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

MONICA LATOYA CHERRY	:	CIVIL ACTION
	:	
v.	:	
	:	
CITY OF PHILADELPHIA and	:	NO. 04-1393
SYLVESTER JOHNSON and	:	
LYNNE ABRAHAM	:	

O'NEILL, J. DECEMBER 21, 2005

MEMORANDUM

This action arises out of events that occurred between February 25, 2002, when plaintiff witnessed a triple-homicide, and April 2, 2004, when plaintiff filed her complaint. I have before me defendant Sylvester Johnson's motion for summary judgment on the remaining claims in this case, plaintiff's response, and defendant's reply thereto.

FACTS

The factual background of this case can be found in my decision of November 15, 2004, Cherry v. City of Philadelphia., No. 04-1393, 2004 WL 2600684 (E.D. Pa. November 15, 2004). Nevertheless, I will briefly discuss the relevant facts here.

On February 25, 2002, plaintiff was at a "speakeasy" (an after-hours bar/private house) near her home in the Strawberry Mansion area of North Philadelphia. A shootout took place between drug gangs, leaving three people dead and five people wounded. Plaintiff fled the speakeasy when the shooting started, but left behind her coat and identification.

Soon after the shootings, Philadelphia police visited plaintiff in her home and took her into custody to question her about the shootout. During the interview, Cherry stated that she was present when the shooting started and, although she did not see who started the fight or who did the shooting, she could identify the people involved. During this interrogation, Cherry alleges that police told her she was being placed in the city's witness relocation program so that she could testify against the shootout suspects without fear of retaliation. Police then released her from custody and sent her home alone.

Cherry claims that she refused to testify. She avers that police continued to call her, urging her to testify, harassing her, and promising police protection if she testified. Cherry also claims that the police department should have placed a squad car near or in front of her house to protect her.

On March 30, 2002, while walking near her home, plaintiff was shot in the head by an unknown assailant. She suffered permanent physical injuries from this attack. Plaintiff believes that the person who shot her did so to keep her from testifying about the speakeasy shooting. No one was arrested or prosecuted for that shooting.

After Cherry was shot, she was hospitalized and placed in police custody under a fake name to protect her from more harm. In June 2002, police decided to move Cherry out of Philadelphia until the trial. Cherry alleges that they seized her, sent her to North Carolina, and failed to support her financially while she was there. Cherry returned to Philadelphia a few weeks later, but lived with her father in another neighborhood. She returned to her Strawberry Mansion home in June 2003.

When the speakeasy shooting trial began, Cherry claims that the Philadelphia police began harassing her again, visiting her at her home, demanding that she testify, promising witness protection, and threatening to arrest her. Cherry avers that the police seized her from her home, placed her in a hotel for a week and, under duress, she agreed to testify.

Despite Cherry's testimony, the defendants in the shooting case were acquitted. Soon afterward, one of the trial suspects approached Cherry and told her that they would leave her alone because of the acquittal. According to Cherry, she still lives in fear, but has not suffered any additional physical harm since the trial ended.

Before Cherry was shot, Johnson and other members of the police department spoke to the press about the speakeasy shooting. Cherry references two March 2002 articles, one in the Philadelphia Daily News and one in the Philadelphia Inquirer.[1] In both, police officers made statements about a posted $5000.00 reward. In the Daily News article, Inspector James Boyle stated that the police had some information about the crime but that they needed witnesses who actually saw the shooting. In the Inquirer article, Captain Thomas Lippo stated that the police were having trouble because of reluctant neighborhood residents, but information received after the reward was offered helped point the police to two men.[2] Cherry denies that she received any of the reward money. Inspector Boyle and Captain Lippo are not defendants in this case.

The Philadelphia Inquirer published two statements by Johnson after Cherry was shot. The April 5th article describes the violence following the speakeasy shooting and quotes

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[1]Cherry references two March 19, 2002 articles, but the article she seems to reference from the Philadelphia Daily News was printed on March 16, 2002.

[2]Although Cherry alleges in some documents that she was the only cooperating witness, she also notes that one survivor of the shooting also cooperated.

Commissioner Johnson: "One of the witnesses was shot Saturday, shot in the head." The April 6th article states: "On Saturday, a witnesses who had been in the rowhouse and was cooperating with police was shot in the head. The victim survived." In those articles, Johnson also publicly described the alleged speakeasy shooters as the city's worst criminals. Johnson did not mention plaintiff's name in either article.

When asked, in three separate interrogatories, for facts supporting Cherry's contentions that she was publicly identified by Commissioner Johnson as a witness in the speakeasy shooting case, she responded:

> Acting or Deputy Commissioner Defendant Sylvester Johnson, approximately one week AFTER Plaintiff had been shot and before he had been appointed Commissioner, made statements in Philadelphia Inquirer April 5th and 6th, 2002 about plaintiff specifically and her shooting, proving knowledge, as attached Exhibits P-1 and P-2, and before Plaintiff was shot potential additional defendant Captain Thomas Lippo, Head of Homicide Division, in a Philadelphia Inquirer March 19, 2002 article and a Daily News article the same date . . . referred to . . . "cooperating" witnesses and informant statements. Plaintiff's research is continuing, and discovery is continuing.

Cherry has not listed any other articles or statements made to the press in her complaint, during discovery, or in her response to defendant's motion.

Plaintiff filed this lawsuit on March 30, 2004 against the City of Philadelphia, Lynn Abraham and Sylvester Johnson. On November 15, 2004, I partially granted the defendants' motion to dismiss. Defendant Sylvester Johnson is the only remaining defendant in this case. The remaining claims relate to plaintiff's contention that she was publicly identified by Police Commissioner Sylvester Johnson as a cooperating witness to the speakeasy shooting.

In my memo of November 15, 2004, I dismissed the false imprisonment and intentional infliction of emotional distress claims that originated before April 12, 2002, because they were

time barred. After that order, plaintiff filed a second amended complaint, in which she seems to assert two additional, timely claims. First, Cherry claims that in June 2002, after she was shot in the head, police seized her and forced her into witness protection. Second, she asserts that police seized her and forced her to stay in a hotel before trial.

DISCUSSION

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "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) (2005). Rule 56(e) provides that when a properly supported motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material fact. Id. at 322-323. If the moving party sustains the burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue for trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). An issue of material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id. at 255. In addition, the "existence of disputed issues of material fact should be ascertained by

resolving 'all inferences, doubts and issues of credibility against'" the moving party. Ely v. Hall's Motor Transit Co., 590 F.2d 62, 66 (3d Cir. 1978) (quoting Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 878 (3d Cir. 1972)).

1. State-Created Danger Claim

There is no general constitutional affirmative duty to protect individuals from private violence. The Court of Appeals, however, adopted the state-created danger exception in Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996). In order to recover under this exception, plaintiff must 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; and
(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.

The Court of Appeals has refined the second Kneipp element to require conscience-shocking behavior by the state actor. Scheiber v. City of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003); see also Miller v. City of Philadelphia, 174 F.3d 368, 374 (3d Cir. 1999). To determine whether an official's actions were conscience-shocking, they must be viewed in context. Schieber v. City of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003). This is a high standard; "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998) (internal citations omitted). "To generate liability, executive action must be so ill-conceived or malicious that it 'shocks the conscience.'" Id. at 1717; see also Miller, 174 F.3d at 374. "[O]fficials will not be held liable for actions that are merely negligent." Lewis, 523 U.S. at 849; Schieber v. City

of Philadelphia, 320 F.3d 409, 417 (3d Cir. 2003).

In my November 15, 2004 opinion, I refused to dismiss the state-created danger claim against Commissioner Johnson. In that opinion, I found that if Johnson publicly identified Cherry, her shooting could have been a foreseeable and fairly direct result and his actions could shock the conscience. I analyzed Commissioner Johnson's behavior, noting:

> Johnson has not alleged he was under any pressure to identify plaintiff publicly, and there is no allegation that he was forced to balance any competing priorities. Johnson's alleged decision to place plaintiff in a witness protection program demonstrates that he was aware of an excessive risk of serious harm to her; if he indeed publicly identified her, plaintiff may also prove that he consciously disregarded this risk.

This analysis, however, was based upon the assumption that Commissioner Johnson publicly identified plaintiff. In her complaint, discovery responses, and motions, plaintiff has not shown that Police Commissioner Johnson publicly identified her. Throughout the documents filed with the court, she seems to focus on three different acts: (1) the "seizure" from her home; (2) statements made by police officers published before the shooting; and (3) Johnson's statements, published in the Philadelphia Inquirer after Cherry was shot.[3]

None of these acts constitutes public identification. Plaintiff argues that she was publicly identified in her community when the police came to her house to investigate the shootings.[4]

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[3]Cherry argues, "I interpret 'public identification' as a concept embodying a series of exposures relating specifically to the 'public' persons that occupy Plaintiff's community, the 'public' including the suspects antagonized by the Defendant actions and threats of Defendant Sylvester Johnson in the form and forums he transmitted them in, the 'public' that felt like they had to intimidate Plaintiff, kill her or shot her in the head, to prevent her from testifying against them in the speakeasy shooting case."

[4] Cherry argues: ""The 'public identification' directly caused by the defendant endangering Plaintiff . . . was police publicly seizing Plaintiff, and making it appear that she was

This cannot satisfy the requirements of a state-created danger claim. As the plaintiff must recognize, it is the job of the police to make the City safer. One way they do so is by investigating crimes–collecting evidence, following leads, and interviewing suspects. A holding that investigating crimes by interviewing witnesses at their homes "shocks the conscience" would be a severe blow to both police investigations and to the City's safety in general.

The statements made by Inspector Boyle and Captain Lippo also do not satisfy the elements of a state-created danger claim against Johnson. First, giving the public general information about a crime or the police's attempts to apprehend and prosecute suspects does not "shock the conscience." Cherry argues that these "anonymous reference to 'witnesses' only served to implicate plaintiff, because there were no other witnesses who came forward to testify against the suspects." Neither officer mentioned the plaintiff's name; neither officer even mentioned that the police had a cooperating witness. They merely said that they police had some information on the suspects. I cannot do as plaintiff urges; I cannot liken an anonymous reference to public identification. Second, Lippo's and Boyle's actions cannot be attributed to Johnson individually or officially. Johnson did not make the statements, and Cherry does not allege any facts indicating that Johnson specifically directed them to make the remarks to the newspapers.[5] Therefore, these statements cannot be the basis of the state-created danger claim.

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a government witness and stating that they had a witness."

[5] Cherry only makes a broad, bald assertion that Johnson directed Lippo to make the statements to the newspaper. According to plaintiff, "Defendant Johnson publicly identified Plaintiff in her community as a prosecution witness by authorizing his subordinate Thomas Lippo, Head of Homicide Division to make reference to a "witness" cooperating with police in the March 19th, 2002 articles in the local newspapers announcing the issuance of arrest warrants for the Broaster Brothers on homicide charges 11 days PRIOR TO Plaintiff's shooting." She does not mention whether Johnson also directed Inspector Boyle to speak to the Philadelphia

Commissioner Johnson's statements to the press also cannot be the basis for the state-created danger claim for two reasons. First, the generic, after-the-fact statements of Commissioner Johnson were not "conscience shocking" in the constitutional sense. Contrary to the impression created by plaintiff's amended complaint, Cherry was not "publicly identified" as a prosecution witness. Plaintiff was never specifically identified in the press by Commissioner Johnson. In any event, Johnson's providing generic information to the public with respect to a high-profile triple murder was not "arbitrary" or "conscience shocking." Johnson did not identify Cherry by name or publicize her location. He merely updated the public on the status of the police investigation into the speakeasy shooting. Second, Johnson's statements could not be the cause of her harm. The first requirement of a state-created danger exception is that the harm caused must be foreseeable and direct. An action that occurs after the harm is caused cannot be the cause of the harm. Johnson's statements occurred after Cherry was shot, therefore they cannot be the cause of Cherry's injuries, and also cannot be the basis for the state-created danger exception.[6]

2. False Imprisonment

Cherry's original false imprisonment claims against Johnson were time-barred. In her second amended complaint, she asserts two additional, timely claims. First, plaintiff claims that

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Daily News.

[6] Cherry also argues that Johnson incited the speakeasy defendants to violence by calling them the "worst criminals in the city" in his attempt to become Commissioner. She avers that "the direct result of Defendant Sylvester Johnson attacking the speakeasy shooting suspects in the news media was that Defendant made the Plaintiff the target of violence against her because she was the 'only' witness that Police had, thus Defendant directly increased the risk of harm to Plaintiff." This bald assertion, completely unsupported by facts, is too tenuous to be the basis of liability under the state-created danger exception.

in June 2002, after she was shot in the head, police seized her and forced her into witness protection. Second, she asserts that police seized her and forced her to stay in a hotel before trial. "The elements of false imprisonment are (1) the detention of another person, and (2) the unlawfulness of such detention." Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994).

I will grant summary judgment on both of these claims for two reasons. First, Cherry does not offer any evidence more than a bald assertion that she was unconstitutionally seized. She does not offer any specific facts to support these assertions, and therefore they cannot survive summary judgment. Second, one major theme of her argument is that Commissioner Johnson and the police force left her unprotected in a dangerous community. I find it untenable and irreconcilable that plaintiff both asks for police protection and complains when she gets that protection.

3. Intentional Infliction of Emotional Distress

I also grant summary judgment to defendant Johnson on the Intentional Infliction of Emotional Distress claim. The elements of an intentional infliction of emotional distress claim include (1) extreme and outrageous conduct; (2) intentional and reckless; (3) causing emotional distress; and (4) that distress must be severe. Hoy v. Angelone, 691 A.2d 476, 610 (Pa. Super. Ct. 1997); see also Hooten v. Penna. College of Optometry, 601 F. Supp. 1151, 1155 (E.D.Pa. 1984); Section 46 of the Restatement (Second) of Torts. Pennsylvania only allows recovery for the most egregious cases. Hoy, 691 A.2d at 610.

Once again, Cherry offers only bald assertions and no factual support for her intentional infliction of emotional distress claim. The claims seem to arise from the actions of Commissioner Johnson and the other police officers working the speakeasy case. Cherry alleges

that "by seizing Plaintiff repeatedly, visiting her home unannounced, making threats to Plaintiff, and abusing their police power to force Plaintiff to testify as a State witness against her will," Johnson has inflicted severe emotional and mental distress. As discussed above, none of the police actions that Cherry specifically alleges "shocks the conscience" and under similar analysis, none of it is egregious and extreme enough to satisfy the intentional infliction of emotional distress requirements. The police were doing their job, investigating crimes and trying to make the City safer. Cherry has not alleged any specific facts to demonstrate otherwise; her claim cannot survive summary judgment.

4. Negligent Infliction of Emotional Distress

Cherry also asserts a negligent infliction of emotional distress claim against Johnson. Cherry has not alleged any facts sufficient to prove a negligent infliction of emotional distress claim, also known as a bystander liability claim. In Pennsylvania, a negligent infliction of emotional distress claim is judged by the following criteria:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it;
> (2) Whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence;
> (3) Whether plaintiff and the victim were closely related as contrasted with an absence of any relationship or the presence of only a distant relationship.

Bloom v. Dubois Regional Medical Center, 597 A.2d 671, 680-681 (Pa. Super. Ct. 1991); see also Sinn v. Burd, 486 Pa. 146, 404 A.2d 672, 685 (Pa. 1979). Cherry has not alleged any facts to fill the requirements of this claim against Johnson, and therefore I will grant summary judgment.

5. Pain and Suffering, Medical Expenses and Attorneys Fees

In her complaint, Cherry also makes separate claims for pain and suffering, medical expenses and attorneys fees. These claims, however, are merely the damages elements of the other claims in her complaint. None of the other claims survive summary judgment, and therefore these claims are also dismissed.

An appropriate order follows.

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v.	:	
	:	
CITY OF PHILADELPHIA and	:	NO. 04-1393
SYLVESTER JOHNSON and	:	
LYNNE ABRAHAM	:	

ORDER

AND NOW, this 21th day of December 2005, upon consideration of the defendant's motion for summary judgment, the plaintiff's reponses, and defendant's reply thereto, and for the reasons set forth in the accompanying memorandum, it is ORDERED that defendant's motion for summary judgment is GRANTED, and judgment is entered in favor of defendant, Sylvester Johnson, and against plaintiff, Monica Latoya Cherry. The clerk is directed to close this case statistically.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.