



decision, there remained for trial only the following claims: as to the defendant James DeCrescenzo, claims for defamation, invasion of privacy, false arrest/imprisonment, gross negligence/willful misconduct, and intentional infliction of emotional distress; as to the three police-officer defendants, Sergeant Knox, and Officers Neipp and Hawthorne, a §1983 claim for excessive use of force, and claims for assault and battery, gross negligence/willful misconduct, and intentional infliction of emotional distress.

At the conclusion of plaintiffs' evidence at trial, I entered judgment as a matter of law in favor of the three police officer defendants, and the case proceeded to verdict only as against defendant DeCrescenzo. In answers to special interrogatories, the jury found in favor of the defendant on all issues, except that it found "negligence" on the part of the defendant. I thereupon set aside the negligence finding as unsupported by the evidence, and entered judgment in favor of the defendant in all respects. Plaintiffs have now filed a Motion for a New Trial.

### **I. Factual Background**

The defendant James DeCrescenzo is the owner of a court-reporting service. Plaintiff Rebecca Doby is one of the court reporters who works for the DeCrescenzo firm, as an independent contractor. Her husband, Herbert Doby, is employed

by his wife as a note-reader. Mr. Doby is a member of the Montana bar, but no longer practices law. The reporting firm's office is in Center City Philadelphia. The Dobys reside in Warrington, Bucks County, Pennsylvania, and the DeCrescenzos reside in New Jersey.

Plaintiff Rebecca Doby had a stressful and unhappy childhood and adolescence. She has experienced recurring bouts of depression, and has been under psychiatric care intermittently for several years.

Many of the persons associated with the DeCrescenzo firm were social friends as well as professional associates. On some of these social occasions, Mrs. Doby drank to excess, and had to be transported home by others, or be provided lodging for the night by others.

Beginning in December 1992, Mrs. Doby became convinced that there was a special emotional bond between herself and Mr. DeCrescenzo. She convinced herself that she was madly in love with him, and on at least one occasion sought to become physically intimate with him. They both agree, however, that no sexual intercourse between them ever occurred, and that Mr. DeCrescenzo was responsible for that decision.

Mrs. Doby's relationship with her parents has long been stressful, and her depressive tendencies always became worse during the holidays. She became particularly depressed at

Thanksgiving time in 1993, apparently as a result of associating with her parents and other family members, and she very seriously contemplated suicide.

On December 22, 1993, she handed Mr. DeCrescenzo an eleven-page letter which can reasonably be described as suicidal in tone. It contained many references to the fleeting nature of life, her realization that time was growing short, etc. The letter contained a lengthy passage of an explicitly sexual and pornographic nature, detailing the sexual acts she would like to share with Mr. DeCrescenzo, and the regret caused by her realization that they would never occur.

Mr. DeCrescenzo became understandably concerned, and consulted an attorney and a psychologist (who had earlier provided family counseling for Mr. and Mrs. DeCrescenzo). As a result of their advice, he sought to involve the mobile emergency unit of the Philadelphia Mental Health Department, and arranged to have them come to interview Mrs. Doby at the firm's office on December 30, 1993. That interview did not occur, however, because, on the morning of December 30, 1993, Mrs. Doby ran out of her office in a tearful state, informing her co-workers that she would not be back. She later telephoned one of these co-workers from her automobile, still tearful and distraught, and informed the co-worker that she would not be attending the latter's New Year's Eve party.

Mr. DeCrescenzo was advised by the Philadelphia Mental Health people that, since Mrs. Doby lived in Bucks County, he should communicate with the Bucks County authorities for assistance. He did so, and eventually was advised of the availability of Section 302 emergency commitment procedures, if it should appear that Mrs. Doby posed an immediate threat of harm to herself or others.

In reviewing the matter with the chief of police of Warrington Township, Mr. DeCrescenzo quoted some of the more disturbing phrases from the eleven-page letter. The chief advised DeCrescenzo to check for further evidence of suicidal intent. At DeCrescenzo's request, two co-workers proceeded to plaintiff's office (which was located in an upstairs room in the building), and there discovered, in plain view, a mass of additional evidence: suicide notes addressed to various relatives and friends, reminders about organ donations, requests for assistance to her husband in the task of raising their two daughters, etc.

Mr. DeCrescenzo then proceeded to initiate the procedures for emergency commitment under the Mental Health Procedures Act.

On the basis of the information provided by Mr. DeCrescenzo in his petition, the appropriate authorities determined that a warrant should be issued, and it was. The

Warrington Police Department were called upon to serve the warrant and take Mrs. Doby into custody.

Several of the employees of the DeCrescenzo firm, including Mr. DeCrescenzo himself and also including the plaintiffs, were gun enthusiasts. They also, on occasion, engaged in the game of "paint ball" -- a simulated war game in which the participants, in camoflauge gear, stalk, ambush, and shoot at each other, but with paint-filled balloons instead of real bullets. Mrs. Doby was licensed to carry a firearm, and was known to do so on occasion.

In the evening of December 30, 1993, the police returned to the Doby home. Mrs. Doby was seated in the living room, drinking a glass of wine, while her two small daughters were having their evening bath in a nearby bathroom. Mr. Doby was in another room. The police asked Mrs. Doby to step outside where her children could not hear what they were about to say. They then informed her that they had a warrant to take her into custody, and that she would have to accompany them. She became hysterical, resisted their efforts to arrest her, and had to be subdued. She was transported to the Doylestown Hospital for examination by a psychiatrist. It was decided that she was indeed suffering from severe mental disturbance, and posed an imminent threat to herself and others, and the involuntary commitment papers were signed. She later agreed that she did

need help, and signed voluntary commitment papers. She remained in the hospital for five and one-half days, after which she was released.

## II. Legal Theories

Plaintiffs' attorney theorized that Mr. DeCrescenzo did not entertain an honest and good faith belief that Mrs. Doby was suicidal and a danger to herself and others, but rather arranged for her commitment in bad faith, in order to prevent his wife from learning of his romantic involvement with Mrs. Doby, or at least to undermine Mrs. Doby's credibility in the event she did make their affair public. While this is an interesting theory, it finds absolutely no support in the evidence. In the first place, there was no sexual affair, and the alleged romance was definitely one-sided. In the second place, petitioning for an involuntary mental examination of the purported paramour would be a strange way to prevent one's spouse from learning of the affair. Finally, and of particular importance, Mr. DeCrescenzo had kept his wife fully informed about plaintiff's letters and behavior; and Mrs. DeCrescenzo participated in the consultation with the psychologist and in the decision to file the petition.

With respect to the police-officer defendants, the theory of the case was that they used excessive force in accomplishing plaintiff's arrest, should not have shackled the plaintiff, should not have used metal handcuffs or shackles in

any event, and treated plaintiff like a criminal rather than as a person committed under the Mental Health Act.

**III. The Propriety of Dismissing the Case Against the Police Officer Defendants**

The police officers were executing a warrant which they believed to be valid, and which was in fact entirely valid. The undisputed evidence shows that they did not use excessive force against the plaintiff. She herself testified that she resisted arrest and refused to accompany the officers; that, in the course of the struggle, she kicked the officers; that the officers used force only for the purpose of affixing handcuffs and leg shackles (which they explained they were required to use when transporting persons in custody); and that she suffered no injury at the hands of the police officers. It is also clear that the handcuffs and shackles remained in place only until plaintiff was delivered to the mental health professionals at the Doylestown Hospital.

The contention of plaintiff's counsel that it was a violation of the statute, or otherwise improper, to use metal handcuffs and shackles, rather than restraints made of a softer material, is simply incorrect: Those refinements apply only after the patient is delivered to the mental health professionals. Moreover, plaintiff sustained no physical injury, from the metal restraints or anything else.

The statute does provide that, if "circumstances

permit" a "mentally disabled person" being transported for admission to a facility should be accompanied by a relative or other suitable person of the same sex. It is not at all clear that the quoted provision is applicable to transportation provided by police officers in executing arrest warrants, but even if it does apply, in our case the "circumstances" did not "permit" - no female police officer was available, and the only known family member had to remain at home to care for the children. In any event, no damages can be attributed to a lack of female or family companionship in the police car.

The police officer defendants were properly granted judgment as a matter of law.

#### **IV. The Motion for a New Trial**

In accordance with the overwhelming weight of the evidence, the jury found in favor of the defendant DeCrescenzo on plaintiffs' claims for defamation, invasion of privacy, false arrest/imprisonment, and intentional infliction of emotional distress. They found in favor of the plaintiffs with respect to "negligence," but I set aside that part of the verdict, and granted judgment in favor of the defendant in all respects. Plaintiffs challenge that decision.

Defendant objected to submitting the negligence claim to the jury, arguing that no such claim was pleaded in the complaint, or survived Judge Rendell's earlier rulings. I

decided to submit the claim to the jury as a precautionary measure. The facts are these:

Plaintiffs' complaint does not include a claim for negligence, but only a claim for "gross negligence/willful misconduct." Judge Rendell treated the allegation as claiming that DeCrescenzo "acted in reckless disregard of his duty to exercise reasonable care once he determined to seek out involuntary treatment for Rebecca Doby"; plaintiffs' brief in opposition to the motion for summary judgment which Judge Rendell ruled upon describes the defendant's conduct as "malicious" and willful. And plaintiffs' final pretrial memorandum describes that count of the complaint as stating a claim "for Mr. DeCrescenzo's gross abuse of the MHPA for his own purposes."

This is not at all surprising, given the language of Section 7114(a) of the Pennsylvania statute:

In the absence of willful misconduct or gross negligence, a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined or treated under this act...shall not be civilly or criminally liable for such decision or for any of its consequences.

Apparently, until the end of the trial, plaintiffs' counsel was acknowledging that he would have to establish "willful misconduct or gross negligence" in order to recover.

On the other hand, in her summary judgment opinion, Judge Rendell had concluded, largely in reliance upon a Superior

Court decision, McNamara v. Schleifer Ambulance Serv. 556 A.2d 448 (Pa. Super. Ct. 1989), that the statutory immunity provision quoted above did not afford protection to Mr. DeCrescenzo - this on the theory that he did not "participate in a decision that a person be examined or treated...", and that the immunity provision should be narrowly construed. Because the issue did not surface until the last moment, I concluded it would be preferable to submit a negligence interrogatory to the jury, since it was conceivable that a claim of simple negligence should be regarded as included sub silentio in an allegation of gross negligence/willful misconduct; and since it was at least arguable that Judge Rendell's interpretation of the immunity clause of the statute constituted the "law of the case."

I am satisfied that the jury's finding of negligence was properly vacated, for several reasons. First and foremost, there was simply no evidence to support it. Unless the defendant provided false information, or withheld material information, or acted in bad faith or with ulterior motives, he cannot be held liable for submitting and processing the petition for commitment. But, as the evidence overwhelmingly established, and as the jury found, the information he provided was true, reasonably complete, and not misleading in any respect. Thus, there is simply no room for a finding that Mr. DeCrescenzo negligently failed to provide reasonably complete and accurate information.

In the second place, any negligence that the jury may have derived from the evidence (in my view, erroneously) could not have been a proximate cause of harm to the plaintiff. The intervening decisions by the mental health professionals, particularly the conclusion of Dr. Richards after his examination of the plaintiff, validated the actions taken by the defendant DeCrescenzo.

In the third place, plaintiffs should be deemed to have waived any claim based on simple negligence, in view of their failure to plead it, and their litigation posture throughout the entire case.

Finally, while I concede that the issue is not free from doubt, I am inclined to believe that the defendant is immune from liability except for willful misconduct or gross negligence. The statute grants immunity to "a county administrator, a director of a facility, a physician, a peace officer or any other authorized person who participates in a decision that a person be examined..." The defendant DeCrescenzo, as a "responsible person" was "authorized" to present the petition. It seems to me that he must be regarded as having "participated" in the decision to have the plaintiff examined, whether or not he should be considered a participant in the decision to have her committed.

I acknowledge that there is language in the McNamara decision of the Superior Court suggesting that immunity is

limited to trained medical personnel, and does not extend to ambulance attendants transporting mental patients. But a petitioner for commitment is certainly much more directly a participant in the decision to have the patient examined, than is an ambulance attendant involved in transportation. I note also that the Superior Court rationale is, it would seem, refuted by the statutory language which extends immunity to a "peace officer." It seems to me to be more probable than not that, if confronted with this case, the Pennsylvania Supreme Court would interpret the statute as requiring proof of willful misconduct or gross negligence.

For all of these reasons, it was not error to set aside the jury finding of negligence and to enter judgment in favor of the defendant in all respects.

I am satisfied that the charge was reasonably accurate; indeed, I am not aware of any properly-preserved objection to the charge.

It was not error to exclude the testimony of plaintiffs' proposed expert, Susan Bierker. At the outset, it should be noted that her testimony related only to plaintiffs' damages, so the ruling is of no present concern. In any event, the testimony which she proposed to give was inadmissible. She is a clinical social worker, not a medical expert. She examined the plaintiff on a single occasion, about two years after the

pertinent events occurred. Based exclusively upon the information provided by the plaintiff during a two-hour interview, the witness proposed to express the view, not only that plaintiff's five-day commitment for mental examination triggered a post-traumatic stress disorder from which plaintiff still suffers, but also that these untoward consequences were due entirely to the involuntary mental examination, and not at all to the stresses and abuse she had sustained throughout her life, including the stresses which had caused her, admittedly, to contemplate suicide a few weeks earlier. I am convinced that the witness was not competent to render such opinions. Moreover, on the basis of her written report (which she stated was the same as her testimony would be), her opinions were based upon a seriously inaccurate version of the facts. Her testimony was properly excluded.

#### **V. Declaratory Judgment**

In Count XVII of their complaint, plaintiffs sought, as against "all defendants," a declaratory judgment to the effect that the Pennsylvania Mental Health Procedures Act is unconstitutional. Judge Rendell's September 9, 1996 opinion does not specifically refer to Count XVII, although it does clearly hold that none of the dismissed defendants violated plaintiff's constitutional rights. It also clearly holds that the police defendants could be liable only for using excessive force if that

were proven, and that the defendant DeCrescenzo is not a state actor.

No further mention of the declaratory judgment request was made until the end of the trial (indeed, I have no recollection of any mention of declaratory judgment until the pending post-trial motion was filed).

Federal Rule of Civil Procedure 24(c) precludes any decision by this Court as to the constitutionality of a state statute without first providing the Attorney General of the state an opportunity to be heard on the issue. The same rule imposes upon plaintiffs seeking such a ruling the obligation of alerting the Court to the need for such notice to the Attorney General. Neither of these steps has occurred here. Under the terms of the rule, plaintiffs' failure to alert the Court to the need for notifying the Attorney General does not amount to a waiver of "any constitutional right otherwise timely asserted." I conclude, therefore, that plaintiffs' failure to raise the issue until the end of the trial (at the earliest) provides ample reason to decline to issue a declaratory judgment, but does not deprive them of a remedy for any actual constitutional violations they may have suffered. Judge Rendell's opinion, and the verdict of the jury, established that plaintiffs' constitutional rights were not violated. Count XVII will therefore be dismissed.

It should also be noted that the validity or invalidity

of the statute in question is not a matter of concern to any of the remaining defendants.

An Order follows.

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

REBECCA S. DOBY and	:	CIVIL ACTION
HERBERT K. DOBY	:	
	:	
v.	:	
	:	
JAMES DECRESCENZO, et al.	:	NO. 94-3991

ORDER

AND NOW, this        day of March, 1998, IT IS ORDERED that plaintiffs' "Motion for Reconsideration, for New Trial and Motion to Amend Judgment" is DENIED.

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John P. Fullam, Sr. J.