151 F.Supp.3d 568
United States District Court, E.D. Pennsylvania.

Crystal **ARNOLD**, Plaintiff,
v.
The **CITY** OF **PHILADELPHIA**, Defendant.

CIVIL ACTION NO. 14-2598
|
Filed December 21, 2015

**Synopsis**

**Background:** Arrestee brought action against **city** and police officers who arrested and later released her in a high crime area with no phone or money, alleging claims under § 1983 for state-created danger in violation of her Fourteenth Amendment right to substantive due process, and state law claims for negligence and intentional infliction of emotional distress. Defendants moved for summary judgment.

**Holdings:** The District Court, Wendy Beetlestone, J., held that:

[1] genuine issue of material fact precluded summary judgment on state-created danger claim;

[2] officers were not entitled to qualified immunity;

[3] genuine issue of material fact precluded summary judgment on intentional infliction of emotional distress claim; and

[4] **city** was not responsible for the actions of police officers under theory of vicarious liability.

Motion granted in part and denied in part.

**Procedural Posture(s):** Motion for Summary Judgment.

West Headnotes (26)

**[1]** **Constitutional Law** Duty to Protect; Failure to Act

**Constitutional Law** Creation of danger or risk

Generally, the due process clause does not impose an affirmative duty upon the state to protect citizens from the acts of private individuals; however, an exception to the rule exists where the state acts to create or enhance a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process. U.S. Const. Amend. 14.

**[2]** **Federal Civil Procedure** Civil rights cases in general

Arrestee, who was abducted and raped after being released in high-crime area at night following her arrest for public intoxication, made prima facie showing that she was foreseeable victim of violence or harm, as would support denial of police officers' motion for summary judgment regarding arrestee's § 1983 claim for violation of substantive due process under state-created danger doctrine; arrestee's summary-judgment evidence indicated that officers were aware of arrestee's intoxicated state, and inherent danger facing a woman left alone at night in unsafe area, especially if impaired by alcohol, was matter of common sense. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

**[3]** **Federal Civil Procedure** Civil rights cases in general

Arrestee, who was abducted and raped after being released in high-crime area at night following her arrest for public intoxication, made prima facie showing that some relationship existed between arrestee and state, as would support denial of police officers' motion for summary judgment regarding arrestee's § 1983 claim for violation of substantive due process under state-created danger doctrine; arrest, transportation of arrestee, and her release distinguished her from public at large such that officers would have had specific knowledge that arrestee faced particular danger created by their actions. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

  

[4] **Federal Civil Procedure** Civil rights cases in general

Arrestee made prima facie showing that arrest and removal from curtilage of her home represented affirmative act under state authority and created opportunity for arrestee's rape following her release from custody in the middle of the night in a high crime neighborhood alone, intoxicated, shoeless, and without her purse, wallet, or phone that would not have existed absent her arrest, as would support denial of police officers' motion for summary judgment regarding arrestee's § 1983 claim for violation of substantive due process under state-created danger doctrine, although arrestee was locked out of her house prior to arrest; officers worsened arrestee's situation by removing her from curtilage of her home, taking her away from familiarity of her neighborhood, neglecting to arrange for medical attention, and stranding her over a mile away from her home. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[5] **Federal Civil Procedure** Civil rights cases in general

Genuine issue of material fact as to whether police officers' conduct in making arrest for public intoxication and later releasing arrestee in a high crime neighborhood alone, shoeless, without her purse, wallet, or phone, and over a mile away from her home shocked the conscience precluded summary judgment in favor of officers on arrestee's § 1983 claim against officers for violation of substantive due process under state-created danger doctrine. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[6] **Constitutional Law** Creation of danger or risk

The severity of conduct needed to shock the conscience, for purposes of a state-created danger claim under the due process clause, will depend upon the circumstances of each case, particularly the extent to which deliberation is possible, and the level of culpability required to shock the conscience will decrease as the time the state actors have to deliberate on their decision increases. U.S. Const. Amend. 14.

[7] **Constitutional Law** Creation of danger or risk

Deliberate indifference that constitutes behavior which shocks the conscience requires conscious disregard of a substantial risk of serious harm, for purposes of a state-created danger claim under the due process clause. U.S. Const. Amend. 14.

[8] **Constitutional Law** Creation of danger or risk

Mere negligence is not enough to shock the conscience, for purposes of a substantive due process claim under state-created danger doctrine. U.S. Const. Amend. 14.

[9] **Constitutional Law** Creation of danger or risk

An official's conduct may create state-created danger liability, for purposes of a substantive due process claim under state-created danger doctrine, if it exhibits a level of gross negligence or arbitrariness that shocks the conscience. U.S. Const. Amend. 14.

[10] **Civil Rights** Sheriffs, police, and other peace officers

Arrestee's substantive due process right to be protected from state-created danger was clearly established when **city** police officers, following arrest for public intoxication, released arrestee in high-crime neighborhood at night while she was alone, and thus officers were not entitled to qualified immunity in § 1983 action, which arose from rape of arrestee following release; it had been clearly established for nearly two decades in federal circuit in which **city** was located that a state-created danger violated due process, and federal court of appeals for circuit had specifically addressed state-created danger doctrine under circumstances in which police

  

officers abandoned intoxicated woman alone in dangerous setting. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

[11] **Civil Rights** Government Agencies and Officers

**Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

Qualified immunity shields government officials from civil damages liability unless: (1) the official violated a statutory or constitutional right, and (2) the right was clearly established at the time of the challenged conduct.

[12] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

For a right to be "clearly established," for purposes of determining whether qualified immunity shields a government official from civil damages liability, it must be sufficiently clear such that every reasonable official would have understood that what he is doing violates that right.

[13] **Civil Rights** Good faith and reasonableness; knowledge and clarity of law; motive and intent, in general

There need not be precedent directly on point for an official to lose the protection of qualified immunity; rather, in light of preexisting law the unlawfulness must be apparent.

[14] **Federal Civil Procedure** Tort cases in general

Genuine issue of material fact as to whether conduct of police officers in releasing arrestee who had been arrested for public intoxication, in the middle of the night, in a high crime neighborhood, alone, shoeless, without her purse, wallet, or phone, and over a mile away from her home, which resulted in her abduction and rape, was outrageous conduct precluded summary judgment on arrestee's claim for intentional infliction of emotional distress under Pennsylvania law.

[15] **Damages** Elements in general

To survive summary judgment on a claim for intentional infliction of emotional distress under Pennsylvania law, a plaintiff must demonstrate that: (1) the defendant's conduct was extreme and outrageous; (2) the defendant acted intentionally or recklessly; and (3) the act caused severe emotional distress.

3 Cases that cite this headnote

[16] **Damages** Mental suffering and emotional distress

Under Pennsylvania law, a plaintiff must support her claim for intentional infliction of emotional distress with competent medical evidence that the plaintiff actually suffered the claimed distress.

2 Cases that cite this headnote

[17] **Damages** Nature of conduct

Under Pennsylvania law, in order to establish that a defendant's conduct was extreme and outrageous, so as to support a claim for intentional infliction of emotional distress, the defendant's conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

2 Cases that cite this headnote

[18] **Damages** Mental suffering and emotional distress

Under Pennsylvania law, the determination of outrageous conduct, as required to support a claim for intentional infliction of emotional distress, is within the sound discretion of the fact-finder.

  

1 Cases that cite this headnote

[19] **Civil Rights** Acts of officers and employees in general; vicarious liability and respondeat superior in general

Generally, a municipal entity cannot be held responsible in a § 1983 action for the acts of its employees under a theory of respondeat superior or vicarious liability. 42 U.S.C.A. § 1983.

[20] **Civil Rights** Governmental Ordinance, Policy, Practice, or Custom

To establish municipal liability for the acts of its employees under § 1983, a plaintiff must demonstrate that the municipality has a policy or custom that caused the constitutional violation they allege. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[21] **Civil Rights** Lack of Control, Training, or Supervision; Knowledge and Inaction

The acts of a government employee may trigger *Monell* liability under § 1983 where the need to take some action to control the agents of the government is so obvious and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need. 42 U.S.C.A. § 1983.

[22] **Civil Rights** Lack of Control, Training, or Supervision; Knowledge and Inaction

Deliberate indifference, for purposes of establishing *Monell* liability for the acts of a municipality's employees under § 1983, requires that the plaintiff show: (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights. 42 U.S.C.A. § 1983.

[23] **Civil Rights** Lack of Control, Training, or Supervision; Knowledge and Inaction

Arrestee failed to establish that the **city** was deliberately indifferent to her constitutional rights, as required to hold **city** responsible for actions of police officers under theory of vicarious liability, and thus **city** would not be held liable in § 1983 action brought by arrestee, who was released alone at night in high-crime neighborhood following her arrest for public intoxication, for violation of right to substantive due process under state-created danger doctrine; arrestee did not articulate custom or policy that led to violation of her constitutional rights, there was no indication that police officers in general had history of mishandling similar situations, and officers acted in complete contradiction to their training and department policy. U.S. Const. Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[24] **Civil Rights** Lack of Control, Training, or Supervision; Knowledge and Inaction

Ordinarily, a plaintiff seeking to hold a municipality liable under § 1983 must show a pattern of similar constitutional violations to establish deliberate indifference on the part of the municipality. 42 U.S.C.A. § 1983.

[25] **Civil Rights** Police, Investigative, or Law Enforcement Activities

Individual citizens do not have a constitutional right to the prosecution of alleged criminals, as would give rise to § 1983 cause of action. 42 U.S.C.A. § 1983.

[26] **Municipal Corporations** Constitutional and statutory provisions

  

Exceptions to governmental immunity in Pennsylvania Subdivision Tort Claims Act are to be strictly construed. 42 Pa. Cons. Stat. Ann. § 8542.

**Attorneys and Law Firms**

***572** Andrew J. Stern, Kline & Specter, PC, **Philadelphia**, PA, for Plaintiff.

Craig M. Straw, Amanda C. Shoffel, Mark Maguire, **Philadelphia** Office of **City** Solicitor, **Philadelphia**, PA, for Defendant.

**OPINION**

WENDY BEETLESTONE, District Judge.

The case arises out of an encounter in 2011 between Plaintiff Crystal **Arnold** (nee **Snider**) and **Philadelphia** police officers in which **Arnold** was taken into custody and later released, and after which Plaintiff was abducted and raped by an unknown third party. Plaintiff brings this action against Police Officer Joseph Guinan ("Guinan") and Police Officer Nicole Enggasser [1] ("Enggasser") (collectively, "the officers"), alleging claims under 42 U.S.C. § 1983 for state-created danger, which violated her Fourteenth Amendment rights, and state law claims for negligence and intentional infliction of emotional distress ("IIED"). Plaintiff also sues the **City** of **Philadelphia** ("the **City**"), asserting a claim under *Monell v. **City** of N. Y. Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Before the Court is defendants' motion for summary judgment as to each of **Arnold's** claims. For the reasons discussed herein, summary judgment is granted in part and denied in part.

**I. FACTUAL BACKGROUND**

On the evening of August 19, 2011, Plaintiff Crystal **Arnold** left work at the end of her shift and went to a bar to celebrate a co-worker's birthday. *See* Joint Appendix ("JA") 29; Defendants' Statement of Undisputed Material Facts ("Def. Facts") ¶ 1; Plaintiff's Statement of Disputed Material Facts ("Pl. Facts") ¶ 1. An hour later, **Arnold** and a friend proceeded to a second bar, where they stayed until it closed around 2:00 a.m. JA 31. **Arnold** testified at her deposition that she did not recall how many alcoholic drinks she consumed over the course of the evening, but estimated that it was probably more than five. *Id.*; Def. Facts ¶ 2; Pl. Facts ¶2. That same evening, **Philadelphia** Police Officers Enggasser and Guinan were on patrol out of the 24th police district headquarters. JA 121, 203.

When **Arnold** arrived home, she dropped her clutch purse on the ground. JA 31-33; Def. Facts ¶5; Pl. Facts ¶ 5. Two teenagers on bicycles rode up to her, grabbed the purse containing **Arnold's** debit card, identification, cell phone, keys, and money, and fled across the street where about twenty people were gathered. *Id.* **Arnold** followed the teens into the street and yelled toward the house that she wanted her things back; she then began arguing with a woman. JA 31; Def. Facts ¶ 6; Pl. Facts f¶ 6. When **Arnold** continued to demand the return of ***573** her belongings, another woman exited the house and struck her. JA 31. When she tried to defend herself, **Arnold** was kicked and hit repeatedly by several individuals. JA 31, 35, 623-24, 626; Def. Facts ¶8; Pl. Facts ¶ 8.

Defendants responded to a radio call of a person screaming at **Arnold's** location and arrived on scene at approximately 2:50 a.m. JA 35, 623; Def. Facts ¶¶ 9-10; PL Facts ¶¶ 9-10. Officer Enggasser observed that **Arnold** appeared to have been in a fight and that her face was bleeding. JA 205, 209; Def. Facts ¶ 11; Pl. Facts ¶ 11. When defendants ordered her to disperse, **Arnold** cursed at the officers and threw one of her shoes at the police vehicle. JA 31, 205-07, 212. **Arnold's** belligerence, use of profanity, and failure to follow simple commands led Officers Enggasser and Guinan to conclude that **Arnold** was highly intoxicated. JA 144, 209. When **Arnold** spat on the ground in the officers' direction, they arrested her, placed her in handcuffs, and secured her inside the patrol vehicle. JA 213-15; Def. Facts ¶ 14; Pl. Facts ¶ 14. Neither Officer Enggasser nor Officer Guinan offered **Arnold** medical assistance while she was in custody. JA 220-21. Defendants later issued **Arnold** a citation for public intoxication. JA 224, 623-25.

Here, the parties' narratives diverge: **Arnold** maintains that she was "made to get out" of the police vehicle on Kensington Avenue; Defendants assert that she was taken to the police station and released after being informed that there were pay phones available. JA 31, 135, 205, 219-20; Def. Facts ¶¶ 17, 20; Pl. Facts ¶¶ 17, 20. [2] **Philadelphia** Police Department Directive #128 states that, before an intoxicated person

may be released from custody, a friend or relative must be contacted to accept responsibility for escorting her home; if next of kin is unavailable, the individual should be "housed in the respective district/division of arrest" until she has regained full control of her faculties. JA 629-30; Def. Facts ¶ 19; Pl. Facts ¶ 19. Sergeant Alfred Corson ("Corson"), the officers' supervisor at the time, testified at his deposition that it is improper police procedure to release an intoxicated person without first contacting a family member. JA 304-05. Sergeant Rafael Ali ("Ali"), a corporal in the 24th district at the time of **Arnold's** arrest, testified that if a person in custody is injured, officers must take that individual to a hospital for treatment and fill out a separate form. JA 357-58. It is uncontested that **Arnold** ended up alone, shoeless, without her purse, wallet, or phone, while intoxicated, over a mile away from her home. JA 32, 144, 219-20; Def. Facts ¶¶ 5, 16, 18, 21; Pl. Facts ¶¶ 5, 16, 18, 21.

Nonetheless, Officer Enggasser was unconcerned that **Arnold** departed without assistance. JA 221, 226. At her deposition, Officer Enggasser testified to the following:

> Q: Have you had situations where you have become aware in the years you've been a police officer that people who are intoxicated, that they can end up sustaining various types of injury on the streets, have you seen that happen?
>
> A: Yeah, I've seen that happen. (JA 226)
>
> Q: ... Back at the time when you let [**Arnold**] had go [sic] and you saw her walk off into the darkness, you didn't know where she was going to go; right?
>
> ***574** A: She was an adult. (JA 221)

Officer Guinan testified similarly at his deposition:

> Q: And others who see you in an intoxicated condition, who are bad guys, you become more vulnerable, don't you, if you're intoxicated; right?
>
> A: You could. (JA 147)
>
> Q: Did you think about that time ... this could create a risk to [**Arnold**], this is a risky situation for her, did that thought cross your mind when you watched her walk away that night?
>
> A: Not really. (JA 146)

The officers further testified that they was aware of **Philadelphia** Police directives that mandate all adult females charged with intoxication be transported to the Police Detention Unit ("PDU"), and that all prisoners in the PDU with injuries must receive medical treatment. JA 145-46, 233-35. Both officers conceded that they failed to comply with such directives. *Id.*

After her release from custody, **Arnold** "blacked out" and found herself walking on Kensington Avenue. JA 31-32; Def Facts ¶ 22; Pl. Facts ¶ 22. **Arnold** "blacked out" again a short time later and awoke in a strange home, bent over a couch, with an unfamiliar man. JA 32. When she grew alarmed and began to scream, the man took **Arnold** to his vehicle where she "blacked out" for a third time. JA 32, 39. **Arnold** later awoke in an outdoor, gravel area where she was raped by the unknown man. JA 32; Def. Facts ¶ 25; Pl. Facts ¶ 25. When the individual finished sexually assaulting her, he left the scene. JA 32. **Arnold** was found by police a short distance away from the scene and taken to a nearby hospital for treatment. JA 32, 40; Def. Facts ¶ 26; Pl. Facts ¶ 26.

Police Officer Tomekia Terry ("Terry") of the Special Victims Unit interviewed **Arnold** regarding the rape and gave her a copy of the citation that Officers Enggasser and Guinan had issued earlier that evening. JA 40, 47. At her deposition, Officer Terry could not recall the results of the sexual assault kit collected at the hospital; she did not know what happened to the evidence collected from the scene of the rape because she did not generate a property receipt for it. JA 406,411,415.

## II. LEGAL STANDARD

Summary judgment, pursuant to Federal Rule of Civil Procedure 56(a), "is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Alabama v. North Carolina*, 560 U.S. 330, 345, 130 S.Ct. 2295, 176 L.Ed.2d 1070 (2010) (citations and internal quotation marks omitted). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (emphasis in original). "A genuine issue is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden

  

of proof." *Doe v. Abington Friends Sch.*, 480 F.3d 252, 256 (3d Cir.2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–26, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Anderson,* 477 U.S. at 248–52, 106 S.Ct. 2505).

The reviewing court should view the facts in the light most favorable to the non-moving party and "draw all reasonable inferences in that party's favor." *Burton v. Teleflex Inc.*, 707 F.3d 417, 425 (3d Cir.2013). However, "the non-moving party ***575** must present more than a mere scintilla of evidence; 'there must be evidence on which the jury could reasonably find for the [non-movant].'" *Jakimas v. Hoffmann–La Roche, Inc.*, 485 F.3d 770, 777 (3d Cir.2007) (citing *Anderson, 477* U.S. at 252, 106 S.Ct. 2505).

## III. DISCUSSION

### A. Section 1983 "State-Created Danger"

#### 1. *Prima Facie Case*

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that a person acting under color of state law engaged in conduct that violated a right protected by the Constitution or laws of the United States. *See Morrow v. Balaski*, 719 F.3d 160, 165–66 (3d Cir.2013). **Arnold's** Section 1983 claim rests on the Due Process Clause of the Fourteenth Amendment, which provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const, amend XIV, § 1. **Arnold** alleges that defendants violated her constitutional protection against arbitrary governmental action by creating a dangerous condition that was directly responsible for **Arnold's** rape.

**[1]** Generally, the Due Process Clause does not impose an affirmative duty upon the state to protect citizens from the acts of private individuals. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 198–200, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). However, an exception to the rule exists where "the state acts to *create* or *enhance* a danger that deprives the plaintiff of his or her Fourteenth Amendment right to substantive due process." *Sanford v. Stiles*, 456 F.3d 298, 304 (3d Cir.2006) (emphasis in original) (citing *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir.1996)). To prevail on a "state-created danger" theory, **Arnold** must prove the following four elements:

1) the harm ultimately caused was foreseeable and fairly direct;

2) a state actor acted with a degree of culpability that shocks the conscience;

3) there existed some relationship between the state and the plaintiff; and

4) a state actor affirmatively used his or her authority in a way that created a danger to the plaintiff or that rendered him more vulnerable to danger than had the state not acted at all.

*Kneipp*, 95 F.3d at 1208 (quoting *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1152 (3d Cir.1995)). In evaluating these elements, the Third Circuit's decision in *Kneipp v. Tedder* is particularly instructive.

In *Kneipp*, the plaintiff was visibly intoxicated, smelled of urine, and stumbled as she made her way home with her husband on a winter evening. 95 F.3d at 1201. When the couple was less than a block from their home, police officers stopped them for causing a disturbance on the highway. *Id.* As the officers questioned the pair, the plaintiff's husband asked if he could continue home to relieve the babysitter. *Id.* at 1202. He was permitted to leave while the officers continued to speak with the plaintiff. *Id.* Thereafter, in spite of the freezing temperatures and the plaintiff's plainly intoxicated condition, the officers sent her home alone; she was later found unconscious at the bottom of an embankment across the street from her apartment. *Id.* at 1203. The plaintiff suffered severe hypothermia resulting in, *inter alia*, brain damage, blindness, incontinence, and an inability to walk or sit upright. *Id.* at n. 16.

On appeal, the Third Circuit reversed the district court's decision to grant summary judgment in favor of the defendants. ***576** In examining the elements of a state-created danger claim, the court held that the plaintiff's injuries were foreseeable because the officers were aware of her intoxication but nevertheless sent her home alone in freezing

  

weather. *Id.* at 1208–09. For that same reason, the court held that there was a material issue of fact regarding whether, having knowledge of her impairment, the officers willfully disregarded her safety. *Id.* Finally, the Court held that "but for the intervention of the police," it was conceivable that the plaintiff would have returned home unscathed, escorted by her husband. *Id.* at 1209.

**[2]** The case at hand is remarkably similar. As in *Kneipp*, there is no dispute that Officers Guinan and Enggasser were aware of **Arnold's** intoxicated state. She was belligerent, screaming, using profanity, and threw a shoe at the police vehicle; Officers Enggasser and Guinan even issued **Arnold** a citation for public intoxication. JA 144, 209, 623-25. Officers Guinan and Enggasser also acknowledged in their depositions that impairment from alcohol could render someone vulnerable to crime or injury, and **Philadelphia** Police Directives specify that intoxicated individuals in police custody should not be released until a family member arrives to escort them home or until they have regained their full faculties.[3] JA 147-49, 226.

To demonstrate that she was a foreseeable victim, **Arnold** need only establish that the defendants had "awareness of a *risk* of violence or harm," not that the officers foresaw the specific circumstances of her rape. *L.R. v. School Dist. of **Philadelphia***, 60 F.Supp.3d 584, 590 (E.D.Pa.2014) (emphasis in original). In addition to the officers' knowledge of her intoxicated state and the relevant Police Directives, **Arnold** has presented sufficient evidence of the dangerousness of the 24th police district through the deposition testimony of Sergeants Corson and Ali, who testified that the 24th police district is considered a "high-crime" area. JA 305, 361. Even if **Arnold** had not presented this specific evidence, "the inherent danger facing a woman left alone at night in an unsafe area," especially if she is impaired by alcohol, "is a matter of common sense." *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir.1989); *see also* *Phillips v. Cty. of Allegheny*, 515 F.3d 224, 237 (3d Cir.2008) (noting that in *Kneipp*, "ordinary common sense and experience ... sufficiently informed the officer of the foreseeability of harm to the woman"). Thus, the harm that could befall **Arnold** if left to wander alone at night, while impaired, was undoubtedly foreseeable.

**[3]** As to the third prong of the state-created danger doctrine, the circumstances of **Arnold's** arrest, transportation, and release "distinguished her from the public at large" such that defendants would have had specific knowledge that **Arnold** faced a particular danger created by their actions. *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 912–13 (3d Cir.1997); *Wood*, 879 F.2d at 590. In *Wood*, the defendant police officer arrested a drunk driver and impounded his car, leaving the driver's female passenger stranded alone, at night, in a crime-ridden area. As in the case at hand, the plaintiff subsequently was raped. The Ninth Circuit held: "[t]he fact that [Officer] Ostrander arrested ... [the driver of the vehicle], impounded his car, and apparently stranded ... [the plaintiff] in a high-crime area at 2:30 a.m. distinguished ***577** Wood from the general public and triggers a duty of the police to afford her some measure of peace and safety." *Id.* Similarly, when defendants placed **Arnold** under arrest, took her into custody, and released her alone in a high crime area in the middle of the night, they created a relationship that triggered a duty to afford **Arnold** a measure of safety that, at the very least, should have included following police directives regarding intoxicated persons.

**[4]** **Arnold's** arrest and removal from the scene also represented an affirmative act under state authority, the fourth prong of the state-created danger doctrine, creating an opportunity for the rape to occur that would not have existed absent the officers' intervention. Defendants claim in their papers that, if anything, their affirmative act was that "the officers intervened—during [**Arnold's**] assault" and "stopped that assault and moved her somewhere else." Mtn. at 19.[4] This argument is unsubstantiated and disingenuous in light of Defendants' Statement of Undisputed Material Facts and the officers' testimony that **Arnold** was alone in the street when they arrived. Def. Facts ¶ 9 ("[*a*]*fter* plaintiff was beaten ... Police arrived on the scene"); JA 135, 205.

While, as Defendants further argue, **Arnold's** position prior to the officers' intervention—locked outside of her apartment while intoxicated—was less than ideal, Mtn. at 18-20, Officers Enggasser and Guinan worsened **Arnold's** situation by removing her from the curtilage of her home, taking her away from the familiarity of her neighborhood, neglecting to arrange for medical attention, and stranding her over a mile away from her home. Undoubtedly, as in *Wood*, this represented an affirmative use of authority that rendered

**Arnold** *more* vulnerable to danger than had the officers not acted at all. *See also* *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982) ("[i]f the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit").

**[5]** **[6]** **[7]** **[8]** Finally, the Court examines whether Defendants' conduct shocks the conscience. The severity of conduct needed to shock the conscience "will depend upon the circumstances of each case, particularly the extent to which deliberation is possible." *Sanford*, 456 F.3d at 310. The level of culpability required to shock the conscience will decrease as the time the state actors have to deliberate on their decision increases. *Id.* at 306; *cf.* *Miller v. **City** of **Philadelphia***, 174 F.3d 368, 375 (3d Cir.1999) ("[a] much higher fault standard is proper when a government official is acting instantaneously and making pressured decisions without the ability to fully consider their risks"). In cases where the action was taken following deliberation, as is alleged here, conscience-shocking behavior may be established if the defendants' actions demonstrated deliberate indifference, "or perhaps gross negligence or recklessness," to the plaintiff's safety. *Sanford*, 456 F.3d at 306, 310. Deliberate indifference requires "conscious[ ] disregard[ ] of a substantial risk of serious harm." *Robinson v. Peirce*, 586 Fed.Appx. 831 (3d Cir.2014) (internal quotations omitted) (citing *Ziccardi v. **City** of **Philadelphia***, 288 F.3d 57, 66 (3d Cir.2002)). Regardless of the standard applied, "[m]ere negligence is not enough to shock the conscience." *Sanford*, 456 F.3d at 311.

***578** **[9]** When Officers Guinan and Enggasser placed **Arnold** under arrest, she was visibly bleeding from her face and obviously intoxicated, yet defendants sought no medical attention for her once she was in custody, in violation of police directives. JA 145, 220-21, 357-58. The officers admitted in their depositions that they failed to follow directives mandating that all adult females charged with intoxication be transported to the Police Detention Unit ("PDU"), and that all prisoners in the PDU with injuries must receive medical treatment. JA 145, 233-35. Additionally, Police Directive #128 mandates that an intoxicated person may be released from custody only where a sober third party is available to escort her home, or if the individual has regained full control of her faculties. JA 629-30. When **Arnold** was released, she was still intoxicated, she was missing at least one shoe, and her purse, wallet, keys, and cell phone had been stolen. "An official's conduct may create state-created danger liability if it exhibits a level of gross negligence or arbitrariness that shocks the conscience." *Estate of Smith v. Marasco*, 318 F.3d 497, 509 (3d Cir.2003). Based upon this record, this Court finds that **Arnold** has presented sufficient evidence such that a reasonable jury could find that defendants' actions shock the conscience. **Arnold** having proven all four elements of a state-created danger claim, the Court now turns to whether defendants are entitled to qualified immunity.

### 2. *Qualified Immunity*

**[10]** **[11]** Qualified immunity shields government officials from civil damages liability unless the official: (1) violated a statutory or constitutional right; and, (2) the right was clearly established at the time of the challenged conduct. *See e.g.*, *Reichle v. Howards*, —— U.S. ——, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012); *Taylor v. Barkes*, —— U.S. ——, 135 S.Ct. 2042, 192 L.Ed.2d 78 (2015). District courts have discretion as to the order in which to address the two-part test. *See* *Egolf v. Witmer*, 526 F.3d 104, 110 (3d Cir.2008); *Ashcroft v. al–Kidd*, 563 U.S. 731, 731, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011). Having concluded *supra* that **Arnold** has presented sufficient factual evidence of the deprivation of her constitutional right under the state-created danger doctrine, the Court proceeds to the second step of qualified immunity: whether the constitutional right was clearly established at the time the violation occurred.

**[12]** **[13]** The principle underlying the second step of the analysis is notice. *See* *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002). For a right to be "clearly established," it must be sufficiently clear such that "every reasonable official would have understood that what he is doing violates that right." *Reichle*, 132 S.Ct. at 2093. There need not be precedent directly on point for an official to lose the protection of qualified immunity; rather, "in light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987); *see also* *Acierno v. Cloutier*, 40 F.3d 597, 620 (3d Cir.1994).

  

The Supreme Court first addressed an individual's liberty interest in bodily integrity and the state-created danger doctrine in *DeShaney v. Winnebago Cty. Department of Social Services, et al.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). In the twenty-six years since *DeShaney*, the contours of that right have been thoroughly explored and defined. *See e.g.*, *Bright v. Westmoreland Cty., 443* F.3d 276, 281 (3d Cir.2006); *Kneipp*, 95 F.3d at 1199; *Sanford*, 456 F.3d at 304. Certainly, "[i]t has been clearly established in this ***579** Circuit for nearly two decades that a state-created danger violates due process." *Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 769 F.3d 850, 859 (3d Cir.2014). Moreover, the Third Circuit has specifically addressed the state-created danger doctrine under circumstances in which police officers abandon an intoxicated woman alone in a dangerous setting, through its holding in *Kneipp.* The compelling similarity of the facts of this case to *Kneipp* in the Third Circuit, and *Wood* in the Ninth Circuit, discussed *supra* at Part 111(A)(1), lead this Court to conclude that **Arnold's** constitutional right was sufficiently clear such that "every reasonable official would have understood that what he [was] doing violates that right." *Reichle*, 132 S.Ct. at 2093; *see also* *Estate of Lagano*, 769 F.3d at 859 ("earlier cases involving fundamentally similar facts can provide especially strong support for a conclusion that the law is clearly established"). Accordingly, defendants are not entitled to qualified immunity.

**B. Intentional Infliction of Emotional Distress**

**[14]** **[15]** **[16]** Defendants refer to their arguments regarding state-created danger and qualified immunity in arguing for summary judgment on **Arnold's** IIED claim. Mtn. at 29-30. The Pennsylvania Supreme Court has never explicitly recognized the tort of IIED under Pennsylvania law. *See e.g., Taylor v. Albert Einstein Med. Ctr.*, 562 Pa. 176, 754 A.2d 650 (2000) ("we have never expressly recognized a cause of action for intentional infliction of emotional distress"). The Third Circuit, however, has predicted that the Supreme Court of Pennsylvania would adopt the IIED tort as set forth in Section 46 of the Restatement (Second) of Torts. *See* *Williams v. Guzzardi*, 875 F.2d 46, 50–51 (3d Cir.1989) (discussing *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1273 (3d Cir.1979)). To survive summary judgment, a plaintiff must demonstrate that: (1) the defendant's conduct was "extreme and outrageous;" (2) the defendant acted intentionally or recklessly; and (3) the act caused severe emotional distress. *Williams*, 875 F.2d at 52. In Pennsylvania, a plaintiff must also support her claim with competent medical evidence that the plaintiff actually suffered the claimed distress. *See* *Kazatsky v. King David Mem'l Park, Inc.*, 515 Pa. 183, 527 A.2d 988 (1987).

**[17]** With regard to the first element, the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Kasper v. Cnty. of Bucks*, 514 Fed.Appx. 210, 217 (3d Cir.2013) (internal citations and quotations omitted). In Pennsylvania, this action has been found to lie in only a limited number of cases. *See e.g.*, *Chuy*, 595 F.2d at 1265 (reckless diagnosis of a fatal disease); *Papieves v. Lawrence*, 437 Pa. 373, 263 A.2d 118 (1970) (mishandling of a child's corpse); *Hoffman v. Memorial Osteopathic Hospital*, 342 Pa.Super. 375, 492 A.2d 1382 (1985) (denial of medical treatment in emergency room); *cf. Kutner v. Eastern Airlines, Inc.*, 514 F.Supp. 553 (1981) (no cause of action against airline for rerouting flight due to weather conditions); *Daughen v. Fox*, 372 Pa.Super. 405, 539 A.2d 858 (1988) (no cause of action against veterinarian for confusing x-rays causing death of dog).

**[18]** The determination of outrageous conduct is within the "sound discretion of the fact-finder." *SHV Coal v. Continental Grain Co.*, 526 Pa. 489, 495–96, 587 A.2d 702 (1991). Reading the facts in the light most favorable to **Arnold**, and for the reasons discussed *supra* at Part 111(A)(1), a reasonable jury could conclude that defendants ***580** recklessly acted in an extreme and outrageous manner by stranding her under such circumstances, knowing that severe emotional distress was substantially certain to occur given her intoxication alone at night, and the evidence suggests that **Arnold** did in fact suffer severe emotional distress when she was raped. Therefore, summary judgment shall be denied on this Count.

**C. *Monell***

**[19]** **[20]** **[21]** **[22]** Generally, a municipal entity "cannot be held responsible for the acts of its employees under a theory of *respondeat superior* or vicarious liability."

*Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 583 (3d Cir.2003) (citing *Monell v. N.Y.C. Dep't. of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). To establish municipal liability, a plaintiff must demonstrate that the municipality has a "policy or custom [that] caused the constitutional violation they allege." *Id.* The acts of a government employee may trigger *Monell* liability where "the need to take some action to control the agents of the government is so obvious and the inadequacy of existing practice so likely to result in the violation of constitutional rights, that the policymaker can reasonably be said to have been deliberately indifferent to the need." *Natale*, 318 F.3d at 584 (internal citations omitted). Deliberate indifference requires that the plaintiff show: (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights. *See* *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir.1999).

**[23]** **Arnold** alleges that the **City** was on notice of the alleged constitutional violation when "they signed off" on her arrest, that the failure to investigate her subsequent rape was intended to cover up Defendants' actions, and that it can be reasonably inferred that policymakers were deliberately indifferent because they failed to discipline or train the officers after **Arnold** was raped. Opp'n at 23-29. This contention suffers from a number of deficiencies, not the least of which is that it fails to address the three prongs of the deliberate indifference test.

First, **Arnold** has not articulated a policy or custom that led to the violation of her constitutional rights, making only vague assertions about the **Philadelphia** Police Department's "historical lack of policies and training" and culture. Opp'n at 23. **Arnold** cites nothing from the record to support these conclusions. **Arnold** also has not presented evidence that any individual municipal policymaker or decision maker had knowledge of the alleged policy or custom she endured. *See* *Santiago v. Warminster Township*, 629 F.3d 121, 135 at n. 11 (3d Cir.2010) (noting a plaintiff's "obligation to plead in some fashion that [a natural person] had final policymaking authority, as that is a key element of a *Monell* claim"). **Arnold's** claim that "the **City**" was on notice of the constitutional violation when "they" signed off on documents relating to the arrest, implies a contemporaneous collusion of unidentified policymakers with the police that is simply unsupported by the record. Opp'n at 25.

**[24]** As to the second prong of deliberate indifference, **Arnold** cites no evidence that police officers in general had a history of mishandling similar situations. Ordinarily, a plaintiff must show a pattern of similar constitutional violations to establish deliberate indifference on the part of the municipality. *Thomas v. Cumberland Cty.*, 749 F.3d 217, 223 (3d Cir.2014) (citing ***581** *Connick v. Thompson*, 563 U.S. 51, 62, 131 S.Ct. 1350, 179 L.Ed.2d 417 (2011)). **Arnold** has not identified a single situation in which another individual similarly suffered as a result of the **City's** alleged custom. Opp'n at 23.

By any view, the officers acted in complete contradiction to their training and police department policy as found in the record. Defendants' supervisors testified at their depositions that releasing an intoxicated detainee alone is improper procedure, and that an impaired individual is supposed to be released to a family member who can escort them home, held until they regain control of their faculties, or taken to a hospital. JA 305, 357. Officers Enggasser and Guinan admitted that they failed to follow proper procedures regarding **Arnold's** arrest. JA 145-46, 233-34. Although **Arnold** alleges that there was never an investigation into the officers' procedural violations, she cites no record evidence to support that contention. Opp'n at 25. In his deposition, Sergeant Corson even remarked that the entire incident was shocking and speculated that a formal review would likely occur. JA 306.

**[25]** **Arnold** also takes great pains to detail what she believes was an inadequate investigation of her rape by the Police Department, arguing that the investigation was both a constitutional violation in itself as well as proof that the **City** violated her constitutional rights through Defendants' conduct. Opp'n at 27. The Court is mindful of **Arnold's** reaction to the result of the investigation, however, "individual citizens do not have a constitutional right to the prosecution of alleged criminals." *Capogrosso v. The Supreme Court of New Jersey*, 588 F.3d 180, 184 (3d Cir.2009) (citing *Sattler v. Johnson*, 857 F.2d 224, 227 (4th Cir.1988)); *see also* *Leeke v. Timmerman*, 454 U.S. 83, 85–86, 102 S.Ct. 69, 70 L.Ed.2d 65 (1981) ("[a] private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another"). While ultimately fruitless,

**Arnold's** case was not ignored; an officer from the Special Victims Unit met **Arnold** in the hospital and ensured that a sexual assault kit was completed. The DNA recovered was then checked against a police database for potential matches, but there were none. JA 405-08. **Arnold** asks this Court to make an inference between her alleged treatment at the hands of the officers, the **City's** supposed knowledge thereof, and the outcome of the rape investigation, but cites no record evidence to support her contention. Moreover, **Arnold** has not connected the Police Department's failure to locate and arrest her rapist *after* the fact with a municipal policy that enabled Defendants' conduct *prior* to her rape.

Thus, **Arnold** has not shown that the **City** was deliberately indifferent to her constitutional rights, and summary judgment will be granted in the **City's** favor.

**D. Negligence**

**[26]** Defendants assert that **Arnold's** negligence claim is barred by the Political Subdivision Tort Claims Act ("the Act"), which affords local government agencies immunity from tort claims unless their actions fall within one of eight, narrowly drawn, exceptions. Mtn. at 28. These enumerated torts involve: vehicle liability; care, custody, or control of personal property; real property; trees, traffic controls, or street lighting; utility service facilities; streets; sidewalk; and care, custody or control of animals. 42 Pa. C.S.A. § 8542. Exceptions to governmental immunity are to be strictly construed. *See* *Finn v. **City** of **Philadelphia***, 541 Pa. 596, 601, 664 A.2d 1342 (1995).

Here, the Court can discern no relationship between **Arnold's** claims and the enumerated exceptions, and **Arnold** offers none in her response in opposition. Even if ***582** Defendants' actions fell within one of the eight categories, government negligence which merely facilitates injury by a third party is not actionable. *See* *Grieff v. Reisinger*, 548 Pa. 13, 16, 693 A.2d 195 (1997) ("the government is not liable for harm caused by third parties"); *see also Edison Learning, Inc. v. School Dist. of **Philadelphia***, 56 F.Supp.3d 674, 682 (E.D.Pa.2014) ("the exception does not apply when the alleged defect merely facilitates an injury by a third party") (internal citation omitted). **Arnold** did not address negligence at all in her opposition, and the Court has found nothing in the record to support a negligence claim that would fall within one of the exceptions. In **Arnold's** proposed Order, she consents to dismissal of her negligence claim. Accordingly, summary judgment is granted in favor of defendants on this Count.

**All Citations**

151 F.Supp.3d 568

## Footnotes

1 Since the incident in 2011, Nicole Enggasser married co-defendant Joseph Guinan and legally changed her name to Nicole Guinan. However, due to the frequent use of the name Enggasser in documents and witness statements, the Court will refer to her as Nicole Enggasser for convenience.

2 For reasons discussed *infra*, the location at which **Arnold** was released from custody is not a material fact. *See* *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ*, 470 F.3d 535, 538 (3d Cir.2006) ("[a] fact is material if it might affect the outcome of the suit under the governing substantive law").

3 Even if the Court were to accept as true Officer Enggasser's contention that **Arnold** declined to use a pay phone within the police station, "a telephone [is not] much help to a person who allegedly has no money to place a call." *Wood v. Ostrander*, 879 F.2d 583, 590 (9th Cir.1989); JA 205.

4 Defendants did not utilize page numbers in their motion; therefore, the Court uses the page numbers as designated by the ECF filing for reference.

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