

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

ESTATE OF SALIM HENDERSON, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	NO. 98-3861

MEMORANDUM AND ORDER

YOHN, J. July , 1999

Donna Henderson filed this civil rights action on her own behalf and as the representative of her incapacitated son, Salim Henderson (“Henderson”), against the City of Philadelphia, former Philadelphia Police Commissioner Richard Neal (“Neal”), and Philadelphia Police Officers Mellaneese Peoples-Barksdale (“Officer Barksdale”) and Byron Purnell, Jr. (“Officer Purnell”). The plaintiffs claim that Officers Barksdale and Purnell violated Henderson’s substantive due process rights, as guaranteed by the Fourteenth Amendment, when they failed to prevent him from jumping out a window while at his home to oversee his involuntary commitment. Plaintiffs additionally claim that the City and Neal are liable for their unconstitutional customs and policies of providing inadequate training and supervision to officers undertaking involuntary commitments, condoning violations of the Pennsylvania Mental Health Procedures Act, and failing to develop procedures that would adequately protect the safety of mentally ill individuals who were being involuntarily committed. Before this court is the defendants’ motion for summary judgment which contends that plaintiffs’ substantive due process claims should be dismissed because they have failed to produce evidence demonstrating

that Henderson was injured by a state-created danger, they have failed to present evidence supporting their municipal liability claims, they have failed to demonstrate that Neal is liable for Henderson's injuries, and because the individual officers are entitled to qualified immunity. After considering the parties' submissions, I conclude that the defendants' motion will be granted.

FACTUAL BACKGROUND

The following facts are undisputed. On the morning of July 29, 1996, Donna Henderson decided that her son, Salim Henderson, a diagnosed schizophrenic, was acting in a way that would endanger himself and should be involuntarily committed to a mental health institution for treatment. See Deposition of Donna Henderson ("Henderson Dep."), at 9, 21, 44-45. Before July, 1996, Henderson had been involuntarily committed six or seven times. See id. at 13. Donna Henderson obtained authorization from Misericordia Hospital in Philadelphia to have her son involuntarily committed, and completed the paperwork necessary to have the police transport him to the hospital. See id. at 18-19, 22; Plaintiffs' Memorandum of Law In Opposition to Defendants' Motion for Summ. Judg. ("Plaintiffs' Mem."), Ex. E, at 5. These papers, which the parties refer to as "302 papers,"¹ indicate that Salim Henderson, a twenty-year-old black male, had been discharged from another mental health facility in early July, but had not been taking his prescription medicine or keeping his appointments for continuing treatment. See Plaintiffs' Mem., Ex. E, at 3. After completing the necessary paperwork, Donna Henderson called 911 to

¹ The papers are referred to as "302 papers" because the papers, containing the authorization of the county's mental health administrator, are required for an involuntary commitment under § 302 of Pennsylvania's Mental Health Procedures Act. See Pa. Stat. Ann., tit. 50, § 7302 (West Supp. 1999).

request that the police transport her son to Misericordia Hospital. See Henderson Dep., at 22-23.

Officers Barksdale and Purnell arrived at the Henderson house at 10:10 p.m., believing that they were to pick up a female who was voluntarily committing herself. See Plaintiff's Mem., Ex. C (computer assisted dispatch form notes that the officers arrived at 22:10); Henderson Dep., at 24; Deposition of Officer Barksdale ("Barksdale Dep."), at 14, 24, 28, 33; Deposition of Officer Purnell ("Purnell Dep."), at 18, 41-43, 73. The sequence and timing of events once the officers entered the Henderson home are disputed. See Memorandum of Law in Support of Defendants' Motion for Summ. Judg. ("Defendants' Mem."), at 1-2.

For purposes of resolving this motion for summary judgment, defendants have agreed, as they must, to accept the following facts alleged by plaintiff. Donna Henderson testified that when they arrived, the officers said that they were to take a female to the hospital. See Henderson Dep., at 24. She told the officers that she had called them to transport her son to the hospital, and then showed them the 302 papers she had obtained from Misericordia. See id. While the officers were reading the 302 papers, Donna Henderson asserts, Henderson came downstairs to where the officers were standing and sat near them on the sofa. See id. He then told his mother that he knew that she did not want him in her house and that he did not want to go to the hospital. See id. at 26-27. Approximately two to three minutes after Henderson had come downstairs, according to Donna Henderson, he told the officers that he had "to go upstairs for something." Id. at 24-25, 26. The officers did not attempt to restrain Henderson, and allowed him to go upstairs. See id. at 28. When he was out of earshot at the top of the stairs, Donna

Henderson says that she told the officers that Henderson might "jump."² Id. at 27, 29. Three to four minutes later, Donna Henderson testified, she heard a loud noise, and ran up the stairs to find that Henderson had jumped out of a second-story window. See id. at 29-31. Henderson suffered severe and permanent injuries from his fall, and plaintiffs estimate that his future medical costs will approximate \$2,500,000. See Plaintiffs' Mem., Ex. F, at 4. The Computer Assisted Dispatch report indicates that backup officers were called to the scene at 10:17 p.m., seven minutes after the officers had arrived. See Plaintiffs' Mem., Ex. C (noting that backup officer Michael Kennedy was summoned at 22:17 and that rescue was en route at 22:17).

Plaintiffs' expert, Dr. Randall Paul McCauley, a professor of criminology, opined that the officers had adequate time to verify the 302 papers, that they were required to take Henderson into custody as soon as they verified the 302 papers, and that they "had more than enough time to take Salim into custody and control his movements" before he jumped out the window.³ See Plaintiffs Mem., Ex. G, at 4-5. He thus concluded that the officers "should have controlled [Henderson's] movements so as to prevent him from going upstairs or supervised his movements by following Salim up the stairs, as a matter of officer safety, at a minimum." Id. at 5.

² The officers contend that Donna Henderson told them, in a strangely calm voice, that Henderson "is probably going to go out the window." Purnell Dep., at 63-66; Barksdale Dep., at 17, 34. Officer Purnell testified that Donna Henderson did not say that Henderson would "jump" and that he interpreted her comment to mean that he would try to escape. See Purnell Dep., at 64. Officer Barksdale testified that she too did not interpret Donna Henderson's comment to mean that Henderson would jump. See Barksdale Dep., at 56, 60-61.

³ Dr. McCauley opined that the Computer Assisted Dispatch report reveals that nine minutes elapsed between the time the officers arrived and the time they requested medical assistance. See Plaintiffs' Mem., Ex. G, at 4. Contrary to the expert's opinion, the report clearly indicates that backup officers and a rescue team were called to the scene seven minutes after the officers' arrival. See Plaintiffs' Mem., Ex. C. There is no evidence about the extent to which this two minute difference in time would change Dr. McCauley's opinions.

SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (c). The court should not resolve disputed factual issues, but rather, should determine whether there are factual issues which require a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If no factual issues exist and the only issues before the court are legal, then summary judgment is appropriate. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). If, after giving the nonmoving party the “benefit of all reasonable inferences,” id. at 727, the record taken as a whole “could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,’” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), and the motion for summary judgment should be granted.

DISCUSSION

Count I of the plaintiffs’ complaint asserts § 1981 and § 1983 claims against all the defendants based on a number of theories of liability. Encompassed in the allegations in Count I are claims that the defendants 1) were under a duty to protect Henderson because of their “special relationship” with him; 2) created a dangerous situation that made him more vulnerable to harm; 3) failed to train officers properly to handle involuntary commitments; and 4) had inadequate policies to protect the rights of individuals who were being involuntarily committed. See Complaint, ¶¶ 35-60. Count II of the complaint asserts § 1983, § 1985 (3), and § 1986 conspiracy claims against all of the defendants based on allegations that they conspired to

deprive Henderson of “the equal protection of the laws” and his right to bodily integrity under the Fourteenth Amendment. Complaint, ¶ 62. Count III alleges that all of the defendants except Officer Purnell, in violation of Henderson’s rights under § 1981, § 1983, § 1985 and § 1986, conspired to maintain a practice of failing to investigate complaints about the police’s handling of involuntary commitment cases, and misrepresenting the facts of those cases, and thus encouraged civil rights violations in those cases, and increased the likelihood that the rights of “mentally handicapped citizens” would not be protected. See Complaint, ¶¶ 70-73. Count IV seeks damages against all defendants for the state law tort of intentional infliction of emotional distress. See Complaint, ¶¶ 75-80.

Defendants have moved for summary judgment on the entire complaint.⁴ They argue that the plaintiffs have failed to establish that Henderson’s substantive due process rights were violated either by the police officers or by the city. See Defendants’ Mem., at 4-14. Even if the court refuses to grant summary judgment on the Henderson’s § 1983 claims, the defendants argue, the individual officers are entitled to qualified immunity. See id. at 15. Finally, the defendants argue that all claims against Neal should be dismissed because the plaintiffs have failed to produce evidence demonstrating that he had personal knowledge of, or acquiesced, in the alleged violations of Henderson’s rights. See id. at 16.

I. Claims Under § 1981, § 1985 (3) and § 1986

Counts I, II and III contain claims under 42 U.S.C. § 1981, § 1985, and § 1986. The

⁴ Defendants’ Motion for Summary Judgment does not address the validity of the intentional infliction of emotional distress claim contained in Count IV. Because the court will grant defendants’ motion for summary judgment with respect to all of plaintiffs’ federal claims, the court will decline to exercise supplemental jurisdiction over the intentional infliction of emotional distress claim. See 28 U.S.C. § 1367 (c)(3).

parties agree that Henderson's § 1981 claim contained in Count I should be dismissed, as plaintiffs have conceded that they have no viable claim for race-based animus. See Saint Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (concluding that § 1981 prohibits particular types of discrimination based solely on a person's "ancestry or ethnic characteristics"); Defendants' Mem., at 4 n.5; Plaintiffs' Mem., at 6 n.4.

Similarly, § 1985 (3) requires the plaintiff to prove a conspiracy to deprive them of "equal protection or equal privileges and immunities" based on an invidious class-based animus. D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1377 (3d Cir. 1992) (en banc). Plaintiffs have presented no evidence that the defendants' actions were motivated by a class-based animus, or that the defendants conspired to deprive Henderson of rights based on his membership in an identifiable class. Moreover, plaintiffs appear to agree that their § 1985 (3) claim should be dismissed. See Defendants' Mem., at 4 n.5; Plaintiffs' Mem., at 6 n.4.

Additionally, because a cause of action under § 1986 depends upon the existence of a cause of action under § 1985, and plaintiffs' § 1985 claim must be dismissed, their § 1986 claim will also be dismissed. See Clark v. Clabaugh, 20 F.3d 1290, 1295 n.5 (3d Cir. 1994) ("if the elements of the § 1985 conspiracy are missing, a § 1986 cause of action is properly dismissed on summary judgment"). Defendants' Motion for Summary Judgment is therefore granted with respect to the § 1981 claim in Count I, the § 1985 (3) and § 1986 claims in Count II, and the § 1981, § 1985, and § 1986 claims in Count III.

II. § 1983 Claims Against Officers Barksdale and Purnell

The plaintiffs assert that the officers are liable under § 1983⁵ for violating Henderson’s Fourteenth Amendment substantive due process right to bodily integrity by failing to take him into their custody, and thus, permitting him to injure himself by jumping out of a second story window. Section § 1983 does not create substantive rights, but only provides a cause of action to remedy the deprivation of rights established by the Constitution or federal law. See Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997). Neither party disputes that the officers, by responding to Donna Henderson’s request that the police transport her son to a hospital for involuntary commitment, were acting “under color of” state law as required by § 1983. See Mark v. Borough of Hatboro, 51 F.3d 1137, 1141 (3d Cir.), cert. denied, 516 U.S. 858 (1995) (discussing state action requirement) .

It is well-established that the substantive due process rights protected by the Fourteenth Amendment do not generally impose a duty on state actors to protect citizens from the violence of private actors, or themselves. See DeShaney v. Winnebago County Dep’t of Social Serv., 489 U.S. 189, 195 (1989). In DeShaney, the Supreme Court declined to impose a constitutional duty on the Department of Social Services to protect a child in his father’s custody from his father’s abuse, even though the Department knew of past abuse, and had been warned of the potential for future abuse. See id. at 202. The Court, however, left open the possibility that, under certain circumstances, the state may have a duty to protect its citizens from the violence of private actors

⁵ In pertinent part, 42 U.S.C. § 1983 provides that:
[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of 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.

when it commented that “[w]hile the State may have been aware of the dangers that [the child] 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.” Id. at 201. Based on this comment in DeShaney, a number of Courts of Appeal have concluded that a state may be liable for its failure to protect its citizens against private violence when the state enters into a “special relationship” with the plaintiff or when the state creates a danger which results in foreseeable injury to a discrete plaintiff. See Morse, 132 F.3d at 907; Kneipp v. Tedder, 95 F.3d 1199, 1205 (3d Cir. 1996); accord Sutton v. Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1237 (10th Cir. 1999); Monfils v. Taylor, 165 F.3d 511, 516 (7th Cir. 1998); Greer v. Shoop, 141 F.3d 824, 826 (8th Cir. 1998); Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998); but see Randolph v. Cervantes, 130 F.3d 727, 731 (5th Cir. 1997), cert. denied, 119 S. Ct. 65 (1998) (noting that the Fifth Circuit has not adopted the state-created danger theory). Plaintiffs claim that the officers are liable under both of these exceptions to the general rule of non-liability.

A. Special Relationship Theory

Under the special relationship theory, a state actor may be liable if “the state enters into a special relationship with a particular citizen . . . [and] fails, under sufficiently culpable circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty.” Morse, 132 F.3d at 907 (quoting D.R., 972 F.2d at 1369). A “special relationship” exists only in the limited circumstances where the state has taken a person into custody or otherwise prevented that person from helping himself. See Kneipp, 95 F.3d at 1204-05; D.R., 972 F.2d at 1370 (“Our court has read DeShaney primarily as setting out a test of physical custody.”). To create a “special relationship,” the “state must affirmatively act to curtail the individual’s

freedom such that he or she can no longer care for him or herself.” Regalbuto v. City of Philadelphia, 937 F. Supp. 374, 379-80 (E.D. Pa. 1995), aff’d, 91 F.3d 125 (3d Cir.), cert. denied, 519 U.S. 982 (1996) (rejecting argument that 911 dispatcher entered into special relationship with heart attack victim by assuring the victim that help was on the way and thus allegedly depriving victim of seeking alternative sources of aid). In the case of school children, the Third Circuit and other courts in this district have refused to find that the existence of compulsory school attendance laws creates a special relationship between school officials and the child because the child’s parents provide for the child’s basic needs and remain the child’s primary caretakers. See D.R., 972 F.2d at 1372; Maxwell v. School Dist. of Philadelphia, No. 98-1682, 1999 WL 313764, at * 4 (E.D. Pa. May 18, 1999); Page v. School Dist. of Philadelphia, No. 95-7674, 1999 WL 236179, at * 5 (E.D. Pa. April 14, 1999); Pearson v. Miller, 988 F. Supp. 848, 855 (M.D. Pa. 1997).

Here, defendants contend that the officers never established a special relationship with Henderson and thus were under no affirmative duty to protect him because the officers had neither taken him into their physical custody, nor restrained his liberty to protect himself, at the time he injured himself. See Defendants’ Mem., at 5-7. Plaintiffs assert, to the contrary, that Henderson “was in the custody of the defendant officers” when the officers failed to protect him. Plaintiffs’ Mem., at 8. Plaintiffs’ assertion that Henderson was in the officers’ custody is contrary to both the facts contained in the record, and their argument that the officers are liable for failing to take Henderson into their custody. Whether the officers had a constitutional duty to exercise physical custody over Henderson, a question to be addressed later, see infra, pt. II.B., the record is clear that they had not acted to restrain Henderson’s liberty at the time when he was

injured. See Henderson Dep., at 30 (admitting that when Henderson jumped out the window, the officers “were standing around reading the papers”); Plaintiffs’ Mem., Ex. G, at 4-5 (opining that “the officers had more than enough time to take Salim into custody”). Moreover, the record is clear that the officers had not restrained Donna Henderson’s ability to protect her son. Thus, despite plaintiffs’ unsupported assertion to the contrary, the record is clear that the officers never took physical custody of Henderson, and therefore, never entered into a special relationship with him that would confer upon them an affirmative duty to protect him from harm. See D.R., 972 F.2d at 1372.

B. State-Created Danger Theory

Plaintiffs next contend that the officers are liable for Henderson’s injuries under the state-created danger theory because they increased his vulnerability to harm and then failed to take adequate measures to protect him from that harm. See Complaint, ¶¶ 35-39, 41-46. The Third Circuit formally adopted the state-created danger theory of liability in Kneipp. See Kneipp, 95 F.3d at 1205. The court found that state actors could be liable under § 1983 for their “discrete, grossly reckless acts” which leave “a discrete plaintiff vulnerable to foreseeable injury” if plaintiffs can prove 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;
- (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.

Id. at 1208 (quoting Mark, 51 F.3d at 1152). In Kneipp, the Third Circuit concluded that the plaintiff had alleged sufficient facts to survive summary judgment on her state-created danger claims when she asserted that police officers willfully disregarded her safety when they separated

her from her husband and left her by the side of the road on a cold winter night to find her way home when she was obviously intoxicated. See id. at 1211. The court concluded that a reasonable jury could find that the plaintiff “was in a worse position after the police intervened than she would have been if they had not done so” and that her obviously impaired state obligated the officers to protect her once they allowed her husband to leave her in their control. Id. at 1209.

In Morse, the most recent Third Circuit case to discuss the state-created danger theory, the court applied the same four-part test to evaluate whether the estate of a teacher had adequately plead a state-created danger claim when she alleged that her school district and a number of contractors were liable for unlocking a rear door to her school and thus, allowing a mentally unstable woman from the community to enter the school and shoot her. See id. at 904. The Third Circuit concluded that the plaintiffs failed to state a claim justifying relief under Kneipp because the plaintiffs had not alleged that the teacher’s death was a foreseeable harm resulting from the defendants’ decision to leave the door unlocked, the defendants did not act in willful disregard for the teacher’s rights because there was no foreseeable harm to prevent, and the defendants’ actions did not increase the teacher’s vulnerability to harm because there was no causal link between their decision and the resulting harm. See Morse, 132 F.3d at 908-15. As explained in greater detail below, plaintiffs here have also failed to present sufficient evidence to raise a triable issue of fact on their state-created danger claim.

1. Henderson’s Harm was Foreseeable and Fairly Direct

Here, plaintiffs premise their state-created danger claim on the officers’ failure to supervise Henderson’s actions when he went upstairs by himself. The court must therefore

determine whether Henderson's decision to jump from the window was a foreseeable harm that was a fairly direct result of the defendants' failure to act. See Morse, 132 F.3d at 908. Plaintiffs contend that because a person who is being involuntarily committed is necessarily a danger to himself or others,⁶ it is foreseeable that such a person would injure himself if his actions are not controlled. See Plaintiffs' Mem., at 11-13. Defendants' brief does not address this aspect of the Kneipp four-part test. See Defendants' Mem., at 9-10.

Considering all of the evidence in the light most favorable to the plaintiffs, the court concludes that a reasonable jury could find that the harm Henderson suffered was a foreseeable and fairly direct result of the officers' failure to control his movements. Accepting the plaintiffs' version of the facts, the officers were presented with valid 302 papers for Henderson which indicated that Henderson was a danger to himself, witnessed a conversation between Henderson and his mother during which Henderson stated he did not want to go to the hospital, allowed Henderson to go upstairs alone, were warned by his mother that he may jump out a window, and did nothing to control Henderson's actions for three to four minutes following the warning. See Henderson Dep., at 26-30; Defendants' Mem., at 2 (conceding, for purposes of summary judgment, that the officers read the 302 papers provided by Donna Henderson and that Henderson jumped from an upstairs window three to four minutes after Donna Henderson warned them that he might jump). Under these facts, and given Henderson's unstable mental condition, it is foreseeable that he would jump out a window to avoid an undesired

⁶ Pennsylvania law allows individuals who pose a threat to themselves or others to be involuntarily committed. See Pa. Stat. Ann., tit. 50, § 7302 (West Supp. 1999). Here, Donna Henderson had obtained authorization from Misericordia Hospital to have her son involuntarily committed because the hospital personnel believed that he was acting in a way that would endanger himself or his mother. See Plaintiffs' Mem., Ex. E, at 2, 5.

hospitalization. See Kneipp, 95 F.3d at 1208 (concluding that because of plaintiff's intoxication, it was foreseeable that she would suffer harm when separated from her husband and left to walk home in cold weather).

Similarly, a reasonable jury may also conclude that Henderson's injuries were a fairly direct result of the officers' failure to control his movements because a jury could believe that the officers' presence precipitated Henderson's attempt to avoid an imminent hospitalization. In contrast to the situation in Morse, where the causal chain between the defendants' decision to unlock a rear door to the school and the ability of a mentally deranged community member to gain access to the school and shoot a teacher was "too attenuated," the causal chain between defendants' failure to control Henderson's movements and his ability to jump from a second story window is far more direct. See Morse, 132 F.3d at 909. A reasonable fact-finder could decide that the officers' failure to control Henderson's actions, when he clearly did not want to be committed and when he was aware that the officers were there to take him to the hospital, "precipitated or was the catalyst for" his decision to jump out of the window. Id. at 910.

2. Plaintiffs Have Produced Sufficient Evidence that the Officers Acted with Willful Disregard for Henderson's Safety

The second element of the Kneipp test requires plaintiffs to prove that the officers acted with willful disregard for Henderson's safety. See Kneipp, 95 F.3d at 1208. In order to do so, the plaintiffs must produce evidence that "[t]he environment created by the state actors must be dangerous; they must know it to be dangerous; and . . . [they] must have been at least deliberately indifferent." Morse, 132 F.3d at 910 (quoting Johnson v. Dallas Indep. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994), cert. denied, 514 U.S. 1017 (1995)). Plaintiffs assert that the officers were

deliberately indifferent to Henderson's safety when they ignored, for three to four minutes, Donna Henderson's warning that her son might try to jump from a window. See Plaintiffs' Mem., at 13-14. This warning, in addition to the information contained in the 302 papers, plaintiffs assert, informed the officers that Henderson was in a dangerous situation and yet the officers ignored that danger and failed to control his movements. See id. Though they do not respond specifically to plaintiffs' assertion that the officers were deliberately indifferent to Henderson's safety, the defendants do argue that the officers could not have acted to restrain Henderson's movements because they were still reviewing the 302 paperwork which gave them legal authority to do so when Henderson injured himself. See Defendants' Mem., at 10. If the officers had not ascertained that the 302 papers were valid and complete before restraining Henderson's movement, defendants' argument continues, the officers could potentially be liable for violating Henderson's right to be free from unauthorized restrictions on his liberty. See id. at 7.

In contrast to the inquiry under the first prong of the Kneipp test, which requires only that plaintiffs prove that Henderson's harm was "foreseeable," the second prong requires plaintiffs to prove that the officers "knew" that Henderson's situation was dangerous. See Morse, 132 F.3d at 910. According to Donna Henderson, she warned the officers that her son would probably jump out of a window and yet the officers did nothing to protect him in the three to four minutes that elapsed between the warning and his injury. See Henderson Dep., at 27-28. Assuming that the jury accepts Donna Henderson's testimony, as the court must on summary judgment, a jury could conclude that the officers knew that Henderson was in imminent danger and yet consciously decided not to protect him. Though nothing in the record indicates that the officers had

completed their verification of the 302 papers before Henderson injured himself, a reasonable jury could conclude that because the officers had begun to review the 302 papers and had been warned about the possibility of Henderson jumping from a second-floor window, their decision to continue reviewing the papers in the face of potentially imminent danger was deliberately indifferent to Henderson's safety. See Kneipp, 95 F.3d at 1208-09 (officer acted in willful disregard for plaintiffs' safety because he knew she was drunk); Maxwell, 1999 WL 313764, at * 5 (teacher acted with reckless indifference to student's safety when "she failed to supervise obviously dangerous students in a classroom that she let get out of control"); Sciotto v. Marple Newtown Sch. Dist., No. 98-2768, 1999 WL 79136, at * 3 (E.D. Pa. Feb. 9, 1999) (plaintiffs could prove that school officials were deliberately indifferent when they ignored warnings against the exact practice that caused harm to the plaintiff); but see Estate of Burke v. Mahanoy City, 40 F. Supp. 2d 274, 281-82 (E.D. Pa. 1999) (asserting that officers were not deliberately indifferent to plaintiff's safety because there is no evidence that they "intend[ed] the result which actually [came] to pass").

Neither party asserts that the officers had the authority, much less the constitutional obligation, to transport Henderson to a mental health treatment facility without completing their review of the 302 papers, but the defendants assert that the officers' authority to protect Henderson from harming himself did not arise until their review of the papers was completed. Given the officers' awareness of 302 papers which Donna Henderson claimed to be complete, and their receipt of a warning that Henderson was in imminent danger, the court cannot find, as a matter of law, that the officers had no obligation to control Henderson's movements before completing their review of the paperwork necessary to transport him to the hospital.

Philadelphia Police Department Directive 136 (“Directive 136”), provides no support for the defendants’ assertion that they had no authority to restrain Henderson’s movements before verifying the completeness of the 302 papers. See Plaintiffs’ Mem., Ex. I, at pt. IV.B.2. To the contrary, Directive 136 only prohibits officers from “remov[ing]” an individual from his residence unless the 302 papers are complete; nothing in Directive 136 suggests that, when faced with an individual who is “reported to be mentally disturbed” and who may imminently injure himself, the officers may not control that individual’s movements before completing their review of 302 papers. Id. Plaintiffs have, therefore, produced evidence that would support a jury’s finding that the officers acted with willful disregard for Henderson’s safety.

3. “Some Relationship” Existed between Henderson and the Officers

Though similarly captioned, this element of the Kneipp test is not the same as the “special relationship” theory of liability explained above. See supra, pt. II.A. To satisfy this prong, plaintiffs need not prove that a custodial relationship existed between Henderson and the officers, but instead must prove that Henderson “was a foreseeable victim of a defendant[s’] acts in a tort sense.” Kneipp, 95 F.3d at 1209 n.22. This element has also been characterized as the “foreseeable plaintiff” requirement. Morse, 132 F.3d at 912. A plaintiff need not prove that state actors placed a “specific individual” in danger, but must demonstrate that “the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions.” Id. at 913. Courts which have rejected plaintiffs’ state-created danger claims under this prong of the test have concluded that those plaintiffs faced no danger not also faced by the public at large. See Mark, 51 F.3d at 1153; Gonzalez v. Angelilli, 40 F. Supp. 2d 615, 620-21 (E.D. Pa. 1999); Pearson, 988 F. Supp. at 856; see also Martinez v. California, 444 U.S. 277, 285 (1980)

(rejecting § 1983 claims of parents of girl murdered by a parolee because the “parole board was not aware that appellant’s decedent, as distinguished from the public at large, faced any special danger”).

Plaintiffs contend, and the court agrees, that a reasonable jury could conclude that Henderson was a foreseeable victim of the officers’ failure to control his movements. See Plaintiffs’ Mem., at 14. Because Henderson’s injuries resulted from foreseeable harm and because the officers were warned that he may injure himself in precisely the manner he did, Henderson was clearly a foreseeable victim of the officers’ inaction. See Maxwell, 1999 WL 313764, at * 5 (student victim of attack was foreseeable plaintiff when teacher ignored signs of the attack); Sciotto, 1999 WL 79136, at * 4 (plaintiffs have satisfied the third prong of the state-created danger test when defendants know that a particular plaintiff has been placed in danger).

4. Plaintiffs Have Not Produced Sufficient Evidence that the Officers Increased Henderson’s Vulnerability to Harm

To survive summary judgment on the fourth prong of the Kneipp test, plaintiffs must produce evidence from which a jury could conclude that the officers “used their authority to create an opportunity that otherwise would not have existed” for Henderson to injure himself. Kneipp, 95 F.3d at 1208. As the Third Circuit noted in Morse, “the question whether an affirmative act is required under the state-created danger theory, and if so what constitutes an affirmative act for purposes of liability, is less than clear.” Morse, 132 F.3d at 914. The court concluded however, that “the dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission.” Id. at 915 (emphasis

added). In Morse, the court concluded that the plaintiff could not meet this element of the state-created danger test because she could not prove “that defendants placed [her] in a dangerous environment stripped of means to defend [herself] and cut off from sources of aid.” Id. The court rejected the plaintiff’s argument that the defendants were liable for increasing the risk she faced because the harm she faced (a mentally unstable woman shooting her) was not a foreseeable consequence of the defendants’ actions (unlocking a rear door to the school). See id. at 915-916. The court must determine, therefore, whether the officers’ acts or omissions “placed” Henderson in greater danger than he already faced such that the state can be said to have “created” a danger to Henderson.

Plaintiffs argue that the officers’ actions here are analogous to the actions of the officers in Kneipp, because in both cases, the plaintiffs relied upon the officers to control a dangerous situation. See Plaintiffs’ Mem., at 15, 17-18. Defendants contend that “[t]he officers’ mere presence and preliminary assessment of the situation did nothing to alter Salim’s circumstances in a way that placed him in a path of peril he did not previously face. Indeed, if any act precipitated Salim’s unfortunate accident, Donna Henderson’s own call to summon police altered her son’s circumstances by presenting him with the inevitability of his commitment - a circumstance he was unwilling to accept.” See Defendants’ Mem., at 10. The facts of this case present an exceedingly close question as to whether a reasonable jury could conclude that the officers “placed” Henderson in a foreseeably dangerous situation.

Though Morse recognizes that a state actor’s omission could theoretically “place[] the victim in harm’s way,” the court is unable to locate, and the plaintiffs have not provided, citation to authority establishing that an omission such as the officers’ failure to act satisfies this element

of the Kneipp test. Morse, 132 F.3d at 915. The cases in which courts have allowed plaintiffs to proceed on their state-created danger claims all discuss actions taken by the defendants which increase the plaintiffs' risk of harm or subject the plaintiffs to harm that did not exist before they acted. For example, in Sciotto, the court concluded that the plaintiffs' allegations that the "defendants' acts of encouraging and permitting college wrestlers of a heavier weight class to wrestle lighter, younger high school wrestlers and compelling the younger student athletes to engage in such activity placed [the plaintiff] closer to the ultimate harm he suffered." Sciotto, 1999 WL 79136, at * 4. Whereas the defendants in Sciotto "encouraged" and "compelled" the plaintiff to participate in a dangerous activity they designed, the officers here only failed to restrain Henderson. Similarly, in Maxwell, the court found that the defendants created a dangerous environment by "lock[ing] the classroom door, isolating the victims with their attackers, [] cutting the vulnerable students off from assistance" and informing the class that the teacher would not attempt to control them. Maxwell, 1999 WL 313764, at * 6. By contrast, the officers in this case exerted no control over Henderson's environment and did not cut him off from the assistance of his mother.

The plaintiffs would probably agree that, if Henderson had seen the officers arrive and had jumped out the window before, or as soon as, they entered the house, there would be no state-created danger. Plaintiffs contend that the officers' liability arose only after they knew that Henderson might jump out the window, had an opportunity to prevent him from jumping, and failed to control his movements. See Plaintiffs' Mem., at 15. Plaintiffs have, however, failed to produce evidence that, in the seven minutes that elapsed between the time they arrived at the Henderson home and the time that Henderson jumped from a second-story window, the officers

changed the dangers that Henderson already posed to himself, as the Kneipp test requires.

The facts of this case are more similar to those of Kneipp than to any of the other state-created danger cases in this circuit. In both cases, the plaintiff, because of his or her mental state, was unable to protect himself or herself from harm and posed an imminent danger to himself or herself if left unattended. The crucial difference between the cases, however, is that in Kneipp, the officers “used their authority as police officers to create a dangerous situation” when they separated Kneipp from her husband, who had previously been ensuring her safety. Kneipp, 95 F.3d at 1209. The court found that the officer’s decision to separate Kneipp from her husband removed her source of private aid and left her “in a worse position” after his intervention than she was in before his intervention. Id. In this case, unlike Kneipp, the officers did not intervene to remove Henderson’s private source of aid, his mother, and did not restrain her ability to assist her son. Nothing prevented Donna Henderson from reiterating her concern, during the three to four minutes that the officers were reading Henderson’s 302 papers, that he would try to jump out a window, from encouraging the officers to take more active measures to protect Henderson, or from going upstairs to supervise Henderson’s actions herself. The officers did not “use[] their authority as police officers” to change the dangers that Henderson faced. The dangerous situation Henderson faced arose when he became aware that his mother was seeking to commit him involuntarily and that there were police officers in his home to transport him to a treatment facility. The officers cannot be liable for the fact that their presence increased Henderson’s agitation and his desire to escape. In the absence of an act by the officers that changed the volatile circumstances which already surrounded Henderson, they cannot be liable.

Like the state officials in D.R. and DeShaney, the officers’ “nonfeasance . . . [does] not

rise to the level of a constitutional violation.” D.R., 972 F.2d at 1376. As in Estate of Burke, the officers “let the events unfold as they stood idly by[.]” Estate of Burke, 40 F. Supp. 2d at 282. There is a substantial difference between the plaintiffs’ assertion that the officers were deliberately indifferent to the risk that Henderson would jump out of a window and their assertion that the officers placed him in that dangerous situation. While they might be able to prove the former, they are unable, as a matter of law, to prove the latter. Thus, because the plaintiffs have failed to produce sufficient evidence to satisfy the fourth element of the Kneipp test, their state-created danger claim must fail as a matter of law. Defendants’ summary judgment motion is granted with respect to plaintiffs’ § 1983 claims premised on the state-created danger theory of liability because plaintiffs have not alleged a violation of Henderson’s constitutional rights.

C. Qualified Immunity

Defendants contend that, even if the court were to find that plaintiffs’ state-created danger claim survives summary judgment, that the officers are entitled to qualified immunity and are thus shielded from liability for damages. Under the qualified immunity doctrine, “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity protects the objectively reasonable actions of government officials by relieving them of liability for damages when their conduct does not violate rights that are “clearly established” in a “particularized . . . sense.” Anderson v. Creighton, 483 U.S. 635, 640 (1987). “The contours of the right” allegedly violated “must be sufficiently clear that a

reasonable official would understand that what he is doing violates that right” and though “the very action in question” need not “previously [have] been held unlawful . . . in the light of pre-existing law the unlawfulness must be apparent.” Id. (citations omitted); see also In re City of Philadelphia Litig., 49 F.2d 945, 961-62 (3d Cir. 1995). The Third Circuit has instructed district courts to examine the factual record carefully in undertaking the fact-specific inquiry into whether the actions of each defendant violated “clearly established” law. See Grant v. City of Pittsburgh, 98 F.3d 116, 122 (3d Cir. 1996).

The Supreme Court recently explained the procedure for evaluating claims of qualified immunity in Wilson v. Layne, 119 S. Ct. 1692, 1697 (1999).

A court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation. This order of procedure is designed to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn-out lawsuit.

Id. (quotations and citations omitted). Because the plaintiffs have not demonstrated that they were deprived of a constitutional right, see supra, pt. II.B., the officers are automatically entitled to qualified immunity. See Torres v. McLaughlin, 163 F.3d 169, 174-75 (3d Cir. 1998) (declining to reach issue of qualified immunity when plaintiff has not demonstrated the deprivation of a constitutional right).

However, because the denial of plaintiffs’ state-created danger theory of liability is a close issue, I will go on to discuss qualified immunity since it clearly appears that the officers are entitled to qualified immunity based on the factual circumstances here. First, in July, 1996, the time of Henderson’s attempted involuntary commitment, it is unlikely that the state-created

danger theory of liability was “clearly established.” Though several other circuits had adopted the state-created danger doctrine as a theory of § 1983 liability by 1996, the Third Circuit had not yet done so when the events at issue here occurred. See Kneipp, 95 F.3d at 1211 (first adopting state-created danger theory in September, 1996); Cornelius v. Town of Highland Lake, 880 F.2d 348, 359 (11th Cir. 1989), cert. denied, 494 U.S. 1066 (1990); Wood v. Ostrander, 879 F.2d 583, 594 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990); Wells v. Walker, 852 F.2d 368, 371 (8th Cir. 1988), cert. denied, 489 U.S. 1012 (1989); White v. Rockford, 592 F.2d 381, 383 (7th Cir. 1979). By contrast, in July, 1996, the Third Circuit’s most recent discussion of the state-created danger theory had cast substantial doubt on its validity. See Mark, 51 F.3d at 1152; DiJoseph v. City of Philadelphia, 953 F. Supp. 602, 608 (E.D. Pa. 1997) (explaining that Mark “infused doubt into whether the state-created danger doctrine was a recognized theory of constitutional liability”). In Mark, the Third Circuit stated that “we have yet to decide definitively whether the state-created danger theory is a viable mechanism for finding a constitutional injury” and noted that “we have found language in the cases supporting and opposing the existence of a state-created danger theory.” Mark, 51 F.3d at 1152. Mark also emphasized that though two Third Circuit cases had previously analyzed state-created danger claims, the court had “consistently referred to the claim as ‘plaintiffs’ theory,’ only going so far as to acknowledge that other courts have recognized the theory.” Id. A particular theory need not have been explicitly adopted by a Court of Appeals for it to constitute the “clearly established law” of that circuit, but when the Court of Appeals casts doubt on its viability as a theory of recovery, as the Third Circuit did in Mark, it is doubtful that the theory may be considered “clearly established.” See Bieregu v. Reno, 59 F.3d 1445, 1459 (3d Cir. 1995) (denying qualified immunity in part because “no gaping

divide has emerged in the jurisprudence such that defendants could reasonably expect this circuit to rule other than we do”); see also Greer v. Shoop, 141 F.3d 824, 828 (8th Cir. 1998) (finding that contours of state-created danger theory were not defined with sufficient clarity in 1991); Soto v. Flores, 103 F.3d 1056, 1064-65 (1st Cir.), cert. denied, 118 S. Ct. 71 (1997) (granting qualified immunity to officials facing state-created danger claims because, in 1991, the First Circuit had not yet addressed the theory and because its contours were blurred by the few court decisions adopting it). Though DiJoseph concluded that the state-created danger theory was clearly established in 1993, the court declined to consider the impact of Mark on its conclusion because Mark was decided well after the events giving rise to the alleged constitutional liability in that case. See DiJoseph, 953 F. Supp. at 608-09. Given the uncertain future of the state-created danger theory after Mark, the state-created danger theory could not have been considered “clearly established” in July, 1996.

Second, even were the court to accept that the state-created danger theory was, in general, clearly established in July, 1996, it was not clearly established in sufficiently analogous factual circumstances that the officers here could not have concluded that their actions were lawful. See In re City of Philadelphia, 49 F.2d at 961, 970 (focusing on whether a reasonable officer could have believed that his conduct was lawful in light of clearly established law). Plaintiffs allege that the officers violated Henderson’s constitutional rights by an omission, a failure to restrain him from injuring himself. Until Morse, and certainly in July, 1996, there were no cases finding that the state-created danger theory would support liability for an officer’s omission. See Morse, 132 F.3d at 914-15. To the contrary, several cases had explicitly held that only affirmative actions could create liability under the state-created danger theory, and had dismissed claims that

were based on omissions. See D.R., 972 F.2d at 1374-75 (explaining that “[l]iability under the state-created danger theory is predicated upon the states’ affirmative acts” and that the cases applying the theory find that the state “affirmatively acted to create the danger to the victims”); Brown v. Grabowski, 922 F.2d 1097, 1116 (3d Cir. 1990), cert. denied, 501 U.S. 1218 (1991) (officer’s failure to act does not subject him to liability); Estate of Burke, 40 F. Supp. 2d at 282 (finding that officers did not take the “requisite affirmative acts” to establish liability); Miller v. Webber, No. 96-5832, 1997 WL 698043, at * 1 (E.D. Pa. Nov. 4, 1997) (finding that “a state-created danger claim cannot be premised on nonfeasance or the failure of an official to act or to investigate” and that such a claim “may well be deemed unreasonable or frivolous”). Taken in a light most favorable to the plaintiffs, the complaint alleges that the officers failed to control Henderson’s movements when they should have done so and presents not a single affirmative act for which the officers could be liable. Given these allegations and the courts’ unwillingness to extend the state-created danger doctrine to omissions, there is no basis to conclude that the rights which plaintiffs seek to vindicate here were clearly established in analogous factual settings such that a reasonable officer should lose the protection of qualified immunity. See Anderson, 483 U.S. at 640 (requiring “[t]he contours of the right” to be “sufficiently clear”). The state-created danger claims against the officers are thus dismissed as barred by the doctrine of qualified immunity.

D. § 1983 Conspiracy Allegations

1. Conspiracy Alleged in Count II

Plaintiffs contend, in Count II of the complaint, that the officers are liable for their conspiracy to deprive Henderson “of the equal protection of the laws and [to] deny the plaintiff []

his rights and privileges under the Constitution of the United States and the laws of the Commonwealth of Pennsylvania” in violation of the Fourth and Fourteenth Amendments. Complaint, ¶¶ 62-67. As all of claims that plaintiffs mention specifically concern the alleged deprivation of his substantive due process right to bodily integrity protected by the Fourteenth Amendment, the court will assume that the plaintiffs’ allegations in Count II also concern a conspiracy to deprive Henderson of this constitutional right.

Because plaintiffs have failed to establish that the officers violated Henderson’s constitutional rights under either of the theories of liability they have argued, their § 1983 conspiracy claims must fail as well. *See supra*, pt. II.A.-B. (rejecting plaintiffs’ claims under the special relationship and state-created danger theories of liability). As a number of courts have recognized, a conspiracy claim brought under § 1983 depends upon the “actual deprivation of a right secured by the Constitution and laws. Mere proof of a conspiracy is insufficient to establish a section 1983 claim.” Ritchie v. Jackson, 98 F.3d 1335, 1996 WL 585152, at *2 (4th Cir. 1996) (quoting Landrigan v. City of Warwick, 628 F.2d 736, 742 (1st Cir. 1980)); Dixon v. City of Lawton, 898 F.2d 1443, 1449 (10th Cir. 1990); Hampton v. Hanrahan, 600 F.2d 600, 622 (7th Cir. 1979), rev’d on other grounds, 446 U.S. 754 (1980); Palma v. Borough of Lansdale, No. 89-4647, 1991 WL 91557, at * 8 (E.D. Pa. May 28, 1991). Defendants’ motion for summary judgment on the § 1983 conspiracy claims contained in Count II is granted because the plaintiffs have not established a violation of their constitutional rights.

2. Conspiracy Alleged in Count III

In Count III of the complaint, plaintiffs allege that Officer Barksdale, but not Officer Purnell, participated in a conspiracy among all of the defendants to deny the plaintiffs their

“constitutionally protected right of access to the courts to petition for redress of grievances” by “attempting to conceal the facts surrounding” Henderson’s injuries. Complaint, ¶ 73. Such a conspiracy, if proven, is actionable under § 1983. See Hampton, 600 F.2d at 622 (recognizing the existence of a § 1983 conspiracy claim based on allegations that defendants attempted to conceal the existence of constitutional violations). Plaintiffs have produced no evidence suggesting either that such a conspiracy existed or that Officer Barksdale took any affirmative acts in support of such a conspiracy. Moreover, plaintiffs appear to have abandoned this allegation as they do not mention this claim as a basis for denying defendants’ motion for summary judgment. Defendants’ motion for summary judgment with respect to the § 1983 conspiracy claim against Officer Barksdale is thus granted.

III. Claims Against Former Police Commissioner Neal

Each of the complaint’s counts also contains § 1983 allegations against former Police Commissioner Neal based on his position as the ultimate supervisor of Officers Purnell and Barksdale and as the ultimate policymaker for the Philadelphia police.⁷ See Complaint, ¶¶ 48, 53, 55-58, 63, 66, 70-73. Defendants contend that the plaintiffs have failed to produce evidence to establish that Neal should be liable in his supervisory capacity while plaintiffs argue that Neal was “deliberately indifferent to the needs of citizens with mental illness” because the need for

⁷ The complaint contains allegations that Neal and the City are liable for their policy of condoning, failing to investigate, and conspiring to cover up, violations of the Pennsylvania Mental Health Procedures Act. See Complaint, ¶ 47, 54. Section 1983 does not provide a remedy for violations of state law, so this claim must be dismissed. Moreover, plaintiffs have produced no evidence of such a conspiracy and do not rely on this basis of liability in response to defendants’ motion for summary judgment. As discussed above, the conspiracy claims in Count II must be dismissed because plaintiffs have not proved a violation of their substantive due process right to bodily integrity. See supra, pt. II.D.1.

further training concerning voluntary and involuntary commitments was obvious. See Defendants' Mem., at 16; Plaintiffs' Mem., at 25.

Because there is no respondeat superior liability under § 1983, to hold Neal liable plaintiffs must demonstrate that he directed his subordinates to violate Henderson's rights, or that he knew of, and approved, the violation of Henderson's constitutional rights. See Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978); Blanche Road Corp. v. Bensalem Township, 57 F.3d 253, 263 (3d Cir.), cert. denied, 516 U.S. 915 (1995). Neal cannot be held vicariously liable for the actions of Officers Purnell and Barksdale because the officers' actions did not violate Henderson's constitutional rights. See Blanche Road, 57 F.3d at 263 (supervisor is not liable if subordinate's conduct did not violate constitutional rights). Neal could also be liable if he personally violated Henderson's rights or if he tolerated continuing misbehavior by his subordinates such that he could be viewed as acquiescing in their constitutional violations. See Baker v. Monroe Township, 50 F.3d 1186, 1190-91 (3d Cir. 1995); Stoneking v. Bradford Area Sch. Dist., 882 F.2d 720, 724-25 (3d Cir. 1989), cert. denied, 493 U.S. 1044 (1990).

Plaintiffs' central argument appears to be that Neal personally violated Henderson's rights by failing to provide adequate training for the officers under his supervision. They contend that he may be liable for his deliberate indifference to the obvious need for further training concerning procedures for voluntary and involuntary commitments. See Plaintiffs' Mem., at 25. In support of their claim, however, plaintiffs cite cases discussing the standards for establishing a municipality's liability for its policies or its failure to train its employees. See id. (citing City of Canton v. Harris, 489 U.S. 378, 390 (1989); Simmons v. City of Philadelphia, 947 F.2d 1042, 1064 (3d Cir. 1991), cert. denied, 503 U.S. 985 (1992)). Though the plaintiffs may be able to

prove that the city is liable if they prove that the city displayed deliberate indifference to Henderson's rights by failing to provide adequate training to its police officers responsible for involuntarily committing those with mental illnesses, plaintiffs must still prove that Neal himself was deliberately indifferent to Henderson's rights in order to hold him personally liable under § 1983. See Baker, 50 F.3d at 1994; Simmons, 947 F.2d at 1062-64. Measured against this standard, plaintiffs' claims against Neal must be dismissed because plaintiffs have produced no evidence that Neal was aware of the actions of Officers Purnell or Barksdale, that he was aware of a need for further training, or that he deliberately chose not to provide further training in the face of that need. See Rode v. Dellarciprete, 845 F.2d 1195, 1207-08 (3d Cir. 1988) (dismissing supervisory liability claims because plaintiffs failed to allege supervisor's knowledge or acquiescence with "particularity"). Though plaintiffs make the bald assertion that Neal should have been aware of the need for further training because the need was "obvious," they offer no evidence to support this assertion, either by questioning Neal to determine whether he knew of a need for further training or by demonstrating that there was a pattern of similar incidents which would have put Neal on notice about the need for further training. Plaintiffs' Mem., at 25. Even plaintiffs' expert, who opined that the city was deliberately indifferent to a need for further training, did not offer an opinion that Neal personally was aware of the need for further training and was deliberately indifferent to that need. See Plaintiffs' Mem., at 20-21; Ex. G, at 6. Defendants' motion for summary judgment on plaintiffs' claims against Neal will be granted as plaintiffs have failed to produce evidence supporting a finding of supervisory liability against Neal under § 1983.

IV. Claims Against the City of Philadelphia

Plaintiffs also assert claims that the City of Philadelphia is liable under § 1983 for its failure to provide adequate training for police officers who participate in involuntary commitments, for its promulgation of inadequate procedures to accomplish involuntary commitments, for its participation in a conspiracy to deprive Henderson of his substantive due process right to bodily integrity, and for its failure to investigate and thus, its encouragement of police officers' violations of the constitutional rights of the mentally ill.⁸ See Complaint, ¶¶ 47, 52-58, 63, 70-73. Defendants seek summary judgment on all the claims against the city because they contend that the city's liability depends upon the officers' liability and because the city's training program concerning involuntary commitments was adequate and did not cause Henderson's injuries. See Defendants' Mem., at 12-14. Plaintiffs oppose summary judgment on grounds that their expert's opinion that a number of city policies caused Henderson's injuries raises a factual issue as to whether the city was deliberately indifferent to Henderson's constitutional rights. See Plaintiffs' Mem., at 18-21. Plaintiffs also contend that the city's liability is independent of the officers' liability. See id. at 22.

A. Policy or Custom Claims

Under Monell, a municipality may be liable under § 1983 if its policy or well-settled custom causes a constitutional injury. Monell, 436 U.S. at 694; Kneipp, 95 F.3d at 1211. A plaintiff seeking damages from a municipality must prove that municipal policymakers

⁸ Plaintiffs claims against the city, contained in Count II, based on its alleged participation in a conspiracy to deprive Henderson of his substantive due process rights will be dismissed because there was no underlying constitutional violation. See supra, pt. II.D.1. Plaintiffs claims against the city, contained in Count III, alleging that the city failed to investigate, and attempted to conceal violations of the rights of the mentally ill, will also be dismissed because plaintiffs have presented no evidence to support their allegations. Not even plaintiffs' expert has opined that the city engaged in such practices. See Plaintiffs' Mem., Ex. G.

established or maintained a policy or custom which caused a municipal employee to violate the plaintiff's constitutional rights; the policy must be the "moving force" behind the constitutional tort. See Monell, 436 U.S. at 691, 694; Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3d Cir. 1994); Regalbuto, 937 F. Supp. at 378-79. The policy must also exhibit deliberate indifference to the constitutional rights of those the policy affects. See Beck v. City of Pittsburgh, 89 F.3d 966, 972 (3d Cir. 1996), cert. denied, 519 U.S. 1151 (1997) (noting that the deliberate indifference standard has been extended beyond the failure to train context).

Plaintiffs first assert that the city should be liable for its policy embodied in Philadelphia Police Department Directive 136 because the policy provides inadequate protection for the safety of those with mental illnesses who are being involuntarily committed. See Complaint, ¶ 51. Specifically, plaintiffs claim that Directive 136 "fails to provide sufficient direction and policy regarding the procedures to be used by police officers in taking such individuals . . . into custody." Id. Directive 136 provides, in relevant part, that

[p]olice personnel called to a residence, observing a person inside the residence reported to be mentally disturbed, but who is not acting in a manner dangerous to himself or others, shall NOT remove individual unless an application for emergency commitment . . . shows the approval by the Mental Health and Mental Retardation administrator or his delegate. Verbal approval will be noted in the warrant portion of the 302 commitment by the delegate's name and the date.

Plaintiffs' Mem., Ex. I, pt. IV.B.2. The Directive also provides that a relative, or a same sex friend, who has completed the involuntary commitment paperwork shall accompany the patient to the specified "Catchment Center" where the patient will be examined. See id. There is nothing facially unconstitutional about this policy as it balances the liberty interests of persons being involuntarily committed with the need to protect them from themselves. See City of

Canton, 489 U.S. at 386-87 (observing that “it is difficult to see what constitutional guarantees are violated” by a policy requiring the city jailer to take a person seeking medical care to a hospital with permission of a supervisor). Though plaintiffs contend that the policy fails to provide constitutionally-required protection for the safety of people facing involuntary commitments, they provide no support for their argument beyond the bare assertions of the complaint. Not even plaintiffs’ expert, who opines that the officers should have taken Henderson into custody, and who opines that the city’s dispatching and training procedures were constitutionally inadequate, offered an opinion that the provisions of Directive 136 are constitutionally inadequate such that they are likely to be the moving force behind a constitutional violation. Plaintiffs’ Mem., Ex. G, at 4-6. Plaintiffs’ expert only indicated that Directive 136 required the officers to take Henderson into custody and take him to a treatment facility. See id. at 4. Moreover, there is no evidence that Directive 136 caused a constitutional tort; there is thus no constitutional injury which was permitted or authorized by Directive 136. See Beck, 89 F.3d at 971 (3d Cir. 1996); *supra*, pt. II (finding that officers did not violate Henderson’s constitutional rights). Plaintiffs have not, therefore, produced a scintilla of evidence that would sustain their claims in the face of the defendants’ summary judgment motion, for they have not produced evidence that would support a jury’s finding in their favor. See Celotex Corp. v. Catrett, 477 U.S. 317, 321 n.3 (1986) (quoting Fed. R. Civ. P. 56 (e)); Anderson, 477 U.S. at 249. Defendants’ motion for summary judgment is thus granted with respect to plaintiffs’ Monell claims based on the alleged inadequacy of Directive 136.

Plaintiffs also assert that the police department’s policy or custom of not recording the precise words which dispatchers say to officers is unconstitutional because it evinces a deliberate

indifference to the rights of plaintiffs. See Plaintiffs' Mem., Ex. G. at 6. Plaintiffs' expert opined that "the dispatch log does not reflect the actual language transmitted to the officers by the dispatcher. Such an inconsistency reflects improper dispatching and reporting procedures. These improper dispatching/reporting procedures are the product of [police department] policies, supervision, and training of dispatchers." Id. In contrast to their claims based on Directive 136, plaintiffs have failed to produce evidence that there actually was a city policy or custom under which dispatchers are instructed not to record the precise language they transmit to police officers. In order to sustain a claim under Monell, plaintiffs are obligated to prove that the challenged action was taken pursuant to a "policy," defined as an "official proclamation [] or edict" made by a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" or a "custom," defined as "such practices of state officials so permanent and well settled as to virtually constitute law." Beck, 89 F.3d at 971 (quotations omitted). The court will assume, however, for purposes of argument, that plaintiffs can prove that the dispatchers here acted pursuant to a city policy or custom. Assuming that plaintiffs are able to prove that the dispatchers acted pursuant to municipal policy or custom, there remain two reasons why defendants are entitled to summary judgment on this Monell claim as well. First, there is nothing in the record to suggest that the dispatcher's failure to record the precise language transmitted to Officers Barksdale and Purnell caused a constitutional violation. The dispatcher's action in recording the message s/he relayed to the officers did not change the message s/he conveyed to them; there is no way that the act of recording precise language, as opposed to recording a summary of precise language, impacted the actions of Officers Barksdale and Purnell. Though plaintiffs are now disappointed about an inconsistency between the officers'

testimony and the contents of the dispatch report, they can point to nothing in the record to show that the contents of the dispatch report caused the constitutional violation they allege, namely the increased danger to Henderson which resulted in his injuries. Second, there is no evidence that the dispatcher's actions resulted in, much less caused, a constitutional violation. As discussed above, the officers did not violate Henderson's rights. Though the city could be liable under Monell even if the officers were not liable (either because the standard governing their liability was different or because they were protected by qualified immunity), the plaintiffs must nonetheless prove that Henderson's constitutional rights were violated. See Collins v. City of Harker Heights, 503 U.S. 115, 122 (1992) (emphasizing that plaintiff's harm must be caused by a constitutional violation); Kneipp, 95 F.3d at 1213 (recognizing that municipality's liability is separate question from officers' liability). Plaintiffs' expert's opinion that the city's dispatch policy caused Henderson's injuries is premised upon his opinion that the officers violated Henderson's constitutional rights by increasing the danger he faced. See Plaintiffs' Mem., Ex. G, at 6. In the absence of such a violation of Henderson's constitutional rights, the city cannot be liable for its dispatching policies under the theory of Monell. Defendants' motion for summary judgment will thus be granted with respect to plaintiffs' claims against the city based on its dispatching policy.

B. Failure to Train Claim

Plaintiffs also claim that the city is liable for its failure to provide adequate training to its officers who are charged with responding to involuntary commitment requests. See Complaint, ¶¶ 53-58. Plaintiffs' expert opined that the officers' confusion about why they were sent to the Henderson house was a result of their improper training because it "is apparent that [the officers]

use the term '302' to mean 'mental' rather than 'involuntary commitment.' The officers refer to '302 voluntary and involuntary,' when in fact there is no such thing as a voluntary 302 commitment. All 302's are involuntary. This confusion and lack of understanding apparently is the result of inadequate training by the [police department]." Plaintiffs' Mem., Ex. G, at 6. The expert also opined that "the failure of the [police department] to train wagon drivers in 302 procedures . . . would reflect a deliberate indifference to the rights of citizens of Philadelphia, especially those with mental illness." Id.

A municipality can be liable for its failure to train its employees properly "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact" and the municipality has made a deliberate or conscious choice to fail to provide adequate training. City of Canton, 489 U.S. at 388-89; Beck, 89 F.3d at 972. Plaintiffs may succeed by showing that "in light of the duties assigned to specific officers or employees the need for more or different training is so obvious and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." City of Canton, at 390; Gonzalez, 40 F. Supp. 2d at 622. A failure to train claim must be based on a systemic failure to train and not the shortcomings of one particular officer, for holding the city liable for one officer's application of a municipal policy in an unconstitutional manner would be indistinguishable from imposing respondeat superior liability on the city. See City of Canton, 489 U.S. at 387.

Contrary to defendants' assertion, the Third Circuit has held that a municipality's liability under § 1983 is not necessarily dependent upon the individual liability of municipal employees. See Kneipp, 95 F.3d at 1213 (reversing district court opinion which failed to consider the

elements of the municipal liability claims independently of the claims against the officers); Fagan, 22 F.3d at 1292; Estate of Burke, 40 F. Supp. 2d at 285. The municipality's policy or custom must, however, cause a constitutional injury to the plaintiff. See Collins, 503 U.S. at 120 (finding that plaintiffs pursuing § 1983 claims against municipalities must determine "(1) whether plaintiff's harm was caused by a constitutional violation, and (2) if so, whether the city is responsible for that violation"); Kneipp, 95 F.3d at 1213 (holding that policy or custom must be "the proximate cause of the injury sustained"); Mark, 51 F.3d at 1149-50 (city's deliberate indifference is not actionable under § 1983 if the plaintiff does not suffer constitutional injury).

Viewing all of the facts in the light most favorable to plaintiffs, there is no basis for concluding that Henderson's constitutional rights were violated, and thus no basis to conclude that the city's policies or failure to train caused a constitutional injury. As discussed above, the officers never established a special relationship with Henderson that made them responsible for his safety, and they did not create a danger that increased his risk of harm. See supra, pt. II.A.-B. Thus, even if the training received by Officers Purnell and Barksdale was inadequate, there is no evidence that the city's inadequate training caused a constitutional violation. See Collins, 503 U.S. at 120; Page, 1999 WL 236179, at * 9 (granting summary judgment on failure to train claims when plaintiffs failed to prove an underlying constitutional violation).

Moreover, plaintiffs have not produced any evidence suggesting that there was a systemic failure to train police officers concerning involuntary commitment procedures. In order to establish the city's deliberate indifference to the rights of Henderson and those similarly situated, plaintiffs are required to demonstrate that police department policymakers were aware of, and consciously disregarded, a pattern of constitutional violations which would put them on notice of

the need for more training. For example, in evaluating plaintiffs' Monell claim based on an alleged policy of "deliberate indifference to the serious medical needs of intoxicated and potentially suicidal detainees," the Third Circuit held that plaintiffs "must have shown that the officials determined by the district court to be the responsible policymakers were aware of the number of suicides in City lockups and of the alternatives for preventing them." See Simmons, 947 F.2d at 1064; Gonzalez, 40 F. Supp. 2d at 622 (explaining that plaintiffs failed to allege how the training program was defective or "how the need for more or different training was so obvious to defendants that they could be said to have been deliberately indifferent to that need"). At best, the evidence here demonstrates that Officers Purnell and Barksdale were confused about the terminology used for voluntary and involuntary commitments. There is nothing in the record, aside from plaintiffs' expert's conclusory opinion, to indicate that this confusion was the result of inappropriate training, and nothing in the record to suggest that the police department had reason to be aware that Officers Purnell and Barksdale were confused about the correct terminology for involuntary commitments. See Plaintiffs' Mem., Ex. G, at 6. To the contrary, the officers testified that they received training in the police academy, and in refresher courses, about the appropriate way to handle voluntary and involuntary commitments. See Purnell Dep., at 53, 108; Barksdale Dep., at 9-11, 25-27, 41. Even interpreting the facts in the light most favorable to plaintiffs, which would permit an inference that the officers' confusion was the result of inadequate training, there is nothing in the record that would permit a conclusion that the city was deliberately indifferent to the need for further training. Plaintiffs have not, and apparently cannot, claim, that the police department was on notice that Officers Barksdale and Purnell, or any other police officers, were confused about the appropriate terminology for involuntary

commitments, were aware of an additional course of training that would resolve this confusion, and consciously declined to undertake such training. See Simmons, 947 F.2d at 1064; Turner v. City of Philadelphia, 22 F. Supp. 2d 434, 439 (E.D. Pa. 1998) (dismissing plaintiff's Monell claim because plaintiff has "improperly extrapolate[d] his experience with police officers as an indicia of inadequate . . . training") (citing DiJoseph, 947 F. Supp. at 843). The situation here is very different from that in Beck, where the police department had available information that one police officer had been the subject of a number of citizen complaints and yet continued to dismiss citizens' complaints against him. See Beck, 89 F.2d at 973-74. In the absence of evidence that the police department was aware of the need for further training concerning involuntary commitments, defendants' motion for summary judgment on plaintiffs' failure to train claims must be granted. Plaintiffs' expert's conclusory opinion that the city was deliberately indifferent to the need for further training is insufficient to prevent summary judgment, as the court is not obliged to accept conclusory legal allegations from either the plaintiffs or their experts. See Anderson, 477 U.S. at 249-50.

CONCLUSION

Defendants' motion for summary judgment on all of plaintiffs' federal claims is granted. Plaintiffs have failed to produce evidence to demonstrate that Henderson's constitutional rights were violated by Officers Barksdale and Purnell, former Police Commissioner Neal, or the City of Philadelphia. Because summary judgment is granted on all of plaintiffs' federal claims, the court will decline to exercise supplemental jurisdiction over plaintiffs' state law claim for intentional infliction of emotional distress. See 28 U.S.C. § 1367 (c)(3). Count IV is thus dismissed without prejudice.

An appropriate order follows.

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

ESTATE OF SALIM HENDERSON, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA, et al.	:	NO. 98-3861

ORDER

AND NOW, this _____ day of July, 1999, after consideration of the defendants' motion for summary judgment, and the plaintiffs' opposition, IT IS ORDERED that Defendants' Motion for Summary Judgment is GRANTED. Judgment is entered in favor of the defendants and against the plaintiffs on Counts I, II, and III of the complaint. Count IV is dismissed without prejudice to plaintiffs' right to raise this claim in state court.

William H. Yohn, Jr., J.