REBECCA S. DOBY and HERBERT K. DOBY v. JAMES DECRESCENZO, et al.

CIVIL ACTION NO. 94-3991

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

1996 U.S. Dist. LEXIS 13175

September 9, 1996, Decided
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For JOSEPH KNOX, SERGEANT, of the Warrington Township Police Department, in his official and individual capacity, DEFENDANT: JOSEPH J. SANTARONE, JR., (See above).

For MICHAEL NEIPP, OFFICER, [*3] of the Warrington Township Police Department, in his official and individual capacity, DEFENDANT: JOSEPH J. SANTARONE, JR., (See above).

For KENNETH HAWTHORN, OFFICER, of the Warrington Township Police Department, in his official and individual capacity, DEFENDANT: JOSEPH J. SANTARONE, JR., (See above).

JUDGES: JUDGE MARJORIE O. RENDELL

OPINION BY: MARJORIE O. RENDELL

OPINION

MEMORANDUM

Rendell, J.

September 9, 1996

Plaintiffs, husband and wife, filed this *§ 1983* action against the defendants arising out of the involuntary commitment of Rebecca Doby at Doylestown Hospital on December 30, 1993. Plaintiffs also allege various state law claims against defendants. Defendants include: James DeCrescenzo (hereinafter "DeCrescenzo"), who was Mrs. Doby's employer and the person who applied for the warrant to have her involuntarily examined on an emergency basis; the Lenape Valley Foundation (hereinafter "LVF"), and Amy Bryant (hereinafter "Bryant") (collectively "the Foundation defendants"), who took information from DeCrescenzo and processed the warrant application; the Bucks County Department of Mental Health and Mental Retardation (hereinafter "Bucks County"), Philip M. Fenster [*4] (hereinafter "Fenster"), and Debbie Neidhardt (hereinafter "Neidhardt") (collectively "the County defendants"), under whose auspices the warrant was authorized and issued; the Township of Warrington, the Warrington Township Police Department (hereinafter "the Police Department"), Chief John Bonargo (hereinafter "Chief Bonargo"), Sergeant Joseph Knox (hereinafter "Knox"), Officer Michael Neipp (hereinafter "Neipp"), and Officer Kenneth Hawthorn (hereinafter "Hawthorn") (collectively "the Police defendants"), who were responsible for serving the warrant upon Mrs. Doby and taking her to Doylestown Hospital for the examination; and Dr. John C. Richards (hereinafter "Dr. Richards") and Doylestown Hospital (hereinafter "the Hospital"), who examined and involuntarily committed Mrs. Doby. Plaintiff and each of the defendants have moved for summary judgment.

DISCUSSION

I. STATEMENT OF FACTS AND THE PENNSYLVANIA MENTAL HEALTH PROCEDURES ACT

The facts of this case are extensive, as evidenced by the hundreds of pages of documents and deposition testimony submitted by the parties in support of their motions. I will briefly summarize the facts here, then add further facts as may [*5] be relevant to the discussion of plaintiffs' specific claims against each defendant.

Rebecca Doby began working as a court reporter for DeCrescenzo's court reporting agency in 1991 when she, her husband, and their child moved to Philadelphia to be closer to Herbert Doby's daughter from a prior marriage. Plaintiffs allege that Rebecca Doby and DeCrescenzo formed a personal relationship beyond that of an employer and an employee which involved personal letters from Rebecca Doby to DeCrescenzo (and one from DeCrescenzo) and several instances of personal intimacy. In early 1993, April 1993, and approximately June 1993, Rebecca Doby wrote three letters to DeCrescenzo, each in a flowery, melodramatic style, filled with very personal reflections. Rebecca Doby further alleges that several instances of physical, sexual contact between herself and DeCrescenzo occurred during this time period. DeCrescenzo has denied many of the events alleged, or characterizes them differently, but has not denied having received the three letters from Rebecca Doby.

In September 1993, Rebecca Doby and Herbert Doby had been arguing, and Rebecca Doby "felt a great need to get out of our small apartment and have [*6] a break from him." She asked DeCrescenzo whether she and her daughter Amanda could stay with his family (DeCrescenzo and his wife and three children), and he acquiesced. They stayed with the DeCrescenzos for

approximately three nights.

On December 22, 1993, Rebecca Doby gave DeCrescenzo an eleven-page letter which was flowery and melodramatic, and which has been characterized in many different ways by the different parties. In the letter, Rebecca Doby indicates she wants to end her relationship with DeCrescenzo. The letter discusses painful experiences from Rebecca Doby's childhood, contains statements referring to the shortness of time and how life is fleeting, and is rather graphic in describing sexual conduct she would like to engage in with DeCrescenzo. After receiving the letter, DeCrescenzo consulted with his wife, his marriage counselor, and an attorney about the letter. He spoke with personnel of the Philadelphia mental health office who told DeCrescenzo that they could send a mobile emergency crisis team to meet with Rebecca Doby. Without consulting her, DeCrescenzo arranged for the crisis team to come to the office and speak with Rebecca Doby on December 30, 1993. DeCrescenzo [*7] states that this was the earliest possible time this could be arranged because he was involved in an audit and he wanted to meet with his marriage counselor to discuss the eleven-page letter. DeCrescenzo had no contact with Rebecca Doby or her husband between December 22, 1993 and December 30, 1993.

On December 30, 1993, Rebecca Doby left the office of DeCrescenzo's court reporting agency before the mobile emergency crisis team arrived. She placed a call by car phone to a co-worker, Kathy McHugh, to advise her that she would not be at her New Year's Eve party. Rebecca Doby was upset and crying, and she indicated that she was driving in the rain and would not tell McHugh where she was going. McHugh told DeCrescenzo that she had just spoken with Rebecca Doby on the latter's car phone and that Rebecca Doby had been crying during their conversation. After her conversation with McHugh, Rebecca Doby called her husband to tell him that she was going for a drive and would be home after wards. DeCrescenzo then called Rebecca Doby on her car phone and asked her to return to the office; she refused and said she did not want to talk to him that day but that they would talk later.

DeCrescenzo [*8] then called the Philadelphia mental health office and the Warrington Township police. He then contacted Herbert Doby at the suggestion of the Philadelphia mental health office. DeCrescenzo spoke with Herbert Doby briefly and related a few phrases from Rebecca Doby's letter. Herbert Doby then contacted Rebecca Doby on her car phone; the conversation convinced Herbert Doby that nothing was wrong. Rebecca Doby called DeCrescenzo to assure him that she was fine.

As a result of DeCrescenzo's call to the Warrington Township police department, Sergeant Miller visited the Dobys' home and spoke with Herbert Doby who assured him that Rebecca Doby was fine. Sergeant Miller, upon arriving at the police station, telephoned DeCrescenzo and told him that Herbert Doby had spoken with Rebecca Doby, that Doby felt the letter was being blown out of proportion, and that the guns kept in their apartment were secured. The parties dispute whether Herbert Doby then telephoned DeCrescenzo to advise him that Doby's guns were secured; the plaintiffs deny the second conversation.

The next series of events is disputed. DeCrescenzo contends that he faxed the eleven-page letter to Sergeant Miller and that Sergeant [*9] Miller, upon receipt of the letter, telephoned DeCrescenzo and advised him that the letter would not be sufficient to commit Rebecca Doby and that he should search Rebecca Doby's desk to see whether any other materials could be found. Sergeant Miller stated that he did not really want the eleven-page letter to be faxed and only had allowed DeCrescenzo to fax it because DeCrescenzo seemed to need to take some action, and that he was not sure whether he saw the letter on December 30, 1993 or afterward.

In any event, the parties do not dispute the fact that DeCrescenzo asked his wife, Sheila DeCrescenzo, who was a part-time employee of his court reporting agency and Kathy McHugh, another employee, to search Rebecca Doby's work area. They did so and located a two-page note which appeared to be a suicide note, making reference to organ donation and custody of Rebecca Doby's daughter and step-daughter, among other things. The parties, though, do dispute whether DeCrescenzo had this two-page note when he completed the 302 petition to have Rebecca Doby involuntarily examined with Bryant at Doylestown Hospital that afternoon. Plaintiffs argue that he could not have had the two-page note because [*10] of the sequence of various events and the fact that the handwritten notes were attached to the 302 petition when Dr. Kieve examined Rebecca Doby; however, Neidhardt testified that she remembered Bryant reading particular parts of the

two-page note to her before she issued the warrant for an emergency involuntary examination of Rebecca Doby.

Thereafter, DeCrescenzo proceeded to Doylestown Hospital to complete the paperwork necessary to begin the involuntary commitment process under the Pennsylvania Mental Health Procedures Act (hereinafter "MHPA"). During his drive to Doylestown Hospital, he received a telephone call on his car phone relaying a message from Herbert Doby that Rebecca Doby was fine.

At the Hospital, DeCrescenzo met with Bryant, the crisis worker employed by LVF to process the filing of 302 petitions. The parties dispute whether Bryant wrote down what DeCrescenzo said verbatim on the 302 application, which DeCrescenzo then reviewed for accuracy, as the Foundation defendants contend, or whether DeCrescenzo explained the situation to Bryant and gave her a file of material from which Bryant composed the 302 application, as DeCrescenzo contends.

Section 302 of the MHPA, [*11] entitled "Involuntary emergency examination and treatment authorized by a physician -- not to exceed one hundred twenty hours," provides for the issuance of a warrant for an involuntary emergency examination:

> Upon written application by a physician or other responsible party setting forth facts constituting reasonable grounds to believe a person is severely mentally disabled and in need of immediate treatment, the county administrator may issue a warrant requiring a person authorized by him, or any peace officer, to take such a person to the facility specified in the warrant.

Pa. Stat. Ann. tit. 50, § 7302(a)(1) (Supp. 1996).

If the physician performing the examination determines that the person is severely mentally disabled and in need of immediate treatment, then the person may be involuntarily committed to begin treatment for a period not to exceed 120 hours, unless a procedure is followed to extend the involuntary treatment or the person signs a voluntary commitment form. *See id.* at *§ 7302(b)*, *(d)*.

DeCrescenzo presented an undated copy of the eleven-page letter to Bryant and indicated that he had found a suicide note that day on Rebecca Doby's desk. Bryant [*12] wrote the information given to her by DeCrescenzo on the 302 application:

> I believe that Rebecca Doby is in need of emergency psychiatric care. Today I found an extensive suicide note on her desk, as well as lists of chores including transference of information to her husband about access to bank accounts, insurance policy bills, a shared storage shed, and her current status with my company. She also has written a reminder to call about organ donations. Rebecca asked me as well to lock away a file for her with a note attached instructing me to destroy it if anything should happen to her. She also has begun letters to friends and relatives, with envelopes already addressed, asking either for forgiveness for pain she caused or including pleas for their help with the raising of her children. The return address is to a P.O. Box which only lists the names of her husband and children. In the past few weeks. Rebecca has been drastically less efficient at work and often retires to a cot to sleep during working hours. She has access to guns and has a licensed to carry one herself; she also talks a great deal about guns. I truly fear for her safety.

DeCrescenzo did not recount the [*13] events of the day specifically, nor did he relate his discussions with Rebecca Doby, Herbert Doby, or Sergeant Miller. When the 302 application asked for employment information concerning the subject of the application, DeCrescenzo identified himself as Rebecca Doby's employer and listed her termination date as that day, December 30, 1993.

Plaintiffs argue that neither Bryant nor Neidhardt could have seen the two-page letter located by Sheila DeCrescenzo and McHugh on Rebecca Doby's desk because of the fact that it was not found in the hospital's files concerning Rebecca Doby since LVF's and Doylestown Hospital's procedures required that any supporting documentation be kept in the patient's file. I note that Neidhardt's deposition testimony supports the defendants' contention that DeCrescenzo presented both Rebecca Doby's eleven-page letter and two-page

handwritten note to Bryant, who related their contents to Neidhardt. Neidhardt testified as to particular provisions of the two-page note which she remembered hearing when she was deciding whether a 302 warrant should be issued for Rebecca Doby.

The nature of the relationship between Rebecca Doby and DeCrescenzo is disputed. Rebecca [*14] Doby claims that they had a romantic affair which was never completely consummated, while DeCrescenzo contends that they were simply employer and employee who did socialize outside of work but with their spouses. Plaintiffs suggest that DeCrescenzo's actions in committing Rebecca Doby were motivated by a desire to discredit and embarrass her and to prevent DeCrescenzo's wife from learning about his relationship with Doby; DeCrescenzo denies anything but a genuine concern for Mrs. Doby's welfare.

Bryant inquired whether involuntary emergency treatment was the least restrictive alternative available, and then read the 302 application over the telephone to Neidhardt. Neidhardt spoke with Bryant for approximately fourteen minutes and made notes of the information being relayed by Bryant. At the end of their conversation, Neidhardt authorized the issuance of a 302 warrant to perform an involuntary emergency examination of Rebecca Doby. Bryant then signed the 302 warrant on behalf of Neidhardt. DeCrescenzo delivered the warrant to the Warrington Township police department. The Police Department executed the warrant at approximately 7:00 p.m. at the Dobys' apartment.

Three police officers, [*15] Knox, Neipp, and Hawthorn, arrived at the apartment and knocked on the door. Rebecca Doby answered the door; at that time, her children were in the bathtub, and her husband was in their bedroom, with the door closed, on the telephone. The police officers asked Rebecca Doby to step outside, so the children would not see. She did so. She states that the officers never told her, although she asked repeatedly, why they were taking her into custody or where she was being taken; the officers state that she was told why she was being taken into custody. The officers have admitted that they knew that, while guns may have been in the apartment, Rebecca Doby did not have a gun when she was in the hallway.

Rebecca Doby attempted to return to the apartment to tell her husband what was happening, at which point the officers handcuffed her. She tried to kick the door to get her husband's attention. Thereafter, the officers put her in leg shackles, carried her to a police car, placed her in it, and drove her to Doylestown Hospital. At some point before she was examined by Dr. Richards, a female police officer performed a pat-down body search of Rebecca Doby over her clothes. Mrs. Doby remained in [*16] the restraints for some period of time at the hospital until the crisis worker who was on duty at that time authorized their removal.

While Rebecca Doby was being removed from her apartment building and being placed in the police car, Hawthorn stayed behind in the Dobys' apartment and spoke briefly with Herbert Doby about what had happened to Rebecca Doby (the plaintiffs allege that Hawthorn was silent most of the time, but they acknowledge that he did attempt to provide Herbert Doby with some information). Hawthorn then left the apartment and drove Rebecca Doby to Doylestown Hospital.

Dr. Richards then met with Rebecca Doby to perform a mental examination; his examination lasted between fifteen and forty-five minutes. They discussed the eleven-page letter and Rebecca Doby's feelings towards DeCrescenzo. Rebecca Doby admitted to Dr. Richards that she had been depressed most of her life but had functioned very well. She informed him that she had been seeing a psychiatrist, Dr. London, that her last visit with Dr. London had been on December 7, 1993, and that she had been taking Prozac, prescribed by Dr. London but had run out on the previous day. Immediately before their session ended, [*17] Dr. Richards asked Rebecca Doby whether she thought she needed some help, and she admitted that she did. They then discussed the options available with the end result being that Rebecca would be either involuntarily or voluntarily committed that day. Rebecca Doby then asked if she could call Dr. London and her husband. Dr. Richards agreed, and Rebecca Doby left the room, concluding the examination. Dr. Richards committed Rebecca Doby involuntarily for a period not to exceed 120 hours and prescribed Ativan, a psychotropic drug, on an as-needed basis.

Rebecca Doby was reexamined on December 31, 1993 by Dr. Kieve, not a defendant in this suit, who concluded Rebecca Doby was not suicidal but should not be released at that point because of the situation with DeCrescenzo and Herbert Doby. On January 3, 1994, Rebecca Doby signed voluntary commitment papers (she has stated that she signed them because she was told that

signing the papers would lead to her release the next day). On January 4, 1994, she was released.

The Dobys have alleged numerous claims against the defendants. They have brought claims under *§ 1983* for violation of her civil rights (Counts I, II, III, IV, V, VI, VII and [*18] VIII of the Complaint), [1] false arrest and imprisonment (Count XI), assault and battery (Count XII), conspiracy (Count XII), [2] gross negligence (willful misconduct) (Count XIV), intentional infliction of emotional distress (Count XVI), declaratory judgment (Count XVII), and loss of consortium (Count XVIII) against all defendants. In addition, plaintiffs have alleged an invasion of privacy claim (Count X) against DeCrescenzo, the County defendants, the Foundation defendants, and the Police defendants. Finally, plaintiffs have alleged defamation (Count IX) and wrongful use of civil proceedings (Count XV) against DeCrescenzo.

1 The *§ 1983* claim against Dr. Richards was dismissed in a prior Opinion, as were plaintiffs' conspiracy claims.

2 As mentioned above, I dismissed this claim in a prior Opinion.

I will address the defendants' motions first, in the order in which the events of December 30 unfolded, and then the plaintiffs' motion.

II. DECRESCENZO'S MOTION

DeCrescenzo raises a number of [*19] arguments in support of his motion for summary judgment. First, he argues that plaintiffs' *§ 1983* civil rights claim against him must be dismissed because he was not acting under color of state law; if he was not a state actor, he cannot be held liable for plaintiffs' alleged federal constitutional violations. Second, he contends that even if he were a state actor, he could not be held liable for plaintiffs' *§ 1983* claim because he is entitled to "good faith" immunity which protects private citizens found to be state actors. Third, DeCrescenzo asserts that even if he were a state actor and not protected by "good faith" immunity, plaintiffs cannot state a federal claim against him arising out of actions of non-state actors, including Dr. Richards and, possibly, Bryant and Neidhardt. Fourth, DeCrescenzo challenges the sufficiency of plaintiffs' evidence supporting their federal constitutional claims. Fifth, he argues that he is entitled to immunity from plaintiffs' state law claims under *§ 7114(a)* of the MHPA. Finally, he argues that plaintiffs have not raised a genuine issue of material fact and that he is entitled to judgment as a matter of law on their defamation, invasion of privacy, [*20] false arrest/false imprisonment, assault and battery, gross negligence, malicious prosecution, and intentional infliction of emotional distress claims. I will discuss each argument in turn.

A. Whether DeCrescenzo Is A State Actor

DeCrescenzo first argues that he was not a state actor for purposes of plaintiffs' claim under *42 U.S.C. § 1983* and, accordingly, that plaintiffs' *§ 1983* claim against him must be dismissed. Plaintiffs respond by stating that the Bucks County Department of Mental Health issued the 302 warrant for Rebecca Doby based solely upon DeCrescenzo's information, made no independent review of that information, and substituted DeCrescenzo's judgment for its own. Plaintiffs contend that this set of facts demonstrates "improper delegation," which constitutes state action for purposes of *§ 1983*. [3]

3 Plaintiffs also rely upon an earlier opinion in this case in which I denied DeCrescenzo's motion to dismiss on the basis that he was not a state actor. *See Doby v. DeCrescenzo, 1995 U.S. Dist. LEXIS 4017*, No. 94-3991, 1995 WL 141483, at *4 (E.D. Pa. Mar. 30, 1995). However, that opinion clearly examined only the sufficiency of the pleading, not the sufficiency of the evidence which is now before me, as to whether the "improper delegation" of authority of the state has been demonstrated. *See generally Gilbert v. Feld, 788 F. Supp. 854, 859-60 (E.D. Pa. 1992).*

[*21] The improper delegation theory is rooted in the Supreme Court's decision in *Lugar v. Edmondson Oil Co., 457 U.S. 922, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982)*, in which the Court decided that one acting pursuant to a state's procedure which allowed the attachment of a party's property upon the ex parte application of another was a state actor for purposes of *§ 1983*. *See id. at 941-42*.

The Court in *Lugar* outlined four tests which are applied to determine whether a private actor has become a state actor for purposes of *§ 1983*: the public function test, the state compulsion test, the nexus test, and the joint action test. *See id. at 939*. I discuss here only the joint action test actually applied in *Lugar* because no party has argued that the other tests apply here and because I do not believe that they would govern the instant facts. The

improper delegation theory is actually one method of analysis under the joint action test. *See Cruz v. Donnelly, 727 F.2d 79, 82 (3d Cir. 1984)*.

In finding that the statute improperly delegated the state's attachment power to an otherwise private actor, the Court noted that two principles guide the state action inquiry: [*22]

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

457 U.S. at 937. In *Lugar*, the person effecting the attachment was viewed as one who "has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* Simply acting pursuant to a statute did not make one a state actor. *Id. at 939*. However, the use of a statutory scheme under which state officials attached one's property based upon an ex parte application, without notice or opportunity for a hearing to the party whose property was being seized, constituted state action such that the private party was a state actor. *See id. at 941-42*.

In *Cruz v. Donnelly*, the Third Circuit found that a store manager and his employer were not state actors simply because the manager had asked two police officers to detain and search the plaintiff because the manager suspected the plaintiff [*23] was shoplifting. *See id. at 79*. Relying upon *Lugar*, the court held that unless plaintiff could demonstrate that the officers' judgment had been subordinated to the judgment of the manager and the store, they would not be state actors under *§ 1983*. *See id. at 82*.

The Third Circuit more recently applied the principles enunciated by the *Lugar* Court in the context of a confession of judgment proceeding. *See Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1265-67 (3d Cir. 1994)*. There, it concluded that one who executes on a confessed judgment without notice and with the aid of state officials was a state actor. *See id. at 1266-67*. The *Jordan* court stated:

> We agree again with the district court that a private individual who enlists the compulsive powers of the state to seize property by executing on a judgment without predeprivation notice or hearing acts under color of law and so may be held liable under *section 1983* if his acts cause a state official to use the state's power of legal compulsion to deprive another of property.

Id. at 1267.

With this authority as a guide, I find *Lugar* and *Jordan* distinguishable from [*24] the case at hand because here, as in *Cruz*, the "state" processed information and acted based upon its own judgment and assessment of the situation. The defendants have produced evidence that Bryant took information from DeCrescenzo and engaged in a fourteen minute telephone conversation with Neidhardt during which Neidhardt was presented with and evaluated all of DeCrescenzo's information. They have also shown that Neidhardt determined that the information demonstrated reasonable grounds to conclude that Rebecca Doby was severely mentally disabled and in need of immediate treatment. DeCrescenzo's judgment was not substituted for that of the county delegate, because Neidhardt evaluated the information he provided and made an independent determination that Rebecca Doby should be involuntarily examined on an emergency basis.

Plaintiffs contend that the failure of Bryant, the crisis worker, and Neidhardt, the county delegate, to make any independent review of the facts presented by DeCrescenzo, attempt to corroborate the facts presented, or more fully explore alternatives less restrictive than an involuntary emergency examination equates with the state's having substituted DeCrescenzo's [*25] judgment for its own. I do not agree. The existence of state action does not turn on whether more information could have been obtained or should have been obtained in order to satisfy a probable cause standard, but rather, on whether the state actor exercised independent judgment. I conclude as a matter of law that Neidhardt did exercise independent judgment as to the information presented by DeCrescenzo to Bryant and that actions were taken based upon her assessment of reasonable cause, not on DeCrescenzo's. Accordingly, DeCrescenzo is not a state actor for purposes of *§ 1983*, and plaintiffs' *§ 1983* claim

against him must be dismissed. [4]

4 My finding that DeCrescenzo is not a state actor obviates the need for me to discuss the sufficiency of plaintiffs' evidence of constitutional violations or DeCrescenzo's other arguments relating to plaintiffs' *§ 1983* claim.

B. Whether DeCrescenzo May Be Liable For Plaintiffs' State Law Claims

Plaintiffs have alleged a number of state law claims against DeCrescenzo, [*26] namely defamation, invasion of privacy, false arrest/false imprisonment, assault and battery, gross negligence, malicious prosecution, and intentional infliction of emotional distress. DeCrescenzo seeks summary judgment on all such claims and on each claim, on several grounds. I will address each argument separately.

1. Whether DeCrescenzo Is Entitled To Immunity From Plaintiffs' State Law Claims Under *§ 7114* Of The MHPA

DeCrescenzo argues that he is entitled to immunity from all of plaintiffs' state law claims under *§ 7114* of the MHPA. *Section 7114(a)* of the MHPA provides:

> 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.

Pa. Stat. Ann. tit. 50, § 7114(a) (Supp. 1996).

Plaintiffs argue that DeCrescenzo does not fall within the class of persons entitled to immunity and, further, that even if he did, they have shown that he acted maliciously and that his actions [*27] therefore fall outside of the grant of immunity of the statute. I agree with plaintiffs' first argument and so do not reach their second.

DeCrescenzo argues he is immune because he is an "authorized person" within the meaning of the statute. However, I find he does not fit within the immunity provision, not based upon whether he was an "authorized person," but rather, because the statute provides immunity only to persons who "participate" in an examination or treatment decision. In *McNamara v. Schleifer Ambulance Serv., Inc., 383 Pa. Super. 100, 556 A.2d 448 (Pa. Super. Ct. 1989)*, the court held that ambulance attendants responsible only for transporting a mental patient between hospitals were not immune under *§ 7114(a)*:

> It is clear from these sections that the legislature contemplated the decision-making process under *§ 7114* as one which would take place within the context of treatment, care, diagnosis or rehabilitation. It is equally clear that the individuals who would participate in those decisions would be trained in the field of mental health. . . . To read the MHPA as extending immunity to untrained individuals would be an unreasonable result.

556 A.2d [*28] *at 449-50*. The *McNamara* court emphasized the importance of participation in the examination or treatment decision in determining whether immunity under *§ 7114(a)* would apply: "further, and more critical for purposes of determining the applicability of *§ 7114* immunity, neither [of the ambulance drivers] was participating in the patient's treatment." *Id. at 450*.

Clearly, Pennsylvania courts, as well as the plain language of *§ 7114(a)*, require some level of participation in the decision to examine or treat someone under the MHPA before immunity will apply. Here, DeCrescenzo did nothing more than provide information; I see no evidence that he performed any role in Bucks County's decision-making process as to whether a warrant should issue for an examination of Rebecca Doby. I find that he is not entitled to immunity from plaintiffs' state law claims under *§ 7114(a)* and will deny his motion on this ground.

2. Whether DeCrescenzo Is Entitled To Judgment As A Matter Of Law On Plaintiffs' State Law Claims

DeCrescenzo also argues that the plaintiffs have failed to allege conduct actionable under state law and have failed to adduce sufficient evidence in support of their [*29] state law claims against him. Plaintiffs contend that they have provided sufficient facts, or shown

genuine issues of material fact, precluding entry of summary judgment in DeCrescenzo's favor.

a. Defamation

In Count IX of the complaint, plaintiffs describe the nature of DeCrescenzo's conduct giving rise to their defamation claim against DeCrescenzo as: 1) providing false written and oral statements to the other defendants stating that Rebecca Doby was suicidal, a danger to herself, and suffered a mental impairment; 2) stigmatizing Rebecca Doby by having her committed; 3) causing false statements to be circulated throughout the community; 4) causing Rebecca Doby to be detained in handcuffs and leg shackles in public view; and 5) spreading false statements to coworkers. As to items 2) and 4), DeCrescenzo contends that summary judgment should be granted because the plaintiffs have not alleged the publication of an allegedly defamatory statement. As to items 1), 3) and 5), DeCrescenzo argues that because the statements he made were true, he has a complete defense to these aspects of plaintiffs' defamation claim.

In order to sustain a claim for defamation under Pennsylvania law, [*30] the plaintiffs must prove: "(1) the defamatory character of the communication; (2) its publication by the defendant; (3) its application to the plaintiff; (4) the understanding by the recipient of its defamatory meaning; (5) the understanding by the recipient of it as intended to be applied to the plaintiff." *Weinstein v. Bullick, 827 F. Supp. 1193, 1196 (E.D. Pa. 1993)*. However, the truth is a complete defense to a defamation claim. [5] *See Schonek v. WJAC, Inc., 436 Pa. 78, 258 A.2d 504, 507 (Pa. 1969)*.

5 I note that DeCrescenzo cited the case of *Marcone v. Penthouse Int'l, Ltd., 533 F. Supp. 353, 361 (E.D. Pa. 1982)*, among others, as support for this proposition. DeCrescenzo, however, failed to advise the Court that the Third Circuit had overruled that case in *Marcone v. Penthouse Int'l, Ltd., 754 F.2d 1072 (3d Cir. 1985)*, although the Third Circuit did not overrule on the proposition for which the case was cited. I remind the parties of their obligation to provide the Court with an *accurate* statement of the law.

[*31] I agree with DeCrescenzo that he is entitled to judgment as a matter of law with respect to items 2 and 4) of plaintiffs' defamation claim because plaintiffs have not alleged a defamatory statement and publication in those allegations.

With respect to the truth of his statements in defense of items 1), 3), and 5) of the defamation allegations, I find that a genuine issue of material fact exists for a jury to decide. DeCrescenzo contends that statements 1), 3) and 5) -- that is, that Rebecca Doby was suicidal, was a danger to herself, and had a mental impairment -- were true. While various doctors had diagnosed Rebecca Doby as suffering from major depression and as severely mentally disabled and in need of immediate treatment at various times in December 1993, I do not view these diagnoses as necessarily confirming that she was suicidal, a danger to herself, or mentally impaired.

DeCrescenzo points to the fact that Rebecca Doby has admitted in her deposition both that she drafted the two-page suicide note found on her desk on December 30, 1993 and that it could be characterized as a suicide note. Finally, DeCrescenzo points to the fact that Rebecca Doby signed voluntary commitment [*32] papers on January 3, 1994 which extended her treatment at Doylestown Hospital for one day.

However, I cannot conclude that this evidence proves that no genuine issue of material fact exists as to the truth of the alleged statements. Dr. Kieve specifically testified that she did not know whether Rebecca Doby was suicidal on December 31, 1993 and that Rebecca Doby was not suicidal as of January 3, 1994. While Dr. Richards believed that Rebecca Doby was suicidal, I note that the plaintiffs have produced two expert reports which challenge Dr. Richards' examination and diagnosis. Accordingly, I cannot conclude that DeCrescenzo's statements to the County defendants, the Police defendants, Bryant, Dr. Richards, the community, and coworkers were true as a matter of law.

Accordingly, I will deny DeCrescenzo's motion for summary judgment with respect to plaintiffs' defamation count (Count IX), except that I will dismiss plaintiffs' allegations that DeCrescenzo defamed her "by causing social stigma to attach to Plaintiff due to the involuntary commitment of Mrs. Doby to a mental institution" and "by causing Mrs. Doby to be detained at Plaintiffs' apartment in handcuffs and leg shackles in full [*33] public view which implied that Mrs. Doby and/or her family was involved in criminal conduct."

b. Invasion of Privacy

In Count X of the complaint, Rebecca Doby alleges that DeCrescenzo invaded her privacy by rummaging "through Mrs. Doby's personal effects and made public her very most private writings and papers, and set in motion a devastating and intentional invasion in the Dobys' personal life and family." The search complained of is the search performed by Sheila DeCrescenzo and Kathy McHugh (hereinafter "McHugh"), at the request of DeCrescenzo, of Rebecca Doby's desk at DeCrescenzo's reporting agency's office. [6] The search revealed a two-page "suicide note."

> 6 While plaintiffs make some reference in their response to the defendants' intentional invasion into Rebecca Doby's life by removing her from her home and providing her with involuntary medical care, they do not discuss, or demonstrate, how DeCrescenzo could be held liable under a state law invasion of privacy claim for these actions. Accordingly, I will confine my discussion to the search performed of Rebecca Doby's desk and will assume that plaintiffs have no other invasion of privacy claim against DeCrescenzo.

[*34] DeCrescenzo argues that this claim must be dismissed because plaintiffs have not established that he intended an invasion of privacy; instead, he acted only to obtain assistance for Rebecca Doby who he believed, in good faith, was suicidal. Plaintiffs respond that they have set forth facts controverting DeCrescenzo's claim of good faith and demonstrating that he intended to intrude into her private affairs and intended to subject her to involuntary medical treatment.

Pennsylvania law recognizes four distinct kinds of invasion of privacy: intrusion upon seclusion, public disclosure of private facts, false light, and appropriation for commercial purpose. *See Marks v. Bell Tel. Co., 460 Pa. 73, 331 A.2d 424, 430 (Pa. 1975).* Here, DeCrescenzo states, and plaintiffs do not dispute, that plaintiffs are stating a claim for intrusion upon seclusion. Pennsylvania courts have adopted the Restatement (Second) of Torts' definition of intrusion upon seclusion which provides:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of privacy, if the intrusion [*35] would be highly offensive to a reasonable person.

Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1326 (E.D. Pa. 1994) (quoting *Restatement (Second) of Torts § 652B*).

According to the Restatement (Second) of Torts, the intent required is: "the actor desires to cause the consequences of his act, or that he believes that the consequences are substantially certain to result from it." *O'Donnell v. United States, 891 F.2d 1079, 1083 (3d Cir. 1989)* (quoting *Restatement (Second) of Torts § 8*). The Third Circuit has described the intentional intrusion required to support an invasion of privacy claim under Pennsylvania laws as follows:

> We conclude that an actor commits an intentional intrusion only if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act.

Id.; *see also Kohn Nast & Graf, P.C., 862 F. Supp. at 1326.*

Here, DeCrescenzo does not contend that Rebecca Doby had given him permission to search her desk. At least one court has concluded that "[a] search of an employee's workplace which is done in such a way as to reveal matters unrelated to the workplace, may constitute [*36] tortious invasion of the employee's privacy." *Id.* Given the different characterizations by the parties as to DeCrescenzo's motives based upon the disputed facts of the relationship between DeCrescenzo and Rebecca Doby, plaintiffs have raised an issue as to whether DeCrescenzo was searching for matters relating to his employee's welfare or in order to locate material to have Rebecca Doby committed for personal reasons. Accordingly, I find that genuine issues of material fact exist, which must be resolved by a jury, in order to determine whether DeCrescenzo intentionally intruded into Rebecca Doby's privacy by ordering the search of her desk. Accordingly, I will deny DeCrescenzo's motion for summary judgment with respect to Count X of the complaint, plaintiffs' claim for invasion of privacy.

c. False Arrest/False Imprisonment

DeCrescenzo next argues that he is entitled to summary judgment as to count XI of the complaint,

which charges DeCrescenzo with false arrest and false imprisonment. Plaintiffs allege that DeCrescenzo caused Rebecca Doby to be falsely arrested and imprisoned by the Warrington police, when they served the warrant and took her to Doylestown Hospital, and [*37] by Doylestown Hospital, when it confined her for several days and administered psychotropic drugs.

DeCrescenzo asks that I grant summary judgment on this claim against him because: first, Rebecca Doby was not arrested; second, DeCrescenzo was not involved in the decision to commit her; third, the warrant was valid such that any arrest was not false; and finally, taking Rebecca Doby into custody to have her examined was supported by probable cause. Plaintiffs respond that Rebecca Doby was subject to arrest under Pennsylvania law because she was confined and detained and that the warrant was not supported by probable cause.

False arrest or imprisonment occurs under Pennsylvania law where a person has been (1) arrested or restrained (2) without adequate legal justification. *See Gilbert v. Feld, 788 F. Supp. 854, 862 (E.D. Pa. 1992).* An "arrest" occurs under Pennsylvania law by "any act that indicates an intention to take the individual into custody and subjects him to the actual control and will of the person making the arrest. When a person is actually restrained of his freedom by the police and taken into custody, an arrest has occurred." *Commonwealth v. Carter, 537 Pa. 233,* [*38] *643 A.2d 61, 67 (Pa. 1994)*, *cert. denied*, *131 L. Ed. 2d 198, 115 S. Ct. 1317 (1995).* While DeCrescenzo contends that no arrest occurred, I find that the undisputed facts here demonstrate that Rebecca Doby was restrained and arrested.

The issue, however, is whether DeCrescenzo, as a private party who did nothing more than provide information to the county and its agent, LVF, can be held liable for Rebecca Doby's detention. In *Gilbert v. Feld, 788 F. Supp. 854 (E.D. Pa. 1992)*, the court held that a private individual who provided false information to law enforcement officials could be held liable for a false arrest or imprisonment resulting from that false information. *See Gilbert, 788 F. Supp. at 862*. The court relied upon *Hess v. County of Lancaster, 100 Pa. Commw. 316, 514 A.2d 681 (Pa. Commw. Ct. 1986)*, which had allowed a claim for malicious prosecution to proceed against a private person who provided false information to law enforcement officials who instituted criminal charges against the plaintiff in that suit. *See id.*

Here, I am faced with a situation where DeCrescenzo appears to have provided incomplete information to LVF, Bryant, and the county delegate, [*39] Neidhardt, but the information he did provide appears to be true. For instance, while Rebecca had left the office crying, and while DeCrescenzo did find the two-page handwritten note on her desk that day, he did not indicate that Rebecca Doby had given him the eleven-page letter some eight days before. Also, he had written the date of December 22, 1993 on the original letter, yet he provided Bryant with an undated copy of the letter. DeCrescenzo also did not tell Bryant of his several conversations with Rebecca Doby and Herbert Doby and Sergeant Miller, all of whom told DeCrescenzo that the situation was under control.

I must determine whether a false arrest or imprisonment claim can lie against one who does not provide all of the relevant facts to the authorities. While Pennsylvania courts have not addressed this precise issue, the concern expressed by the Pennsylvania Commonwealth Court in *Hess* may apply to this situation as well. In *Hess*, the court concluded that one who provided false information to authorities could be liable for malicious prosecution because he prevented the police officer from adequately exercising independent judgment as to whether criminal charges [*40] should be instituted. *See id. at 683*.

Incomplete information would result in the same deficiency, and a Missouri court has so stated. In *Wehrman v. Liberty Petroleum Co., 382 S.W.2d 56, 61-62 (Mo. Ct. App. 1964)*, the court stated that if the defendant had reported all of the facts known to him, it would not hesitate to find that he could not be held liable for false arrest or imprisonment but that:

> We are of the opinion, however, that a different rule should prevail where the informant knowingly and deliberately gives the police an incomplete and biased version of the occurrence which induces them to believe that another is a thief, and results in the latter's unwarranted arrest.

Id. at 61.

Following the rationale espoused by the court in *Hess*, and consistent with the *Wehrman* court's conclusion, I find that a private citizen can be held liable

for false arrest or imprisonment if he has either knowingly provided false information to authorities or knowingly provided incomplete, misleading information to the authorities which resulted in the detention of another. In the instant case, I conclude that, at a minimum, a genuine issue of material fact [*41] exists as to whether DeCrescenzo knowingly provided incomplete and misleading information to LVF, Bryant, and Neidhardt.

DeCrescenzo contends that the warrant was issued with probable cause, and therefore there can be no claim of false arrest. While this would be true if a false arrest charge were levelled against a police officer who acted based on information in a warrant, it will not shield DeCrescenzo if a jury finds that had he provided incomplete information, and, had he given complete information, the warrant would not have been issued, i.e., probable cause would have been found not to exist and no arrest would have occurred. The *Hess* case, discussed above, only has meaning if the defendant is liable for giving information that led to an arrest that would not have occurred if he had been forthright. Whether probable cause for the arrest existed without the information he concealed is not relevant to this issue. The resolution of this aspect of DeCrescenzo's defense involves genuine issues of material fact as to the information he possessed and the completeness of the information provided to Bryant at the time he acted. The issue of whether probable cause existed is inexorably [*42] tied to the issue of the significance of what was, and was not, included by DeCrescenzo in the grounds he gave for an emergency warrant. This will turn on credibility of witnesses and inferences to be drawn from facts difficult if not impossible to resolve on a motion for summary judgment.

Accordingly, I will deny DeCrescenzo's motion for summary judgment with respect to plaintiffs' false arrest and imprisonment claim.

d. Assault and Battery

DeCrescenzo next seeks summary judgment with respect to plaintiffs' assault and battery claim in Count XII of the complaint, asserting that no evidence has been produced showing that he ever attempted to make, or made, physical contact with Rebecca Doby or that she was in apprehension of such physical contact by DeCrescenzo. Plaintiffs do not respond to DeCrescenzo's claim specifically but state that all defendants threatened Rebecca Doby with being placed in hand cuffs and leg shackles or with a "padded room" and solitary confinement, both of which constitute an assault. I find that plaintiffs have not supported a claim for battery against DeCrescenzo, and I will grant summary judgment as to this claim. However, they have argued that [*43] a genuine issue of material fact exists as to their assault claim against DeCrescenzo.

In Pennsylvania, "an assault occurs when one acts with the unprivileged intent to put another in reasonable and immediate apprehension of a harmful or offensive contact and which does cause such apprehension." *Proudfoot v. Williams, 803 F. Supp. 1048, 1054 (E.D. Pa. 1992)*. Pennsylvania courts do allow liability for an assault when the alleged tortfeasor was not the one who put the plaintiff in apprehension of an offensive contact "through a showing of common design or mutual aid in bringing about harm." *Keich v. Frost, 63 Pa. D. & C. 2d 499, 501 (Dauphin Ct. C.P. 1973)*. The Middle District of Pennsylvania has noted that Pennsylvania allows vicarious liability for assault and battery based upon concert of action. *See Shoop v. Dauphin County, 766 F. Supp. 1323, 1326 (M.D. Pa. 1990)*. Plaintiffs base their assault claim against DeCrescenzo on the fact that he set the 302 petition process in motion, which resulted in the police officers taking Rebecca Doby into custody and Doylestown Hospital confining her. DeCrescenzo contends that he did not commit an assault and cannot be held liable for [*44] an assault committed by someone else. I agree. DeCrescenzo provided information to LVF and Bryant, but plaintiffs have not shown that he was present at the time of any assault such that he committed the assault or that he engaged in a concerted action with the police or the hospital such that he could be held liable even if they committed an assault. Accordingly, I will grant DeCrescenzo's motion for summary judgment with respect to plaintiffs' assault claim.

e. Gross Negligence And Willful Misconduct

DeCrescenzo next contends that he is entitled to judgment as a matter of law on Count XIV of the complaint, which states a claim for gross negligence and willful misconduct, because no genuine issues of material fact exist. Plaintiffs argue that a genuine issue of material fact exists as to whether he acted maliciously toward Rebecca Doby, such that his conduct violated the standard for gross negligence and willful misconduct.

DeCrescenzo urges that his actions could, at most,

constitute negligence, not gross negligence or willful misconduct, since he was acting on information sufficient to cause the issuance of a 302 warrant. As a result, he concludes that he is entitled to [*45] summary judgment on plaintiffs' gross negligence and willful misconduct claim. I disagree. Pennsylvania courts have defined gross negligence as "a want of even scant care, but something less than intentional indifference to consequences of acts" or "a failure to perform a duty in reckless disregard of the consequences or with such want of care and regard for the consequences as to justify a presumption of willfulness or wantonness." Jack K. Levin, *Negligence*, 2 Summary of Pennsylvania Jurisprudence 2d 1, 13 (Lonnie E. Griffith, Jr. et al. eds., 1991). Pennsylvania courts have defined willful misconduct as occurring when:

> An actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or her or so obvious that he or she must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

Brian H. Redmond, *Kinds & Classifications of Tortious Acts*, 1 Summary of Pennsylvania Jurisprudence 2d 47, 53 (Lonnie E. Griffith, Jr. et al. eds., 1991).

In addition, Pennsylvania has adopted *section 323 of the Restatement (Second) of Torts* which defines a certain circumstance under which an actor [*46] can owe a duty to another. *Section 323*, otherwise known as a Good Samaritan Rule, imposes a duty on:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965).

Was DeCrescenzo acting with reasonable care and concern of an employer, genuinely fearful for Rebecca Doby's safety, as he contends? Or was he acting unreasonably, seeking to confine her to keep their romantic involvement from his wife or to embarrass or humiliate Rebecca Doby? A jury could conclude that although DeCrescenzo possessed information which supported the issuance of a 302 warrant, he may have believed that Rebecca Doby was, in fact, not in need of immediate care or severely mentally disabled and, therefore, was not acting with reasonable care, [*47] or was acting in reckless disregard of a risk of which he knew or should have been aware.

Even if Decrescenzo was acting on behalf of Rebecca Doby when he sought out involuntary mental health treatment for her, once he undertook this responsibility, he had a duty to exercise reasonable care in performing it. Given the facts before me, I find that a genuine issue of material fact exists as to whether DeCrescenzo acted with gross negligence or with willful misconduct, or whether he acted in reckless disregard of his duty to exercise reasonable care once he determined to seek out involuntary treatment for Rebecca Doby. Accordingly, I will deny DeCrescenzo's motion for summary judgment on plaintiffs' gross negligence or willful misconduct claim.

f. Malicious Prosecution

DeCrescenzo asks that I grant summary judgment in his favor on plaintiffs' claim for malicious prosecution, Count XV of the complaint, for two reasons. First, he states that a claim of malicious prosecution applies only to criminal proceedings and that plaintiffs have not pled the equivalent claim for civil proceedings. Second, he argues that since Rebecca Doby was committed, the proceeding has terminated favorably [*48] to the plaintiff, so that a malicious prosecution claim cannot be proven. Plaintiffs respond that an abuse of process claim [7] and claim for malicious prosecution can be asserted in a civil proceeding.

7 While plaintiffs argue in their response that they have stated a claim in their complaint against DeCrescenzo for abuse of process, there is no such claim. Accordingly, I do not address the merits of an abuse of process claim.

I find that Pennsylvania does recognize a cause of action for malicious prosecution in a civil context. Count

XV of the complaint clearly is titled "Malicious Prosecution, 42 PA. C.S.A. *§ 8351* Wrongful Use of Civil Proceeding." The statutory citation and the phrase "wrongful use of civil proceeding" clearly refers to the Pennsylvania cause of action for the civil equivalent of a malicious prosecution claim.

However, I agree with DeCrescenzo's argument that plaintiffs have provided no evidence demonstrating that the proceeding, here the involuntary commitment process, terminated favorably [*49] to Rebecca Doby. In Pennsylvania, the Dragonetti Act sets out the elements needed to prove a wrongful use of civil proceedings claim:

> (a) Elements of action. -- A person who takes part in the procurement, initiation or continuation of civil proceedings against another is subject to liability to the other for wrongful use of civil proceedings:
>
> (1) He acts in a grossly negligent manner or without probable cause and primarily for a purpose other than that of securing the proper discovery, joinder of parties or adjudication of the claim in which the proceedings are based; and
>
> (2) The proceedings have terminated in favor of the person against whom they are brought.

Pa. Stat. Ann. tit. 42, § 8351 (1982).

Favorable termination within the meaning of the wrongful use of civil proceeding statute need not be an adjudication on the merits; favorable termination can occur as the result of a voluntary dismissal of the underlying proceeding or an abandonment of the proceeding. *See Shaffer v. Stewart, 326 Pa. Super. 135, 473 A.2d 1017, 1020-21 (Pa. Super. Ct. 1984)*; *Woodyatt v. Bank of Old York Road, 408 Pa. 257, 182 A.2d 500, 501 (Pa. 1962).*

While plaintiffs might be [*50] able to prove the first two elements, initiation of a proceeding and gross negligence or lack of probable cause, I conclude that they cannot prove the third -- that the proceedings terminated in favor of Rebecca Doby. DeCrescenzo applied for a 302 petition, which would allow Rebecca Doby to be examined for two hours on an involuntary, emergency basis. *See Pa. Stat. Ann. tit. 50, § 7302(b)* (Supp. 1995). During the examination, the physician then was to determine whether involuntary emergency treatment was necessary. *See id.* at *§ 7302(b).* If the person examined was committed for involuntary emergency treatment, the person could only be kept for treatment for 120 hours, unless the person agreed to remain in treatment longer voluntarily or a certification for extended involuntary emergency treatment was filed with the court of common pleas. *See id.* at *§ 7302(d).*

I view the process initiated by DeCrescenzo as that for an emergency examination to last no longer than two hours. Therefore, the result of the emergency examination determines whether it was terminated favorably to Rebecca Doby. As a result of his examination of Rebecca Doby pursuant to the 302 warrant, Dr. Richards [*51] did involuntarily commit her for the 120 hour statutory period. This result can in no way be viewed as a termination of the proceedings in favor of Rebecca Doby. I must conclude that no genuine issue of material fact exists as to whether the proceeding terminated favorably to Rebecca Doby because she does not dispute the fact that Dr. Richards did order her committed. Accordingly, DeCrescenzo's motion for summary judgment will be granted as to plaintiffs' wrongful use of civil proceedings claim.

g. Intentional Infliction Of Emotional Distress

DeCrescenzo finally seeks summary judgment on Count XVI of the complaint which states a claim for intentional infliction of emotional distress. He argues both that his conduct was not outrageous enough to support such a claim because he was acting in good faith, and that Rebecca Doby must show an actual injury in order to sustain this claim and has failed to do so. Plaintiffs respond that Rebecca Doby's involuntary commitment was outrageous and that she suffered physical contact throughout the events in question and emotional injury as testified to by an expert.

While the Pennsylvania Supreme Court has not definitively accepted the tort [*52] of intentional infliction of emotional distress, the Third Circuit and other courts within this district have construed the Pennsylvania Supreme Court's decision in *Kazatsky v. King David Memorial Park, Inc., 515 Pa. 183, 527 A.2d 988 (Pa. 1987)*, as being consistent with allowing such a cause of action. *See Silver v. Mendel, 894 F.2d 598, 606* (3d Cir.), *cert. denied*, *496 U.S. 926, 110 L. Ed. 2d 641,*

110 S. Ct. 2620 (1990); *Corbett v. Morganstern, 1996 U.S. Dist. LEXIS 6692*, No. 95-4776, 1996 WL 273676, at *3 (E.D. Pa. May 17, 1996). I agree that Pennsylvania does recognize a cause of action for intentional infliction of emotional distress.

The Third Circuit has set out the elements of the tort: "1) the conduct must be extreme and outrageous; 2) the conduct must be intended; 3) the conduct must cause emotional distress; and 4) the distress must be severe." *Silver, 894 F.2d at 606*. Outrageous conduct is that conduct which is:

> 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. Generally, the case is one in which the recitation of the facts to an average [*53] member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Corbett, 1996 U.S. Dist. LEXIS 6692, 1996 WL 273676, at *3 (internal quotation and citation omitted). As a preliminary matter, I must determine whether a jury could reasonably find that the complained of conduct was sufficiently extreme and outrageous so as to warrant recovery. *See id.*

As indicated above in connection with my discussion of plaintiffs' gross negligence and willful misconduct claim, the jury's view of the facts will be key in deciding this issue. Plaintiffs argue that the inference to be drawn from these facts is that Rebecca Doby and DeCrescenzo had engaged in some sort of romantic relationship, that she sought to terminate both that relationship and her employment with DeCrescenzo, and that he decided to seek to have her committed as either a way to prevent her from discussing their relationship or to seek revenge by embarrassing and humiliating her. A jury could agree with the motivations proposed by plaintiffs, especially when it considers certain information DeCrescenzo possessed, but did not share with Bryant, tending to negate the emergency nature of the situation, [*54] and his seemingly inconsistent persistence in pursuing this extreme step. If a jury concludes that DeCrescenzo acted with malice towards Rebecca Doby, and not in good faith, then I cannot hold as a matter of law that DeCrescenzo's actions in having Rebecca Doby physically removed from her family and home to be subjected to a psychological examination and confined are not outrageous within the meaning of the tort. If the jury believes plaintiff's version of the facts, I conclude that the conduct alleged could be considered so outrageous by a jury that it could find DeCrescenzo intended to inflict emotional distress on Rebecca Doby. Accordingly, I will not dismiss plaintiffs' claim against DeCrescenzo on that ground.

DeCrescenzo next argues that plaintiffs have failed to show by some competent medical evidence that Rebecca Doby suffered some actual injury. While I agree that Pennsylvania does require medical evidence showing some injury, *see Kazatsky, 527 A.2d at 995*, I believe that plaintiffs have met their burden at least for purposes of summary judgment. Plaintiffs have produced the expert report of Susan B. Bierker, a licensed social worker, which diagnoses Rebecca Doby with [*55] Post-traumatic Stress Disorder as a result of her involuntary commitment and attending events. This report is sufficient to demonstrate a medical injury for purposes of summary judgment. I will deny DeCrescenzo's motion for summary judgment with respect to plaintiffs' intentional infliction of emotional distress claim.

III. LENAPE VALLEY FOUNDATION'S AND AMY BRYANT'S MOTION

LVF is a private, not for profit crisis intervention unit, functioning under contract with Bucks County for purposes of, among other things, conducting intake interviews for 302 warrant applications. As indicated above, on December 30, 1993, Bryant was a crisis worker for LVF and was responsible for taking information from petitioners making a 302 application and presenting it to the County delegate, Neidhardt.

The Foundation defendants raise numerous arguments in support of their motion for summary judgment. Their primary argument is that they are not state actors for purposes of *§ 1983* and that plaintiffs' *§ 1983* claim against them must be dismissed. They then argue that even if LVF is considered a state actor for purposes of *§ 1983*, I should dismiss the *§ 1983* claims against LVF because plaintiffs [*56] have not shown a custom or policy of LVF that caused a constitutional violation. Further, even if deemed state actors, they are entitled to qualified immunity under *Harlow v. Fitzgerald*

, 457 U.S. 800, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982). As to plaintiffs' state law claims, they contend that they are entitled to immunity under *§ 7114* of the MHPA.

A. Whether The Foundation Defendants Are State Actors For Purposes Of *§ 1983*

The Foundation defendants first argue that they are not state actors for purposes of *§ 1983*, so plaintiffs' federal constitutional claims should be dismissed.

My state action analysis of the Foundation defendants differs from my analysis of DeCrescenzo's status because while DeCrescenzo acted as a private citizen presenting information to a governmental body, the Foundation defendants had entered into a contract with Bucks County to provide a "*continuum* of mental health services ranging from emergency psychiatric hospitalization (most intensive) to information and referral regarding a temporary situational problem (least intensive)." Therefore, they were contractually bound to provide the services that the County was to provide under the MHPA.

[*57] In *West v. Atkins, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988)*, the Supreme Court was faced with a prisoner's suit against a private physician who was under contract with the prison hospital to provide orthopedic services to inmates. *See West, 487 U.S. at 44*. The Court concluded that the physician was a state actor for purposes of *§ 1983* because the state had created a contractual relationship with the physician who was the only doctor to whom the inmates could turn for his specialty of medical care. *See id. at 54-55*. The Court noted that the contractual relationship between the state and the physician and the obligation of the state to provide medical care to inmates dictated the state action finding; the fact that the physician was an independent contractor and not a state employee did not affect the state action analysis. *See id. at 55-56*. The Court stated:

> It is the physician's function while working for the State, not the amount of time he spends in performance of those duties or the fact that he may be employed by others to perform similar duties, that determines whether he is acting under color of state law. In the State's employ, respondent [*58] worked as a physician at the prison hospital fully vested with state authority to fulfill essential aspects of the duty, placed on the State by the *Eighth Amendment* and state law, to provide essential medical care to those the State had incarcerated. Doctor Atkins must be considered to be a state actor.

Id. at 56-57.

Here, the Foundation defendants are in the same position as the physician in *West*; LVF entered into a contract with Bucks County to provide the mental health services that Bucks County was obligated to provide under the MHPA. LVF employed Bryant to effectuate its duties under the contract. Accordingly, I conclude that Bucks County delegated its authority to provide mental health services under the MHPA to the Foundation defendants such that the Foundation defendants are state actors for purposes of *§ 1983*. [8]

8 In their reply brief, the Foundation defendants argue that they could not be state actors because Bucks County did not delegate to LVF the authority to issue a 302 warrant; that authority remained with the County. While this may be true as to the actual issuance of the 302 warrant, Bucks County did delegate substantial responsibilities under the MHPA to LVF. I must conclude LVF was a state actor with respect to its duties under the contract with Bucks County.

[*59] **B. Liability of LVF for Constitutional Violations**

(i) On What Basis Can LVF Be Held Liable For Violation of Plaintiff's Constitutional Rights

LVF was a private entity acting as a state actor. LVF argues that it should not be held liable under principles of respondeat superior, just as a municipality is not. At the same time, however, it argues that theories permitting liability against municipalities should not apply. It does not support this argument with authority in the case law. Plaintiffs contend that the same standards applicable to municipalities apply, that is, that LVF will be liable if it had a custom and policy which violated constitutional rights. *See Monell v. Department of Social Servs., 436 U.S. 658, 691-92, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)*. I believe that the Supreme Court's holding in *Monell* applies with equal force to both municipalities

and private entities which are state actors. In rejecting *respondeat superior* liability and defining the "custom and policy" requirement, the Supreme Court did not rest upon factors unique to municipalities but, instead, relied upon more general legislative history. It stated:

> We conclude, therefore, [*60] that a local government may not be sued under *§ 1983* for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under *§ 1983*.

Id. I find that in order to be held liable under *§ 1983* for any constitutional violation which may have occurred, LVF must have a custom or policy which caused the violation. The question before me is whether LVF is entitled to judgment as a matter of law that it did not have a custom and policy that caused any violation of Rebecca Doby's constitutional rights.

(ii) Did LVF Have A Custom And Policy That Caused A Violation Of Plaintiff's Constitutional Rights

The practice of LVF, as related by Bryant and a supervisor, Mr. Eusebi, was to have a crisis worker take information from the petitioner, then consult with and take instructions from the County Administrator or delegate by telephone. Plaintiffs contend that LVF should have investigated the facts independently, rather than acting solely as a [*61] facilitator. Plaintiffs also contend that LVF should have contacted Rebecca Doby's doctor, Dr. London, and her husband; this complaint is related to LVF's challenged custom of performing no independent investigation of information presented in a 302 petition. In addition, plaintiffs argue that LVF should have investigated further into what the least restrictive alternative actually available was, rather than relying upon the representation of the 302 petition. The plaintiffs' argument stems from their belief that, had LVF done this, perhaps the investigation would have revealed information that would have caused Neidhardt not to issue the warrant. However, custom and policy for purposes of *§ 1983* municipal liability is not proven by demonstrating that a municipality has a practice which in *one* instance caused a constitutional violation. Rather, the essence of *Monell* and its progeny is that custom and policy means habitual neglect or indifference to rights, such as a pattern of behavior or conduct which reflects that the entity has adopted a practice that *causes* constitutional violations. [9] *See Monell, 436 U.S. at 694-95*; *Beck v. City of Pittsburgh, 89 F.3d 966*, [*62] slip op. at 10-12 (3d Cir. 1996); *Bielevicz v. Dubinon, 915 F.2d 845, 850 (3d Cir. 1990)*. Plaintiffs have made no showing that LVF has engaged in a custom of processing warrant applications in a way that violates constitutional rights of those sought to be brought in for treatment, or that their practices in this regard were suspect in any way.

> 9 The cases applying *Monell* discuss custom and policy in terms that imply, if not require, that the municipality must have known, or reasonably should have realized, from the nature of its conduct or from actual past violation, that its practices were causing or likely to cause violations of constitutional rights, and permitted these practices to continue. The Third Circuit in *Bielevicz v. Dubinon, 915 F.2d 845 (3d Cir. 1990)*, defines "custom or policy" as "tolerated known misconduct," *id. at 851*, "known but uncorrected custom or usage," *id.*, "failure to act, once [the municipality] was on notice that its procedures were constitutionally deficient," *id.*, "the township was on notice of the inadequacy of its detention procedures," *id.*, "continued official tolerance of repeated misconduct," *id.*, "acquiesced in the continuation of this custom," *id.*

[*63] Plaintiffs also attack LVF's practice of accepting information for warrants from responsible adults, arguing that "physician or other responsible person" limits those who should be allowed to petition to persons with physician-like training. I find no constitutional implications in this practice, first, because I disagree with plaintiffs' interpretation of the statute, but also because, again, I find no showing that the practice of permitting non-physicians to report facts to support the issuance of warrants is a custom and policy that cause constitutional violations. [10]

> 10 Plaintiffs have argued in their motion for summary judgment that the MHPA must be construed so as to allow only physician or

physician-like persons to petition for a 302 warrant. Under their proffered construction of the MHPA, DeCrescenzo would be an improper petitioner under the MHPA which, according to plaintiffs, would render the 302 warrant issued for Rebecca Doby invalid under the *Fourth Amendment*. However, I have very little basis for construing this language narrowly so as to find that only a limited class of people, physicians or physician-like people, could supply facts constituting "reasonable grounds" under the MHPA. The reporter of facts does not opine, diagnose, or decide whether someone should be committed *§ 7302(a)(1)*. While plaintiffs argue that legislative intent and statutory construction principles require that the meaning of "other responsible party" be limited, I find that the context of this statutory language undercuts this.

The statute focuses not so much on the type of person completing a 302 petition but, rather, on the quality of the information they convey. A county administrator may issue a warrant "upon written application by a physician or other responsible party *setting forth facts constituting reasonable grounds to believe a person is severely mentally disabled and in need of immediate treatment*." *Pa. Stat. Ann. tit. 50, § 7302(a)(1)* (Supp. 1996). I will decline to construe the concept of "other responsible party" in a vacuum. Whether a party was or was not responsible, as a 302 petition applicant, in a given setting must be determined on a case by case basis. In reaching this conclusion, I employ two principles of statutory construction under Pennsylvania law. First, "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." *Pa. Stat. Ann. tit. 1, § 1921(b)* (1995). Second, "words and phrases shall be construed according to . . . their common and approved usage." *Pa. Stat. Ann. tit. 1, § 1903(a)* (1995). "Responsible" is defined, in this context, as:

> 1. Being legally or ethically accountable for the welfare or care of another. 2. Involving personal accountability or ability to act free from guidance or higher authority. . . . 4. Capable of making moral or rational decisions on one's own, thereby being answerable for one's behavior. 5. Capable of being trusted or depended on: reliable. 6. Based on or marked by good judgment.

I believe that the term "other responsible party" is free from ambiguity such that I need not engage in the more complicated statutory construction analysis plaintiffs advocate. Given his apparently close relationship to Rebecca Doby and the facts related by him, I cannot say that DeCrescenzo should have been viewed by Bryant or Neidhardt as anything other than a responsible party.

[*64] I find, therefore, that plaintiffs have failed to show that a genuine issue of material fact exists that LVF has a custom or policy which has deprived plaintiffs of their constitutional rights, and I will grant the Foundation defendants' motion for summary judgment as to plaintiffs' *§ 1983* claim against LVF.

C. Whether Bryant Is Entitled To Good Faith Immunity

Bryant [11] argues that she is entitled to good faith immunity from plaintiffs' *§ 1983* claims because her conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Plaintiffs reply that Bryant is not entitled to good faith or qualified immunity because she deliberately and recklessly disregarded plaintiffs' rights by not holding a hearing, not balancing Rebecca Doby's individual rights versus medical necessity, making no attempt to verify the veracity of DeCrescenzo, and making no attempt to ensure that the warrant was necessary.

11 The Foundation defendants actually argue that both LVF and Bryant are entitled to a "good faith" defense such that plaintiffs' *§ 1983* claims against them must be dismissed; however, their legal discussion seems to argue for qualified immunity. The Supreme Court has explicitly rejected the notion that private actors who are found to be state actors for purposes of *§ 1983* can avail themselves of qualified immunity. *See Wyatt v. Cole, 504 U.S. 158, 168-69, 118 L. Ed. 2d 504, 112 S. Ct. 1827 (1992)*. The Third Circuit has

adopted a form of a good faith defense to *§ 1983* actions applicable to private persons, and so for purposes of my discussion here, I will analyze whether Bryant may escape liability under the Third Circuit's good faith defense.

As for the Foundation defendants' claim that LVF is entitled to a good faith defense, I need not resolve this issue here because I have decided above that LVF had no custom or policy which violated plaintiffs' federal constitutional rights.

[*65] In *Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250 (3d Cir. 1994)*, the Third Circuit adopted a modified form of the good faith defense available to individual private actors in *§ 1983* claims in the Fifth Circuit:

> [The Fifth Circuit] said: "Private defendants should not be held liable under *§ 1983* absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity." We are in basic agreement, but we believe "malice" in this context means a creditor's subjective appreciation that its act deprives the debtor of his constitutional right to due process.

Id. at 1276 (citation omitted). I see no evidence which would indicate that Bryant was aware or knew that any of her actions might violate Rebecca Doby's rights. While plaintiffs allege deliberate and reckless behavior on the part of Bryant, they have not provided support for their allegations, nor have they provided evidence that Bryant knew her actions would cause a constitutional deprivation. Instead, I conclude that Bryant simply followed the policies of LVF whereby she did not make substantive decisions regarding the merits of 302 applications; [*66] her role was to facilitate the processing of 302 petitions. There is no evidence that she was aware of any constitutional infirmity in this process. Accordingly, the Foundation defendants' motion for summary judgment as to plaintiffs' *§ 1983* claim against Bryant will be granted. [12]

12 The Foundation defendants make an additional argument that plaintiffs cannot maintain direct causes of action for constitutional violations but must proceed via a *§ 1983* action. They cite to two paragraphs of plaintiffs' complaint as evidence that plaintiffs are attempting to bring claims directly under those constitutional provisions. I read the complaint as raising several different constitutional violations, all within the context of their *§ 1983* claim. The paragraphs cited both allege that Rebecca Doby's *Fourth*, *Eighth*, and *Fourteenth Amendment* rights "actionable under *42 U.S.C.A. § 1983*." As plaintiffs have only stated a *§ 1983* claim with several elements, I will not address the Foundation defendants' argument here.

In addition, as I have dismissed plaintiffs' *§ 1983* claims against both LVF and Bryant, I need not address whether plaintiffs stated valid constitutional claims against LVF and Bryant.

[*67] **D. Whether The Foundation Defendants Are Immune From Plaintiffs' State Law Claims Under *§ 7114* Of The MHPA**

The Foundation defendants next argue that they are entitled to immunity under *§ 7114* of the MHPA from plaintiffs' state law claims. As discussed above in conjunction with DeCrescenzo's claim for immunity under *§ 7114*, the MHPA provides immunity to various officials, including a county administrator, and any other authorized person who participates in a decision that someone be examined or treated under the MHPA. *See Pa. Stat. Ann. tit. 50, § 7114(a)* (Supp. 1996). Plaintiffs argue that the Foundation defendants are not entitled to immunity because they acted with gross negligence or willful misconduct.

First, I note that if Bryant is entitled to immunity, then LVF will also be immune under *§ 7114*. *See Farago v. Sacred Heart General Hosp., 522 Pa. 410, 562 A.2d 300, 303 (Pa. 1989)*. The *Farago* court stated:

> Unquestionably, the clear intent of the General Assembly in enacting Section 114 of the MHPA was to provide limited civil and criminal immunity to those individuals and institutions charged with providing treatment to the mentally ill. Treatment [*68] in these facilities, in practical terms, must be administered by individuals. Therefore, these facilities do not act independent of their personnel. To allow an individual to claim immunity

> under this provision but in turn preclude its employer the same benefit of the immunity would indeed undermine the stated purpose of the limited immunity conferred under the Act. This result would only encourage a plaintiff to circumvent the immunity clause by naming a hospital or facility and not its employees in a lawsuit: a result which would be both absurd and unreasonable.

562 A.2d at 303 (citations omitted). Accordingly, I need only decide whether Bryant is entitled to immunity under *§ 7114(a)*.

Section 7114(a) first requires that a person be "authorized" in order to receive immunity under that section if she is not "a county administrator, a director of a facility, a physician, [or] a peace officer." *See id.* I conclude that Bryant was an authorized person because she was LVF's employee, such that she was cloaked with the authority of Bucks County by virtue of LVF's contract with Bucks County under which LVF performed many of Bucks County's duties under the MHPA. The statute [*69] further requires that one must "participate[] in a decision that a person be examined or treated" to be immune under *§ 7114(a). Pa. Stat. Ann. tit. 50, § 7114(a)* (Supp. 1996). The Pennsylvania courts have construed this language as requiring that immunity will be given only to those who are involved in the mental health field by virtue of their training or experience. *See McNamara v. Schleifer Ambulance Serv., Inc., 383 Pa. Super. 100, 556 A.2d 448, 449-50 (Pa. Super. Ct. 1989).*

Bryant was an employee of LVF which was under contract with Bucks County to provide mental health services required under the MHPA, not only in the emergency 302 warrant situation, but also in non-emergency situations. Bryant did play a role in the decision to issue a 302 warrant for Rebecca Doby. She inquired of DeCrescenzo as to the least restrictive treatment option which would meet Rebecca Doby's needs. She gathered information and asked questions to clarify the information presented by the petitioner and determine the behavior DeCrescenzo had witnessed in the past 30 days. Bryant also advised DeCrescenzo of the different alternatives available. She presented information to the county delegate, [*70] here Neidhardt, and would ask any follow-up questions which the delegate thought were necessary. While I recognize that Bryant's view of her role as a facilitator and scrivener means that she herself did not make the decision to issue a 302 warrant for Rebecca Doby, I nevertheless conclude that Bryant participated in the decision to examine and treat Rebecca Doby such that she is entitled to immunity under *§ 7114(a)* as long as she did not act with gross negligence or willful misconduct. *Section 7114(a)* does not limit the immunity granted to decision makers; instead, it provides immunity to all who participate in a decision. Participation includes those who compile and present information to, and discuss it with, the county delegate. In addition, Bryant's training for her role as a crisis worker, albeit limited, is sufficient to bring the Foundation defendants within the scope of *§ 7114(a)* immunity. Accordingly, both LVF and Bryant are entitled immunity under *§ 7114(a)* if Bryant did not act with gross negligence or willful misconduct.

The Superior Court of Pennsylvania has discussed the level of culpability necessary to constitute gross negligence or willful misconduct under § [*71] *7114(a). See Bloom v. Dubois Regional Medical Ctr., 409 Pa. Super. 83, 597 A.2d 671, 677 n. 6, 679 (Pa. Super. Ct. 1991).* In *Bloom*, the court defined willful misconduct "for immunity purposes as 'conduct whereby the actor desired to being about the result that followed or at least was aware that it was certain to follow, so that such desire can be implied.'" *597 A.2d at 677 n. 6*. Gross negligence, for purposes of *§ 7114(a)*, is "a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care." *Id. at 679*.

I see no such conduct on the part of the Foundation defendants. The plaintiffs have portrayed the Foundation defendants as adopting a passive approach to their role in assisting in the preparation of 302 petitions. This approach, and the purported lack of diligent inquiry plaintiffs rely upon, could not constitute anything more than, at most, ordinary negligence. Accordingly, I conclude that the Foundation defendants are entitled to immunity under *§ 7114(a)* of the MHPA from plaintiffs' state law claims [*72] for invasion of privacy (Count X), false arrest and false imprisonment (Count XI), assault and battery (Count XII), gross negligence/willful misconduct (Count XIV), intentional infliction of emotional distress (Count XVI), and loss of consortium (Count XVIII). [13] I will grant the Foundation defendants'

motion for summary judgment on this ground.

13 The grant of immunity under *§ 7114(a)* only extends to a decision that a person be examined or treated under the MHPA and its consequences, but plaintiffs have not argued or produced any evidence to support the notion that their claims against the Foundation defendants are based upon facts distinct from the decision to examine or treat Rebecca Doby under the MHPA.

IV. THE COUNTY DEFENDANTS' MOTION

Plaintiffs have sued Bucks County, Fenster, and Neidhardt for their actions in implementing the involuntary emergency examination provisions of the MHPA and their actions in the particular circumstances surrounding Rebecca Doby's involuntary emergency examination [*73] and commitment. Bucks County was responsible for implementing the provisions of the MHPA and contracted with LVF to perform many of its duties under the Act. Fenster is the county administrator for Bucks County and was responsible for issuing 302 warrants under the MHPA. Fenster has been sued only in his official capacity as county administrator; the Supreme Court has held that official capacity suits are simply "another way of pleading an action against an entity of which an officer is an agent." *Brandon v. Holt, 469 U.S. 464, 472 n. 21, 83 L. Ed. 2d 878, 105 S. Ct. 873 (1985)* (internal quotation omitted). Accordingly, plaintiffs have essentially named Bucks County twice as a defendant, and I will, therefore, only discuss the claims against Bucks County and Neidhardt, not Fenster. Neidhardt was the county mental health delegate for Bucks County who, at the time that DeCrescenzo submitted the 302 application, was responsible for reviewing and approving 302 petitions.

The County defendants raise several arguments in support of their motion for summary judgment. I need address only three of them. First, they assert that they are entitled to qualified immunity for plaintiffs' *§* [*74] *1983* claims because plaintiffs have not shown that the County defendants knew or should have known that they were violating plaintiffs' clearly established constitutional rights. Next, they argue that plaintiffs have failed to demonstrate that Bucks County adopted a custom or policy which violated plaintiffs' constitutional rights sufficient to impose liability on Bucks County under *§ 1983*. Last, the County defendants argue that they are entitled to immunity from plaintiffs' state law claims pursuant to *§ 7114(a)* of the MHPA.

A. Whether The County Defendants Are Entitled To Qualified Immunity From Plaintiffs' *§ 1983* Claims

The County defendants argue that they are entitled to qualified immunity from plaintiffs' *§ 1983* claims because they did not violate clearly established constitutional rights of which they knew or should have known. Plaintiffs respond that they have shown that the County defendants violated clearly established constitutional rights such that they may not claim qualified immunity.

As an initial matter, I note that qualified immunity is a defense available to officials for individual-capacity suits against them; it is not available to governmental agencies [*75] or officials sued in their official capacity. *See Harlow v. Fitzgerald, 457 U.S. 800, 817-19, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)*. Thus, the County defendants' qualified immunity defense is available only to Neidhardt, not to Bucks County or Fenster, who is sued only in his official capacity.

In *Harlow*, the Supreme Court defined the contours of qualified immunity: "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id. at 818*. In the context of a motion for summary judgment, I may determine the currently applicable law and whether it was clearly established at the time the events alleged occurred. *See id.* In making these decisions, I rely upon objective factors, not the subjective knowledge of the particular defendant. *See id. at 819*.

Here, plaintiffs have alleged that Neidhardt violated the *Fourth Amendment* by issuing a 302 warrant for Rebecca Doby without probable cause and also violated due process requirements by not following certain procedural protections [*76] required before depriving Rebecca Doby of her liberty. I will discuss each claim in turn to determine whether Neidhardt violated clearly established constitutional rights in her handling of the 302 application filed with respect to Rebecca Doby.

The probable cause to seize and detain an individual for an involuntary commitment will depend upon, in part, the length of the detention:

> The shorter the detention, the less

> compelling is the evidence of the necessity for it that the authorities need to produce. This is the theory of the "Terry stop" and of much else in *Fourth Amendment* law. In mathematical terms, the test of a reasonable commitment can be expressed by the inequality C<PH, where C is the cost of confinement to the person confined, H is the harm he might do if released, and P is the probability of his doing that harm if released. . . . The test of negligence at common law and of an unlawful search or seizure challenged under the *Fourth Amendment* is the same: unreasonableness in the circumstances.

Villanova v. Abrams, 972 F.2d 792, 795 (7th Cir. 1992) (citations omitted).

Here, Neidhardt issued a 302 warrant which allowed Rebecca Doby to be taken into custody [*77] by the police and kept in custody for a maximum of two hours for purposes of performing an emergency examination. In light of the extremely brief duration of detention authorized by the warrant, the probable cause needed to sustain Neidhardt's decision to issue the warrant is low as compared to the probable cause required in an arrest situation. *See id.*; *Cf. McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 547-50* (1st Cir.), *petition for cert. filed*, *64 U.S.L.W. 3808* (May 29, 1996).

The information and documents received from DeCrescenzo clearly reflected a suicidal person in imminent danger, giving "reasonable grounds" to believe she was severely mentally disabled and in need of immediate treatment. Even if the evidence relied upon was not sufficient to constitute probable cause in this particular case, I cannot conclude that Neidhardt violated a clearly established *Fourth Amendment* right of which a reasonable person in her situation would have been aware. [14] Rather, in light of the emergency nature of the proceeding, the short duration of the 302 warrant, and the facts presented, a reasonable person deciding whether to issue a 302 warrant under these circumstances [*78] would have concluded that probable cause existed for an involuntary emergency examination to last no longer than two hours and that the issuance of the warrant did not violate Doby's clearly established constitutional rights. Similarly, I have no basis for concluding that Neidhardt violated a clearly established right to due process of which a reasonable person in her situation would have been aware [15] by following the MHPA procedures as she did and reaching her decision based on all the facts. Issuing a 302 warrant based upon this information could not be deemed a violation of clearly established constitutional rights of which she should have been aware. Neidhardt is entitled to qualified immunity from plaintiffs' *Fourth Amendment* and due process claims for her decision to issue a 302 warrant for Rebecca Doby.

14 In *McCabe*, the court allowed a person to be seized for an involuntary commitment via a "pink paper," a slip signed by a physician, noting:

> Although the *Fourth Amendment* is implicated in a variety of civil proceedings, the Supreme Court has made it clear that the civil nature of certain search procedures may call for a narrowed application of the warrant and probable cause requirements.

Id. (citation omitted). The court eventually held that a seizure for purposes of an involuntary commitment fell within an exception to the probable cause and warrant requirements of the *Fourth Amendment*. *See id. at 545*. The warrantless search and seizure was permitted when conducted for an important administrative or regulatory purpose. *See id.* The lower probable cause burden in a circumstance such as an involuntary commitment, and possibly the lack of probable cause requirement as noted by the *McCabe* court, dictates my finding that Neidhardt did not violate any clearly established due process or *Fourth Amendment* rights of Rebecca Doby of which a reasonable person should have known. If the law, in fact, today holds that the process used here, which is very similar to that approved by the *McCabe* court, did not violate Rebecca Doby's constitutional rights, then I would be hard pressed to conclude that the law was clearly established to the contrary three years ago.

[*79]

15 The fact that Neidhardt received information and approved the warrant via telephone does not affect my decision. The emergency nature of the 302 petition, the potentially disastrous consequences of a delay in issuing the 302

> warrant, and the short duration of the warrant all militate in favor of a finding that the county delegate is not constitutionally required to be present to meet the petitioner and need not personally sign the warrant. *See generally McCabe v. Life-Line Ambulance Serv., Inc., 77 F.3d 540, 552* (1st Cir.), *petition for cert. filed*, *64 U.S.L.W. 3808* (May 29, 1996).

B. Whether Bucks County Had A Custom Or Policy Which Violated Plaintiffs' *Fourth Amendment* Or Due Process Rights

The County defendants next argue that plaintiffs' *§ 1983* claim against Bucks County must be dismissed because plaintiffs have failed to show that Bucks County had a custom or policy which violated plaintiffs' rights. Plaintiffs respond that Bucks County's custom of not investigating the information presented, not placing the affiant under oath, not reviewing documents presented before [*80] issuing a warrant, and issuing warrants over the telephone all violated the notions of due process and probable cause required under the *Fourth* and *Fourteenth Amendments*.

As discussed in connection with LVF's motion for summary judgment, plaintiffs must demonstrate a custom or policy of Bucks County which caused constitutional violations. My discussion with respect to LVF has application here. Again, I need not reach the issue of constitutional violation, because I find the type of custom and policy that will subject Bucks County to liability to be lacking. As with LVF, plaintiffs complain of an instance in which, had Bucks County conducted itself differently, an alleged wrong might not have occurred. However, no indifference or clearly inadequate practice, or tolerance of a flawed procedure, has been shown.

The First Circuit in *McCabe* allowed the police to conduct warrantless seizures of individuals who were to be involuntarily committed based upon a "pink paper" signed by a physician; on the facts of *McCabe*, the physician had signed the pink paper based solely upon the reports of family members and neighbors. *See id. at 542, 546-47*. The court did not indicate that the [*81] reports had been made under oath or that the physician had made any attempt to verify the information presented. It held that the pink paper provided evidence of a "special need" such that:

> [A] residential search pursuant to an established warrantless search procedure may be reasonable if conducted in furtherance of an important administrative or regulatory purpose, or "special need," which would be undermined systemically by an impracticable warrant or probable-cause requirement.

Id. at 545. I concur with the court's conclusion in *McCabe* and conclude that Bucks County's procedure of receiving information and issuing a warrant via telephone, without placing the affiant under oath, does not constitute a custom or policy which violates the *Fourth Amendment* or due process requirements. Accordingly, I will dismiss plaintiffs' *§ 1983* claim against Bucks County and Fenster, who was sues in his official capacity.

C. Whether The County Defendants Are Entitled To Immunity Under *§ 7114(a)* Of The MHPA

The County defendants next argue that they are entitled to immunity from plaintiffs' state law claims pursuant to *§ 7114(a)* of the MHPA. Plaintiffs respond that [*82] the County defendants acted with gross negligence or willful misconduct such that they fall outside of the grant of immunity contained in *§ 7114(a)*. I have discussed the scope of immunity granted by *§ 7114(a)* above in connection with the same arguments raised by DeCrescenzo and the Foundation defendants, and I will not repeat that discussion here. I find that the County defendants fall within the grant of immunity because *§ 7114(a)* grants immunity to "a county administrator . . . or any other authorized person." *Pa. Stat. Ann. tit. 50, § 7114(a)* (Supp. 1996). Further, as may be clear from my analysis in the preceding two sections, I conclude that neither Bucks County nor Neidhardt acted with gross negligence or willful misconduct. Accordingly, the County defendants are immune from plaintiffs' state law claims under *§ 7114(a)*, and plaintiffs' state law claims against the County defendants will be dismissed. All of plaintiffs' federal and state claims against the County will be dismissed.

V. THE POLICE DEFENDANTS' MOTION

Warrington Township, the Police Department, Chief Bonargo, Knox, Neipp, and Hawthorn have collectively sought summary judgment absolving them of liability

[*83] for their role in Rebecca Doby's involuntary commitment in December of 1993. Plaintiffs have sued the Police defendants for *Fourth*, *Eighth*, and *Fourteenth Amendment* violations via *§ 1983* and state law claims of invasion of privacy, false arrest and false imprisonment, assault and battery, gross negligence/willful misconduct, intentional infliction of emotional distress, and loss of consortium.

First, the Police defendants ask that I dismiss plaintiffs' official capacity claim under *§ 1983* against Chief Bonargo, Knox, Neipp, and Hawthorn because those claims merge into the claim against their employer, either Warrington Township or the Police Department.

Second, the Police defendants next argue that plaintiffs' *§ 1983* claim must be dismissed because plaintiffs have not shown any constitutional violation, either on the part of the individual police officers or on the part of the Police Department via showing of a custom or policy which caused the alleged constitutional deprivation.

Third, they contend that Sergeant Knox, Officer Neipp, and Officer Hawthorn are entitled to qualified immunity from plaintiffs' *§ 1983* claim because they did not violate any clearly established constitutional [*84] rights in dealing with Rebecca Doby.

Fourth, they ask that I dismiss plaintiffs' punitive damages claim under *§ 1983* against Warrington Township and the Police Department because punitive damages cannot be awarded against a public entity under *§ 1983*.

Fifth, the Police defendants seek to dismiss plaintiffs' state law claims based upon the immunity granted in the Pennsylvania Political Subdivision Tort Claims Act.

Sixth, they believe they also are entitled to immunity under *§ 7114(a)* of the MHPA.

Seventh, they ask that I grant summary judgment as to plaintiffs' invasion of privacy claim because plaintiffs have provided no evidence to support that claim.

Eighth, the Police defendants argue that plaintiffs' false arrest and imprisonment claim should be dismissed as a matter of law because the police had probable cause and had no discretion as to whether to serve the warrant.

Ninth, they contend that the assault and battery claim must be dismissed because they were entitled to use force once she resisted arrest.

Tenth, they seek summary judgment as to the gross negligence/willful misconduct claim because the Police defendants followed appropriate procedures and because Rebecca [*85] Doby's embarrassment resulted from her own actions, not theirs.

Finally, they argue that they are entitled to summary judgment on plaintiffs' intentional infliction of emotional distress and loss of consortium claims pursuant to the Tort Claims Act.

A. Whether Plaintiffs Have Demonstrated The Police Defendants Violated Their Constitutional Rights

The Police defendants make several arguments in support of their contention that plaintiffs have not proven a constitutional violation. I address three as a preliminary matter. First, the Police defendants argue that plaintiffs' official capacity claims against Knox, Neipp, and Hawthorn should be dismissed because they have already sued the entity; they make the same argument elsewhere in their brief with respect to the official capacity claim against Chief Bonargo. As discussed above, official capacity suits are simply another method of pleading an action against the entity which employs the official. *See Brandon v. Holt, 469 U.S. 464, 472 n. 21, 83 L. Ed. 2d 878, 105 S. Ct. 873 (1985)*. Plaintiffs have sued Warrington Township and the Police Department, a department of the Township, so their official capacity claims against Knox, [*86] Neipp, Hawthorn, and Chief Bonargo are redundant. I will dismiss the official capacity claims against the aforementioned individuals. 16 Next, the Police defendants argue that plaintiffs' *§ 1983* claim must be dismissed to the extent it rests upon state law violations; I agree. *See Baker v. McCollan, 443 U.S. 137, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979)*. I will dismiss plaintiffs' *§ 1983* claim to the extent that it rests upon violations of the MHPA.

16 In addition, I note that naming both Warrington Township and the Police Department also appears to be naming the same defendant twice. However, the Police defendants have not asked that I dismiss the claims against one or the other of these two defendants, so I will leave the claims against both intact but, for purposes of this Memorandum opinion, will refer to both defendants as the Police Department.

Later in their brief, the Police defendants argue that the claims against Chief Bonargo should be dismissed because plaintiffs had not shown that supervisory liability should be imposed upon him. I need not reach this issue because Chief Bonargo was sued only in his official capacity which, as discussed above, is a suit against the entity employing him, here the Police Department.

[*87] Last, defendants contend that plaintiffs have not shown any constitutional violation committed by the Police defendants. Plaintiffs' complaint alleges *Fourth Amendment* violations based upon the Police defendants' actions in taking Rebecca Doby into custody pursuant to the 302 warrant and transporting her to Doylestown Hospital where she was examined by Dr. Richards. Plaintiffs also appear to seek liability for actions taken by the hospital thereafter in giving Rebecca Doby psychotropic medications and keeping her confined for several days. [17]

17 In their opposition to all of the defendants' summary judgment motions, plaintiffs do not appear to maintain their claim that the Police defendants violated their rights by Doylestown Hospital's forced medication and confinement of Rebecca Doby after the police officers transported her to Doylestown Hospital. In addition, they have not provided any legal support for such an argument. Accordingly, I will assume that plaintiffs no longer seek to impose liability on the Police defendants for actions taken by Doylestown Hospital after the officers left Rebecca Doby there.

[*88] Plaintiffs' first constitutional claim against the Police defendants is that they arrested her without probable cause in violation of the *Fourth Amendment* because they relied upon a facially invalid warrant. The Police defendants argue that they had no discretion to question the warrant but were required under the MHPA to transport the person listed, Rebecca Doby. They have produced an expert report which notes that "they must accept the warrant of [sic] face value."

As to plaintiffs' complaint that the 302 warrant was facially invalid because it was approved over the telephone and signed by Bryant on behalf of Neidhardt, I disagree. The Pennsylvania Commonwealth Court in *Uram v. County of Allegheny, 130 Pa. Commw. 148, 567 A.2d 753 (Pa. Commw. Ct. 1989)*, specifically held that receiving information over and approving a 302 warrant via the telephone did not violate either the MHPA or the Due Process Clause. *See 567 A.2d at 757*. I find that this procedure similarly does not create a facially invalid warrant simply because the warrant is signed by Bryant for Neidhardt.

Police officers executing a facially valid warrant, as was the case here, cannot be held liable for executing [*89] it. *See Malley v. Briggs, 475 U.S. 335, 345-46, 346 n. 9, 89 L. Ed. 2d 271, 106 S. Ct. 1092 (1986)*; *Baker v. McCollan, 443 U.S. 137, 145-46, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979)*; *Stigall v. Madden, 26 F.3d 867, 869 (8th Cir. 1994)*. The Supreme Court in *Malley* stated that:

> It goes without saying that where a magistrate acts mistakenly in issuing a warrant but within the range of professional competence of a magistrate, the officer who requested the warrant cannot be held liable.

Malley, 475 U.S. at 346 n. 9. This rationale would also apply to the execution of a facially valid warrant. The *Baker* court absolved police officers executing a facially valid warrant of the duty to investigate claims that the warrant was improper. *See Baker, 443 U.S. at 145-56*. Finally, the Eighth Circuit has recently held that "the warrant itself, however, shields [the officer] from liability for executing it, unless a reasonably well-trained officer would have known that the arrest was illegal despite the magistrate's authorization." *Stigall, 26 F.3d at 869* (citation omitted). I conclude that the police officers here were serving a facially valid warrant [*90] on Rebecca Doby such that they cannot be held liable for a false arrest claim based on the *Fourth Amendment*. [18] Accordingly, I will grant the Police defendants' motion for summary judgment as to plaintiffs' *Fourth Amendment* claim based on lack of probable cause.

18 My conclusion that the police officers had properly served the warrant and are not liable if probable cause was lacking to serve the 302 warrant upon Rebecca Doby and take her into custody also resolves plaintiffs' invasion of privacy claim. If they were entitled to serve the warrant, they were entitled to enter her home to do so. *See Fisher v. Volz, 496 F.2d 333, 340-41 (3d Cir. 1974)*; *United States v. Jones, 475 F.2d*

723, 729 (5th Cir.), *cert. denied*, *414 U.S. 841, 38 L. Ed. 2d 77, 94 S. Ct. 96 (1973)*. Accordingly, I will grant the Police defendants' motion for summary judgment as to this claim.

Plaintiffs' second constitutional claim against the Police defendants is that they used excessive force against her in violation of the *Fourth* [*91] *Amendment* while arresting her. The Police defendants contend that this claim must be dismissed because they acted reasonably under the circumstances: the police knew the Dobys had guns, Rebecca Doby resisted arrest, and the police expert stated that handcuffs were routinely used on everyone, even mental patients. Plaintiffs respond by stating that Pennsylvania's mental health regulations prohibit the use of metal restraints when transporting mental health patients. In addition, they argue that the use of handcuffs and leg shackles and the fact that the police would not advise Rebecca Doby where they were taking her constitutes excessive force under these circumstances. Plaintiffs contend that the relevant circumstances are: three police officers were present, Rebecca Doby clearly did not have a gun with her while she was speaking with the police in the hall, and she was not being arrested on a criminal charge.

The Supreme Court in *Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989)*, has held that excessive force claims resulting from an investigatory stop or other seizure, such as an arrest, are governed by the *Fourth Amendment's* reasonableness standard which [*92] "requires a careful balancing of the nature and quality of the intrusion on the individual's *Fourth Amendment* interests against the countervailing governmental interests at stake." *Id. at 395-96* (internal quotation and citation omitted). This balancing focuses on objective factors and answers the question "whether the officers' actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." [19] *Id. at 397*.

19 The Police defendants argue that an excessive force claim under the *Fourth Amendment* must prove three elements: "1) a significant injury, which 2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was 3) objectively unreasonable." They rely upon the Fifth Circuit case of *Johnson v. Morel, 876 F.2d 477 (5th Cir. 1989)*, as support. However, the Police defendants have failed to mention the fact that the Fifth Circuit and legal commentators view the Supreme Court case of *Hudson v. McMillian, 503 U.S. 1, 117 L. Ed. 2d 156, 112 S. Ct. 995 (1992)*, as overruling the requirement in *Johnson* that a significant injury is required to state an excessive force claim. *See Dunn v. Denk, 79 F.3d 401, 402-03* (5th Cir.), *petition for cert. filed*, *64 U.S.L.W. 3795* (May 20, 1996); *Stroik v. Ponseti, 35 F.3d 155, 157 n. 3 (5th Cir. 1994)*, *cert. denied*, *131 L. Ed. 2d 556, 115 S. Ct. 1692 (1995)*; *Rankin v. Klevenhagen, 5 F.3d 103, 105 n. 2 (5th Cir. 1993)*; *King v. Chide, 974 F.2d 653, 657 (5th Cir. 1992)*; *Knight v. Caldwell, 970 F.2d 1430, 1432-33 (5th Cir. 1992)*, *cert. denied*, *507 U.S. 926 (1993)*; *see also* Martin A. Schwartz & John K. Kirklin, 1 *Section 1983 Litigation: Claims, Defenses, and Fees* 159 (2d ed. 1991 & Supp. 1994). Further, in a recent Third Circuit case, the court did not refer to an injury requirement at all and allowed an excessive force claim to proceed to trial which apparently involved no injuries at all. *See Baker v. Monroe Township, 50 F.3d 1186, 1189, 1193-94 (3d Cir. 1995)*. I am troubled by the Police defendants' citation, reliance, and discussion of *Johnson v. Morel*. Whether done with knowledge of the case's lack of precedential value or not, counsel misled the Court as to the state of the law. I rely upon the parties to provide an accurate indication of the state of the law I should apply. Counsel's brief was clearly lacking in this regard.

[*93] In *Baker v. Monroe Township, 50 F.3d 1186 (3d Cir. 1995)*, the Third Circuit reviewed the district court's grant of summary judgment to the police officers on the plaintiffs' excessive force claim. The *Baker* plaintiffs, a mother and her three children, had been walking up to a relative's house for dinner when police officers, who were beginning a raid upon the house, ordered them to get down on the ground. *See id. at 1188-89*. While a number of officers were performing the raid, several officers stayed with the plaintiffs, handcuffed them, and pointed guns at them. *See id. at 1189*. After the plaintiffs were identified as relatives of the person living in the home, they were released; some of the plaintiffs were kept in handcuffs for as long as twenty-five minutes. *See id.* The court found that if the jury believed the plaintiffs' evidence, it could conclude

that the circumstances present did not warrant the use of handcuffs and guns against the plaintiffs, who appeared to be paying a social call. *See id. at 1193*. Thus, the grant of summary judgment on this issue was improper.

I reach the same conclusion on the instant facts. Rebecca Doby was not being arrested; [*94] she was being transported for mental health purposes. While the police knew the Dobys had guns in their apartment, they also admitted that she did not have a firearm when they were speaking with her in the hallway outside of her apartment. The police knew that her husband thought the entire situation was being blown out of proportion. Three police officers were present when Rebecca Doby was taken into custody, and both Herbert Doby and their children were otherwise occupied in the Dobys' apartment. The apartment door was closed.

While certain facts relevant to this issue are disputed, I construe the facts in the plaintiffs' favor for purposes of summary judgment. Rebecca Doby states that the police did not provide her with any information as to why she was being arrested; they simply told her that she had to go with them. They talked her into stepping outside of the apartment so that her children would not see her talking with the police. She asked for information several times. They apparently began making insulting and degrading remarks and handcuffed her. When she tried to get the attention of her husband to let him know what was happening (because the police officers refused to [*95] allow her to return to the apartment to speak with her husband), the police placed her in leg shackles, dragged her out to the police car, and, at some point, performed a pat-down, over-the-clothes body search. A jury might easily conclude that the officers' use of force, in light of the circumstances, was unreasonable, especially when considering the fact that Rebecca Doby was not being arrested on a criminal charge but was being taken to a hospital for a mental examination.

I must also determine whether plaintiffs have stated an excessive force claim against the Police Department based upon a custom or policy of the Police Department. The police officers have testified that the Police Department had a policy of handcuffing everyone who was taken into custody, regardless of the purpose of custody or crime committed. In addition, they testified that they were given no special instructions for transporting people pursuant to a 302 warrant. The Police Department's policies regarding arrests contain no provision for transporting people pursuant to a 302 warrant.

Further, plaintiffs have produced, and the defendants have not contradicted, a Mental Health Bulletin published by the Pennsylvania [*96] Department of Public Welfare which states that the policy of that department is "any restraints made wholly or largely of metal shall not be purchased, maintained, or used for any purpose by employees or agents of state mental hospitals in the transport or behavior management of non-forensic patients." In light of this policy, I conclude that the Police Department's lack of any special procedures dealing with the custody and transport of 302 patients being taken for an examination might well be a custom or policy of the Police Department which violates the rights of those patients. *See Bielevicz v. Dubinon, 915 F.2d 845, 850-51 (3d Cir. 1990)*. I view this situation as very different from LVF's actions. LVF was not acting with knowledge or notice that its conduct caused or could cause constitutional violations, even if one did occur. Here, the Police Department had specifically drafted regulations on how to accomplish an arrest and the use of force and had made no provisions for people being transported by the police for a noncriminal reason. In addition, the Pennsylvania state agency responsible for mental health issues had specifically prohibited exactly what the Police Department [*97] allowed here, which clearly would constitute notice to the Police Department of potentially suspect procedures. The Police Department's lack of guidance in effect advises the police officers that they are to treat 302 patients just as any other person being arrested; however, the *Fourth Amendment* requires that police use force only as is reasonable under the circumstances. The force which would be reasonable when arresting a drug or murder suspect would not be reasonable when transporting someone who is in need of treatment for a mental condition. Accordingly, I will deny the Police defendants' motion for summary judgment on plaintiffs' claim for excessive force under the *Fourth Amendment*.

B. Whether Knox, Hawthorn, And Neipp Are Entitled To Qualified Immunity

The individual police officers next ask that I dismiss plaintiffs' excessive force claims against them because they are entitled to qualified immunity. As discussed above in my resolution of the County defendants' motion, the police officers are entitled to qualified immunity

unless they violated clearly established constitutional rights of which a reasonable officer would have been aware. Further, the constitutional [*98] rights must have been clearly established at the time of the alleged events. I first examine whether plaintiffs' alleged excessive force claim states facts which would have violated clearly established law at the time the events occurred. The individual police officers do not dispute that the reasonableness standard established by the Supreme Court for excessive force claims in *Graham v. Connor* was clearly established as of December 1993 when the events in question occurred. *See Graham v. Connor, 490 U.S. 386, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989).*

Prior to December 1993, I note that the Third Circuit in *Black v. Stephens, 662 F.2d 181 (3d Cir. 1981)*, *cert. denied*, *455 U.S. 1008, 71 L. Ed. 2d 876, 102 S. Ct. 1646 (1982)*, held that the conduct of an unidentified police officer who pointed his revolver at a citizen's head, with another citizen's head directly in the line of fire, and threatened to shoot, shocked the conscience such that it could support liability for a *Fourth Amendment* excessive force claim. [20] In addition, the Seventh Circuit concluded that a police officer who pointed a gun at a child's head during a search of the child's home violated the excessive [*99] force prohibition of the *Fourth Amendment* when the child posed no threat to the safety of the officer, was not actively resisting arrest, was not under arrest or suspected of committing a crime, was not armed, and was not interfering with the performance of the officer's duties. *See McDonald v. Haskins, 966 F.2d 292, 292-93, 294-95 (7th Cir. 1992).* Construing the facts in the light most favorable to plaintiffs, I conclude that a reasonable officer would have known that using leg shackles and handcuffs and performing a pat-down body search on a mental patient who was unarmed and who was not suspected of any crime was an unreasonable use of force in that context, especially in light of the directive from the Pennsylvania Department of Public Health prohibiting the use of metal restraints on those being transported under the MHPA. Accordingly, the police officers are not entitled to summary judgment on the issue of qualified immunity from plaintiffs' *Fourth Amendment* excessive force claim.

20 The "shocks the conscience" standard which had been employed by different circuit courts prior to the Supreme Court's adoption of the reasonableness inquiry for all *Fourth Amendment* claims is even higher than the reasonableness standard I must apply. *See McDonald v. Haskins, 966 F.2d 292, 293, 295 (7th Cir. 1992).*

[*100] **C. Whether Punitive Damages Are Available Against The Police Department**

The Police defendants next ask that I dismiss the punitive damages claim against Chief Bonargo in his official capacity, Warrington Township, and the Police Department because punitive damages may not be awarded against a public entity. [21] As discussed above, plaintiffs' claims against these parties amount to one claim against the municipal entity, referred to herein as the Police Department. I agree with the Police defendants. The Supreme Court has held that municipalities are not liable for punitive damages under *§ 1983*. *See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981).* The Third Circuit has held that the rationale adopted by the Court in *City of Newport* prevented punitive damages from being assessed against a hybrid entity which could be analogized to a government entity, namely the regional transportation authority -- Southeastern Pennsylvania Transportation Authority. *See Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 830 (3d Cir. 1991)*, *cert. denied*, *504 U.S. 943, 119 L. Ed. 2d 206, 112 S. Ct. 2281 (1992)*. The parties [*101] agree that the Police Department is a local entity, and so I find that punitive damages may not be awarded against them. Accordingly, I will dismiss plaintiffs' punitive damages claim against Warrington Township, the Police Department, and Chief Bonargo in his official capacity.

21 They do not ask for the dismissal of punitive damages claims against the individual police officers.

D. Whether The Police Defendants Are Entitled To Immunity From Plaintiffs' State Law Claims Under The Pennsylvania Political Subdivision Tort Claims Act

The Police defendants next ask that I dismiss plaintiffs' state law claims against them because both the Police Department and the individual officers are immune from suit pursuant to the Pennsylvania Political Subdivision Tort Claims Act (hereinafter "Tort Claims Act"). Plaintiffs argue that the grant of immunity under the Tort Claims Act applies only to claims which are not brought under the MHPA and that the individual police officers are not immune from plaintiffs' alleged [*102]

intentional torts.

The Tort Claims Act grants local agencies, municipalities, and local officials immunity from liability for certain claims. It provides: "Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." *Pa. Stat. Ann. tit. 42, § 8541* (1982). The Pennsylvania legislature has created eight exceptions to the grant of immunity under the Tort Claims Act; the exceptions encompass negligent acts involving vehicle liability, personal property, real property, trees, traffic controls, street lighting, utility service facilities, streets, sidewalks, and animals. *See id.* at § 8542. In addition, the Tort Claims Act bars claims against a local agency for intentional, as well as negligent torts. *See Parsons v. City of Philadelphia, 833 F. Supp. 1108, 1118-19 (E.D. Pa. 1993)*; *Cooper v. City of Chester, 810 F. Supp. 618, 626 n. 8 (E.D. Pa. 1992).* Here, no one disputes that Warrington Township and the Police Department are local agencies within the meaning of the Tort Claims Act. Accordingly, I will dismiss [*103] all of plaintiffs' state law claims against Warrington Township, Warrington Township Police Department, and Chief Bonargo in his official capacity.

I reach a different result, however, with respect to plaintiffs' state law claims against the individual police officers sued in their individual capacity. [22] Unlike municipal entities, municipal employees or officials are not granted immunity under the Tort Claims Act for intentional torts:

> In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

Pa. Stat. Ann. tit. 42, § 8550 (1982). Plaintiffs have alleged that the police officers committed the torts of invasion of privacy, false arrest and false imprisonment, assault and battery, gross negligence/willful misconduct, [*104] and intentional infliction of emotional distress. These torts all fall outside of the grant of immunity as outlined in *§ 8550* above, so I will deny the Police defendants' motion on this ground as to the individual police officers.

> 22 As stated above, a suit against both an entity and an official in his or her official capacity is essentially a suit against the entity twice. This applies in analyzing state law claims as well.

E. Whether The Individual Police Officers Are Immune Under *§ 7114(a)* Of The MHPA

The Police defendants contend that the individual police officers are immune from plaintiffs' state law claims under *§ 7114(a)* of the MHPA. [23] Plaintiffs respond that the police officers are not entitled to immunity under *§ 7114(a)* because the officers violated the MHPA by using handcuffs and leg shackles and performing a body search.

> 23 Actually, the Police defendants argue that all of them, including the Police Department, Warrington Township, and Chief Bonargo's official-capacity claim, are entitled to immunity under *§ 7114(a)*; however, as I have already found that the local agencies are immune under the Tort Claims Act, I need not address whether the agencies would also be entitled to immunity under *§ 7114(a).*

[*105] To resolve this issue, I rely upon my discussion of *§ 7114(a)* immunity in connection with DeCrescenzo's motion. If ambulance drivers transporting a person under the MHPA do not "participate" in a treatment or examination decision, then neither do police officers who are transporting someone under the MHPA. *See McNamara v. Schleifer Ambulance Serv., Inc., 383 Pa. Super. 100, 556 A.2d 448, 450 (Pa. Super. Ct. 1989).* Accordingly, the police officers are not entitled to immunity under *§ 7114(a)*, and I will deny their motion upon this ground.

F. Whether Plaintiffs Have Adequately Alleged Their State Law Claims Against The Individual Police Officers

The Police defendants next make a series of arguments which attack plaintiffs' ability to maintain each state law claim against the individual police officers. [24] I address each state law claim separately.

24 Again, I discuss only the individual police officers because I have already concluded that Warrington Township, the Police Department, and Chief Bonargo in his official capacity are immune from suit under the Tort Claims Act.

[*106] **1. Invasion Of Privacy**

The police officers argue that plaintiffs have not provided any evidence to support their allegation of invasion of privacy (Count X) and that the officers complied with the terms of the 302 warrant and the MHPA.

As discussed above when resolving DeCrescenzo's motion, Pennsylvania law recognizes four distinct kinds of invasion of privacy: intrusion upon seclusion, public disclosure of private facts, false light, and appropriation for commercial purpose. *See Marks v. Bell Tel. Co., 460 Pa. 73, 331 A.2d 424, 430 (Pa. 1975).* Here, plaintiffs have alleged intrusion upon seclusion against the Police defendants by "intentionally, unlawfully and with deliberate indifference to the bounds of decency, dragged Mrs. Doby from her home in front of her neighbors and when Police Officer # 3 attended to the Dobys' children without the knowledge or consent of Mr. or Mrs. Doby."

Pennsylvania courts have adopted the Restatement (Second) of Torts' definition of intrusion upon seclusion which provides:

> One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability [*107] to the other for invasion of privacy, if the intrusion would be highly offensive to a reasonable person.

Doe v. Kohn Nast & Graf, P.C., 862 F. Supp. 1310, 1326 (E.D. Pa. 1994). While the police officers did intrude upon the privacy of the Dobys when they arrested Rebecca Doby and when one officer remained in the Dobys' apartment to advise Herbert Doby about what had transpired, I believe that such actions are justified when performed under a valid warrant. *See Fisher v. Volz, 496 F.2d 333, 340-41 (3d Cir. 1974)*; *United States v. Jones, 475 F.2d 723, 729* (5th Cir.), *cert. denied*, *414 U.S. 841, 38 L. Ed. 2d 77, 94 S. Ct. 96 (1973)*; *Commonwealth v. Terebieniec, 268 Pa. Super. 511, 408 A.2d 1120, 1126 (Pa. Super. Ct. 1979).* Police officers acting under a valid arrest warrant are permitted to enter that person's residence if they have probable cause to believe that the person is there. *See Terebieniec, 408 A.2d at 1126.* They are also permitted to search the residence to the extent necessary to locate the person identified in the warrant, as long as they do not use the search simply to uncover incriminating evidence or extend it beyond what is necessary. [*108] *See id. at 1127 n. 4.*

On the facts before me, the police officers clearly had probable cause to believe that Rebecca Doby was there because the apartment was hers, so they could enter the premises. In addition, while one police officer did remain in the Dobys' apartment after Rebecca Doby had been arrested, plaintiffs have not produced evidence that he performed any search of the apartment or gathered any evidence. Instead, he simply remained to inform Herbert Doby of what had happened and then left. I must, therefore, conclude that the police officers did not commit a highly offensive intrusion into the Dobys' privacy because they possessed a 302 warrant for Rebecca Doby and did not go beyond the authority therein. The action of one officer in waiting inside the apartment to tell Herbert Doby what had happened does not transform the intrusion into a highly offensive one. Accordingly, I will grant the Police defendants' motion on this ground and will dismiss plaintiffs' invasion of privacy claim against the individual police officers.

2. False Arrest And False Imprisonment

The individual police officers argue that plaintiffs' false arrest and false imprisonment claim (Count [*109] XI) against them should be dismissed because they complied with law enforcement procedures and were executing a valid 302 warrant. Plaintiffs state that the 302 warrant was not supported by probable cause.

False arrest or imprisonment occurs under Pennsylvania law where a person has been (1) arrested or restrained (2) without adequate legal justification. *See Gilbert v. Feld, 788 F. Supp. 854, 862 (E.D. Pa. 1992).* However, plaintiffs may maintain an action for false arrest against a police officer only when the process used for the arrest appears to be void on its face. *See Cassidy v. Abington Township, 131 Pa. Commw. 637, 571 A.2d*

543, 545 n. 1 (Pa. Commw. Ct.), *appeal denied*, *593 A.2d 424 (Pa. 1990)*; *see also Schneider v. Kessler, 97 F.2d 542, 544 (3d Cir. 1938)*. I have found above that the 302 warrant for Rebecca Doby was facially valid, so I conclude that plaintiffs' false arrest and false imprisonment claim against the individual police officers must be dismissed and will grant the police officers' motion in that regard. [25]

> 25 Above, I concluded that DeCrescenzo could be held liable for false arrest or imprisonment if he knowingly supplied misleading information to the authorities upon which a warrant was issued. I do not view my decision with respect to the police officers as being inconsistent with that conclusion. One who knowingly causes a warrant to issue on improper grounds should be liable for false arrest or imprisonment, while a police officer who serves a facially valid warrant should not be penalized because of a defect in the underlying evidence supporting the warrant. The police officer's role is to execute the warrant, not determine probable cause or the veracity of the information presented in the warrant. *See Baker v. McCollan, 443 U.S. 137, 145-46, 61 L. Ed. 2d 433, 99 S. Ct. 2689 (1979)*.

[*110] **3. Assault And Battery**

The individual police officers urge that I dismiss plaintiffs' assault and battery claim (Count XII) against them because the police officers acted reasonably under the circumstances and because Rebecca Doby was not entitled to resist even an unlawful arrest. Plaintiffs simply respond that the police officers committed both an assault and a battery because they intended both to put Rebecca Doby in an immediate apprehension of a harmful or offensive contact and to cause an offensive contact.

The rule in Pennsylvania is that "[a] police officer may be held liable for assault and battery when a jury determines that the force used in making an arrest in unnecessary or excessive." *Renk v. City of Pittsburgh, 641 A.2d 289, 293 (Pa. 1994)*. In light of my decision above that the individual police officers are not entitled to qualified immunity on plaintiffs' excessive force claim, a jury could find that the police officers here did use excessive force when arresting Rebecca Doby such that they committed an assault and battery. Accordingly, I will deny the individual police officers' motion on plaintiffs' assault and battery claim.

4. Gross Negligence [*111] **And Willful Misconduct**

The police officers seek summary judgment on plaintiffs' gross negligence/willful misconduct claim (Count XIV) because they complied with the MHPA, because they did not have to make an independent determination of probable cause, and because Rebecca Doby has only alleged that she was embarrassed which, according to the Police defendants, is insufficient to support a gross negligence claim. Plaintiffs, apparently, do not address this argument.

As discussed above in connection with DeCrescenzo's motion for summary judgment, Pennsylvania courts have tended to define gross negligence as "a want of even scant care, but something less than intentional indifference to consequences of acts" or "a failure to perform a duty in reckless disregard of the consequences or with such want of care and regard for the consequences as to justify a presumption of willfulness or wantonness." Jack K. Levin, *Negligence*, 2 Summary of Pennsylvania Jurisprudence 2d 1, 13 (Lonnie E. Griffith, Jr. et al. eds., 1991). Pennsylvania courts have defined willful misconduct as when:

> An actor has intentionally done an act of an unreasonable character, in disregard of a risk known [*112] to him or her or so obvious that he or she must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.

Brian H. Redmond, *Kinds & Classifications of Tortious Acts*, 1 Summary of Pennsylvania Jurisprudence 2d 47, 53 (Lonnie E. Griffith, Jr. et al. eds., 1991).

Under plaintiff's version of the facts, a jury could find that because they violated clearly established law regarding excessive force, so plaintiffs may maintain their claim for gross negligence or willful misconduct. If a jury finds that the police officers did use excessive force upon Rebecca Doby, then it could similarly find that the police officers acted with gross negligence or willful misconduct throughout their detention of Rebecca Doby by performing their duties with a reckless disregard for the consequences. Accordingly, I will deny the police officers' motion on plaintiffs' gross negligence and willful misconduct claim.

5. Intentional Infliction Of Emotional Distress

The individual police officers finally ask that I dismiss plaintiffs' intentional infliction of emotional distress claim (Count XVI) against them. Plaintiffs contend that the officers' actions [*113] were sufficiently outrageous to warrant a claim for intentional infliction of emotional distress.

In my discussion of DeCrescenzo's similar argument, I agreed with other federal courts that Pennsylvania does recognize a cause of action for intentional infliction of emotional distress. The Third Circuit has set out the elements of the tort: "1) the conduct must be extreme and outrageous; 2) the conduct must be intended; 3) the conduct must cause emotional distress; and 4) the distress must be severe." *Silver v. Mendel, 894 F.2d 598, 606* (3d Cir.), *cert. denied*, *496 U.S. 926, 110 L. Ed. 2d 641, 110 S. Ct. 2620 (1990)*. Outrageous conduct is that conduct which is:

> 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, "Outrageous!"

Corbett v. Morganstern, 1996 U.S. Dist. LEXIS 6692, No. 95-4776, 1996 WL 273676, at *3 (E.D. Pa. May 17, 1996) (internal quotation and citation omitted). As [*114] a preliminary matter, I must determine whether a jury could reasonably find that the complained of conduct was sufficiently extreme and outrageous so as to warrant recovery. *See id.*

If I view the facts in the light most favorable to the plaintiffs, as I must, I believe that a jury could find that the police officers' actions in refusing to inform, handcuffing, leg shackling, dragging, verbally insulting, and performing a pat-down body search of a woman who, they admit, did not have a gun on her person and who was being taken for a psychiatric evaluation, were sufficiently outrageous to constitute intentional infliction of emotional distress. Accordingly, I will deny the Police defendants' motion on plaintiffs' intentional infliction of emotional distress as to the individual police officers.

5. Loss of Consortium

I also will not dismiss Herbert Doby's loss of consortium claim (Count XVIII). A loss of consortium claim is derivative, and as I have allowed Rebecca Doby to maintain several state law claims against the Police defendants, Herbert Doby could recover for loss of consortium upon those claims if a jury were to find in favor of Rebecca Doby. *See Tiernan v. Devoe,* [*115] *923 F.2d 1024, 1036 (3d Cir. 1991)*; *Scattaregia v. Shin Shen Wu, 343 Pa. Super. 452, 495 A.2d 552, 553-54 (Pa. Super. Ct. 1985).*

V. DR. RICHARDS' MOTION

Plaintiffs have sued Dr. John C. Richards for his role in both examining Rebecca Doby after she was brought to Doylestown Hospital by the Warrington Township police under the 302 warrant and deciding that she should be involuntarily committed pursuant to § 302 of the MHPA for a period not to exceed 120 hours. They also complain that Dr. Richards prescribed psychotropic drugs for Rebecca Doby while she was involuntarily committed at Doylestown Hospital. Plaintiffs have alleged a host of state law claims against Dr. Richards such as false arrest and imprisonment, assault and battery, gross negligence and willful misconduct, intentional infliction of emotional distress, and loss of consortium. [26]

> 26 In an earlier Memorandum opinion resolving Dr. Richards' motion to dismiss, I dismissed plaintiffs' *§ 1983* and § 1985(3) claims against Dr. Richards. *See Doby v. DeCrescenzo, 1995 U.S. Dist. LEXIS 9105*, No. 94-3991, 1995 WL 385100, at *6 (E.D. Pa. June 27, 1995).

[*116] Dr. Richards raises a number of arguments in support of his motion for summary judgment. I will only address one, namely that Dr. Richards is entitled to immunity from plaintiffs' state law claims under *§ 7114(a)* of the MHPA, because I find that it is dispositive. As discussed above, *§ 7114(a)* provides immunity to a physician who participates in a decision that a person be examined or treated under the MHPA, unless the physician acted with gross negligence and willful misconduct. *See Pa. Stat. Ann. tit. 50, § 7114(a)* (Supp. 1996). As Dr. Richards is clearly a physician who decided that Rebecca Doby should be involuntarily committed for a period of time, he falls within the grant

of immunity. Thus, the only issue before me is whether he acted with gross negligence or willful misconduct.

In discussing the scope of immunity granted under *§ 7114(a)*, Pennsylvania courts have defined gross negligence and willful misconduct by reference to common law rules. In *Bloom v. Dubois Regional Medical Ctr., 409 Pa. Super. 83, 597 A.2d 671 (Pa. Super. Ct. 1991)*, the court concluded:

> It appears that the legislature intended to require that liability [under the MHPA] be premised [*117] on facts indicating more egregiously deviant conduct than ordinary carelessness, inadvertence, laxity, or indifference. We hold that the legislature intended the term gross negligence to mean a form of negligence where the facts support substantially more than ordinary carelessness, inadvertence, laxity, or indifference. The behavior of the defendant must be flagrant, grossly deviating from the ordinary standard of care.

Id. at 679. Similarly, Judge James McGirr Kelly of the Eastern District of Pennsylvania found that "gross negligence is the want of even a scant degree of care or a failure to perform a duty in reckless disregard of the consequences or with such want of care and regard for the consequences to justify a presumption of willfulness or wantonness." *Kelly v. United States, 1987 U.S. Dist. LEXIS 2289*, No. 86-2864, 1987 WL 8544, at *8 (E.D. Pa. Mar. 24, 1987).

Dr. Richards met and evaluated Rebecca Doby at Doylestown Hospital during the evening of December 30, 1993. Dr. Richards first elicited information concerning Rebecca Doby's background, medical history, marital status, and childhood. Rebecca Doby related her past psychiatric history, including the fact that she had been seeing [*118] Dr. Debra London from the summer of 1992 until late 1993 and had been taking Prozac. Rebecca Doby admitted to Dr. Richard that she had written the eleven-page letter, which Dr. Richards characterized as a suicide letter, and she also admitted that she needed help. She left the examination room early to talk to her lawyer and Dr. London, upon Dr. Richards' indication that she could telephone them. Dr. London spoke with Dr. Richards who informed her that he intended to involuntarily commit Rebecca Doby because of her suicidal thoughts as expressed in the letters she had written. He decided that involuntary treatment was the least restrictive alternative because she was very depressed, had access to guns, and should not be released to her husband or any other uncontrolled environment. He further prescribed Ativan for Rebecca Doby without first getting her consent; the medication was ordered on an "as needed" basis, and Dr. Richards believed she was free to refuse the medication.

Plaintiffs have produced two expert reports, one from Dr. Paul S. Applebaum and the other from Dr. Eileen A. Bazelon, to support their contention that Dr. Richards acted in a grossly negligent manner such that [*119] he is not entitled to immunity under *§ 7114(a)*. Dr. Applebaum details five deficiencies with Dr. Richards' examination and resulting diagnosis of Rebecca Doby's depression, including failure to inquire about the most common symptoms of depression, failure to adequately evaluate Rebecca Doby's suicidality, failure to access collateral sources of data such as Dr. London and Herbert Doby, a grossly inadequate mental status evaluation, and failure to explore other less restrictive alternatives to involuntary commitment. Dr. Bazelon faults Dr. Richards for relying solely upon DeCrescenzo's information, even though Dr. Bazelon concedes that the letters produced were "frightening." She also criticizes his failure to contact Dr. London and Herbert Doby for information before deciding to commit Rebecca Doby.

I note that simply providing expert reports does not necessarily create a genuine issue of material fact; the expert reports must be evidence tending to demonstrate gross negligence under Pennsylvania law. *See Callahan v. Walzer*, No. 90-5622, 1992 WL 70408, at *1 (E.D. Pa. Mar. 31, 1992). In addition, the Third Circuit has emphasized that:

> *Rule 56* must be construed with due [*120] regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Williams v. Borough of West Chester, 891 F.2d 458, 466 n. 13 (3d Cir. 1989) (citation omitted).

I find as a matter of law that plaintiffs have not provided evidence sufficient to establish flagrant behavior which grossly deviates from the standard of care required. Dr. Richards had an extensive eleven-page note which even plaintiffs' expert Dr. Bazelon concedes was "frightening." Rebecca Doby had admitted she had contemplated suicide, had been depressed and taking Prozac, and had a history of depression. She admitted she needed help. In light of her own statements, I conclude that the deficiencies noted by Drs. Applebaum and Bazelon could not amount to anything more than simple negligence by Dr. Richards. Further, Dr. Richards is entitled to immunity under *§ 7114(a)* of the MHPA unless he acted with gross negligence or willful misconduct [*121] if he "participated in a decision that a person be examined or treated under this act." *Pa. Stat. Ann. tit. 50, § 7114(a)* (Supp. 1996); the statute does not focus on the precision of the diagnosis as such, which is the focus of Dr. Applebaum's report. Immunity is intended to safeguard those who must make such decisions *without* the luxury of time to do further investigation and inquiry. With respect to Richards' prescribing Ativan, I note that Rebecca Doby admits that she agreed to take the medication and that it was not forced upon her without her knowledge or consent. Prescribing medication in this manner could not amount to gross negligence.

Accordingly, Dr. Richards did not commit gross negligence or willful misconduct. He is immune under *§ 7114(a)* from plaintiffs' state law claims because all of their claims against Dr. Richards arise out of Dr. Richards' examination and treatment decision with respect to Rebecca Doby. I will grant Dr. Richards' motion for summary judgment and will dismiss all of plaintiffs' claims against him.

VII. DOYLESTOWN HOSPITAL'S MOTION

Plaintiffs have sued Doylestown Hospital for its role in providing involuntary treatment for Rebecca [*122] Doby for several days beginning on December 30, 1993. Throughout the relevant time period, the Hospital was under contract with LVF, which in turn was under contract with Bucks County; the Hospital contract required LVF to provide psychiatric crisis intervention, or emergency, services for the Hospital. However, plaintiffs cite no employee or agent of the Hospital whose conduct forms the basis for a claim, nor do plaintiffs make specific allegations as to the hospital's role in the alleged federal and state violations. Plaintiffs' only allegations with respect to Doylestown Hospital are that it was the designated facility that confined Rebecca Doby and that it administered psychotropic medication without consent. Dr. Richards was employed by LVF, as was Dr. Carola Kieve, who oversaw Rebecca Doby from December 31, 1993 until she was released and is not a defendant in this lawsuit.

Plaintiffs have brought claims for a *§ 1983* violation, false arrest and imprisonment, assault and battery, gross negligence/willful misconduct, intentional infliction of emotional distress, and loss of consortium against the Hospital. As I understand plaintiffs' contentions, they complain that the Hospital [*123] housed Rebecca Doby during her involuntary commitment; in addition, they may be complaining about the medication taken by Rebecca Doby during her stay.

The Hospital argues that it is not a state actor for purposes of *§ 1983*, that it is immune from plaintiffs' state law claims under *§ 7114(a)*, and that it cannot be held vicariously liable for the actions of LVF and Dr. Richards. I do not need to address the Hospital's state actor argument because I find that the Hospital's role in Rebecca Doby's involuntary treatment is so minor that it could not rise to the level of a constitutional violation. Even if it were deemed a state actor, it would clearly be entitled to good faith immunity. Further, I have no factual basis for finding that the Hospital is or should be liable for the actions of LVF or Dr. Richards. As discussed above, plaintiffs have not indicated the role of the hospital in relation to Rebecca Doby, or in relation to other actors. Respondeat superior arises only due to the agency or other contractual relationship whereby one is responsible for another's acts. Here, there is no such nexus shown. In addition, plaintiffs have failed to indicate how administering medication, [*124] which Rebecca Doby admits she took voluntarily, constitutes a violation of any of plaintiffs' constitutional rights.

With respect to plaintiffs' state law claims, I must conclude that the Hospital is entitled to immunity under *§ 7114(a)* of the MHPA. The Hospital clearly "participated" in the treatment decisions with respect to Rebecca Doby because it provided the facilities and hired LVF to provide mental health services. *See Farago v. Sacred Heart General Hosp., 522 Pa. 410, 562 A.2d 300,*

303 (Pa. 1989). *Farago* held that an entity receives the same immunity as its employees because treatment must be administered by individuals, so:

> To allow an individual to claim immunity under this provision but in turn preclude its employer the same benefit of the immunity would indeed undermine the stated purpose of the limited immunity conferred under the Act.

Id. An entity should not be treated differently simply because it hires contractors to perform certain functions, rather than hire employees and oversee the work itself. Further, plaintiffs have not shown any conduct of the Hospital that constitutes gross negligence or willful misconduct. Again, I have no basis [*125] for holding Doylestown Hospital responsible for the actions of third parties employed by others or for whose acts they are not liable as a matter of law. Accordingly, plaintiffs have pointed to no evidence demonstrating how such third parties' actions might possibly be attributable to Doylestown Hospital. I will therefore grant the Hospital's motion and find that it is entitled to immunity under *§ 7114(a)* from plaintiffs' state law claims.

VII. PLAINTIFFS' MOTION

In addition to the various motions for summary judgment filed by the defendants in this case, plaintiffs also have filed a motion for summary judgment, seeking several legal declarations. First, plaintiffs ask that I find, as a matter of law, that LVF, Bucks County, and Warrington Township had an unconstitutional custom or policy which violated Rebecca Doby's constitutional rights. Second, they contend that the 302 warrant was invalid under the *Fourth* and *Fourteenth Amendments* as a matter of law because it was not based upon the application of a physician or physician-like person, because it was approved over the telephone, and because Neidhardt was not neutral or detached and performed no independent review of [*126] the information presented. Third, they argue that the MHPA must be read so as to allow a 302 petition for an involuntary emergency examination to be issued only upon the application of a physician or physician-like person, not a person such as DeCrescenzo who has had no mental health training.

Plaintiffs' first two arguments essentially ask for a declaration that the municipal defendants, including LVF, Bucks County, Warrington Township, and those individuals sued in their official capacity, are liable under *§ 1983* because plaintiffs have shown a custom or policy of accepting 302 petitions from people not qualified to file a 302 petition, of issuing warrants on those petitions via telephone and without investigation, and of executing the improper warrants and a declaration that Bucks County's process for issuing a 302 warrant is unconstitutional. In the discussion above, I have concluded that the only defendants potentially liable for a constitutional violation are the Police defendants, and they could be liable only for plaintiffs' excessive force claim.

Therefore, as none of the defendants involved in the issuance of the warrant can be liable for plaintiffs' *Fourth Amendment* probable [*127] cause claim, I need not decide whether the process they employed violated the *Fourth Amendment*. I will deny plaintiffs' motion for summary judgment to the extent it seeks a declaration that the defendants violated Rebecca Doby's constitutional rights.

Plaintiffs next argue that I must construe the language in *§ 7302(a)(1)* so as to allow only physician or physician-like persons to petition for a 302 warrant. I disposed of this argument above in footnote 10 and will deny plaintiffs' motion to the extent it seeks such a statutory construction. Plaintiffs' motion for summary judgment will be denied.

VII. CONCLUSION

As detailed above, I will grant DeCrescenzo's motion for summary judgment in part and dismiss all of plaintiffs' federal claims and their state law claims for assault and battery and wrongful use of civil proceedings against him; I will deny DeCrescenzo's motion for summary judgment in part and will allow plaintiffs to proceed with their defamation, invasion of privacy, false arrest or imprisonment, gross negligence and willful misconduct, and intentional infliction of emotional distress claims against DeCrescenzo. I will grant the Foundation defendants' motion [*128] for summary judgment and will dismiss all of plaintiffs' claims against them. I will grant the County defendants' motion for summary judgment and will dismiss all of plaintiffs' claims against them. I will grant the Police defendants' motion for summary judgment in part; I will dismiss plaintiffs' *Fourth Amendment* claim that Rebecca Doby was arrested on a facially invalid warrant, all of plaintiffs'

state law claims against Warrington Township, the Police Department, and Chief Bonargo in his official capacity, and plaintiffs' invasion of privacy, false arrest or imprisonment state law claims against the individual officers. I will deny the Police defendants' motion in part and will allow plaintiffs to maintain their excessive force claim against all of the Police defendants and their state law claims of assault and battery, gross negligence and willful misconduct, and intentional infliction of emotional distress against the individual police officers. I will grant Dr. Richards' motion for summary judgment and will dismiss all of plaintiffs' claims against him. I will grant Doylestown Hospital's motion for summary judgment and will dismiss all of plaintiffs' claims against it. I will [*129] deny plaintiffs' motion for summary judgment.

An appropriate order follows.

ORDER

AND NOW, this 9th day of September, 1996, it is hereby ORDERED that:

1. DeCrescenzo's motion for summary judgment is GRANTED IN PART and DENIED IN PART such that plaintiffs' *§ 1983* claim (Count VII), assault and battery claim (Count XII), wrongful use of civil proceedings (Count XV) against DeCrescenzo are hereby DISMISSED but plaintiffs' defamation (Count IX), invasion of privacy (Count X), false arrest or imprisonment (Count XI), gross negligence/willful misconduct (Count XIV), and intentional infliction of emotional distress (Count XVI) claims against DeCrescenzo may proceed;

2. The Foundation defendants' (Lenape Valley Foundation and Amy Bryant) motion for summary judgment is GRANTED, and all of plaintiffs' claims against Lenape Valley Foundation and Amy Bryant are hereby DISMISSED;

3. The County defendants' (Bucks County Department of Mental Health and Mental Retardation, Philip M. Fenster, and Debbie Neidhardt) motion for summary judgment is GRANTED, and all of plaintiffs' claims against them are hereby DISMISSED;

4. The Police defendants' (the Township of Warrington, the Warrington [*130] Township Police Department, Chief John Bonargo in his official capacity, Sergeant Joseph Knox, Officer Michael Neipp, and Officer Kenneth Hawthorn) motion for summary judgment is GRANTED IN PART and DENIED IN PART such that plaintiffs' *§ 1983* claim based upon the *Fourth Amendment* and a claimed facially invalid warrant (Counts III and IV in part), all of plaintiffs' state law claims against the Township of Warrington, the Warrington Township Police Department, Chief John Bonargo in his official capacity (Counts X, XI, XII, XIV, and XVI), and plaintiffs' invasion of privacy (Count X) and false arrest or imprisonment (Count XI) against the individual officers are hereby DISMISSED. Plaintiffs may maintain their *§ 1983* claim (Counts III and IV in part) against all of the Police defendants for excessive force and their assault and battery (Count XII), gross negligence/willful misconduct (Count XIV), and intentional infliction of emotional distress (Count XVI) claims against the individual police officers Knox, Neipp, and Hawthorn;

5. Dr. John Richards' motion for summary judgment is GRANTED, and all of plaintiffs' claims against him are hereby DISMISSED;

6. Doylestown Hospital's motion [*131] for summary judgment is GRANTED, and all of plaintiffs' claims against it are hereby DISMISSED;

7. Plaintiffs' motion for summary judgment is DENIED.

BY THE COURT:

Marjorie O. Rendell, J.