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

JOHN MCHENRY, INDIVIDUALLY	**:**	
AND AS THE NATURAL GUARDIAN	**:**	**CIVIL ACTION**
OF MICHAEL MCHENRY AND	**:**	
NICOLE MCHENRY,	**:**	
Plaintiffs,	**:**	
	:	
v.	**:**	
	:	
COUNTY OF DELAWARE, et al.,	**:**	**No. 04-1011**
Defendants.	**:**	

MEMORANDUM AND ORDER

Schiller, J. **October 24, 2005**

John McHenry brings this action against the following Defendants: Officer Joseph Nigro and Officer Joseph Swett, both of the Domestic Relations section of Delaware County; Officer Francis Devlin of the Upper Darby Police Department; Upper Darby Township; and the County of Delaware. His children, Michael and Nicole McHenry, are also named as Plaintiffs. The Complaint asserts various § 1983 claims against Defendants stemming from a case of mistaken identity that led to John's arrest and detention for several hours on Father's Day, 2002. The Complaint also contains state law claims for *inter alia*, intentional and emotional infliction of emotional distress, and due process claims. Presently before the Court are the summary judgment motions of all Defendants. For the reasons set forth below, the Court grants in part and denies in part the motions.

I. BACKGROUND

The following facts are either undisputed or viewed in the light most favorable to Plaintiffs. On June 16, 2002, Father's Day, John McHenry went boating and swimming in Maryland with his son, Michael, and John's friend, Todd Stewart. (J. McHenry Dep. at 35; M. McHenry Dep. at 11-

12.) On that same day, Officer Joseph Nigro, then employed as a domestic relations warrant officer for the County of Delaware, had a valid arrest warrant for John Hart for contempt of court, presumably for failing to pay child support. (*See* Pls.' Resp. to Defs.' Nigro and Del. County Summ. J. Mot. Ex. L.) Officer Nigro was serving the warrant in Upper Darby Township. Therefore, as a courtesy, the Delaware County Domestic Relations section informed the Upper Darby Police Department that domestic relations officers would be in their jurisdiction serving a warrant and requested backup assistance. (Nigro Dep. at 17.) Officer Francis Devlin, a twenty-four year veteran of the Upper Darby Police Department, received a dispatch requesting that he provide backup to domestic relations officers serving a warrant. (Devlin Dep. at 21.) At no point did Officer Devlin see the warrant. (*Id*.)

No one was present at the first two locations where Officer Nigro attempted to serve the warrant. (*Id*. at 25.) Officer Nigro had a third address for John Hart, but when they arrived at that location, a woman in the house said that John Hart did not live there. (*Id*.) As they were leaving, Officer Nigro asked a group of people congregated on a porch nearby if they knew where John Hart could be found. (Nigro Dep. at 20.) A woman on the porch informed Officer Nigro that she knew John Hart and provided Hart's address and a physical description. (*Id*.) She described John Hart as "about six-foot, [with] glasses and he's bald on top." (*Id*.) Only Officer Nigro was provided with this description; Officer Devlin neither knew John Hart nor had a description of him. (Devlin Dep. at 27.) Based on this information, the law enforcement officers proceeded to 7243 Clinton Road in Upper Darby. (Nigro Dep. at 20.)

Around dinnertime, John and Michael returned to their home at 7243 Clinton Road, where they lived with John's daughters, nineteen year-old Nicole and thirteen or fourteen year-old Katie

Ann, and John's friend Harry Schirg.[1] (J. McHenry Dep. at 7; N. McHenry Dep. at 6.) John was still dressed in his swim trunks and was preparing dinner when the law enforcement officers arrived, and Schirg answered the door. (J. McHenry Dep. at 35-38.) Officer Nigro alleges that when he arrived at 7243 Clinton Road he initially saw a man who did not fit the description of John Hart that he had been given. (Nigro Dep. at 22.) Therefore, Officer Nigro claims that he asked to speak to John Hart.[2] (*Id*.) Schirg told John that somebody was at the door to see him and about fifteen seconds after Officer Nigro's request, John McHenry appeared. (Nigro Dep. at 22.) At the door, John encountered Officer Nigro standing on the porch asking for "John."[3] (J. McHenry Dep. at 39.) When John responded affirmatively to Officer Nigro, who walked into the house. (*Id*.) An argument ensued, with John telling Officer Nigro to "get the fuck out of my house," while Officer Nigro insisted on taking John to jail. (*Id*. at 40.) As the situation escalated, John insisted on seeing the warrant and pleaded with the law enforcement officers to protect him and to require Officer Nigro to show him the warrant. (*Id*. at 40-41, 43-44, 95-96.) Officer Nigro, however, refused to show John the warrant and told him, "[T]his is the favorite part of my job. I like arresting deadbeat dads on Father's Day." (J. McHenry Dep. at 42; N. McHenry Dep. at 33; M. McHenry Dep. at 17-18.)

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[1] Katie Ann was not at home at any point during the incident. (N. McHenry Dep. at 6.)

[2] It is contested whether Officer Nigro asked John McHenry if his name was John Hart. No testimony disputes Officer Nigro's claim that he mentioned the name John Hart to Schirg when Schirg answered the door. However, Officer Devlin could not recall exactly what Officer Nigro said to Schirg, although he thought that Officer Nigro said, "we have a warrant." (Devlin Dep. at 60.) For purposes of the motions, the Court must infer that Officer Nigro did not ask to speak to John Hart, although that inference is only relevant to Officer Nigro.

[3] John also recalled seeing between two and four uniformed police officers on the porch and two plain clothes officers present. (J. McHenry Dep. at 39-41.) Additionally, there were a number of both marked and unmarked cars parked in the middle of the street blocking traffic. (N. McHenry Dep. at 15-16.)

At some point during the incident Michael informed Nicole, who was a few houses away at a friend's house, that the police were at the McHenry home arresting their father. (N. McHenry Dep. at 13; M. McHenry Dep. at 18.) John continued to vehemently refuse to accompany the officers and offered to show them pay stubs to verify that he was current in his child supportpayments. (J. McHenry Dep. at 42-43.) Nicole also tried to ascertain whether Officer Nigro was certain that he intended to arrest John McHenry and further tried to convince Officer Nigro that her father had the pay stubs to prove that he was current in his payments. (N. McHenry Dep. at 23.) Officer Nigro assured her that he was arresting the correct person. (*Id*. at 24.) With John screaming and yelling and Officer Nigro physically approaching him, Michael, Nicole and the Upper Darby police officers on the scene all attempted to defuse the situation. (J. McHenry Dep. at 46-47.) Finally, John succumbed and accompanied the officers to jail. (*Id*. at 47.) Although John insisted on changing from his bathing suit before heading to jail, he was not permitted to leave the room and was instead forced to change his clothes in view of his children. (*Id*. at 47-50; N. McHenry Dep. at 27.) After John changed his clothes, he was shackled and escorted to a police car while much of the neighborhood watched the spectacle.[4] (J. McHenry Dep. at 50-51, 53, 89.) When she saw her father being handcuffed, Nicole called her aunt Pat, who told Nicole that the officers were required to show her the warrant. (N. McHenry Dep. at 29-32.) All of Nicole's numerous attempts to see the warrant were rebuffed. (*Id*. at 30-33; J. McHenry Dep. at 55.) Throughout this entire incident, John exchanged harsh words with Officer Nigro, who was "strutting around like a chicken in a hen house," and "thought he was king shit." (J. McHenry Dep. at 54-55.) John claims that he told

[4] Nicole estimated that there were ten or fifteen people outside when her father was escorted from their home to the police car. (N. McHenry Dep. at 58.)

Officer Nigro that his name was John McHenry. (*Id*. at 74, 99-100.)

Officer Swett's only role was to transport the man in custody to Delaware Country Prison. (Swett Dep. at 43; Nigro Dep. at 18.) He never entered the McHenry home; he remained in his vehicle during the entire incident and "had no presence during any of the circumstances." (Nigro Dep. at 19.) Officer Nigro placed John in Officer Swett's vehicle and placed the warrant on the empty passenger's seat next to Officer Swett. (Swett Dep. at 64.) It was only when the warrant was placed in the car that Officer Swett first set eyes on the warrant; at that point, he was under the impression that the man now sitting in the back seat was the man sought in connection with the warrant. (*Id*. at 48, 64, 68.) Although John requested to see the warrant, Officer Nigro refused and told Officer Swett to "take him out to the prison. He doesn't have to see nothing." (*Id*. at 65-66.) Once in the vehicle, Officer Swett drove John to the Delaware County Prison, a ride that lasted approximately 45 minutes to an hour. (J. McHenry Dep. at 60.) En route to the prison, Officer Swett began talking with John, who reiterated his request to see the warrant, but Officer Swett understood Officer Nigro to be directing him not to allow John to see the warrant. (Swett Dep. at 69-70.) When John told Officer Swett that his name was McHenry, he thought this might have been an alias for John Hart. (*Id*. at 73-74.) Officer Swett claims that he held up the warrant for John to see and John immediately informed Officer Swett that he was not John Hart. (*Id*. at 74.)

Upon arriving at the prison, John was placed in a holding cell, where he remained for approximately 20 to 40 minutes. (J. McHenry Dep. at 65.) While at the prison, John was ordered to remove everything from his pockets and was given a slip to sign that listed a name other than John McHenry. (*Id*. at 66.) Seeing that the slip did not have his name on it, John told the officer who had requested his signature, "yo, guys, this ain't my fucking name," and Officer Swett immediately called

his superiors to straighten out the situation. (*Id*.; Nigro Dep. at 32.) Officer Swett placed a call to Officer Nigro, voicing his concern that the wrong man was in custody, but according to Officer Swett, Officer Nigro insisted that John was lying and that he would soon arrive at the prison. (Swett Dep. at 75, 80.) A retina scan performed at the prison confirmed that the man in custody was not the man whose name was listed on the booking paper and therefore, the officers at the prison refused to return John to his cell. (J. McHenry Dep. at 68; Swett Dep. at 81-82.) However, when Officer Nigro arrived at the prison, John was informed that it would be in his best interest to return to a holding cell, which he agreed to do. (J. McHenry Dep. at 70; Defs.' Nigro, Swett and County of Del. Summ. J. Ex. Nigro 2.) When John saw Officer Nigro, John "started shooting off [his] big mouth," informing Officer Nigro that he arrested the wrong person and John admitted that he was "being an asshole, screaming and yelling." (J. McHenry Dep. at 70.) Officer Nigro refused to believe John, and insisted that he be booked. (*Id*. at 71.)

After Officer Swett discussed the matter with a lieutenant, it was explained to John that he was to be transported to the state police barracks to confirm his identity and to determine if there were any outstanding warrants for him. (Swett Dep. at 86, 120.) John was then re-shackled and driven to the state police barracks, a ride lasting less than ten minutes, where he was fingerprinted. (J. McHenry Dep. at 71, 75; Swett Dep. at 121-22.) After spending approximately thirty minutes at the state police barracks, it was confirmed that John McHenry was not the man being sought in the warrant, and therefore Officer Swett drove John to his home, a ride that lasted between 25 and 35 minutes. (J. McHenry Dep. at 77-78, 80; Swett Dep. at 123.)

Since the arrest of her father, Nicole has not seen any counselors, psychologists, or psychiatrists, nor has she sought any medical or psychological treatment. (N. McHenry Dep. at 48.)

She has not taken any medication for depression or anxiety since the incident, nor has she seen her family doctor for any condition or problems stemming from the events of Father's Day, 2002. (*Id*. at 49-50.) She does claim that she fears that her relationship with her mother will deteriorate as a result of this incident; she also asserts that, for a couple of days, she feared that her father, a recovering drug addict, would suffer a relapse. (*Id*. at 53-54.) Michael also did not see any counselors or doctors to discuss the events of that day; in fact, referring to his father's arrest, Michael said, "[i]t was not really that big." (M. McHenry Dep. at 80-81.) As for John, he has seen a doctor on several occasions since the incident for "mental problems or some kind of problems that I was having with family life . . . ." (J. McHenry Dep. at 18.) He also claims that his relationship with Michael has deteriorated since his arrest. (*Id*. at 18-20.)

II. STANDARD OF REVIEW

Summary judgment is appropriate when the admissible evidence fails to demonstrate a dispute of material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c) (2005); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). When the moving party does not bear the burden of persuasion at trial, the moving party may meet its burden on summary judgment by showing that the nonmoving party's evidence is insufficient to carry its burden of persuasion at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Thereafter, the nonmoving party demonstrates a genuine issue of material fact if sufficient evidence is provided to allow a reasonable jury to find for him at trial. *Anderson*, 477 U.S. at 248. To meet this burden, the opposing party must point to specific, affirmative evidence in the record and not simply rely on mere allegations, conclusory or vague statements, or general denials in the pleadings. *Celotex*, 477 U.S.

at 324. In reviewing the record, "a court must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Armbruster v. Unisys Corp*., 32 F.3d 768, 777 (3d Cir. 1994). Furthermore, a court may not make credibility determinations or weigh the evidence in making its determination. *See Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 150 (2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

A. Legal Standards That Govern Plaintiff's Fourth Amendment Claims

The Fourth Amendment forbids unreasonable searches and seizures and requires that warrants be supported by probable cause. U.S. CONST. amend. IV. The Fourth Amendment does not ensure that "only the guilty will be arrested." *Baker v. McCollan*, 443 U.S. 137, 145 (1979); *see also Grant v. Borough of Darby*, Civ. A. No. 98-1206, 1999 U.S. Dist. LEXIS 4807, at *9 (E.D. Pa. Apr. 15, 1999). The Supreme Court has stated that the Constitution does not require an officer making an arrest "to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent." *Baker*, 443 U.S. at 145-46.

John McHenry's Fourth Amendment claims are brought under 42 U.S.C § 1983. Under that statute, Plaintiff must show that a person acting under color of state law deprived him of a federal constitutional or statutory right.[5] *See* 42 U.S.C. § 1983 (2005); *see also Berg v. County of Allegheny*, 219 F.3d 261, 268 (3d Cir. 2000). Section 1983 is not itself a source of substantive rights, but rather it is a mechanism for vindicating the violation of federal constitutional and statutory rights. *See Berg*, 219 F.3d at 268. Here, the constitutionality of arrests by state officials is governed by the

[5] It is undisputed that the individual officers were acting under color of state law.

Fourth Amendment.[6] *See id*. at 269 (citations omitted). Specifically, a § 1983 false arrest claim requires that Plaintiff demonstrate that the arresting officer lacked probable cause to make the arrest.[7] *See Garcia v. County of Bucks*, 155 F. Supp. 2d 259, 265 (E.D. Pa. 2001) (*citing Dowling v. City of Phila.*, 855 F.2d 136, 141 (3d Cir. 1988)). Probable cause exists when "the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant a reasonable person to believe that an offense has been or is being committed by the person to be arrested." *Orsatti v. N.J. State Police*, 71 F.3d 480, 483 (3d Cir. 1995).

An officer effectuating an arrest pursuant to a valid arrest warrant is generally deemed to have probable cause to arrest. *See Garcia*, 155 F. Supp. 2d at 265 (*citing Kis v. County of Schuylkill*, 866 F. Supp. 1462, 1469 (E.D. Pa.1994)). Furthermore, "where an arrest is based upon a valid warrant, there is no automatic Fourth Amendment violation even if the wrong person is arrested." *Doherty v. Haverkamp*., Civ. A. No. 93-5256, 1997 U.S. Dist. LEXIS 7547, at *17 (E.D. Pa. May 27, 1997); *see also Hill v. California*, 401 U.S. 797, 802-03 (1971) (approving conclusion that "when the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest"). However, a Fourth Amendment violation may be demonstrated if the officers executing the warrant knew they were

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[6] As an initial matter, there can be no doubt that McHenry was seized during this incident. A "seizure" occurs "whenever a police officer accosts an individual and restricts his freedom to walk away." *Terry v. Ohio*, 392 U.S. 1, 16 (1968). "A seizure occurs even when an unintended person is the object of detention, so long as the means of detention are intentionally applied to that person." *Berg*, 219 F.3d at 269.

[7] Plaintiff's false imprisonment claim arises from his claim that he was falsely arrested. *See Groman v. City of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995) ("[W]here the police lack probable cause to make an arrest, the arrestee has a claim under § 1983 for false imprisonment based on a detention pursuant to that arrest.").

arresting the wrong person or acted in reckless disregard of facts that would have led to the conclusion that they arrested the wrong person. *Doherty*, 1997 U.S. Dist. LEXIS 7547, at *17. The linchpin of mistaken identity cases is reasonableness; the key question is whether the arrest of the wrong person was reasonable under the totality of the circumstances. *Grant*, 1999 U.S. Dist. LEXIS 4807, at *11; *see also Doherty*, 1997 U.S. Dist. LEXIS 7547, at *17-*18 ("Thus, the determination of a Fourth Amendment violation for false arrest depends, first and last, upon whether the arresting officers acted reasonably under all of the circumstances existing at the time and place of the arrest or detention."). The Court must be mindful that "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Hill*, 401 U.S. at 804.

Because Officers Devlin and Swett unquestionably were limited to playing backup roles in the arrest of John McHenry, an additional level of analysis is relevant to their actions. Neither Officer Swett nor Officer Devlin was under any duty to make an independent investigation of the facts surrounding the arrest. *See Baker*, 443 U.S. at 145-46 ("[W]e do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent."). Furthermore, "[i]n assisting an officer from another jurisdiction, a police officer is entitled to rely on upon the assumed validity of an arrest warrant and the accuracy of the information conveyed by the police officer requesting assistance." *Doherty*, 1997 U.S. Dist. LEXIS 7547, at *28 (*citing Capone v. Marinelli*, 868 F.2d 102 (3d Cir. 1989)). "[T]he Constitution does not mandate that every single officer conduct an independent investigation into the existence of [] probable cause. Instead, lower-level officers are permitted to rely upon the investigation conducted by more senior officials." *Fullard v. City of Phila.*, Civ. A. No. 95-4949, 1996 U.S. Dist. LEXIS 5321, at *28 (E.D.

Pa. Apr. 22, 1996). The Court finds instructive the description of the roles played by various officers in serving warrants laid out by Judge Kozinski in *Ramirez v. Butte-Silver Bow County,* 298 F.3d 1022 (9th Cir. 2002). In *Ramirez*, the court noted that the roles of officers can vary greatly in serving warrants. Often, a few officers plan and lead the search and must ensure that they are acting in accordance with the law. *Id*. at 1027. While the line officers must also comply with the law, they need not read or even see the warrant. *Id*. at 1028. Those officers not leading the team are entitled to rely on the representations made by those responsible for serving the warrant. *Id*.

B. Qualified Immunity

Officers Nigro, Devlin and Swett claim that they are entitled to qualified immunity. Qualified immunity provides a shield that protects officials charged with exercising discretionary functions from being dragged into court for the exercise of that discretion. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Grant*, 1996 U.S. Dist. LEXIS 4807, at *8 (E.D. Pa. Apr. 15, 1999). Because the privilege is "an immunity from suit rather than a mere defense to liability," qualified immunity is "effectively lost if a case is erroneously permitted to go to trial." *Bennett v. Murphy*, 274 F.3d 133, 136 (3d Cir. 2001) (*quoting Saucier v. Katz*, 533 U.S. 194, 200-01 (2001)). Accordingly, the issue of qualified immunity should be decided early in the litigation. *Saucier*, 533 U.S. at 201.

When presented with a qualified immunity defense, a court must undertake a two-step inquiry. First, a court must determine whether, taken in the light most favorable to plaintiff, the alleged facts show that the officer's conduct violated a constitutional right. *Id*. If that question is answered affirmatively, the court must then proceed to the second step, whether the right was clearly

established. *Id*. Defendants may be protected from liability if their actions were not contrary to clearly established constitutional or statutory rights of which a reasonable person would have known. *See Carswell v. Borough of Homestead*, 381 F.3d 235, 242 (3d Cir. 2004). "A right is clearly established if its outlines are sufficiently clear that a reasonable officer would understand that his actions violate the right." *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000).

1. Officers Devlin and Swett

The Court grants summary judgment as to Officers Devlin and Swett, because, applying the appropriate legal standards, neither officer violated John McHenry's constitutional rights, and, furthermore, both officers are protected by qualified immunity.

a. Officer Devlin did not violate John McHenry's constitutional rights

It is undisputed that Officer Devlin was dispatched to assist domestic relations officers, who were responsible for serving the warrant. (Devlin Dep. at 11, 13.) Officer Devlin was dispatched solely to provide assistance and to help keep the peace should the situation escalate or the threat of violence become real. (*Id*. at 13, 37, 46-47.) As Officer Nigro explained the role of the police officers, "[t]hey provide backup assistance, and security for us while we effectuate the warrant. That is all. They are there to assist us." (Nigro Dep. at 17.) While in the house, Officer Devlin simply stood behind Officer Nigro. (M. McHenry Dep. at 39-40.) Officer Devlin's role was to assist another officer; he was to "stand by and make sure there is [sic] no problems, and they handle – whoever has the warrant handles the arrest." (Devlin Dep. at 34, 46-47; *see also* Pls.' Resp. to Defs.' Nigro, Swett and Del. County Summ. J. Mot. Ex. D.) Therefore, Officer Devlin was under no duty to view the warrant beforehand; he was entitled to rely on Officer Nigro regarding the validity of the warrant and Officer Nigro's assurances that the man who was being arrested was the man whose

name was on the warrant. *See Ramirez*, 298 F.3d at 1028; *see also, e.g.*, *Capone*, 868 F.2d at 105-06 (officer acting upon information provided by another officer acted reasonably as matter of law). The evidence is undisputed that Officer Devlin believed that Officer Nigro was serving a valid warrant on a suspect who failed to pay his child support. *See Fullard*, 1996 U.S. Dist. LEXIS 5321, at *28. Once John McHenry was arrested and placed in Officer Swett's vehicle, Officer Devlin was no longer involved and proceeded to another matter. (Devlin Dep. at 43.) Accordingly, he did not violate John McHenry's Fourth Amendment rights.

None of Plaintiffs' arguments for holding Officer Devlin liable are availing. The fact that Devlin received no training on serving warrants is irrelevant because that was not part of his job, nor was he responsible for serving the particular warrant at issue here. It is also irrelevant that Officer Devlin failed to confirm that McHenry was the subject of the warrant. *See Garcia*, 155 F. Supp. 2d. at 265 (officer under no duty to investigate arrestee's claim of innocence or mistaken identity). It is further undisputed that John McHenry was irritated, used foul language, and repeatedly needed to be told to calm down. The law did not require any of the officers on the scene to immediately verify John McHenry's true identity in a tense situation with tempers quickly rising. *See Doherty*, 1997 U.S. Dist. LEXIS 7547, at *29 (finding it acceptable for officer to fail to verify claims of mistaken identity while arrestee was agitated and using profane language). There is also no support for the bald assertion that Officer Devlin is to be held responsible for failing to force Officer Nigro to show the warrants to others, especially when Officer Devlin never had physical possession of the warrant.

b. Officer Devlin acted reasonably

The Court holds that Officer Devlin did not violate any of John McHenry's constitutional

rights. However, assuming that Officer Devlin did violate John McHenry's constitutional rights, Officer Devlin would nevertheless remain shielded by qualf ied immunity because a reasonable officer in his position could have believed that he was acting lawfully, in light of the clearly established law and information that the officer possessed. *See Berg*, 219 F.3d at 272; *see also Bennett*, 274 F.3d at 136. Officer Devlin acted reasonably in his role and was not required to take John's claims of innocence and mistaken identity as true. *See Garcia*, 155 F. Supp. 2d at 266.

The expert report submitted by Plaintiffs, which Defendants assert is not admissible, fails to create a genuine issue of material fact as to Officer Devlin. The issue of whether it would be clear to a reasonable officer that his conduct was unlawful in the situation faced by Officer Devlin is decided as a matter of law, not left to be decided by an expert. *See Carswell*, 381 F.3d at 242-44 (although jury may determine disputed historical facts material to qualified immunity, the court must ultimately decide the issue of qualified immunity as a matter of law); *see also Forbes v. Twp. of Lower Merion*, Civ. A. No. 00-930, 2003 U.S. Dist. LEXIS 7713, at *6 n.3 (E.D. Pa. Apr. 10, 2003). The expert report faults Officer Devlin for not knowing more about the man named on the warrant. (Pls.' Resp. to Defs.' Devlin and Upper Darby Summ. J. Mot. Ex. A at 7.) According to Plaintiffs' expert, the warrant assistance that Officer Devlin provided was inadequate and failed to comport with generally accepted police practices. In addition, the expert asserts that Officer Devlin should have taken steps to verify McHenry's identity "the moment the officers questioned his identity (physical characteristics) or when they were told he was not Hart." (*Id.*)

While the report contains a compendium of mistakes that the expert believes Officer Devlin made, this Court concludes that it would not have been clear to a reasonable officer faced with the factual scenario confronted by Officer Devlin that his actions were unlawful. It is undisputed that

Officer Nigro possessed a valid warrant for the arrest of John Hart. Also, nothing in the record suggests that Officer Devlin thought that the wrong person was being arrested. It was only when he received notice of this lawsuit that he learned that the man arrested was not John Hart. (Devlin Dep. at 43.) It is undisputed that the situation in the McHenry home was becoming heated and was on the verge of turning into a physical altercation. (*Id*. at 37; J. McHenry Dep. at 41-42, 45.) It is also undisputed that the identity of John McHenry was verified shortly after he was arrested. The fact that the verification did not occur in the McHenry home does not mean that Officer Devlin violated clearly established law or acted unreasonably. Unsurprisingly, arrestees often lie about their identity and claim to be innocent of the charges brought against them. *See Hill*, 401 U.S. at 803 (noting that aliases and false identifications are common). Trials are designed to address such issues. *See Baker*, 443 U.S. at 145-46 ("A reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers . . . is entirely consistent with 'due process of law' . . . [t]he ultimate determination of such claims of innocence is placed in the hands of the judge and the jury."). Officer Devlin was under no obligation to allow an irate arrestee to search his house for pay stubs and information that would demonstrate he was current in his child support payments. *See Garcia*, 155 F. Supp. 2d at 264 (granting motion to dismiss § 1983 claims despite plaintiff's pleas that he was not person sought in warrant and had documentation to prove his claim). Accordingly, Officer Devlin is entitled to qualified immunity.

c. Officer Swett did not violate John McHenry's constitutional rights

Officer Swett is also entitled to summary judgment. Officer Swett's only duty was to transport the man that Officer Nigro placed in his car to Delaware County Prison. (Nigro Dep. at 18 ("Swett was strictly a transport officer.").) At no point did Officer Swett enter the McHenry

residence; nor did he see the warrant until after John McHenry had been arrested and Officer Nigro placed the warrant on the passenger seat of Officer Swett's vehicle. (*Id*.; Swett Dep. at 63-64, 68.) Officer Swett also believed that John had already seen the warrant. (Swett Dep. at 123-24; Defs.' Nigro, Swett and Del. County Summ. J. Mot. Ex. Nigro 2.) Given that Officer Swett knew that Officer Nigro's policy was to show the warrant to an arrestee, this belief was reasonable. (Swett Dep. at 41.) Although Officer Swett did become concerned during the ride to the prison that the wrong man had been arrested, he was en route to the prison at the time and had an additional prisoner in his car. (*Id*. at 49, 63.) Therefore, he was not free to simply stop his vehicle and conduct an immediate investigation as to the identity of the individual he was transporting to the prison. Instead, Officer Swett took reasonable steps to confirm the identity of the man arrested once he was safely at the prison and possessed the resources to ensure a proper and safe investigation could be conducted.[8] Furthermore, it is undisputed that until the time that John was released, Officer Swett lacked the authority to decide John's fate. (*Id*. at 120.) Under the circumstances, Officer Swett neither violated John McHenry's rights nor acted contrary to clearly established law. Accordingly, Officer Swett is granted summary judgment.

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[8] The Court is aware that there is a disagreement between Officer Swett and Officer Nigro regarding transporting John to the state police barracks. According to Officer Nigro, he told Officer Swett to identify the man in custody at the prison and send him home immediately if he was not John Hart. (Nigro Dep. at 32-33.) Officer Swett claims that Officer Nigro continued to insist that the right man was in custody. (Swett Dep. at 80.) Officer Nigro claims that he never told Officer Swett to take John to the state police barracks. (Nigro Dep. at 36-37.)

This dispute does not create a genuine issue of material fact. Regardless of whose testimony is believed, the identity of the man in custody remained unclear – the brief trip to the state police barracks to determine the man's identity does not amount to a constitutional violation. Furthermore, John admits that at that time, "I was still being a bit of an asshole myself." (J. McHenry Dep. at 73.)

2. Officer Nigro

Officer Nigro has a somewhat different account of the events of Father's Day, 2002, and because the events surrounding Officer Nigro's actions are in contention, summary judgment is denied as to Officer Nigro. Officer Nigro alleges the following set of facts. Officer Nigro held the warrant in his hand and asked John if he was John Hart, but no response was forthcoming. (Nigro Dep. at 14-15.) Nicole never informed Officer Nigro that the man being arrested was John McHenry, not John Hart. (*Id*. at 15.) Although Officer Nigro repeatedly attempted to ascertain the man's identity, John would not reveal his last name. (*Id*. at 15-16.) Furthermore, Officer Nigro never refused to show the warrant; in fact, he picked it up and said, "I have a warrant right here." (*Id*. at 15.) When John came to the door, the first question that Officer Nigro asked was, "Are you John Hart?" (*Id*. at 22.) Officer Nigro explained that he "had an arrest warrant for John Hart and [John McHenry] fit the description." (*Id*. at 23.) The man refused to answer, instead insisting that he paid his child support. (*Id*. at 22-23.) Officer Nigro then continued, "Are you John Hart; yes or no? If you're not, we're out of here. I don't want to bother you. But I have to find out if you're John Hart." (*Id*. at 23.) Although Officer Nigro never asked for identification, he requested the man's full name at least half a dozen times, yet never received a response. (*Id*. at 23, 25.) All the while, John was "out of control." (*Id*. at 23, 50.) Officer Nigro denies making any comments about deadbeat dads. (*Id*. at 31.)

Officer Nigro received a phone call from Officer Swett, who was at the prison with John McHenry. (*Id*. at 32.) Officer Swett revealed that the wrong man might have been arrested, to which Officer Nigro replied, "Get him ID'd through the ion [retina] scan. If it's not him, get him back home and I'll make a report." (*Id*.) Officer Nigro admits proceeding to the prison, but he denies

having any contact whatsoever with John once he arrived at the prison. (*Id*. at 33.) Officer Nigro never told Officer Swett to take John to the state police barracks, rather he told Officer Swett to immediately return John home from the Delaware County Prison if it became clear that the man arrested was not John Hart. (*Id*. at 33, 36-37.)

While it is undisputed that Officer Nigro was in possession of a valid arrest warrant for John Hart, a warrant alone "does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances." *Berg*, 219 F.3d at 273; *see also Garcia*, 155 F. Supp. 2d at 266 (officer may not indefinitely detain an arrestee without attempting to resolve an apparent issue of identity); *Grant*, 1999 U.S. Dist. LEXIS 4807, at *15 (prolonged detention pursuant to a valid warrant but in the face of repeated protests of mistaken identity may, under certain circumstances, amount to deprivation of constitutional rights).

Because wildly divergent stories have been put forth by the parties, a jury must decide whether Officer Nigro violated John McHenry's Fourth Amendment rights as well as the common law false arrest and false imprisonment claims against Officer Nigro.

C. Due Process Claims

John McHenry's Fourteenth Amendment claim merely parrots his Fourth Amendment claims. Defendants correctly note that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims.'" *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (*quoting Graham v. Connor*, 490 U.S. 386, 395 (1989); *see also Berg*, 219 F.3d at 268 (noting that when government behavior is governed by a specific constitutional amendment, due process analysis is inappropriate). "[T]he

constitutionality of arrests by state officials is governed by the Fourth Amendment rather than due process analysis." *Berg*, 219 F.3d at 269 (citations omitted). Furthermore, the Supreme Court has stated that a three-day detention, a period of time much longer than John McHenry was detained, pursuant to a valid arrest warrant was not a due process violation. *Baker*, 443 U.S. at 145. Accordingly, John's Fourteenth Amendment claim will de dismissed.

The Complaint also contains the rather amorphous claim that Defendants violated Michael and Nicole's due process rights when arresting their father. As Officers Devlin and Swett committed no constitutional violation merely by being present while John was arrested, they obviously cannot be liable to John's children because John was arrested. Yet, Plaintiffs further contend that Defendants are at fault for "creat[ing] a potentially dangerous situation for Mr. McHenry's children by le[aving] both plaintiff Nicole and plaintiff Michael, ages 19 and 13 at the time, respectively, at home with plaintiff's roommate, a drug addict, to fend for themselves." (Pls. Resp. to Defs.' Devlin and Upper Darby Summ. J. Mot. at 24-25.) This argument is patently frivolous. Plaintiffs' suggestion that Defendants must assume responsibility for John's children while he was detained is baseless. Indeed, at the time of the incident, Nicole was an adult. It is ridiculous to fault the officers for leaving John's children with his roommate, a drug addict. As Plaintiffs note, the drug addict with whom Michael and Nicole were left was already living in the house with the McHenrys. (*Id*.)

A special relationship was not created between the government and John McHenry's children, nor were Michael and Nicole taken into custody such that the Constitution imposed a duty upon the Defendants to assume responsibility for their well-being. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (*citing Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)). Finally, Michael and Nicole spent only a few hours away from their father, and

no harm befell either. No grounds exist for finding a due process violation for placing Plaintiffs "in the potential path of immediate harm." (Pls.' Resp. to Defs.' Devlin and Upper Darby Summ. J. Mot. at 25.) Accordingly, all due process claims are dismissed.

D. Municipal Liability Claims

1. Upper Darby Township

Having found that Officer Devlin did not commit any constitutional violation, the Court also finds that Upper Darby is also entitled to summary judgment. An underlying constitutional violation is a prerequisite to finding a municipality liable under § 1983. *See City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (Supreme Court case law does not permit awarding damages against a municipality based on actions of one of its officers when jury has concluded that officers inflicted no constitutional harm); *see also Debellis v. Kulp*, 166 F. Supp. 2d 255, 274 (E.D. Pa. 2001); *Williams v. Borough of W. Chester*, 891 F.2d 458, 467 (3d Cir. 1989). Furthermore, to face liability under § 1983, the municipality *itself* must have caused the constitutional violation. *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original). That is, there must be a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. *Id*.; *see also Brown v. Muhlenberg Twp.*, 269 F.3d 205, 214-15 (3d Cir. 2001). Without a constitutional violation, Plaintiff obviously cannot show the necessary causal link. Accordingly, the Court grants Upper Darby's summary judgment motion and dismisses all claims against it.

2. Delaware County

a. Legal standards

For Delaware County to be held liable, Plaintiff must "demonstrate that, through its

deliberate conduct, the municipality was the 'moving force' behind the injury alleged."[9] *Berg*, 219 F.3d at 276 (*quoting Bd. of County Comm'rs of Bryan County v. Brown*, 520 U.S. 397, 404 (1997)). Plaintiff must point to a municipal policy or custom that caused the violation of his rights. *See id*. at 275. A policy exists when a decision maker with final authority to establish municipal policy with respect to the action in question issues an official proclamation, policy or edict. *Id*. A custom is a course of conduct which, although not formally authorized by law, reflects practices of state officials that are so permanent and well settled as to virtually constitute law. *Id*. However, "proof of a single incident by lower level employees acting under color of law does not suffice to establish either an official policy or custom." *Wakshul v. City of Phila.*, 998 F. Supp. 585, 591 (E.D. Pa. 1998) (*citing City of Okla. City v. Tuttle*, 471 U.S. 808, 823 (1985)).

To survive Delaware County's summary judgment motion, Plaintiff must establish that policymakers were aware of similar unlawful conduct in the past and tolerated it. *See id*. (*citing Bielevicz v. Dubinon*, 915 F.2d 845, 851 (3d Cir. 1990)). Without proof of a pattern of underlying constitutional violations, proof of which is not present in this case, the Third Circuit has described the task of proving deliberate indifference as "difficult." *Carswell*, 381 F.3d at 244 (*citing Berg*, 219

[9] Neither side has briefed the issue of sovereign immunity. However, there is deposition testimony that the Domestic Relations section is an arm of the Court of Common Pleas. (Nigro Dep. at 60-61; Walker Dep. at 85.) The Director of that section reports to the President Judge of the Delaware County Court of Common Pleas. (Walker Dep. at 85.) Just recently, the Third Circuit held that Eleventh Amendment immunity barred an ADA claim brought against a judicial district. *Benn v. First Judicial Dist. of Pa.*, No. 01-3769, 2005 WL 2511451 (3d Cir. Oct. 12, 2005). According to that opinion, the Judicial District is an instrumentality of the Commonwealth. *Id*. at *5-*6. Therefore, because the Commonwealth was the real party in interest, the Judicial District was entitled to immunity. *Id*. at *4-*5. Judicial districts, which are comprised in part by the various Courts of Common Pleas, are state entities. *Id*. at *1 n.1, *5. Here, if the appropriate defendant is the Delaware County Court of Common Pleas and not the County of Delaware, it follows that as part of the Commonwealth's unified judicial system, the Court of Common Pleas is entitled to immunity.

F.3d at 276). The plaintiff must come forward with "scienter-like evidence of indifference on the part of a particular policymaker or policymakers." *Simmons v. City of Phila.*, 947 F.2d 1042, 1064 (3d Cir. 1991).

Before a municipality may be held liable under § 1983 based on a failure to train claim, it must also be shown that the municipality's decisions were the "moving force" behind an actual constitutional violation. *Grazier v. City of Phila.*, 328 F.3d 120, 124-25 (3d Cir. 2003) (*quoting City of Canton*, 489 U.S. at 389); *see also Reitz v. County of Bucks*, 125 F.3d 139, 145 (3d Cir. 1997). As the Third Circuit has stated, "[t]o survive summary judgment on a failure to train theory, [Plaintiff] must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference." *Brown*, 269 F.3d at 216; *see also Reitz*, 125 F.3d at 145. It is insufficient to merely show that a particular officer acted improperly or that better or additional training could have avoided the injury because "[s]uch a claim could be made about almost any encounter resulting in injury" and "adequately trained officers occasionally make mistakes." *City of Canton*, 489 U.S. at 390-91; *see also Grazier*, 328 F.3d at 125; *Garcia*, 155 F. Supp. 2d at 268; *Canty v. City of Phila.*, 99 F. Supp. 2d 576, 581 (E.D. Pa. 2000) (municipal liability for failure to train cannot be "predicated solely upon a showing that a city's employees could have been better trained or that additional training was available that would have reduced the overall risk of constitutional injury"). This is a difficult standard to meet because "[a] plaintiff pressing a § 1983 claim must identify a failure to provide specific training that has a causal nexus with their injuries and must demonstrate that the absence of that specific training can reasonably be said to reflect a deliberate indifference to whether the alleged constitutional deprivations occurred." *Reitz*, 125 F.3d

at 145 (*citing Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1030 (3d Cir. 1991)); *see also Garcia*, 155 F. Supp. 2d at 268.

b. Analysis

Here, there is no evidence that the relevant policymakers had any knowledge that domestic relations officers serving arrest warrants were either improperly arresting individuals or detaining individuals despite convincing evidence that those individuals were wrongly arrested. Plaintiff has not identified any policy or custom of Delaware County that amounts to deliberate indifference. Instead, he argues that the failure of Delaware County to have written policies and procedures for serving warrants is sufficient to sustain a claim against Delaware County. This claim fails for several reasons. First, Officer Nigro testified that Plaintiff had a right to see the warrant. (Nigro Dep. at 46.) Officer Swett also said that the protocol was to show the warrant such that the arrestee could read the information on it, see the signature and feel the seal. (Swett Dep. at 39.) Second, both officers also testified that it is Officer Nigro's normal practice to show the arrestee the warrant. Officer Nigro testified that his standard practice is to hold the warrant in his left hand and show it to the arrestee. (Nigro Dep. at 13-14.) Officer Swett confirmed that Officer Nigro's practice was to hold up the warrant and allow the arestee to see the warrant and judge's signature. (Swett Dep. 41.) In fact, Officer Nigro testified that he was instructed as to how to show an arrestee a warrant. (Nigro Dep. at 13.) Therefore, assuming that Officer Nigro failed to show John McHenry the warrant, such was contrary to his usual practice and not the result of any Delaware County policy or custom.

Third, the claim fails because there is no evidence that Delaware County's training practices caused any constitutional violations. In fact, Officer Nigro testified that although he has been on the job thirty-two years, this is the first instance of mistaken identity that he has encountered and that

he has a clear record. (Nigro Dep. at 51, 60.) Officer Swett also testified that he was aware of no other instances in which a warrant was not shown or the wrong man was arrested. (Swett Dep. at 127-28.) The Domestic Relations Director, Mimi Bradley Walker, also testified that, other than the incident with John McHenry, she never "[had] any incidents of arrests of the wrong individuals." (Walker Dep. at 22.) Also Kathleen Connor, Deputy Director of Domestic Relations, could not recall any incidents when the wrong person was arrested. (Connor Dep. at 12-13.) No pattern of constitutional violations exists here.

Fourth, there is no requirement that the policies and procedures for serving a warrant must be in writing. Officer Swett testified that he received on-the-job training regarding the proper procedures for serving a warrant.[10] (Swett Dep. at 18-19.) He further testified regarding the protocol for showing the warrant to the individual being arrested. (*Id*. at 39; *see also* Nigro Dep. at 13.) The warrant was not to be turned over to the individual for fear that it would be damaged or destroyed. (Swett Dep. at 39; Nigro Dep. at 13.) This Court is in no position to direct Delaware County on the format of its practices. *See Grazier*, 328 F.3d at 125 (no deliberate indifference when on-the-job training was provided, albeit not in the form plaintiffs preferred). The evidence is undisputed that junior officers receive on-the-job training by being paired with more senior officers. (Swett Dep. at 17-18, 22, 110; Walker Dep. at 10.)

Finally, there is no causal nexus that shows the municipality was the moving force behind the alleged injury. Instead, the most that Plaintiff can show is that Officer Nigro neglected to follow his usual practice of showing the warrant to the arrestee and acted contrary to the known right that

[10] Officer Nigro also testified that he received on-the-job training working with a senior officer and observing proper techniques. (Nigro Dep. at 12-13.)

an arrestee may see a warrant that has been issued for his arrest. Such a showing is insufficient for § 1983 municipal liability. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978) ("[A] municipality cannot be held liable under § 1983 on a *respondeat superior* theory.").

Plaintiff's reliance on the argument that standard police procedure requires a more formal and thorough training program for serving warrants is insufficient to survive summary judgment. A failure to train claim under § 1983 is not sustained upon a mere negligence standard. *Berg*, 219 F.3d at 276 ("A showing of simple or even heightened negligence will not suffice."). Plaintiff has taken a single incident of mistaken identity and attempted to establish municipal liability under § 1983.[11] Because Plaintiff has put forth no evidence that a policy or custom caused a constitutional violation, Delaware County's summary judgment motion is granted.

[11] Although Plaintiff's counsel argues that Officer Nigro had a history of improperly treating prisoners, that interpretation of the record is inaccurate. Officer Swett testified that Officer Nigro has acted "authoritative to me and condescending to me." (Swett Dep. at 98.) Officer Swett also testified that he believed that Officer Nigro was less concerned with basic dignity than he. (*Id*. at 100.) However, Officer Swett provided sworn testimony that he had "never seen [Officer Nigro] act negatively toward a prisoner" and that he was unaware of any incidents when Officer Nigro acted either physically or "unreasonably verbally" towards any prisoner. (Swett Dep. at 94-96.) The Deputy Director of Domestic Relations also testified that she had no issues related to Officer Nigro's performance. (Connor Dep. at 19.) Furthermore, the relevant conduct here is the serving of warrants, and the undisputed testimony of both officers is that Officer Nigro's policy is to show the arrestee the warrant. (Swett Dep. at 41; Nigro Dep. at 14.)

E. State Law Claims[12]

1. Defamation

There is no viable defamation claim in this litigation. John McHenry claims that Officer Nigro's reference to him as a deadbeat dad defamed him. (Compl. ¶¶ 84-85.) Michael and Nicole also claim to have suffered humiliation and embarrassment because their father was called a deadbeat dad. (*Id.*) These events occurred on June 16, 2002, and Plaintiffs' lawsuit was not filed until March 8, 2004. Accordingly, the statute of limitations for Plaintiffs' defamation claim has passed. *See* 42 PA. CONS. STAT. ANN. § 5523(1) (2005) (Under Pennsylvania law, defamation claims must be brought within one year); *see also Kreimer v. Phila. Inquirer, Inc.*, Civ. A. No. 03-669, 2004 U.S. Dist. LEXIS 10077, at *3 (E.D. Pa. May 27, 2004).

The defamation claim asserted on behalf of Michael and Nicole suffers from another fatal flaw. In Pennsylvania, to succeed on a claim for defamation, the plaintiff must prove: (1) the defamatory character of the communication; (2) publication by the defendant; (3) its application to the plaintiff; (4) understanding by the recipient of its defamatory meaning; (5) understanding by the recipient of the communication that it is intended to be applied to the plaintiff; (6) special harm to the plaintiff; and (7) abuse of a conditionally privileged occasion. *Rush v. Phila. Newspapers, Inc.*, 732 A.2d 648, 651-52 (Pa. Super. Ct. 1999) (*citing Maier v. Maretti*, 671 A.2d 701, 704 (Pa. Super. Ct. 1995)). Even granting that Officer Nigro defamed John McHenry, he said nothing about Michael or Nicole. Therefore, any defamatory statement was not applied to Michael or Nicole nor

[12] Although Plaintiff raised a malicious abuse of process claim, Plaintiff's failure to mention this issue in his summary judgment response constitutes an abandonment of that claim. *See Hackett v. Cmty. Behavior Health*, Civ. A. No. 03-6254, 2005 WL 1084621, at *6 (E.D. Pa. May 6, 2005) (failure to address claims waives opportunity to contest summary judgment on that ground); *see also Ankele v. Hambrick*, 286 F. Supp. 2d 485, 496 (E.D. Pa. 2003).

would a recipient of the communication understand it as intended to be applied to Michael or Nicole.

2. Intentional Infliction of Emotional Distress

To prove a claim for intentional infliction of emotional distress, the following elements must be established: (1) the conduct must be extreme and outrageous; (2) the conduct must be intentional or reckless; (3) the conduct must cause emotional distress; and (4) the distress must be severe. *Dittrich v. Seeds*, Civ. A. No. 03-6128, 2005 U.S. Dist. LEXIS 22078, at *33 (E.D. Pa. Sept. 28, 2005) (citations omitted). The conduct must be such that it goes "beyond all bounds of decency, and [is] regarded as atrocious, and utterly intolerable in a civilized society." *Marable v. W. Pottsgrove Twp.*, Civ. A. No. 03-3738, 2005 U.S. Dist. LEXIS 13754, at *41-*42 (E.D. Pa. July 8, 2005) (*quoting Buczek v. First Nat'l Bank of Miffletown*, 531 A.2d 1122, 1125 (Pa. Super. Ct. 1987)). Only the most egregious conduct can serve as the basis for an intentional infliction of emotional distress claim. *See Hoy v. Angelone*, 720 A.2d 745, 754 (Pa. 1998) ("[I]t has not been enough that the defendant has acted with intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation that would entitle the plaintiff to punitive damages for another tort.").

Additionally, in order to state a claim for intentional infliction of emotional distress, the plaintiff must allege physical injury. *Rolla v. Westmoreland Health Sys.*, 651 A.2d 160, 163 (Pa. Super. Ct. 1994). Plaintiff's claim must be supported with competent medical evidence, in the form of expert medical evidence. *See Debellis*, 166 F. Supp. 2d at 281; *see also Kazatsky v. King David Mem'l Park, Inc.*, 527 A.2d 988, 995 (Pa. 1987).

There is no conduct here which could be said to rise to the level of atrocious or utterly intolerable in a civilized society. Furthermore, no competent medical evidence supports a claim for

intentional infliction of emotional distress. Neither Michael nor Nicole took any medications or spoke with any medical professional as a result of the incident. John saw a doctor on a couple of occasions, but said that the arrest was related to his treatment "maybe a little bit." (J. McHenry Dep. at 18.) The only other "medical evidence" presented is a note from Steven M. Segal, Ph.D., which states that John was "agitated and frustrated re an event pertaining to the police that occurred at his house. . . I doubt that I was able to make a diagnosis at that time. Currently, I have no other material memory re that case." (Defs.' Nigro, Swett and Del. County Summ. J. Mot. Ex. McHenry 1.) This note is hardly the competent medical evidence required to sustain an intentional infliction of emotional distress claim. Accordingly, that claim is dismissed in its entirety.

3. Negligent Infliction of Emotional Distress

Summary judgment will also be granted on Michael and Nicole's negligent infliction of emotional distress claims. Under the Political Subdivision Tort Claims Act, municipalities and their employees generally enjoy absolute immunity from tort liability. 42 PA. CONS. STAT. ANN. §§ 8541, 8545. For a negligent act to serve as the basis for liability, that act must fall within one of eight specified categories. *See* 42 PA. CONS. STAT. ANN. § 8542; *see also Moser v. Bascelli*, 865 F. Supp. 249, 253 (E.D. Pa. 1994); *Wakshul*, 998 F. Supp at 588. The eight enumerated categories are: (1) vehicle liability; (2) the care, custody and control of personal property; (3) the care, custody and control of real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) the care, custody and control of animals. 42 PA. CONS. STAT. ANN. § 8542(b). Courts must strictly construe these exceptions to further the legislative intent of insulating the government from tort liability. *See Lesher v. Colwyn Borough*, Civ. A. No. 02-1333, 2002 U.S. Dist. LEXIS 16848, at *18 (E.D. Pa. Sept. 6, 2002) (*citing Lockwood v. City of*

Pittsburgh, 751 A.2d 1136, 1139 (Pa. 2000)). Obviously, none of the exceptions to liability under the Political Subdivision Tort Claims Act apply here; therefore summary judgment on the negligent infliction of emotional distress claim will be granted. *See Debellis*, 166 F. Supp. 2d at 281 (granting summary judgment when plaintiff's negligent infliction of emotional distress claim failed to fall within any specified categories that waived immunity). Plaintiffs' negligent infliction of emotional distress claims are therefore also dismissed.

IV. CONCLUSION

For the reasons set forth above, the Court grants in part and denies in part the various summary judgment motions of Defendants. An appropriate Order follows.

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

JOHN MCHENRY, INDIVIDUALLY AND AS THE NATURAL GUARDIAN OF MICHAEL MCHENRY AND NICOLE MCHENRY, **Plaintiffs,**	:	**CIVIL ACTION**
v.	:	
COUNTY OF DELAWARE, et al., **Defendants.**	:	**No. 04-1011**

ORDER

AND NOW, this **24th** day of **October**, **2005**, upon consideration of the summary judgment motions of Officer Francis Devlin and Upper Darby Township (Document No. 54), the summary judgment motions of Officer Joseph Nigro, Officer Joseph Swett and the County of Delaware (Document No. 55), all responses thereto, the reply of Officer Devlin and the County of Delaware thereon, and for the above stated reasons, it is hereby **ORDERED** that:

1. Defendants Devlin and Upper Darby's motion to file a reply brief (Document No. 60) is **GRANTED**.

2. The summary judgment motion of Officer Devlin and Upper Darby Township is **GRANTED in its entirety** and the case against these Defendants is **DISMISSED**.

3. The summary judgment motion of Officer Nigro, Officer Swett and the County of Delaware is **GRANTED in part and DENIED in part** as follows:

    a. Summary judgment is **GRANTED** as to Officer Swett and the case against him is **DISMISSED**.

    b. Summary judgment is **GRANTED** as to the County of Delaware and the

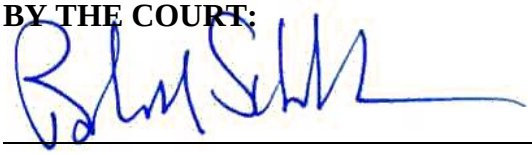
case against it is **DISMISSED**.

c. Summary judgment as to Officer Nigro is **GRANTED** as to the Due Process claims, defamation claim, malicious abuse of process claim, intentional infliction of emotional distress claim, and negligent infliction of emotional distress claim.

d. Summary judgment as to Officer Nigro is **DENIED** as to the § 1983 false arrest and false imprisonment claims and the common law false arrest and false imprisonment claims.

4. Plaintiffs' Motion to Compel Deposition Testimony (Document No. 64) is **DENIED**.[1]

BY THE COURT:



Berle M. Schiller, J.

[1] On October 17, 2005, well after the close of discovery and after summary judgment had been filed and responded to, Plaintiffs sought to compel additional deposition testimony based on events that occurred at a deposition that took place on August 24, 2005. As this case is over a year and a half old, and no valid reason exists for Plaintiffs to wait well over a month to bring this issue to the Court's attention, the Court finds that there is no excuse for Plaintiffs' delay tactics.