

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

SYLVESTER J. SCHIEBER and : CIVIL ACTION
VICKI A. SCHIEBER, as Co-Personal :
Representatives of the Estate of :
SHANNON SCHIEBER; SYLVESTER :
SCHIEBER; VICKI SCHIEBER; and :
SEAN SCHIEBER :
 :
 :
v. :
 :
 :
CITY OF PHILADELPHIA, :
STEVEN WOODS, individually and :
as a Police Officer, and :
RAYMOND SCHERFF, individually and :
as a Police Officer : NO. 98-5648

MEMORANDUM and ORDER

Norma L. Shapiro, S.J.

July 9, 1999

Plaintiffs Sylvester and Vicki Schieber, as Administrators of the Estate of Shannon Schieber, and individually as her parents, together with Sean Schieber, Shannon's brother, filed an action asserting civil rights violations and state law claims against the City of Philadelphia and the individual police officers, Steven Woods ("Woods") and Raymond Scherff ("Scherff").

Defendants have moved to dismiss Counts I, II, and V of the complaint for failure to state a claim upon which relief can be granted. For the reasons set forth below, the motion to dismiss will be granted in part and denied in part.

FACTS

Plaintiffs allege that on May 7, 1998, at 2:00 a.m., Shannon Schieber screamed for help as she was attacked in her apartment;

a neighbor called the police for assistance. (Compl. at ¶ 1.) In response to the "Priority 1"¹ emergency call, Officers Woods and Scherff arrived at the apartment building where the neighbor stood ready to assist. (Compl. at ¶ 2.) The officers knocked on Schieber's door; receiving no answer, they made no further inquiry. (Compl. at ¶ 2.) They did not attempt to enter Schieber's apartment. (Compl. at ¶ 2).

The officers did not call for assistance to break down the door. (Compl. at ¶ 33.) Officer Woods admitted he would have called a supervisor had he known the call was in response to a woman screaming. (Compl. at ¶ 34.) Officer Scherff would not force entry unless he himself heard the screams. (Compl. at ¶ 34.) Neighbors, having been assured by the officers that Schieber was not home, took no further action; they would have taken action otherwise. (Compl. at ¶ 35.) The following afternoon, Schieber's brother found her dead on the floor of her apartment. (Compl. at ¶¶ 40, 69.) Her parents were notified and arrived at the scene shortly thereafter. (Compl. ¶ 70.)

Plaintiffs, parents and brother of the decedent and the decedent's estate, allege the City of Philadelphia failed adequately to train and supervise its officers in their responses to Priority 1 emergency calls, (Compl. at ¶ 45), and failed to

¹ Emergency 911 calls are classified from 0-6 in order of priority. A "Priority 1" call is the highest classification for a civilian in need of assistance. (Compl. ¶ 28.)

adopt policies and procedures guiding officers in response to emergency calls. (Compl. at ¶ 45.)

DISCUSSION

I. Standard of Review

In considering a motion to dismiss under Rule 12(b)(6), the court "must take all the well pleaded allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the pleadings, the plaintiff may be entitled to relief." Colburn v. Upper Darby Township, 838 F.2d 663, 665 (3d Cir. 1988), cert. denied, 489 U.S. 1065 (1989); see Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). The court must decide whether "relief could be granted on any set of facts which could be proved." Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988). A motion to dismiss may be granted only if the court finds the plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. See Conley v. Gibson, 355 U.S. 41, 45 (1957).

II. Civil Rights Liability

To maintain a civil rights action, plaintiff must allege: 1) action by the state or governmental entity; 2) deprivation of a

constitutional right; and 3) causation. See 42 U.S.C. § 1983;² City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)(per curiam); Kneipp v. Tedder, 95 F.3d 1199, 1212 n.26 (3d Cir. 1996). The parties do not dispute that the conduct of the officers and municipality was "under color of state law."

A. Standing of Parents and Sibling

To assert an action under 42 U.S.C. § 1983, plaintiffs must plead a constitutionally protected interest to have standing to sue. Parents have a liberty interest in the life of a minor child because of the parents' interest in custody and maintaining the family. See Estate of Bailey v. County of York, 768 F.2d 503, 509, n.7 (3d Cir. 1985)(overruled on other grounds). It is not certain that interest extends to the life of a child no longer a minor. See Freedman v. City of Allentown, 853 F.2d 1111, 1117 n.5 (3d Cir. 1988).

In Estate of Bailey, our Court of Appeals relied on Bell v. City of Milwaukee, 746 F.2d 1205 (7th Cir. 1984), a Seventh Circuit decision that a parent whose child has died as a result of unlawful state action may maintain a § 1983 action for

² 42 U.S.C. § 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

deprivation of a liberty interest. The Bell court acknowledged a father's cognizable liberty interest in preserving the life and safety of his child from deprivation by state action based on his liberty interest in the custody of his child and the maintenance and integrity of the family. See id. at 1245-46. Bell recognized an "interest in the companionship, care, custody, and management" of the children, interests that do not change based on the age of the child. See id. at 1244-45. The Bell court refused to except an adult child; the child's age and dependence on the parents were just factors a jury could consider in determining the amount of damages. See id. at 1245.

It is likely our Court of Appeals would follow the Bell decision. See Estate of Bailey, 768 F.2d at 509, n.7; Estate of Cooper v. Leamer, 705 F. Supp. 1081, 1087 (M.D. Pa. 1989)(parents could recover loss of interest in son's life regardless of age and residential status); Agrista v. Sambor, 687 F. Supp. 162, 164 (E.D. Pa. 1988)(parents stated cause of action under § 1983 despite age and marital status of son). The parents of Shannon Schieber have an actionable liberty interest in the life of their daughter.

However, Bell held that a person does not have a constitutionally-protected interest in the society and companionship of a sibling whose life is lost in violation of a constitutional right. See Bell, 746 F.2d at 1248. But see,

Trujillo v. Board of County Comm'rs of the County of Santa Fe, 768 F.2d 1186, 1189 (10th Cir. 1985) ("other intimate relationships" are protected by § 1983). If a sibling's liberty interest were recognized, "there could be no principled way of limiting such a holding to the immediate family or perhaps even to blood relationships." Bell, 746 F.2d at 1247. Any deterrent effect on governmental action would be uncertain. See id. Our Court of Appeals will likely follow Bell on the issue of a sibling's liberty interest as well. The brother, Sean Schieber, does not have a liberty interest in the society and companionship of his sister. Moreover, Pennsylvania's Wrongful Death Act does not confer standing on a sibling, see 42 Pa. Con. Stat. Ann. § 8301(b); Sean Schieber's claims will be dismissed in their entirety for lack of standing.

B. Deprivation of the Constitutional Right

1. Individual Officers (Count I)

a. Liability

To maintain a civil rights action, a plaintiff must prove defendants deprived her of a federal right while acting under color of state law. See 42 U.S.C. § 1983. Section 1983 compensates a person for the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." Davidson v. O'Lone, 752 F.2d 817, 826 (3d Cir. 1984), aff'd, 474 U.S. 344 (1986).

State action exists if a defendant's "official character is such as to lend the weight of the State to his decisions." Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982). Here the individual defendants are police officers for the City of Philadelphia; official actions taken by them while on duty were under color of state law. See Screws v. United States, 325 U.S. 91, 110 (1945).

Plaintiffs must also prove that the state actors violated a constitutional right. While governmental actors are not normally liable for injuries caused by private actors, they may be held liable for creating the danger. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989); Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996). To recover for a state-created danger, there must be: 1) foreseeable and fairly direct harm; 2) wilful disregard of the harm to the plaintiff by the government actor; 3) a relationship between plaintiff and defendants; and 4) use of defendants' authority to create a danger that otherwise would not have existed. See id.

Taking the allegations of the complaint as true, the screams that initiated the police response suggest the initial attack was neither foreseeable nor preventable. But, at this stage of the proceedings, it cannot be assumed that Shannon Schieber was already dead when the police arrived or that her attacker had departed. Therefore, it was foreseeable that the officers'

failure to intervene created additional danger for Shannon Schieber from the increased risk of harm or delay in medical attention. Shannon Schieber was a particular individual for whom assistance had been called, not a general member of the public. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 912-13 (3d Cir. 1997)(plaintiff must be foreseeable individual or discrete class). Had the officers not exercised their authority as they did, neighbors would have intervened, and whatever danger there was would have been terminated not enhanced. It may be that plaintiffs' cause of action cannot survive a motion for summary judgment for lack of evidence Shannon Schieber was still alive when the officers responded to the emergency call. But on this motion to dismiss the facts alleged must be accepted as true.

When addressing whether the officers acted with wilful disregard, the appropriate test to apply to the actions of the officers is whether their conduct "shocks the conscience." County of Sacramento v. Lewis, __ U.S. __, 118 S. Ct. 1708, 1720 (1998), and Miller v. City of Philadelphia, 174 F.3d 368 (3d Cir. 1999). See Radecki v. Barela, 146 F.3d 1227, 1231 (10th Cir. 1998); see also Gillyard v. Stylios, 1998 WL 966010 (E.D. Pa. December 23, 1998)(Shapiro, J.).

To find individual police officers liable for the deprivation of constitutional rights, their conduct must "shock the conscience." What "shocks the conscience" depends on the

totality of the circumstances. See Lewis, 118 S. Ct. at 1720. In a high speed police pursuit, the conduct would do so only if the police had an actual purpose to cause harm. See id. Police officers involved in high-speed pursuit of suspected criminals must be afforded great deference in the exercise of their official discretion, because in such situations they must make split-second decisions without the luxury of prolonged deliberation. See id. at 1719-20. Competing interests, such as the needs to apprehend and protect the safety of the public, make it appropriate to grant more leeway in determining the level of misconduct that will "shock the conscience." See id. at 1720. The Lewis Court drew an analogy to the standard applicable to officials confronted with a prison riot; "the police on an occasion calling for fast action have obligations that tend to tug against each other." Id.

Miller, decided by the Court of Appeals following Lewis, addressed the § 1983 liability of a social worker for removing children from the custody of their mother in response to an allegedly abusive situation. See Miller, 174 F.3d at 375. The standard of culpability for the alleged substantive due process violation had to exceed both negligence and deliberate indifference and reach a level of arbitrariness "shocking the conscience," but an actual intent to cause harm was not mandatory. See id. at 375-76.

Interpreting Lewis, the Miller court conceded that the requirement of a purpose to cause harm to "shock the conscience" extends beyond police pursuits if the state actor does not "have the luxury of proceeding in a deliberate fashion." Id.; see also Gillyard, 1998 WL 966010 at *4-*5. But the Court of Appeals declined to apply the Lewis requirement in Miller because social workers do not "usually act in the hyperpressurized environment of a prison riot or high-speed chase." Miller, 174 F.3d at 375.

Action "that shocks in one environment may not be so patently egregious in another." Lewis, 118 S. Ct. at 1718. If the state actor has more time for contemplation, intent to harm should not be imposed. A lower court must consider how much time the governmental actor had to contemplate the appropriate course of conduct. See Miller, 174 F.3d at 375. The underlying government action must be considered, not the outcome. Gillyard, 1998 WL 966010, at *6.

Officers Woods and Scherff responded to a "Priority 1" call. (Compl. at ¶¶ 27-28.) They heard no screams or noises from the apartment; they saw that the balcony door was closed and the apartment was dark. (Compl. at ¶ 30.) The officers spent less than five (5) minutes at the apartment. (Compl. ¶ 33.) There is no evidence the officers had other calls to which to respond immediately or that they had to leave the apartment building for any other reason. Nothing prevented them from making a forcible

entry when they received no response to inquiries or waiting to see whether the cries would continue or anything else would occur. Telling the neighbors to call again if they heard cries for help without doing anything else could be found not just negligent or even grossly negligent, but deliberately indifferent; reckless disregard of Shannon Schieber's demonstrated need for police help, if proved, might shock the conscience. At this stage of the proceedings, it cannot be held that these actions could not rise to the level of "arbitrary conduct shocking to the conscience." Lewis, 118 S. Ct. at 1711-12. Discovery may proceed without prejudice to a motion for summary judgment if warranted by the facts.

b. Qualified Immunity

If plaintiffs allege a plausible violation of a constitutional right, whether there is qualified immunity must be decided at the outset to protect individual officials not only from liability but from the demands of litigation. See Siegert v. Gilley, 500 U.S. 226, 232 (1991).

Neither municipalities nor individuals sued in their official capacity are accorded qualified immunity. See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 166 (1993); W.B. v. Matula, 67 F.3d 484, 499 (3d Cir. 1995); Hynson v. City of Chester, 827 F.2d 932, 934 (3d Cir. 1987). This defense may be asserted only by

the police officers in their individual capacities.

Qualified immunity is a shield from liability for government officials performing discretionary functions. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Government officials are immune if they act reasonably, although mistakenly. See Anderson v. Creighton, 483 U.S. 635, 641 (1987). Officials are protected "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. The constitutional right asserted must be so clear that a "reasonable official" would understand he is violating that right. Anderson, 483 U.S. at 640. The "inquiry is whether a reasonable officer could have believed that his or her conduct was lawful, in light of the clearly established law and the information in the officer's possession." Sharrar v. Felsing, 128 F.3d 810, 826 (3d Cir. 1997). This standard is liberal, "protecting 'all but the plainly incompetent or those who knowingly violate the law.'" Hunter v. Bryant, 502 U.S. 224, 229 (1991) (quoting Malley v. Briggs, 475 U.S. 335, 341, 343 (1986)).

At the time of the alleged constitutional violation, the law was clear that police officers are individually liable for due process violations when they have created the danger. See Kneipp, 95 F.3d at 1210. The unclear only issue was whether the officers would be liable for "deliberate indifference" or only if

the conduct "shocks the conscience." Compare Fagan v. City of Vineland, 22 F.3d 1296, 1306-07 (3d Cir. 1994)(applying a "shocks the conscience" standard) with Kneipp, 95 F.3d at 1207-08 ("shocks the conscience" standard applies only in police pursuit cases). The Court of Appeals has since recognized that the "shocks the conscience" standard is not limited to police pursuit actions but need not always include an actual purpose to harm. See Miller, 174 F.3d at 375-76.

In this action, the conduct of the officers might violate plaintiffs' rights regardless of which standard is applied. Even if the officers' actions must "shock the conscience," their alleged deliberate indifference and reckless disregard of plaintiffs' constitutional rights might do so. Reasonable officers acting as they did should have known that the conduct did not conform to constitutional standards. The individual officers are not entitled to qualified immunity.

2. City of Philadelphia (Count II)

To assert a claim against the City of Philadelphia, plaintiffs must allege a constitutional violation. City of Los Angeles v. Heller, 475 U.S. 796, 799 (1986)(per curiam); Kneipp, 95 F.3d at 1212 n.26 (3d Cir. 1996). If a constitutional violation occurred, plaintiffs must also establish that the City

caused the violation, that is, "it can be fairly said that the city itself was the wrongdoer." Collins v. City of Harker Heights, 503 U.S. 115, 122 (1992).

Municipal liability is established only by proof that the municipal agency had an official policy or custom permitting or requiring its agent's action. See Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 691 (1978). "Policy is made when a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict. A course of conduct is a 'custom' when, though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law." Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996), cert. denied, 117 S. Ct. 1086 (1997), (quoting Andrew v. City of Phila., 895 F.2d 1469, 1480 (3d Cir. 1990)). A municipal body may violate the Constitution if its policies demonstrate deliberate indifference towards the constitutional rights of those with whom its agents have contact. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

Liability for failure to train and supervise attaches when: 1) the training program and supervision were inadequate; 2) the City was deliberately indifferent to the inadequacies; and 3) the inadequate training and supervision caused the injury. See Kneipp, 95 F.3d at 1213.

Plaintiffs claim the City of Philadelphia had a custom and policy of failing to train and supervise its officers in their response to "Priority 1" emergency calls, and that the officers had no "guidelines" to follow. (Compl. at ¶¶ 45-46, 56.) Plaintiffs allege the City was deliberately indifferent to the inadequacy of its training and supervision. (Compl. at ¶¶ 45, 56.) Plaintiffs allege further that Shannon Schieber would not have been murdered had the officers been properly trained and supervised. (Compl. at ¶¶ 47, 57.) Plaintiffs are entitled to discovery on the issue of municipal liability. At this stage of litigation, it cannot be concluded as a matter of law that no set of facts exist entitling plaintiffs to relief. See Conley, 355 U.S. at 45. Denying the motion to dismiss is without prejudice to a timely motion for summary judgement.

C. Causation

Plaintiffs must prove the deprivation of their constitutional rights was caused by the conduct of the governmental actors. Thus, plaintiffs must ultimately prove that Shannon Schieber was still alive when the officers responded to the emergency call and that the damages claimed would not have resulted if the officers had intervened and/or if they were properly trained and supervised. The complaint alleges the actions of the defendants caused Shannon Schieber's death; these allegations survive a motion to dismiss. Whether plaintiffs can

prove their allegations is a matter for consideration at trial or, in the absence of probative evidence, on a motion for summary judgment.

III. Negligent and Intentional Infliction of Emotional Distress (Count V)

Pennsylvania recognizes a cause of action for both intentional and negligent infliction of emotional distress. Prior to 1979, Pennsylvania recognized a cause of action for negligent infliction of emotional distress of third persons only when the plaintiff was within the "zone of danger" of the alleged tortious conduct. See Niederman v. Bridsky, 261 A.2d 84 (Pa. 1970). In Sinn v. Burd, 404 A.2d 672, 684 (Pa. 1979), the Pennsylvania Supreme Court held when the conduct of the defendant is directed at a third person, a plaintiff need not be in the "zone of danger" to bring an action for negligent infliction of emotional distress. Instead, the court considered whether the emotional distress to the plaintiff must be reasonably foreseeable. See id. Reasonable foreseeability is based on: 1) physical relationship of the plaintiff to the scene of the incident; 2) direct emotional impact on plaintiff from sensory and contemporaneous observance of the incident; and 3) a close rather than distant relationship to the victim. Id. at 685. In Sinn, it was held reasonably foreseeable that a mother would

suffer emotional distress if she saw an automobile strike and kill her daughter. See id. at 686.

Mazzagatti v. Everingham, 516 A.2d 672, 673 (Pa. 1986), limited liability to a bystander, a contemporaneous observer of the accident scene. See also Restatement (Second) of Torts § 46(2)(a)(1965). In Mazzagatti, the plaintiff mother was not on the scene when her daughter was killed by an automobile, but arrived on the scene within minutes of the incident and became hysterical and emotionally distraught at the sight of the fatally injured daughter. The Pennsylvania Supreme Court, refusing to impose liability, held that a relative cannot recover for negligent infliction of emotional distress on learning of an accident if not actually present at the time of the injury. See id. at 679.

Liability for emotional distress to third parties is imposed "only where a reasonable person would recognize the existence of an unreasonable risk of harm to others through the intervention of [defendant's] negligence." Id. at 678. Analyzing the Sinn foreseeability test, the Mazzagatti court found that "at some point along the causal chain, the passage of time and the span of distance mandate a cut-off point for liability." Id. at 676. When the plaintiff is not present, the emotional injury suffered is for loss of affection, bereavement and anguish that family members suffer when a loved one is injured; such injury cannot

impose liability for negligent infliction of emotional distress. Id. at 679.

The elements of intentional infliction of emotional distress are: 1) "extreme and outrageous" conduct; 2) done intentionally or recklessly; and 3) causing severe emotional distress. See Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 85 (3d Cir. 1987). The Court of Appeals has applied Mazzagatti to an action for intentional infliction of emotional distress. See id. In Wisniewski, plaintiffs sued asbestos manufacturers, inter alia, for intentional infliction of emotional distress from watching asbestos-related diseases develop and eventually kill family members; plaintiffs could not recover for lack of contemporaneous observation of the cause of injury. See id. at 89-90. If the injury occurred when the decedents ingested the asbestos fibers, plaintiffs were not present at the time of injury. See id. at 89-90. If the injury occurred where the disease was manifested, plaintiffs injury was "no more than a claim for loss of solatium." Id. at 90.

Plaintiffs here were not at Shannon Schieber's apartment when the officers responded to the emergency call. Decedent's brother did not discover her body until the following afternoon, eleven hours after the incident giving rise to plaintiffs' cause of action occurred. The distress of the parents occurred even later when they arrived at the scene without prior knowledge of

the death of their daughter. There was no contemporaneous observation of the incident giving rise to their daughter's death.

Seeing a deceased sister or daughter is unquestionably traumatic; but defendants cannot be held liable for causing the pain. If plaintiffs watched their daughter's demise, they would have a claim for emotional distress. If the injury was at the time police acted or failed to act, plaintiffs were not present at the time and place of injury and cannot recover; if the injury occurred when plaintiffs found the decedent's body, the form and nature of the infliction of the emotional distress was not reasonably foreseeable to the officers. The facts alleged in this complaint do not give rise to a claim for negligent or intentional infliction of emotional distress under Pennsylvania law.

Even if the complaint stated a cause of action for intentional and/or negligent infliction of emotional distress against the officers in their individual capacities, the City is immune from suit under the Pennsylvania Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa. Con. Stat. Ann. §§ 8541 - 8564. See Wakshul v. City of Philadelphia, 998 F. Supp. 585, 588 (E.D. Pa. 1998); Smith v. City of Chester, 851 F. Supp. 656, 659 (E.D. Pa. 1994). The PSTCA permits imposition of liability on a municipality only for its negligent acts or those of an employee,

but not for an employee's wilful misconduct. See 42 Pa. Con. Stat. Ann. § 8542(a)(2). It waives sovereign immunity for some claims but not for infliction of emotional distress, see 42 Pa. Con. Stat. Ann. § 8542(b).

CONCLUSION

The claims of plaintiffs Sylvester Schieber and Vicki Schieber, individually and as administrators of Shannon Schieber's estate, under 42 U.S.C. § 1983 will not be dismissed. Plaintiffs are not entitled to relief for intentional or negligent infliction of emotional distress, so these claims will be dismissed. Plaintiff Sean Schieber does not have standing to bring a civil rights action under § 1983, so he will be dismissed as a plaintiff.

An appropriate order follows.

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

SYLVESTER J. SCHIEBER and : CIVIL ACTION
VICKI A. SCHIEBER, as Co-Personal :
Representatives of the Estate of :
SHANNON SCHIEBER; SYLVESTER :
SCHIEBER; VICKI SCHIEBER; and :
SEAN SCHIEBER :
 :
 :
v. :
 :
 :
CITY OF PHILADELPHIA, :
STEVEN WOODS, individually and :
as a Police Officer, and :
RAYMOND SCHERFF, individually and :
as a Police Officer : NO. 98-5648

ORDER

AND NOW, this 9th day of July, 1999, upon consideration of Defendants' Motion to Dismiss, and Plaintiffs' Response and Supplemental Memorandum in Opposition, and in accordance with the attached Memorandum it is **ORDERED** that:

1. Defendants' motion to dismiss Count I of the Complaint is **GRANTED** as to the claim of Sean Schieber and **DENIED** as to the claims of Sylvester Schieber and Vicki Schieber, as administrators of Shannon Schieber's estate and as individuals.

2. Defendants' motion to dismiss Count II of the Complaint is **GRANTED** as to the claim of Sean Schieber and **DENIED** as to the claims of Sylvester Schieber and Vicki Schieber, as administrators of Shannon Schieber's estate and as individuals.

3. Defendants' motion to dismiss Count V is **GRANTED**.

4. Sean Schieber is **DISMISSED** as a party plaintiff; the caption shall be amended accordingly.

5. Defendants shall answer the remaining claims on or before July 23, 1999.

Shapiro, S.J.