

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

JOHN WEBB, JR. : CIVIL ACTION  
 :  
v. :  
 :  
CITY OF PHILADELPHIA, et al. : NO. 98-2261

**MEMORANDUM AND ORDER**

BECHTLE, J. OCTOBER , 1999

Presently before the court is defendants the City of Philadelphia's (the "City"), the Sheriff of Philadelphia's ("Sheriff"), Gregory Moses' ("Moses"), James Smith's ("Smith"), Luigi Accardo's ("Accardo"), Frank Spattocco's ("Spattocco"), Shaheed Newton's ("Newton") and David Rotan's ("Rotan") (collectively "Moving Defendants") motion for summary judgment and plaintiff John Webb, Jr.'s ("Webb") response thereto. For the reasons set forth below, said motion will be granted.

**I. BACKGROUND**

On March 20, 1998, Webb filed a civil action in the Court of Common Pleas of Philadelphia County alleging, among other things, that Moving Defendants violated his rights guaranteed by the Fourth, Eighth and Fourteenth Amendments to the United States Constitution. On April 29, 1998, Moving Defendants filed a notice of removal to this court. On May 20, 1998, Webb filed an Amended Complaint. In the Amended Complaint, Webb again alleges that Moving Defendants violated his rights guaranteed by the Fourth, Eighth and Fourteenth Amendments to the United States

Constitution and seeks recovery pursuant to 42 U.S.C. § 1983. Webb further asserts a state law negligence claim against Moving Defendants.<sup>1</sup> Webb also alleges state law claims for assault and battery and negligence against defendant Frederick Bullock ("Bullock").<sup>2</sup> Additionally, Webb alleges claims for intentional and negligent infliction of emotional distress against all defendants in the case.

On March 22, 1996, Webb attended a domestic relations hearing at the Philadelphia Family Court located at 34 South 11th Street, Philadelphia, Pennsylvania ("Family Court Building"). (Am. Compl. ¶ 15.) The Family Court convened the hearing as part of a dispute between Webb and Marva Buchanan ("Buchanan"), the mother of Webb's son.<sup>3</sup> Defendant Bullock is Buchanan's boyfriend. (Webb Dep. at 27.) Bullock attended the hearing, but was not required to do so, and had not been subpoenaed. (Pl.'s Supp. Submission in Support of Ans. in Opp. to Defs.' Mot. for Summ. J. at 1.) Upon entering the Family Court Building, Bullock

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1. This court has jurisdiction over Webb's civil rights claims because they arise under federal law. 28 U.S.C. § 1331. The court may exercise jurisdiction over Webb's state law claims pursuant to 28 U.S.C. § 1367.

2. In their moving and responsive papers the parties spell Bullock's name as "Bullock." However, the Complaint lists his name as "Bulloch." The court will follow the spelling of the name listed in the moving papers, as this was represented by counsel at a hearing held before the court to be the correct spelling.

3. Webb instituted a custody action to obtain custody, partial custody or visitation of his son. (Pl.'s Ans. in Opp. to Defs.' Mot. for Summ. J. Ex. S.)

informed Court Security Officer Rotan, who was stationed at the metal detector near the entrance to the Family Court Building, that he was carrying a gun. (Am. Compl. ¶ 20; Bullock Dep. at 19-20.) Rotan asked Bullock for identification and Bullock produced his certification to carry a weapon and private patrolman badge. (Am. Compl. ¶ 20; Bullock Dep. at 20.) Rotan took Bullock's identification and reviewed it before handing it back to him. (Bullock Dep. at 20-21.) Rotan then escorted Bullock to a gun locker, where Bullock checked his weapon.<sup>4</sup> (Pl.'s Ans. in Opp. to Defs.' Mot. for Summ. J. at 15-16; Moses Dep. at 69-73.) Rotan did not ask Bullock for further identification and allowed him to enter the building. (Pl.'s Ans. in Opp. to Defs.' Mot. for Summ. J. at 15-16.)

Following the hearing, Webb proceeded to the hallway

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4. In his deposition, Rotan testified that he did not see Bullock check his gun in the gun locker. Rather, Rotan stated that Bullock "proceeded upstairs with the weapon." (Rotan Dep. at 27.) Webb does not dispute the fact that Bullock's weapon was checked into the gun locker. (Pl.'s Ans. in Opp. to Defs.' Mot. for Summ. J. at 16.)(recognizing "the fact that defendant Bullock actually . . . checked the gun"). However, Webb asserts that Rotan's statement undermines his credibility regarding the remainder of his testimony. Id. at 16.

Under Fed. R. Civ. P. 56, "once the movant has supported his or her motion [for summary judgment], however, the opponent must affirmatively show that a material issue of fact remains in dispute and may not simply rest on the hope of discrediting the movant's evidence at trial." Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 260 (8th Cir. 1996) (citation omitted). Here, it is uncontested that the facts supported by the evidence presented show that Bullock's gun was checked. Webb cannot create a genuine issue of material fact by speculating that a trier of fact may disbelieve the remainder of Rotan's testimony.

directly outside of the courtroom.<sup>5</sup> (Am. Compl. ¶ 22.) After an oral encounter, Bullock physically assaulted Webb. (Am. Compl. ¶¶ 23-25.) Webb alleges that he suffered severe injuries as a result of the assault. (Am. Compl. ¶¶ 35-39.) Moving Defendants filed the instant motion for summary judgment on all claims against them. For the reasons set forth below, the motion will be granted.

## II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d

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5. The courtroom where the hearing was held is located on the second floor of the Family Court Building.

Cir. 1992) (citation omitted).

### **III. DISCUSSION**

Webb argues that his assault should have been prevented by Moving Defendants and that Moving Defendants created the danger that led to his injuries. In Count I of his Complaint, Webb asserts a claim against Moving Defendants pursuant to 42 U.S.C. § 1983. In Count II, Webb asserts a claim of state law negligence against Moving Defendants. In Counts III and IV, Webb asserts state law claims against Bullock. In Count V, Webb asserts a state law claim for intentional infliction of emotional distress against all defendants. In Count VI, Webb asserts a state law claim for negligent infliction of emotional distress against all defendants. In Count VII, Webb seeks attorneys fees pursuant to 28 U.S.C. § 1988. The court will grant summary judgment for Moving Defendants and remand Webb's claims against Bullock back to state court.

#### **A. Claims Against Moving Defendants**

##### **1. Count I**

In Count I, Webb asserts a claim against Moving Defendants pursuant to 42 U.S.C. § 1983.<sup>6</sup> The claim is based on Moving

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6. The statute reads, in pertinent part:

Every person who, under color of any statute, ordinance,  
(continued...)

Defendants' alleged failure to protect Webb from the harm inflicted upon him by Bullock.

Section 1983 provides only remedies for deprivations of rights established in the United States Constitution or federal laws; it does not, by its own terms, create substantive rights. Kneipp v. Tedder, 95 F.3d 1199, 1204 (3d Cir. 1996). In the instant case, Webb is seeking a remedy through § 1983 for alleged violations of his substantive right to due process guaranteed by the Fourteenth Amendment to the United States Constitution.<sup>7</sup> Webb argues that Moving Defendants created the danger that caused his injuries.<sup>8</sup>

The United States Court of Appeals for the Third Circuit has adopted the "state-created danger" theory as a mechanism for

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(...continued)

regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1983. Municipalities are "persons" in the context of this statute. Monell v. Department of Social Servs. of the City of New York, 436 U.S. 658, 663 (1978). Moving Defendants do not dispute that they are state actors for purposes of this statute.

7. Webb's Amended Complaint also references the Fourth and Eighth Amendments to the United States Constitution.

8. Although not argued by Webb, to the extent that Webb's pleadings can be reasonably read to assert a due process claim under the "special relationship" theory as explained by the Supreme Court in Deshaney v. Winnebago Co. Dep't of Social Serv., 489 U.S. 189, 197 (1989), the court finds that such a claim cannot be supported by the record before the court. The custodial element needed to assert such a claim is not present on the facts of this case.

establishing a constitutional deprivation under § 1983. Id. at 1201. To prevail under the state-created danger theory a plaintiff must establish four elements. The plaintiff must show 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. In Kneipp, the Third Circuit concluded that the plaintiff had alleged sufficient facts to survive summary judgment on her state-created danger claims when she asserted that police officers willfully disregarded her safety when they separated her from her husband and left her by the side of the road on a cold winter night to find her way home when she was obviously intoxicated. Id. at 1211. The court concluded that a reasonable jury could find that the plaintiff "was in a worse position after the police intervened than she would have been if they had not done so" and that her obviously impaired state obligated the officers to protect her once they allowed her husband to leave her in their control. Id. at 1209.

In the instant action, the court finds that a reasonable jury could not find that Webb can establish that any of the state actors acted in willful disregard for his safety. The court also finds that a reasonable jury could not find that the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. The

court will discuss each element separately.

**a. Lack of Willful Disregard**

To establish that the state actor acted in willful disregard for the safety of the plaintiff, the plaintiff must show that "[t]he environment created by the state actors [was] dangerous; they must know it to be dangerous; and . . . [they] must have been at least deliberately indifferent." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 910 (3d Cir. 1997) (citation omitted).<sup>9</sup> Merely negligent acts cannot support a claim under the state-created danger theory. Id. at 911. The court will analyze each defendant separately.

**(I) Court Security Officer Rotan**

Moving Defendants argue that Rotan's actions do not rise to the level of deliberate indifference as required to sustain a claim under the state-created danger theory. On the date of the hearing, Rotan was assigned to monitor the metal detector at the entrance to the Family Court Building. (Defs.' Mot. Summ. J. at 10.) When Bullock attempted to gain entrance into the building, Rotan asked him for identification. (Bullock Dep. at 20; Rotan Dep. at 21.) Bullock produced his certification to carry a weapon and his private patrolman badge. (Bullock Dep. at 20.) Bullock's badge was a silver shield with a badge number and read

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9. The Third Circuit uses the phrases "willful disregard" and "deliberate indifference" interchangeably in the context of a claim for violation of substantive due process under the Fourteenth Amendment. Kneipp, 95 F.3d at 1208 n.21.

City of Philadelphia in the center.<sup>10</sup> Id. at 7 & 55. Bullock proceeded through the metal detector, unloaded his gun and checked his weapon at the gun locker. Id. at 21-22. Rotan did not ask Bullock for further identification. Rotan then permitted Bullock to enter the building. (Bullock Dep. at 22; Rotan Dep. at 21.) Rotan states in his deposition that he never had contact or interaction with Bullock before the incident and was not informed by anyone that Bullock was a potential threat to Webb. (Rotan Dep. at 22.)

Moving Defendants argue that Rotan's actions in permitting Bullock to enter the Family Court Building do not rise to the level of willful disregard or deliberate indifference. The court agrees. Rotan did allow Bullock to enter the Family Court Building even though Bullock was neither an arresting officer, nor subpoenaed to appear. However, Rotan required Bullock to produce identification prior to entering the building. (Bullock Dep. at 20-21.) Further, Bullock's weapon was unloaded and checked into the gun locker. Id. at 21-22. The evidence presented to the court at worst indicates that Rotan was

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10. Rotan alleges that Bullock's badge appeared to be that of a Philadelphia Police Officer. (Rotan Dep. at 21-22.) Rotan stated that he asked Bullock whether he was at the building on a personal matter or whether he was the arresting officer on a case. Id. at 21. According to Rotan, Bullock replied that he was an arresting officer. Id. Bullock contends that he specifically advised Rotan that he was a security officer and never indicated, and was never asked, whether he was a Philadelphia Police Officer. (Bullock Dep. at 20.) Further, Bullock avers that there could be no room for confusion between a private patrolman's badge and a City of Philadelphia Police badge. Id. at 6-7.

negligent in allowing Bullock to proceed into the building where he gained access to the courtroom area. But these facts do not rise to the level of deliberate indifference. Even assuming that Rotan was negligent in allowing Bullock to enter the building, negligence is not enough to sustain a failure to protect claim under the state-created danger theory. Morse, 132 F.3d at 911. Webb does not present any evidence that Rotan knew that Bullock posed a danger to Webb. Cf. Kneipp, 95 F.3d at 1208-09 (holding that officer acted in willful disregard for plaintiff's safety because he knew she was drunk); Maxwell v. School Dist. of the City of Philadelphia, 53 F. Supp. 2d 787, 793 (E.D. Pa. 1999) (holding that teacher acted with reckless indifference to student's safety when "she failed to supervise obviously dangerous students in a classroom that she let get out of control"); Sciotto v. Marple Newtown Sch. Dist., No. 98-2768, 1999 WL 79136, at \* 3 (E.D. Pa. Feb. 9, 1999) (holding that plaintiffs could prove that school officials were deliberately indifferent when they ignored warnings against exact practice that caused harm to plaintiff). In fact, Webb stated in his deposition that on the day he was attacked, he did not tell anyone on duty that Bullock was dangerous or that Bullock posed a threat to him. (Webb Dep. at 37.) Based on the record, the court finds that a reasonable jury could not find that Rotan was deliberately indifferent toward Webb's safety. The court will grant summary judgment in favor of Rotan on the § 1983 claim.

**(ii) Deputy Sheriff Moses**

Defendants acknowledge that Moses was present in the hallway outside of the courtroom when Bullock attacked Webb. Moving Defendants argue, however, that the evidence shows that Moses did not act with deliberate indifference toward Webb's safety. The court agrees. When Bullock charged toward Webb, Moses reached for his radio in accordance with standard operating procedures and called for assistance from the other Deputy Sheriffs on duty that day. (Moses Dep. at 32; Newton Dep. at 21.) Moses then separated Bullock from Webb and escorted Bullock to the Sheriff's cell room and processed Bullock's arrest. (Moses Dep. at 32; Newton Dep. at 22.) Bullock was taken from the scene immediately. (Webb Dep. at 44.) Moses testified that he had no prior knowledge that Bullock posed a threat to Webb's safety. (Moses Dep. at 91-92.) Additionally, Webb stated in his deposition that he did not tell anyone on duty that day that Bullock was dangerous or that Bullock posed a threat to him. (Webb Dep. at 37.) Webb fails to offer any evidence that Moses acted with deliberate indifference toward his safety. Based on the record before the court, a reasonable jury could not find that Moses acted with deliberate indifference toward Webb's safety. The court will grant summary judgment in favor of Moses on the § 1983 claim.

**(iii) Deputy Sheriff Smith**

Moving Defendants also argue that the evidence demonstrates that Smith did not act with deliberate indifference to Webb's safety. On the date of the altercation, Smith was assigned to

monitor Courtroom 7 in the Family Court Building. Smith heard Moses' call for assistance and promptly responded to the call. (Smith Dep. at 21.) Upon arriving at the scene, Smith proceeded to attempt to control the crowd of people gathering around the scene. Id. at 25. Smith also called emergency medical personnel to assist Webb. Id. at 21. Webb does not present any evidence to the contrary or any evidence that would support a finding that Smith acted with deliberate indifference toward his safety. Based on the record before the court, a reasonable jury could not find that Smith acted with deliberate indifference toward Webb's safety. The court will grant summary judgment in favor of Smith on the § 1983 claim.

**(iv) Deputy Sheriff Newton**

Moving Defendants argue that Newton did not act with deliberate indifference to Webb's safety. On the date of the altercation, Newton was assigned to monitor a courtroom on the second floor of the Family Court Building. (Newton Dep. at 20.) Newton heard Moses' radio call and responded immediately. Id. at 21. Upon arrival, Newton observed Moses in a struggle with Bullock. Id. at 22. Newton assisted Moses in restraining Bullock and helped escort Bullock to the Sheriff's cell room. Id. at 23-25. After escorting Bullock to the cell room, Newton returned to the scene and advised Webb that Bullock was in custody and that Webb should consider filing a complaint against Bullock. Id. at 25-26. Webb fails to offer any evidence to support a finding of deliberate indifference on Newton's part.

Based on the record before the court, a reasonable jury could not find that Newton acted with deliberate indifference toward Webb's safety. The court will grant summary judgment in favor of Newton on the § 1983 claim.

**(v) Deputy Sheriff Spattocco**

Moving Defendants also argue that Spattocco did not act with deliberate indifference toward Webb's safety. On the date of the altercation, Spattocco was on duty in the Sheriff's operation room located in the basement of the Family Court Building. (Spattocco Dep. at 29.) Spattocco received the call for assistance over the radio and proceeded to the scene. Id. at 30. Upon arriving at the scene, Spattocco observed Webb lying on the floor in obvious discomfort. Id. Spattocco then used his radio to call for emergency medical assistance. Id. Spattocco also placed a jacket under Webb's head to comfort him until the emergency medical team arrived. Id. Webb does not offer any evidence to indicate that Spattocco acted with deliberate indifference toward his safety. Based on the record before the court, a reasonable jury could not find that Spattocco acted with deliberate indifference toward Webb's safety. The court will grant summary judgment in favor of Spattocco on the § 1983 claim.

**(vi) Deputy Sheriff Accardo**

Webb alleges that Accardo, "at all times relevant [to the lawsuit], was employed by the City of Philadelphia as a Sheriff's Deputy and assigned to the Court of Common Pleas Family Court Facility located at 34 S. 11th Street, Philadelphia,

Pennsylvania." (Compl. ¶ 7.) Moving Defendants argue that Webb cannot demonstrate that Accardo acted with willful disregard toward Webb's safety. Webb does not present any evidence in his response to Moving Defendants' motion for summary judgment that would indicate that Accardo acted with willful disregard for Webb's safety. The court will grant summary judgment in favor of Accardo on the § 1983 claim.

**(vii) City and Sheriff of Philadelphia**

Webb argues that the City and the Sheriff of Philadelphia ("Sheriff") were deliberately indifferent to a dangerous situation at the Family Court Building and that the City's and Sheriff's indifference caused his injuries. Webb argues that the City was aware of frequent volatile incidents that occurred from time to time in the Family Court Building. Webb further asserts that in view of the potential for violence, Court Security personnel implemented a policy that prevented third parties not directly involved in a case from gaining access to the courtroom areas. (Pl.'s Ans. in Opp. to Defs.' Mot. for Summ. J. at 3 & 17.) Webb argues that this policy demonstrates that the City was aware of the potential danger and that they acted with deliberate indifference to that danger.

A municipality cannot be liable in a 42 U.S.C. § 1983 action under the doctrine of respondeat superior for the misconduct of its employees. Monell v. Department of Social Servs. of the City of New York, 436 U.S. 658, 691 (1978). The purpose of this rule is to distinguish the acts of the municipality from the acts of

its employees, and "thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." Pembaur v. City of Cincinnati, 475 U.S. 469, 479-80 (1986) (footnote omitted). Liability may be shown either "by policies which affirmatively command that it occur, or by acquiescence in a longstanding practice or custom which constitutes the 'standard operating procedure' of the local governmental entity."<sup>11</sup> Id.; see Beck v. City of Pittsburgh, 89 F.3d 966, 971 (3d Cir. 1996) (stating that Supreme Court has "created a two-path track to municipal liability under § 1983, depending on whether the allegation is based on municipal policy or custom"), cert. denied, 117 S. Ct. 1086 (1997).

A plaintiff must also show that the execution of the municipal policy or custom was the proximate cause of the injuries. The policy itself need not be unconstitutional, but a plaintiff must at least show that the policy or custom amounts to deliberate indifference to the rights of the persons with whom the police come into contact. See City of Canton v. Harris, 489 U.S. 378, 388 (1989) (holding that only where deliberate indifference is shown will municipal liability under § 1983 attach). The fact that an injury could have been avoided with better or more training is insufficient to establish municipal

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11. A plaintiff establishes a government "policy" if he proves that a "'decision maker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir. 1990) (citation omitted).

liability. Id. at 391.

In this case, the policy to limit access to courtroom areas was designed to protect individuals like Webb who attended family court hearings. (Pl.'s Mem. of Law in Support of Ans. in Opp. to Defs.' Mot. for Summ. J. at 7-9.) Webb acknowledges that it was not the policy of the City to allow anyone to gain access to the courtroom areas. Id. at 8-9. Webb asserts that the policy was to limit access to the courtroom areas. While Rotan may have failed to follow those policies, that failure does not require a finding that the City or the Sheriff was deliberately indifferent to Webb's safety. Additionally, Webb does not present evidence to support a finding that a policy or custom of the City was the proximate cause of his injuries. Accordingly, the court will grant summary judgment in favor of both the City and the Sheriff on the § 1983 claim.

**b. Lack of Causal Connection**

The court finds that a reasonable jury could not find that the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur. In D.R. v. Middle Bucks Area Vocational Tech. Sch., 972 F.2d 1364 (3d Cir. 1992) (en banc), cert. denied, 506 U.S. 1079 (1993), the Third Circuit highlighted the differences between conduct by private persons that does not support liability under the state-created danger theory and conduct that can support such liability. In D.R., two high school students filed a § 1983 claim alleging that they were sexually molested by

fellow students in the bathroom and darkroom of their graphic arts class room. Id. at 1366. According to their complaint, the high school's failure to adequately supervise the class or investigate the misconduct created the dangerous situation that resulted in their injuries. Id. at 1373. The court affirmed the district court's dismissal of the complaint, holding that the school was not liable because the plaintiffs did not demonstrate that the state placed the plaintiffs in danger, increased their risk of harm, or made them more vulnerable to danger. Id. at 1374. The court explained that the "plaintiff's harm came about solely through the acts of private persons without the level of intermingling of state conduct with private violence" needed to support liability. Id. at 1375.

Like the facts of D.R., no acts or omissions of the state actors in this case directly placed Webb in danger. Moving Defendants did not use their authority to place Webb in a "unique encounter" with Bullock. Bullock could have attacked Webb anywhere at any time. In fact, the record in this case reveals a history of violent encounters between Webb and Bullock outside the courthouse setting. (Webb Dep. at 27-29.) Webb's harm came about solely through the acts of Bullock, a private person who was not acting under color of state law. The court finds that the causal link is too attenuated to support a finding that Moving Defendants created the harm that befell Webb at the hands of Bullock. The evidence does not support a finding of the level of intermingling of state conduct with private violence needed to

support liability. Accordingly, the court will grant summary judgment in favor of Moving Defendants on the § 1983 claim.

## 2. Count II

In Count II of his Amended Complaint, Webb asserts a state law negligence claim against Moving Defendants. Moving Defendants argue that this claim is barred by Pennsylvania's Political Subdivision Tort Claims Act (the "Tort Claims Act"), 42 Pa. Cons. Stat. Ann. §§ 8541-42. Webb argues that Moving Defendants could be subject to liability for negligence pursuant to the real estate exception to the Tort Claims Act. The real estate exception to the Tort Claims Act reads in pertinent part:

(a) Liability imposed.--A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

(b) Acts which may impose liability.--The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency:

. . .

(3) Real property.--The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for

damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. As used in this paragraph, "real property" shall not include:  
(I) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;  
(ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way; (iii) streets; or (iv) sidewalks.

42 Pa. Cons. Stat. Ann. § 8542(b)(4). Webb argues that the negligence of the City's employees created the dangerous condition on the City's property. Webb basically asserts that had Rotan not allowed Bullock into the building, Bullock would not have been able to assault him.

In Mascaro v. Youth Study Ctr., 523 A.2d 1118 (Pa. 1987), the Pennsylvania Supreme Court held that "the real estate exception can be applied only to those cases where it is alleged that the artificial condition or defect of the land itself causes the injury, not merely when it facilitates the injury by the acts of others, whose acts are outside the statute's scope of liability." Mascaro, 523 A.2d at 1124. Webb cites Kilgore v. City of Philadelphia, 717 A.2d 514 (1998), to support his argument that the real property exception applies in this case. In Kilgore, the Pennsylvania Supreme Court held that the real property exception would apply if the City was found negligent for allegedly failing to remove accumulated snow and ice from its property. Kilgore, 717 A.2d at 517-18. Webb's reliance on Kilgore is misplaced. The facts of this case are more akin to the facts of Mascaro where the acts of a third party ultimately caused the plaintiffs injuries. In Mascaro, the plaintiffs filed

suit against the City of Philadelphia seeking recovery for injuries inflicted upon them by a detainee who escaped from a juvenile detention center due to alleged negligent maintenance of the center. Mascaro, 523 A.2d at 1119. The plaintiffs argued that the negligent maintenance of the center facilitated the detainee's escape. Id. The court explained that "[acts] of others . . . are specifically excluded in the general immunity section (42 Pa. C.S.A. § 8541), and are nowhere discussed in the eight exceptions [to governmental immunity]." Id. at 1124. The court found that the real estate exception did not apply, holding that "the real estate section can be applied only to those cases where it is alleged that the artificial condition or defect of the land itself causes injury, not merely when it facilitates the injury by acts of others." Id.

Similarly, the injuries in the instant action were caused by a third party. Unlike Kilgore, where the City left accumulated snow and ice on its property that directly led to the injury, this case involves an intervening and superseding actor whose conduct directly caused Webb's injuries. Further, in Kilgore, the case upon which Webb relies, the Pennsylvania Supreme Court carefully distinguished that case from cases involving "third parties who were merely acting on City property." Kilgore, 717 A.2d 514. Webb fails to cite a single case where the real estate exception to governmental immunity was found to apply to a situation where a third party acting on City property caused the actual injury to a plaintiff. The court finds that the real

estate exception to governmental immunity does not encompass injury caused by a third party acting on City property and will grant summary judgment in favor of the City and all other municipal defendants on this claim.

Additionally, in Mascaro, the court explained that the Tort Claims Act shielded political subdivisions from "the criminal acts . . . of its own agency or employees acting within the scope of their duties." Mascaro, 523 A.2d at 1124. The court reasoned that "it would be incongruous, indeed, to shield the City or Center from liability for the crimes of its agents and employees, but impose liability for the crimes of others." Id. Based on this reasoning the court held that "given the legislative scheme of immunity . . . the Tort Claims Act consistently excludes all criminal acts from liability, including acts of criminals . . . who take advantage of defects in municipal property to commit their own crimes." Id.; see Wakshul v. City of Philadelphia, 998 F. Supp. 585, 588 (E.D. Pa. 1998) (finding that allegations of assault on property owned by City of Philadelphia did not fall into any enumerated exception of 42 Pa. Cons. Stat. Ann. § 8541). The evidence presented in Webb's and Moses' depositions shows that Bullock's actions were nothing short of a criminal assault. Thus, the Tort Claims Act provides immunity to the City in this situation. The court will grant summary judgment in favor of the City and all Moving Defendants on this ground as well.

### **3. Counts V and VI**

Count V contains a claim for intentional infliction of

emotional distress. Count VI contains a claim against all defendants for negligent infliction of emotional distress. Under the Tort Claims Act, the City is immune from suit on both of these claims. See Wakshul, 998 F. Supp. at 588 (stating that Tort Claims Act provides absolute immunity to local government agency from tort liability, except in eight enumerated situations); Moser v. Bascelli, 865 F. Supp. 249, 253 (E.D. Pa. 1994) (same). Additionally, pursuant to 42 Pa. Con. Stat. Ann. § 8545, Rotan and all the Deputy Sheriff defendants are immune from this claim as well.<sup>12</sup> Moser, 865 F. Supp. at 253 (observing that § 8545 states "[a]n employee of a local agency is liable for civil damages . . . only to the same extent as his employing local agency . . . ."). The court will grant summary judgment in favor of Moving Defendants on both Counts V and VI.

#### **4. Count VII**

Count VII contains a request for attorney's fees pursuant to 42 U.S.C. § 1988. Because the court will dismiss Webb's claim filed pursuant to 42 U.S.C. § 1983, there is no basis to consider an award of attorney's fees pursuant to 42 U.S.C. § 1988. The court will grant summary judgment on this count in favor of

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12. Section 8545 provides as follows:

An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.

42 Pa. Con. Stat. Ann. § 8545.

Moving Defendants.<sup>13</sup>

**B. Claims Against Bullock**

In Counts III and IV, Webb asserts state law negligence claims against Bullock. Bullock is also named as a defendant in Counts V and VI. Bullock is not a party to this motion for summary judgment. Thus, this court will not rule on the merits of these claims. Federal courts have power to decide state law claims that "derive from a common nucleus of operative fact" with claims arising under federal law. See United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). However, the court may decline to exercise supplemental jurisdiction over state law claims if the court has dismissed all claims over which it has original jurisdiction. 28 U.S.C. § 1367(c). If all claims over which a district court has subject matter jurisdiction are dismissed after proper removal from state court, the district court has discretion to either remand the remaining pendent state law claims or dismiss those claims. Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 348-57 (1988) (explaining that federal courts retain jurisdiction over state law claims removed to federal court after federal claims allowing removal are dismissed, although discretionary factors will usually lead court to remand or dismiss state claims).

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13. Webb did not name Bullock as a defendant to this Court.

As discussed above, the court will grant Moving Defendants' motion for summary judgment on the § 1983 claim. That claim is the only claim contained in Webb's Amended Complaint over which the court has original jurisdiction. The court declines to exercise supplemental jurisdiction over the remaining state law claims against Bullock. Failure to retain jurisdiction in this instance will not offend traditional notions of "judicial economy, convenience and fairness to the litigants." Gibbs, 383 U.S. at 726. The court will remand all claims against Bullock to the Court of Common Pleas of Philadelphia County.

### **III. CONCLUSION**

For the reasons set forth above, the court will grant Moving Defendants' motion for summary judgment.<sup>14</sup> The remaining state law claims against Bullock will be remanded to the Court of Common Pleas of Philadelphia County.

An appropriate Order follows.

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14. Because the court grants Moving Defendants' motion for summary judgment, the court denies as moot Moving Defendants' motion for severance pursuant to Federal Rule of Civil Procedure 42(b).

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

JOHN WEBB, JR. : CIVIL ACTION  
v. :  
CITY OF PHILADELPHIA, et al. : NO. 98-2261

**ORDER**

AND NOW, TO WIT, this            day of October, 1999, upon consideration of defendants the City of Philadelphia's, the Sheriff of Philadelphia's, Gregory Moses', James Smith's, Luigi Accardo's, Frank Spattocco's, Shaheed Newton's and David Rotan's motion for summary judgment and plaintiff John Webb's response thereto, IT IS ORDERED that said motion is GRANTED. Judgment is entered in favor of the City of Philadelphia, the Sheriff of Philadelphia, Gregory Moses, James Smith, Luigi Accardo, Frank Spattocco, Shaheed Newton and David Rotan and against plaintiff John Webb, Jr., on all counts.

IT IS FURTHER ORDERED that all counts against defendant Frederick Bullock are hereby REMANDED to the Court of Common Pleas of Philadelphia County.

IT IS FURTHER ORDERED that defendants the City of Philadelphia's, Gregory Moses', James Smith's, Luigi Accardo's, Frank Spattocco's, Shaheed Newton's and David Rotan's motion for severance pursuant to Federal Rule of Civil Procedure 42(b) is DENIED AS MOOT.

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LOUIS C. BECHTLE, J.