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

DIANE HLYWIAK, Plaintiff, v. CITY OF PHILADELPHIA, et al., Defendants.	CIVIL ACTION NO. 96-4241

MEMORANDUM

R.F. KELLY, J. AUGUST 6, 1997

Before this Court are three separate motions for summary judgment filed by Defendants Kevin Wong, Robert DeBolt and the City of Philadelphia. This case arises from a series of events that occurred on January 21, 1995, when Plaintiff was punched in the face during a confrontation with four men in Manayunk, Pennsylvania. Plaintiff claims that one of the men involved, an off-duty police officer, never identified himself or tried to help her when she was punched by one of the other men, Defendant Thomas Turner, but, instead attempted to interfere with Turner's arrest by alleging that another person hit her. Based on the above, Plaintiff claims that she suffered verbal abuse, assault, and battery as a result of Defendants' actions or inactions and that such conduct violated her civil rights under 42 U.S.C. § 1983, the United States and Pennsylvania Constitutions. In addition, Plaintiff has alleged claims of intentional and negligent infliction of emotional distress. For the following reasons, Defendants' Motions for Summary Judgment will be granted.

STANDARD

Pursuant to Rule 56(c), summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party cannot rest on the pleadings, but rather that party must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). If the court, in viewing all reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

BACKGROUND

On January 21, 1995, Plaintiff Diane Hlywiak and four other women were at a pay phone on the 4100 block of Main Street in Manayunk, Pennsylvania, when they were approached by four men. A verbal confrontation began after one of the males pulled Plaintiff's hair from behind. Plaintiff became very nervous and went to the next door parking lot to ask for help from the owner.

When Plaintiff returned to the scene, she witnessed one of the men punch or push her friend, Erin Hill, causing the confrontation to escalate. Then, another male, later identified as

Thomas Turner, punched Plaintiff in the face with a closed fist, causing Plaintiff to fall to the ground. Plaintiff immediately jumped up and ran to a local club called the Riverdeck Club ("Riverdeck"). She asked some of the employees at the Riverdeck for assistance and pointed out Thomas Turner as her assailant.

After all four men arrived at the Riverdeck, one of them, Defendant Kevin Wong, identified himself as an officer with the Philadelphia Police Department and pulled out his badge. Wong claimed that someone else other than Defendant Turner was responsible for punching Plaintiff.

Next, an on-duty, uniformed police officer, Christine Hayes, arrived at the scene and spoke with Plaintiff and other witnesses who indicated that Thomas Turner had struck Plaintiff. At this time, Defendant Wong attempted to interfere with Turner's arrest by again alleging that it was another person who actually hit her. However, when Defendant Wong was instructed by Officer Hayes to step aside, Wong did so.

On June 2, 1995, Defendant Thomas Turner was convicted in the Philadelphia Court of Common Pleas of aggravated assault of the Plaintiff and recklessly endangering a person. The Superior Court of Pennsylvania affirmed the conviction on recklessly endangering another person, but vacated the aggravated assault conviction and the judgment of sentence and remanded the matter for resentencing.[1]

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[1] Because the trial court did not impose separate sentences as to each count, and the conviction on aggravated assault may have affected the overall sentence, the Superior Court vacated the entire judgment of sentence.

On May 9, 1997, the Superior Court of Pennsylvania denied Thomas Turner's Application for Reargument. On June 6, 1997, Turner filed a Petition for Allowance of Appeal in the Supreme Court of Pennsylvania which is currently pending.

As for Defendant Wong, he was investigated by the Internal Affairs Division of the Philadelphia Police Department as a result of a citizen's complaint filed against him by the Plaintiff. Following the investigation, administrative charges were brought against Defendant Wong and, after a hearing before the Police Board of Inquiry, Wong was found guilty of several counts of Conduct Unbecoming an Officer and Neglect of Duty. Later, on March 18, 1996, Police Commissioner Richard Neal dismissed Wong from the Philadelphia Police Department.

DISCUSSION

1. Plaintiff's Section 1983 Claims

In order to succeed on a claim under § 1983, Plaintiffs must show (1) the conduct complained of was committed by a person acting under color of state law, and (2) this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. See 42 U.S.C.A. § 1983; see also Wagner v. Township of Harmar, 651 F. Supp. 1286, 1288 (W.D. Pa. 1987), aff'd, 826 F.2d 1054 (3d Cir. 1987). Under Monell v. Department of Social Services, 436 U.S. 658 (1978), the United States Supreme Court defined the methods by which municipalities could be liable under § 1983. The Court held that:

> Local governing bodies . . . can be

> sued directly under § 1983 . . . [in those situations where] the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by that body's officers. Moreover, . . . local governments . . . may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Id. at 690-91.

In the instant action, Defendant City first contends that proof of a single incident by a lower level employee acting under color of law does not suffice to establish municipal liability and that Plaintiff must present some other evidence of a municipal policy or custom that resulted in a constitutional injury to Plaintiff. In City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), the Supreme Court dealt with this precise issue. In that case, the trial judge instructed the jury that it could infer a nebulous policy of inadequate training on the part of the municipality from a single, unusually excessive use of force by a police officer, amounting to deliberate indifference or gross negligence on the part of the officials in charge. On appeal, the Court reversed, recognizing that "[s]uch an approach provides a means for circumventing Monell's limitations altogether." Id. at 823. The Court further explained:

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under Monell, unless proof of the incident

> includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker. Otherwise the existence of the unconstitutional municipal policy, and its origin, must be separately proved. But where the policy relied upon is not itself unconstitutional, considerably more proof than the single incident will be necessary in every case to establish both the requisite fault on the part of the municipality, and the causal connection between the "policy" and the constitutional deprivation.

Id. at 823-24.

Plaintiff responds that while no written policy exists regarding the conduct required of off-duty police officers, the evidence of record shows that the Philadelphia Police Department instructs its officers that their only duty is to call 911. (Plaintiff's Opposition Memorandum at 8.) Thus, Plaintiff contends that a genuine issue of material fact exists as to whether the City of Philadelphia lacks an appropriate policy regarding the conduct required of its off-duty police officers and whether this has caused a violation of Plaintiff's constitutional rights.

However, state actors are not constitutionally required to protect an individual from private violence. See DeShaney v. Winnebago County Social Servs. Dep't, 489 U.S. 189, 196 (1989). In DeShaney, a child sued for damages under 42 U.S.C. § 1983, claiming that employees of a state-run social service agency, on notice of injuries inflicted on the child by his abusive father, nonetheless failed to protect the child from the readily foreseeable danger. The Court made clear that the affirmative duty of care mandated by

the Fourteenth Amendment's Due Process Clause arises in only the narrowest of contexts, namely, "when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself . . . ." Id. at 200. Thus, in the case at hand, the City cannot be held accountable for the assault of the Plaintiff by Thomas Turner, a third party whose private acts caused the injury to the Plaintiff.[2]

Likewise, Kevin Wong is entitled to summary judgment, under DeShaney, on Plaintiff's § 1983 claims because, despite her allegations, Plaintiff has failed to identify a specific constitutional injury. Instead, Plaintiff cites Horton v. Charles, 889 F.2d 454 (3d Cir. 1989), arguing that where a defendant state employee is involved in creating the harm to a plaintiff, a cause of action should be sustained. However, Horton involved an on-duty police officer who refused to remove an employee, suspected of burglarizing a club, from the owner's premises, despite signs of physical mistreatment.[3] Following the officer's departure, the employee received a beating from the owner and died. The Third

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[2] On July 11, 1997, Plaintiff submitted a supplemental report of Plaintiff's liability expert, Paul J. Mooney, with regard to Plaintiff's case against the City and Defendant Wong. Mr. Mooney opines, based on his 25 years of experience as a police officer with the **New York City** Police Department, that the City of Philadelphia failed to create proper policies, procedures and guidelines and that this alleged failure is a breach of its duty to the general public, including Diane Hlywiak. However, Plaintiff's expert opinion directly contradicts the teachings of the Supreme Court of the United States in DeShaney and, thus, is of no consequence to this Court's review of instant matter.

[3] The owner of the private club was a retired police officer known for his violence.

Circuit determined that the police officer's arrival, his interrogation, his direction to the employee to remain on the premises while he went next door to investigate the suspect's story, and his refusal to remove the employee from the club made the officer "a participant in the custody which led to the victim's death." Id. at 458. Thus, Horton turned on a finding of functional custody. See D.R. by L.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1375 (3d Cir. 1992) (construing Horton), cert. denied, 506 U.S. 1079 (1993).

The instant case is distinguishable. Here, neither the City nor Wong can be said to have created or increased Plaintiff's risk of danger through Wong's actions or inactions as an off-duty police officer when Wong did not even exercise any authority until after Plaintiff was assaulted by a private third party. Because Plaintiff cannot show that some relationship existed between the state and the Plaintiff, nor that Defendant Wong used his authority to create an opportunity that otherwise would not have existed for Defendant Turner's assault on Plaintiff to occur, Plaintiff cannot establish all of the elements necessary to prove the presence of a state-created danger. See Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) (applying Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir.), cert. denied, ___ U.S. ___, 116 S. Ct. 165 (1995)).

The issue then arises as to what action or inaction taken by Defendant Wong could be considered under "color of state law." In this regard, the Third Circuit has held that

> off-duty police officers who purport

> to exercise official authority will generally be found to have acted under color of state law. Manifestations of such pretended authority may include flashing a badge, identifying oneself as a police officer, placing an individual under arrest, or intervening in a dispute involving others pursuant to a duty imposed by police department regulations.

Barna v. City of Perth Amboy, 42 F.3d 809, 816 (3d Cir. 1994). However, "a police officer's purely private acts which are not furthered by any actual or purported state authority are not acts under color of state law." Id.

In applying the above standard to the case at hand, it appears that the only actions taken by Defendant Wong that could be considered under "color of state law" were his alleged attempts to interfere with Thomas Turner's arrest. Here, Plaintiff has alleged that Defendant Wong did not identify himself as a police officer, nor did he attempt to exercise any authority, until after Plaintiff had already been hit by Turner. (Police Board of Inquiry ("PBI"), N.T. 2/8/96 at 6-7.) Indeed, according to Plaintiff, Wong did not pull out his badge and allege that someone other than Turner had punched the Plaintiff until after Plaintiff was hit and had fled to the Riverdeck for assistance. Id. Because this alleged interference with Defendant Turner's arrest was the only conduct that could be considered an exercise of Wong's official authority, it, alone, should be analyzed with respect to § 1983 liability.

However, Plaintiff's own sworn testimony does not support Plaintiff's contention that she suffered a constitutional injury as

a result of Defendant Wong's alleged interference. When questioned by counsel, Plaintiff testified that, after she was hit by Defendant Turner, she ran to the Riverdeck and told two employees that she was hit in the face when the four men approached. Plaintiff then stated:

> I pointed out who it was, and at this time, Lieutenant Wong stated that he was a police -- well, lieutenant, pulled out his badge and said, "You don't know what you're talking about. Nobody hit you." . . . "I have it all under control. I'm a lieutenant. I'll take care of it," and I'm assuming maybe he's going to do something, you know what I mean, and the people at the River Deck were like, "What do you mean she didn't get hit?" My eye was out to here (indicating), and he started to walk away with his friend and I saw the cop car coming which we called and responded.

(PBI N.T. 2/8/96 at 7.) Plaintiff further testified that after she ran up to the uniformed police officer who arrived at the scene, she pointed out Thomas Turner as her assailant, but Defendant Wong continued to interfere:

> He took his badge out and said -- you know -- that I didn't know what I was talking about, that he was the lieutenant. He had it under control. The person who did it got away. It wasn't his friend. He kept trying to basically get his friend out of trouble by using his badge and she said, "if that's the case, I have to call my supervisor." She called her supervisor. He came or I think a bunch of people came and they put Mr. Turner into a paddy wagon. At this point she said, "I'm going to have to ask you to step over there because you're interfering with the arrest." I guess from there, he stepped over or whatever.

Id. at 8.

A review of the above testimony does not support the position that the City of Philadelphia maintains a policy that encourages its off-duty police officers to manipulate their authority and obstruct proper and lawful arrests. Because Plaintiff has failed to supply any evidence that Defendant Wong interfered with Defendant Turner's arrest as a result a policy or custom adopted or promulgated by the City, summary judgment will be granted in favor of the City Defendant.

As for Plaintiff's claims against Defendant Wong, Plaintiff has failed to show how Wong's interference with the investigation rises to the level of a constitutional violation of Plaintiff's rights. In fact, Defendant Turner was arrested, tried and convicted within five (5) months of the occurrence and, thus, there is no evidence that Wong's alleged interference had any substantial impact on the investigatory process or the arrest of Thomas Turner. Thus, Plaintiff's allegations that she suffers from permanent post traumatic stress disorder as a direct result of Defendant Wong's conduct is not actionable under § 1983.

2. Plaintiff's State Law Claims

With respect to Plaintiff's claims against the City of Philadelphia for assault, battery, intentional infliction of emotional distress and negligent infliction of emotional distress, the City contends that the Political Subdivision Tort Claims Act grants immunity. See 42 Pa.C.S.A. § 8541. Section 8541 provides

the following:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person."

Id. Because Plaintiff has not responded to this argument, and because this Court finds that said argument has merit, the pending state law claims against the City will be dismissed.

Defendant Wong has also moved for summary judgment on Plaintiff's state law claims, contending that Plaintiff's tort actions against him must be dismissed for lack of evidence. This Court agrees. Here, Plaintiff has not produced any affirmative evidence that Wong committed an assault and battery upon her. Rather, Plaintiff testified on many occasions that Defendant Turner was the individual who punched her.

In addition, Plaintiff's claim against Wong for intentional infliction of emotional distress will be dismissed, as Plaintiff has failed to demonstrate that Defendant Wong's engaged in extreme and outrageous conduct, as defined by the Restatement (Second) of Torts. Specifically, comment d to § 46 of the Restatement states:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that his conduct has been characterized by "malice," or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in

> character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

See Hunger v. Grand Central Sanitation, 670 A.2d 173, 177 (Pa. Super. 1996) (quoting RESTATEMENT (SECOND) OF TORTS § 46, comment d), allocatur denied, 681 A.2d 178 (Pa. 1996). At least one Pennsylvania Superior Court has found similar conduct not of such an outrageous character. See Motheral v. Burkhart, 583 A.2d 1180, 1190 (Pa. Super. 1990) (holding that an attorney who made accusations to a police officer that she knew or reasonably should have known were false could not be found liable for intentional infliction of emotional distress). Such is the finding of this Court for the case at hand.

Finally, Wong's Motion with regard to Plaintiffs' claims for negligent infliction of emotional distress will be granted because none of the situations in which a party can recover under this tort -- (1) where the plaintiff experiences a contemporaneous sensory observance of physical injuries being inflicted on a close family member, (2) where the plaintiff nearly experiences a physical impact in that he was in the zone of danger of the defendant's tortious conduct, or (3) where there is a contractual or fiduciary duty, see Brown v. Philadelphia College of Osteopathic Medicine, 674 A.2d 1130, 1134-36 (Pa. Super. Ct. 1996) -- are present in the instant action with respect to Defendant Wong's conduct. Here, Plaintiff has argued that "if a plaintiff was in personal danger of a physical impact and where she was in actual

fear of the impact, a cause of action for intentional or even negligent infliction of emotional distress may be maintained." (Plaintiff's Opposition Memorandum at 10) (citing Kahle v. Glosser Brothers, Inc., 462 F.2d 815 (3d Cir. 1972)). However, the conduct of Defendant Wong that is at issue, and which Plaintiff alleges has contributed to her post-traumatic stress disorder, is Wong's interference with the arrest of her assailant, Defendant Turner. Because Wong's interference did not place Plaintiff in actual fear of physical impact, Plaintiff's claim must fail.

3. Defendant Robert Debolt's Motion for Summary Judgment

Defendant Robert DeBolt was one of the four men involved in the confrontation with Plaintiff that has led to the filing of this lawsuit. Plaintiff's claims against DeBolt center on the idea that DeBolt, not Defendant Thomas Turner, punched Plaintiff, as alleged by Thomas Turner's Third-Party Complaint.[4]

According to DeBolt, the issue as to who punched Diane Hlywiak in the face has been determined in the prior criminal conviction of Thomas Turner and that determination should be given conclusive effect in the present civil action. In this regard, the parties agree that Shaffer v. Smith, 673 A.2d 872 (Pa. 1996), is instructive.

In Shaffer, the Pennsylvania Supreme Court held that the pendency of an appeal of a criminal conviction does not deprive a

[4] As a result of allegations made in Thomas Turner's Third-Party Complaint, Plaintiff filed an Amended Complaint adding Robert DeBolt as a defendant in this case.

party of the right to invoke collateral estoppel[5] in a civil proceeding unless or until that conviction is reversed on appeal. Despite Shaffer's holding, Defendant Thomas Turner argues that DeBolt's Motion should be denied because he was not given a full and fair opportunity to litigate the issue of who punched Diane Hlywiak. Turner adds that the Pennsylvania Superior Court vacated the judgment of the Court of Common Pleas regarding the aggravated assault charge and sentencing, leaving the affirmance of the conviction on reckless endangering another person as the single basis for the use of collateral estoppel in this subsequent civil proceeding. Thus, the issue in this case is whether collateral estoppel may be applied when a prior criminal judgment is partially vacated by an appeals court.

> The doctrine of collateral estoppel can only preclude relitigation of those issues actually litigated and decided in

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[5] The Supreme Court of Pennsylvania has defined collateral estoppel as follows:

> Collateral estoppel, or issue preclusion, is a doctrine which prevents re-litigation of an issue in a later action, despite the fact that it is based on a cause of action different from the one previously litigated. The identical issue must have been necessary to final judgment on the merits, and the party against whom the plea is asserted must have been a party, or in privity with a party, to the prior action and must have had a full and fair opportunity to litigate the issue in question.

Balent v. City of Wilkes-Barre, 669 A.2d 309, 313 (Pa. 1995) (citations omitted).

> an earlier proceeding. A determination of which issues were litigated may not be immediately discernible when the antecedent criminal suit resulted in a general verdict of the jury or judgment of the court without special findings. Accordingly, the Supreme Court has held that when a prior criminal judgment is sought to be used as an estoppel, the court must examine the record of the criminal proceeding . . . in order to determine specifically what issues were decided.

Chisholm v. Defense Logistics Agency, 656 F.2d 42, 48 (3d Cir. 1981) (citations omitted).

In this case, the trial court's announcement of the verdict specifically included a finding that Thomas Turner was the person who punched the complainant. Commonwealth of Pennsylvania v. Turner, No. 03761, PHL 95 at 2 n.5 (Pa. Super. Ct. filed Feb. 28, 1997). On appeal, the Superior Court of Pennsylvania partially vacated the trial judge's conviction of Thomas Turner on aggravated assault, however, this decision was based on a determination by the appeals court that there was insufficient evidence that Diane Hlywiak suffered "serious bodily injury" as defined by the Crimes Code.[6] Id. at 3-4. Thus, the Pennsylvania Superior Court did not

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[6] In this regard, the Superior Court wrote:

> At trial the Commonwealth produced no medical evidence regarding the extent of the victim's injury or evidence of her treatment. The evidence of injury consisted of the victim's testimony that she was diagnosed with a fractured cheekbone which might at some point in the future require surgery, and photographs, which allegedly showed

dispute the finding by the trial court that Thomas Turner was the individual who punched Diane Hlywiak, and collateral estoppel is applicable in this regard.

As stated above, Turner also contends that DeBolt's Motion should be denied because Thomas Turner was not given a full and fair opportunity to litigate the issue of who punched Diane Hlywiak. According to Turner, the trial court refused to issue a bench warrant to compel the attendance of an alleged exculpatory witness, Defendant Wong. At the criminal trial, Turner argued that Kevin Wong would have identified another male as the person who punched Diane Hlywiak, but Wong failed to attend the trial, despite being served with a subpoena. Turner's attorney then requested a bench warrant, which the trial court granted. However, defense counsel, after introducing Turner's testimony, rested his case and proceeded to closing argument. Accordingly, the Superior Court concluded that Turner's contention that the trial court refused to issue a bench warrant to compel the attendance of Defendant Wong was not only meritless, but waived. Based on the above, this Court concludes that Defendant Turner was given a full and fair opportunity to litigate the issue of who punched Diane Hlywiak.

In conclusion, the teachings of Shaffer and Chisholm require this Court to grant Defendant DeBolt's Motion for Summary

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facial bruising."

Turner, No. 03761 at 3-4. The Superior Court found the above evidence to be insufficient to show that a broken facial bone created a substantial risk of death and, thus, vacated the appellant's conviction of aggravated assault. Id.

Judgment based on collateral estoppel. Such a decision serves the underlying purposes of this doctrine, which "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication." Allen v. McCurry, 449 U.S. 90, 94 (1980).

In accordance with the above, Defendants' Motions for Summary Judgment will be granted. An appropriate order will follow.

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ORDER

AND NOW, this 6th day of August, 1997, upon consideration of the motions for summary judgment filed by Defendants Kevin Wong, Robert DeBolt and the City of Philadelphia, and all responses thereto, it is hereby ORDERED that said motions are GRANTED.

BY THE COURT:

Robert F. Kelly, J.