did submit a numbered statement facts, the defendant cited only once to the record.

Nevertheless, in the "Memorandum of Law in Support of Defendant Constable Tryone [sic] Comunale's [sic] Motion for Summary Judgment", defendant Comunale does include a detailed statement of facts replete with citations to the record. Therefore, this court will examine those factual contentions and record citations.

experiences of plaintiff Jennifer Wacker Martin.

Anneliese Wacker

With regard to the experiences of Anneliese I. Wacker, the defendant's factual contentions are as follows. Defendant contends that Anneliese Wacker arrived home from work on the evening of December 18, 2001. At that time, her neighbor advised her that there were two men sitting across the street waiting to arrest Jennifer Wacker. After speaking with the neighbor, Anneliese Wacker then entered her home.

Defendant contends that a short while later, Anneliese Wacker stepped back outside her home and approached the vehicle in which the two men were sitting. She asked the men what they wanted.¹⁵ The men told her that they were there to arrest Jennifer Wacker.¹⁶ Anneliese Wacker then went back inside her home.

Defendant asserts that, some time later, Anneliese Wacker came out of her home a second time and approached the men. After approaching the men, she invited them inside her home. The men asked what time Jennifer Wacker would be home, and Anneliese Wacker responded that Jennifer Wacker would be home shortly.

¹⁵ From defendant's factual contentions it is unclear as to when the men identified themselves as Pennsylvania Constables; however, defendant's factual contentions intimate that the men did, at some point, identify themselves as Pennsylvania Constables.

¹⁶ As noted above, currently plaintiff's name is Jennifer Wacker Martin, but, at the time of these events, plaintiff's name was Jennifer Wacker.

While the Constables and Anneliese were waiting for Jennifer Wacker to return to the home, Anneliese's grandson, George, and Jennifer Wacker's fiancé, Michael Martin, arrived at the home. Defendant Comunale asserts that, according to Anneliese Wacker's recollection, Michael Martin contacted Jennifer Wacker and advised her that two constables were waiting for her at the home with warrants for her arrest.

Defendant Comunale asserts that, according to Anneliese, the period in which at least one constable and Anneliese were waiting for Jennifer to return to the home was a few hours. Further, during that period, Anneliese asked one of the constables how much money would be needed to pay the tickets. One of the constables indicated that he would need to speak to someone, and he then left the residence. When he returned, the constable told Anneliese that a payment of \$800.00 would be needed along with Jennifer entering a not guilty plea, so that Jennifer would not be arrested and taken to Allentown.

Defendant Comunale asserts that, according to Anneliese, at some point that evening, Jennifer Wacker's father called the residence and advised Anneliese that Jennifer Wacker would not be coming back to Anneliese's residence. Instead, arrangements were made for the Constables to follow Mr. Martin and George to the parking lot of Vaders, a local nightclub, to meet with Jennifer Wacker. At Vaders, Jennifer was to enter her

not guilty pleas on the warrants.

Finally, defendant asserts that Anneliese Wacker never sought nor received any medical, psychological or other counseling as a result of this incident.

Jennifer Wacker Martin

With regard to plaintiff Jennifer Wacker Martin, on December 18, 2001 Jennifer was on her way home from work. On her way home, her father called her to advise her that there were constables waiting to arrest her and that she should not go home. Her father also advised her that there were 22 warrants for her arrest. Her father said that those warrants were issued in Allentown, Pennsylvania.

After her conversation with her father, Jennifer Wacker Martin called her fiancé Michael Martin. After her conversation with Michael Martin, Jennifer Wacker Martin went to the home of a friend. Her friend was Mike Gleason, who was a detective for the Southhampton Police Department. Detective Gleason advised Jennifer Wacker Martin not to go home because she would be arrested and taken to Allentown, Pennsylvania.

While at Detective Gleason's home, Jennifer contacted Constable Comunale. Constable Comunale indicated that, if she did not meet him and the other constable, she would have much bigger problems because he would serve the warrants at her place of employment. During this conversation, Mrs. Wacker Martin

professed her innocence by saying, among other things, that she had never been to Allentown and that the closest she ever had been to Allentown was when she attended Kutztown University in Kutztown, Pennsylvania.

At some point, Michael Martin contacted another friend, Constable Jack McDermott. Mr. Martin contacted Constable McDermott to ask him to make arrangements with Constable Comunale to ensure that Mrs. Wacker Martin would not be taken into custody and that she would not be alone with the constables.

Constable McDermott assented to Mr. Martin's requests and drove with Mrs. Wacker Martin to the parking lot of Vaders to meet with the constables. After arriving at Vaders, Constable McDermott left Mrs. Wacker Martin in the vehicle and spoke with the constables.

When Constable McDermott returned, he explained to Jennifer Wacker Martin that she needed to sign the warrants and that she would still have to appear in court. Consequently, Mrs. Wacker Martin signed the tickets.

Subsequently, Jennifer Wacker Martin appeared before District Justice Michelle Varricchio with documents evidencing that she did not own the vehicle which received the parking tickets and that she did not live in Pennsylvania at the time the parking tickets were issued. Accordingly, the parking citations against Jennifer Wacker Martin were dismissed.

Lastly, defendant contends that Jennifer Wacker Martin never sought nor received any medical, psychological or other counseling as a result of this incident.

Plaintiff's Factual Contentions

Plaintiffs' factual contentions are as follows.¹⁷

Plaintiffs assert that the most important fact in this case is that the person named in all but one of the warrants was Jenniter Wacker, not Jennifer Wacker.

Plaintiffs contend without citing the record that on December 18, 2001 Jennifer Wacker was a 22-year-old girl who resided in an apartment on the second floor of her grandmother's home. Her grandmother is co-plaintiff Anneliese Wacker.

¹⁷ This court's Rule 16 Conference Order dated February 3, 2005 and filed February 8, 2005 required that "any party opposing a motion for summary judgment ... shall file and serve ... a separate short concise statement, responding in numbered paragraphs to the moving party's statement of the material facts about which the opposing party contends there is a genuine dispute, with specific citations to the record ... All factual assertions set forth in the moving party's statement shall be deemed admitted unless specifically denied by the opposing party in the manner set forth in this paragraph." However, plaintiffs, like the defendant, violated this court's Order because they do not support their contentions with specific citations to the record.

Nevertheless, in the Memorandum of Law in Support of Plaintiffs' Answer to Defendant Tyrone Comunale's Motion for Summary Judgment, plaintiffs do occasionally cite their five exhibits attached to Plaintiffs' Answer to Defendant Tyrone Comunale's Motion for Summary Judgment. Accordingly, this Court will consider those citations and exhibits.

Specifically, plaintiffs' attached exhibits are as follows: Exhibit A contains 19 traffic citations. Exhibit B contains 21 arrest warrants. Of the twenty-one arrest warrants, twenty are for Jenniter Wacker and one is for Jennifer Wacker. Exhibit C consists of three documents. Those documents are a purchase-of-sale receipt, the title, and assignment of title to Jennifer Walker for the 1985 Lincoln, which generated the parking tickets and subsequent arrest warrants. Exhibit D is a copy of the User Terms and Conditions of JNET, an online resource for the Commonwealth of Pennsylvania. Exhibit E is an excerpt from the deposition of defendant Tyrone Comunale, which deposition was taken on Thursday, April 25, 2005.

Subsequent to December 18, 2001, Jennifer Wacker married and her name is Jennifer Wacker Martin.

Plaintiffs further contend without citing the record that defendant Constable Comunale and another constable attempted to arrest Mrs. Wacker Martin for non-payment of parking tickets that were issued for a 1985 Lincoln with a Pennsylvania license plate number DGH5578. The tickets were issued between the years 2000 and 2001. Plaintiffs assert that the vehicle was disabled. Therefore every week, when it was not moved for trash collection, it was issued another ticket.

Further, plaintiffs contend that the actual owner of the vehicle was Jennifer Walker who resided at 628 North 6th Street, in apartment number 2, in Allentown, Pennsylvania. Additionally, plaintiffs assert that Mrs. Wacker Martin never resided in Allentown nor had any connection with the vehicle. Instead, plaintiffs assert that Mrs. Wacker Martin lived in Sedona, Arizona when the tickets were issued.

Plaintiffs aver that there were two typographical errors on the motor vehicle registration of the Lincoln. Specifically, the first and last names of the actual owner, Jennifer Walker, were misspelled. Instead of the name of the actual owner, the name of "Jenniter Wacker" appeared on the motor vehicle registration.

Plaintiffs contend that Constable Comunale concluded

that the name that appeared on the warrants, Jenniter Wacker, was a misspelling and that the name Jennifer Wacker was the correct name. Further, plaintiffs assert that Constable Comunale gained access to the "JNET", an online resource to which District Justices have access, and identified plaintiff as the person identified in the warrant. Then plaintiffs assert that Constable Comunale enlisted the help of another constable to travel to Philadelphia to arrest plaintiff, Jennifer Wacker Martin. Moreover, plaintiffs assert that defendant Constable Comunale's motive was a \$400 fee that he and the other constable would each receive for arresting and transporting Mrs. Wacker Martin to Allentown.

Plaintiffs assert without citing the record that the constables arrived in Mrs. Wacker Martin's neighborhood and staked out the premises. Plaintiffs contend that when plaintiff Anneliese Wacker approached the constables they told her that they were there to arrest Jennifer Wacker Martin and transport her to prison. Plaintiffs further contend that Mrs. Wacker Martin would be released after paying \$3,000.00.

Plaintiffs then contend without citing the record that "[a] series of events ensued wherein Jennifer, a sensitive and nervous young lady, who was on her way home from work, was reached by phone ... she embarked on an odyssey which prevented her return home while she contacted friends and family ... who

tried to intervene."

Finally, plaintiffs assert without citing the record that the outcome was that three months later the \$800.00 was returned and Jennifer Wacker Martin was found not guilty.

DISCUSSION

Plaintiffs' claim for Civil Rights Violations

Count I of plaintiffs' Complaint is a claim that defendants Tyrone Comunale and John Doe violated plaintiffs' civil rights. Defendant contends that he is entitled to summary judgment regarding Count I because there is no genuine issue of material fact, and he is therefore entitled to judgment as a matter of law.

In particular, defendant asserts that he did not violate the civil rights of the plaintiffs and that plaintiffs have not produced any evidence that Constable Comunale violated any of their civil rights because defendant was acting in accordance with a validly issued arrest warrant and could not disregard this warrant. Defendant cites Duffy v. County of Bucks, 7 F.Supp.2d 569 (E.D.Pa. 1998) for this proposition.

Further, defendant asserts under Duffy, that he had no duty to investigate every claim of innocence. For the reasons expressed below, we agree. Accordingly, we grant Defendant Contable Tyrone Comunale's Motion for Summary Judgment.

As noted, Count I of plaintiffs' Complaint alleges that

defendants Comunale and Doe violated the constitutional rights of plaintiffs when defendants unlawfully detained and seized \$800.00 from plaintiffs, while "acting under the color of their authority as Constables working with the minor judiciary of the County of Lehigh and the City of Allentown Parking Authority".¹⁸

Further, plaintiffs allege that defendants exercised unlawful restraint and abuse of authority over plaintiffs, which alleged conduct was grossly disproportionate to the execution of defendants' duties as Constables.¹⁹ Additionally, plaintiffs assert that defendants refused to leave the residence of plaintiff Anneliese I. Wacker and that this refusal constituted cruel and unusual punishment and deprived plaintiff of her constitutional rights of the Fourth, Fifth, Eighth and Fourteenth Amendments.²⁰

In response to defendant Comunale's motion for summary judgment, plaintiffs assert that "[t]here was nothing facially valid about the warrants." Plaintiffs argue that, although in their Complaint they asserted that the name in the warrant was that of Jennifer Wacker, discovery has demonstrated that out of 21 warrants only one articulated the name of Jennifer Wacker.

Additionally, plaintiffs assert that "the constable got

¹⁸ Complaint at para. 35.

¹⁹ Complaint at para. 36.

²⁰ Complaint at para. 37.

possession of warrants issued to Jenniter Wacker...decided, on his own, to investigate, concluded that Jenniter must be a misspelling, decided that Jenniter Wacker of Philadelphia must be the right person, and without notice whatsoever...and threatened to take her to jail."

Additionally, Plaintiff argues that Constable Comunale "prevailed upon the District Justice to allow him to access..." JNET. Also, plaintiffs support their argument by providing an excerpt from Constable Comunale's deposition. Within that excerpt, defendant Constable was asked and answered a compound question, in which plaintiffs implicitly argue that he coerced District Justice Varricchio into improperly using JNET.²¹ Lastly, plaintiffs do not address how the seizure and subsequent return of \$800.00 from plaintiff Wacker constitutes a violation of plaintiff's civil rights.

Notwithstanding plaintiffs' arguments, we agree with defendant and grant defendant's motion for summary judgment. Title 42 United States Code § 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be

²¹ The text of the question is "[t]he only check you made was to look up the name Jennifer. You got the Judge to or the judge volunteered when you told the judge that you thought that the name was Jennifer rather than Jenniter. You told the judge or you got the judge himself [sic] volunteered to look up Jennifer Wacker on J-Net?" Constable Comunale answered, "That's correct." See page 9 of the Memorandum of Law in Support of Plaintiffs' Answer to Defendant Tyrone Comunale's Motion for Summary Judgment.

subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Moreover, a warrant is facially deficient (or facially invalid) when it fails to particularize the place to be searched or the things to be seized so that an executing officer cannot reasonably presume it to be valid. United States v. Leon, 468 U.S. 897, 923, 104 S.Ct. 3405, 3421, 82 L.Ed.2d 677, 699 (1984). Furthermore, the test of whether any seizure violates the Fourth Amendment is a totality-of-the-circumstances test. Graham v. Connor, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) Further, no violation of the Fourth Amendment occurs during an arrest based upon a valid warrant for arrest even if the wrong person is arrested. Graham, supra; see also, Alvarez v. Freiwald, Civ.A.No. 92-1933, 1993 U.S.Dist. LEXIS 19208 (E.D.Pa. December 27, 1993)(Troutman, J.)(citing Graham, supra).

First, plaintiffs have not cited any evidence in the record indicating that plaintiffs were ever arrested, detained or restrained by defendants. Moreover, we have not seen any evidence in the record supporting this contention. Additionally, although plaintiffs argue that defendant refused to leave the home of Anneliese Wacker, plaintiffs do not cite where in the

record there is evidence of this. We have not found in the record any evidence of such a refusal to leave. Instead, on page 14 of the deposition of Anneliese Wacker, she testifies that she offered defendants a drink. This behavior, even with all reasonable inferences in favor of plaintiff, does not indicate that the Constables refused to leave the home.

Even if defendant had arrested or constructively arrested plaintiff Jennifer Wacker Martin, we conclude that plaintiffs' claim fails because they have not cited any authority for the proposition that defendant was not acting pursuant to a validly issued arrest warrant. Moreover, a finding that the warrant was facially valid is strongly supported by the fact that at least one of the arrest warrants had plaintiff's name correctly listed, although she was not the right person to be arrested. Alvarez, supra. Moreover, although the other arrest warrants were a product of typographical errors, the errors on the face of the warrant were not so significant that a reasonable officer could presume the warrant to be invalid. Leon, supra.

Regarding the seizure of \$800.00, plaintiffs admit that the money has been returned to them. Further, plaintiffs have not cited any authority for the proposition that the seizure of \$800 violated plaintiffs' civil rights and, therefore, gives rise to a § 1983 claim.

Further, with regard to Constable Comunale's use of

JNET, plaintiffs cite no authority for the proposition that this would give rise to a 42 U.S.C. § 1983 claim. Instead, in Plaintiff's Exhibit D, plaintiff provides page three of a five-page JNET user agreement, which describes the terms and conditions of JNET use.

We find the JNET user agreement insufficient authority to establish a § 1983 claim. The JNET user agreement is a private agreement that does not establish any Constitutional or statutory right. Moreover, plaintiffs do not address how Constable Comunale's alleged computer use violated the JNET agreement in light of their Complaint which averred that Constable Comunale was working with the Pennsylvania Minor Judiciary.

Therefore, we conclude that no deprivation of plaintiffs' civil rights occurred. Accordingly, we dismiss plaintiffs' section 1983 claim.

Qualified Immunity

Defendant asserts that he is entitled to qualified immunity and that government officials are shielded from liability for civil damages from 42 U.S.C. § 1983 claims. Specifically, defendant contends that the facts established above entitle him to qualified immunity. We agree. Moreover, for the reasons expressed below, we find that defendant is entitled to qualified immunity.

Plaintiffs assert that defendant Constable Comunale is not entitled to qualified immunity because Constable Comunale deprived plaintiffs of their "liberty and money". Plaintiffs cite Duffy, supra, as holding that an officer is not entitled to qualified immunity when knows he is harassing the wrong person in an arbitrary and capricious manner. Additionally, plaintiffs assert that the Constable is aggressive and that his motivation to arrest Jennifer Wacker stemmed from his financial interest.

The defense of qualified immunity is a question of law. Siegert v. Gilley, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277, 287 (1991); DeBellis v. Kulp, 166 F.Supp.2d 255, 266 (E.D. Pa. 2001)(Van Antwerpen, J.). Additionally, qualified immunity is immunity from suit, not a defense to liability at trial. Saucier v. Katz, 533 U.S. 194, 200-201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272, 281 (2001).

Therefore, it is imperative to determine whether the defense is available before trial. Further, "qualified immunity shields state officials performing discretionary functions from suit for damages if 'their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" DeBellis, supra, (quoting Wilson v. Layne, 526 U.S. 603, 609, 119 S.Ct. 1692, 1696, 143 L.Ed.2d 818, 827 (1999)).

The United States Supreme Court has articulated a two-

part test to determine whether a state official is entitled to the defense of qualified immunity. In Saucier, supra, the Supreme Court stated that the initial inquiry is "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201, 121 S.Ct. at 2156, 150 L.Ed.2d at 282. If no right would have been violated, then there is no need for the second step.

If a right were violated, then the next question to ask is "whether the right was clearly established." Saucier, supra. In order to determine whether the right was clearly established the question is whether a reasonable officer would have known that his or her conduct violated the right. DeBellis, supra (citing Harlowe v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d. 396 (1982)). If these requirements are met, then the officer is entitled to qualified immunity.

For the reasons which are stated above, we conclude that, taken in the light most favorable to plaintiffs, they do not allege facts which, if proven, would establish a violation of a constitutional right. Therefore, defendant is entitled to qualified immunity.

Notwithstanding our determination that plaintiffs have not alleged facts which would establish a constitutional violation, we examine the second part of the test. Two major

duties of a constable are to execute arrest warrants and to serve the legal process of the courts. See In re Act 147 of 1990, 528 Pa. 460, 470, 598 A.2d 985, 990 (1991).

A law enforcement officer, for example a constable, does not have the authority to disregard an arrest warrant because it is the judicial system, not the officers, which determines whether a person is guilty or innocent. See Duffy v. County of Bucks, 7 F.Supp.2d 569, 577 (E.D.Pa. 1998)(Shapiro, J.); see also Alvarez v. Freiwald, No. Civ.A. 92-1933, 1993 U.S.Dist.LEXIS 19208 (E.D.Pa. 1993) (Troutman, J.).

We conclude that the alleged facts do not establish that a reasonable officer would have known he violated a clearly defined constitutional right. First, plaintiffs have not cited where in the record support exists for their argument that Constable Comunale knew that he was attempting to arrest the wrong person. In this instance District Justice Michele Varricchio issued valid arrest warrants. Although the warrants contained typographical errors, defendant Constable Comunale did not have the authority to disregard those warrants. Duffy, supra.

Therefore, we conclude that in addition to defendant Constable Comunale being entitled to qualified immunity under part one of the test, Constable Comunale is also entitled to qualified immunity under part two of the test. Accordingly, we

dismiss plaintiffs' 42 U.S.C. § 1983 claim because Constable Comunale has qualified immunity.

Defendants' Motions for Summary Judgment on Plaintiffs' State-Law Claims

In his memorandum of law, defendant Constable Comunale addresses plaintiffs' remaining state-law claims for negligent and intentional infliction of emotional distress. First, we will address plaintiffs' claim for intentional infliction of emotional distress. Then we will address plaintiffs' claim for negligent infliction of emotional distress.

Intentional Infliction of Emotional Distress

Defendant asserts that he is entitled to summary judgment on plaintiffs' claims for intentional infliction of emotional distress because plaintiffs have failed to allege any physical injury. Further defendant contends that plaintiffs have not alleged that they sought any medical or psychological treatment as a result the alleged events. For the reasons expressed below, we agree. Accordingly, we dismiss plaintiffs' claim for intentional infliction of emotional distress against Constable Comunale.

Plaintiffs' entire response to defendant's assertions is as follows: "Plaintiffs do not contest that they did not suffer physical injury other than their emotional upset and did not seek medical treatment."

To prove a claim for intentional infliction of emotional distress, the following elements must be established: (1) the conduct must be extreme and outrageous; (2) it must be intentional or reckless; (3) it must cause emotional distress; and (4) that distress must be severe. Hoy v. Angelone, 456 Pa.Super. 596, 609-610, 691 A.2d 476, 482 (1997), affirmed 554 Pa. 134, 720 A.2d 745 (1998) (citing Hooter v. Pennsylvania College of Optometry, 601 F.Supp. 1151, 1155 (E.D.Pa. 1984) and Section 46 of the Restatement (Second) of Torts).

In order to state a claim under which relief can be granted for the tort of intentional infliction of emotional distress, plaintiffs must allege physical injury. Rolla v. Westmoreland Health System, 438 Pa.Super. 33, 38, 651 A.2d 160, 163 (1994). To recover for intentional infliction of emotional distress in Pennsylvania, a plaintiff must support the claim of emotional distress with competent medical evidence, in the form of expert medical evidence. DeBellis v. Kulp, 166 F.Supp.2d 255, 281 (E.D.Pa. 2001) (VanAntwerpen, J.).

Given the advanced state of medical science, it is unwise and unnecessary to permit recovery to be predicated on an inference based on defendant's "outrageousness" without expert medical confirmation that plaintiff actually suffered the claimed distress. Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 197, 527 A.2d 988, 995 (1987).

Plaintiffs did not allege physical injury. Further, plaintiffs have not demonstrated in the record any medical evidence supporting their claim of intentional infliction of emotional distress. Nor did we find any such evidence in the record. Therefore, because no medical evidence of physical injury has been submitted, we grant defendant's motion for summary judgment on plaintiffs' claim for intentional infliction of emotional distress.

Negligent Infliction of Emotional Distress

Defendant asserts that he is entitled to summary judgment on plaintiffs claim for negligent infliction of emotional distress. Specifically, defendant asserts that Pennsylvania case law requires plaintiffs to allege physical injury for a claim of negligent infliction of emotional distress. Defendant cites Rolla v. Westmoreland Health System, 438 Pa.Super. 33, 38, 651 A.2d 160, 163 (1994) for this proposition. For the reasons expressed below, we agree. Accordingly, we dismiss plaintiffs' claim for negligent infliction of emotional distress against Constable Comunale.

As stated above, plaintiffs conceded that they suffered no physical injury. Moreover, plaintiffs do not dispute that they never sought medical treatment.

Rolla states that, under Pennsylvania law, "except in limited, compelling circumstances...a claimant may not recover

damages for negligently inflicted emotional distress in the absence of attendant physical injury." Therefore, the general rule is that physical injury is required. None of the exceptions²² apply here. Accordingly, the general rule applies.

Plaintiffs have neither alleged physical injury nor provided medical evidence for their claim of negligent infliction of emotional distress. Additionally, we were unable to find any such evidence in the record. Also, plaintiffs have not identified any authority which would dispense with the requirement of physical injury for their claim of negligent infliction of emotional distress. Moreover, plaintiffs cannot rest on their pleadings. Ridgewood Board of Education, supra. Accordingly, we grant defendant's motion for summary judgment on plaintiffs' claim for negligent infliction of emotional distress.

²² See footnote 2 of Rolla, supra, 438 Pa.Super at 38 n.2, 651 A.2d at 163 n.2, which states

n2 For examples of compelling circumstances which work to avoid the general rule, see: Speck v. Finegold, 497 Pa. 77, 439 A.2d 110 (1981)(parent allowed recovery for mental distress caused by birth of unplanned, genetically defective child); Sinn v. Burd, 486 Pa. 146, 404 A.2d 672 (1979)(recovery for mental distress permitted for parent who witnessed tortious assault upon her minor child); and Little v. York County Earned Income Tax Bureau, 333 Pa.Super. 8, 481 A.2d 1194 (1984)(allowing recovery by plaintiff who had been wrongfully imprisoned because of negligent misrepresentation to tax bureau that plaintiff had failed to pay taxes).

As noted above, there is no evidence to support a claim of wrongful imprisonment here, and the remaining exceptions are clearly inapplicable.

Plaintiffs' Claim for Punitive Damages

Count V of plaintiffs' Complaint demands punitive damages arising from their federal and state law claims. Because we have granted defendant's motion for summary judgment on each plaintiffs' federal and state law claims, this remaining claim is moot. Accordingly, Count V is dismissed.

Fictitious Party John Doe

Because we have granted defendant Constable Comunale's motion for summary judgment and because the City of Allentown and the City of Allentown Parking Authority have previously been dismissed, the only remaining defendant is a fictitiously named party, John Doe. While there may be an argument that fictitious defendants are never permissible, it is clear that, if after a reasonable period of discovery a plaintiff has not identified the fictitious defendant, the court may dismiss the fictitious defendant. See Scheetz v. Morning Call, Inc., 130 F.R.D. 34, 36 (E.D.Pa. 1990)(Cahn, J.); Agresta v. City of Philadelphia, 694 F.Supp. 117 (E.D.Pa. 1988)(Van Antwerpen, J.).

This case commenced on December 18, 2003. Additionally, by Rule 16 Conference Order of the undersigned dated February 3, 2005 and filed on February 8, 2005, discovery closed on May 10, 2005. Moreover, as of the date of this Memorandum, plaintiffs have not identified defendant John Doe. Therefore, we dismiss defendant John Doe from this action.

CONCLUSION

For all the foregoing reasons, we grant defendants' motion for summary judgment and dismiss plaintiffs' Complaint.

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

JENNIFER WACKER MARTIN and)
ANNELIESE I. WACKER,) Civil Action

)	No. 03-CV-06793
Plaintiffs)	
)	
vs.)	
)	
TYRONE COMUNALE and)	
JOHN DOE,)	
)	
Defendants)	

O R D E R

NOW, this 18th day of January, 2006, upon consideration of Defendant Constable Tyrone Comunale's Motion for Summary Judgment filed on July 29, 2005; upon consideration of Plaintiffs' Answer to Defendant Tyrone Comunale's Motion for Summary Judgment filed on August 24, 2005; upon consideration of the briefs of the parties; it appearing that plaintiffs have neither identified nor served defendant John Doe; and for the reasons expressed in the accompanying Memorandum,

IT IS ORDERED that defendant's motion for summary judgment is granted.

IT IS FURTHER ORDERED that plaintiffs' claims against defendant Tyrone Comunale are dismissed.

IT IS FURTHER ORDERED that plaintiffs' claims against defendant John Doe are dismissed.

IT IS FURTHER ORDERED that the Clerk of Court shall

close this case for statistical purposes.

BY THE COURT:

/s/ James Knoll Gardner
James Knoll Gardner
United States District Judge