1995 WL 447766
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United States District Court,
S.D. New York.

Gennaro DI COSTANZO and
Christy Di Costanzo, Plaintiffs,
v.
Nancy HENRIKSEN, Thor Henriksen,
Paul L. Mollica, Adina C. Gilbert, Jack S.
Wilkshire, William R. Steinhaus, Thomas
J. Dolan, Nydia E. Perez, Defendants.

No. 94 Civ. 2464 (MGC). | July 28, 1995.

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Attorneys and Law Firms

Gennaro Di Costanzo, Staten Island, NY, plaintiff pro se.

G. Oliver Koppell, Atty. Gen. of the State of N. Y. by Oliver W. Williams, Asst. Atty. Gen., New York City, for defendants Adina C. Gilbert, Thomas J. Dolan and James E. Pagones.

L'Abbate, Balkan, Colavita & Contini, L.L.P. by Thomas J. Cahill, Garden City, NY, for defendant Frank E. Redl.

White, Fleischner & Fino by Benjamin A. Fleischner, New York City, for defendant Jack S. Wiltshire.

Paul L. Mollica, Poughkeepsie, NY, defendant pro se.

Nancy & Thor Henriksen, Red Hook, NY, defendants pro se.

Nydia E. Perez, M.D., Red Hook, NY, defendant pro se.

Opinion

MEMORANDUM OPINION AND ORDER

CEDARBAUM, District Judge.

*1 Gennaro Di Costanzo sues on his own behalf, and on behalf of his minor daughter, Christy, under 42 U.S.C. §§ 1983, 1985, 1986 and 1988 for violations of their constitutional rights which he alleges occurred in connection with custody proceedings in the Family Court of the State of New York, Dutchess County. Defendants have moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), or in the alternative, for summary judgment. Plaintiffs have moved for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c). For the reasons discussed below, defendants' motions are granted, and plaintiffs' motion is denied.

Background

The complaint alleges:

> Several of the above-named Defendants, acting singly or in concert, violated the Plaintiffs' rights served by the First, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Fourteenth Amendments of the Constitution of the United States via:
>
> a. the lodging of a false accusation of child abuse, both physical and mental, against GENNARO DI COSTANZO in an attempt to wrest physical custody of and to thwart visitation with his biological daughter, CHRISTY DI COSTANZO, unlawfully;
>
> b. the systematic manufacturing of tainted "evidence" in support of said false allegation and the systematic prevention and/or ignoring of any refutation of same by the Plaintiffs;
>
> c. the commission of blatantly perjurous [sic] testimony;
>
> d. the deprivation to the Plaintiffs of their constitutional right to free and unfettered access to one another in the pursuit of the father-daughter relationship;
>
> e. the deprivation to GENNARO DI COSTANZO of his good name and reputation, of his fortune, of his ability to earn a living and of his access to life, liberty, property and the equal protection of the law.

The complaint names as defendants Nancy and Thor Henriksen, Christy's mother and step-father; Adina C. Gilbert, a Hearing Examiner for the Dutchess County Family Court; Paul L. Mollica, the Law Guardian appointed to represent Christy Di Costanzo; Jack S. Wiltshire, [1] a clinical psychologist; William R. Steinhaus, [2] County Executive of Dutchess County; Thomas J. Dolan, Judge of the Dutchess County Family Court; and Nydia Perez, a medical doctor. [3]

Because the complaint failed to give a "short and plain statement of the claim [[[s] showing that the pleader is entitled to relief" as required by Fed. R. Civ. P. 8(a)(2), I ordered plaintiff Gennaro Di Costanzo to file a written explanation of

why the complaint should not be dismissed. *See* Order, dated July 14, 1994. He responded by submitting a letter, dated August 10, 1994, in which he attempted to make a "short and plain statement of the claim[s]."

In this letter, Mr. Di Costanzo alleges that Nancy Henriksen made false claims that he physically or sexually abused Christy, and that Ms. Henriksen was "aided and abetted in these endeavors by THOR HENRIKSEN, JACK WILSHIRE [sic] and NYDIA PEREZ, who sought to give a professional imprimatur to these false claims via spurious medical and psychological 'evaluations' and by committing CHRISTY to a mental health care facility in April 1993 ...." Mr. Di Costanzo alleges that Judge Dolan ignored the report of a court-appointed expert who recommended that the father have unsupervised visitation and custody of Christy. He also alleges that Judge Dolan ordered more evaluations and counseling and issued an Order of Protection without sufficient evidence. Mr. Di Costanzo's letter also contains allegations that Hearing Examiner Gilbert "suppressed testimony favorable to [him] during a series of child support hearings by physically manipulating a tape recorder so as to allow only certain segments of the proceedings to be recorded" and "caused [him] to be physically incarcerated for missing a hearing when she had evidence in her hand that [his] absence was due to a death in [his] family." In his letter of August 10, 1994, Mr. Di Costanzo alleges that Law Guardian Mollica violated an order that enjoined him from subjecting Christy to any non-court-ordered medical or psychological experts.

Discussion

***2** Pleadings drafted by *pro se* litigants must be construed liberally. *See Haines v. Kerner,* 404 U.S. 519, 520 (1972). However, even with the most liberal reading of the Complaint, the Amended Complaint and the August 10, 1994 letter, none of these documents states a claim upon which relief can be granted.

I. Section 1983 Claims

Plaintiffs' claims against Judge Dolan and Hearing Examiner Gilbert must be dismissed because those defendants are absolutely immune from liability related to their adjudicatory acts. *See Levine v. County of Westchester,* 828 F. Supp. 238, 243 (S.D.N.Y. 1993), *aff'd,* 22 F.3d...

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... F.R.D. 670, 678--79 (E.D.N.Y. 1993), *aff'd,* 22 F.3d 1090 (2d Cir. 1994). The only acts plaintiffs complain of with respect to these defendants are adjudicatory acts.

Plaintiffs' claim against Judge Pagones must also be dismissed. Plaintiffs do not allege that Judge Pagones took any actions that could give rise to a cause of action under Section 1983. The unfiled Amended Complaint, dated July, 1994, merely alleges that James D. Pagones was a Family Court Judge in Dutchess County and had a sworn duty to uphold the Constitutions of the United States and the State of New York. This allegation does not state a claim against Judge Pagones.

Similarly, plaintiffs' claim against Frank Redl must be dismissed. The unfiled Amended Complaint alleges that Frank Redl was Gennaro Di Costanzo's attorney "and as such has a duty to said Plaintiff as well as a sworn duty to uphold the Constitution of the United States and of the State of New York." This allegation does not state a claim under Section 1983.

The claim against Law Guardian Mollica must also be dismissed for failure to state a claim. In order to state a claim under 42 U.S.C. § 1983, plaintiffs must allege conduct under color of state law that deprives them of rights secured by the Constitution or laws of the United States. *Katz v. Klehammer,* 902 F.2d 204, 206 (2d Cir. 1990). Although a law guardian is appointed by the state, once he is appointed, he must exercise independent, professional judgment on behalf of his client, and is therefore not acting under color of state law for...

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... testify as witnesses in the proceedings, since their role in the proceedings would have been essentially that of witnesses. *See Sykes v. James,* 13 F.3d 515, 521 (2d Cir. 1993) (parole officer immune from liability for statements made in affidavit submitted in state habeas proceeding); *Moses v. Parwatikar,* 813 F.2d 891, 892 (8th Cir.) (psychiatrist appointed by court to conduct competency examination held to have function "analogous to that of a witness" and therefore immune from suit), *cert. denied,* 484 U.S. 832 (1987); *Kurzawa v. Mueller,* 732 F.2d 1456, 1458 (6th Cir. 1984) (psychiatrists and psychologist who examined child and whose findings were used by state court in determination of custody immune from suit).

***3** Finally, plaintiffs' claims against the Henriksens must be dismissed. The Henriksens were acting in their private capacity in utilizing the procedures available to them in the

Family Court -- they were not acting under color of state law. *See Dahlberg v. Becker,* 748 F.2d 85, 93 (2d Cir. 1984), *cert. denied,* 470 U.S. 1084 (1985); *Zebrowski v. Denckla,* 630 F. Supp. 1307, 1309 (E.D.N.Y. 1986) (dismissing Section 1983 claim against private person who filed criminal complaint against plaintiff which resulted in his arrest).

II. Section 1985 Claims

Plaintiffs purport to state claims under 42 U.S.C. §§ 1985(2) & (3). In order to state a claim under Section 1985(2), a plaintiff must allege "(1) a conspiracy between two or more persons, (2) to deter a witness 'by force, intimidation or threat' from attending any court of the United States or testifying freely in a matter pending therein, which (3) causes injury to the claimant." *Herrera v. Scully,* 815 F. Supp. 713, 726 (S.D.N.Y. 1993) (citing *Chahal v. Paine Webber Inc.,* 725 F.2d 20, 23 (2d Cir. 1984)). Plaintiffs' claim under Section 1985(2) appears to be based on the allegations that "[s] everal of the above-named defendants" conspired to "attempt[] to coerce a child of tender years to make incriminating statements against [Gennaro Di Costanzo]." (Compl. ¶ 5) Read in context, this statement refers to Christy Di Costanzo's testimony in the Family Court proceedings. Plaintiffs do not state a claim under Section 1985(2) because that statute applies only to conspiracies to prevent witnesses from appearing in *federal court* proceedings. *See* 42 U.S.C. § 1985(2); *Morast v. Lance,* 807 F.2d 926, 930 (11th Cir. 1987); *McCord v. Bailey,* 636 F.2d 606, 615-17 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 983 (1981); *Herrera v. Scully,* 815 F. Supp. 713, 726 (S.D.N.Y. 1993); *Redcross v. County of Rensselaer,* 511 F. Supp. 364, 374 (N.D.N.Y. 1981).

In order to state a claim under Section 1985(3), a plaintiff must allege that (1) he was a member of a protected class, (2) that the defendants conspired to deprive him of his constitutional rights, (3) that the defendants acted with class-based,...

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United States District Court,
E.D. New York.

Mary Jane GLOWCZENSKI, and Jean Griffin, Individually and as the Co–Administratrix of the Estate of David Glowczenski, Plaintiff(s),
v.
TASER INTERNATIONAL INC., Village of Southampton, Southampton Village Police Department, Police Officer Brian Platt in his individual and official capacity, Police Officer Marla Donovan, in her individual and official capacity, Police Officer Chris Wetter, in his individual and official capacity, Police Officer Arthur Schucht, in his individual and official capacity, County of Suffolk, Suffolk County Police Dept., Lieutenant Jack Fitzpatrick, in his individual and official capacity, Lieutenant Howard Lewis, in his individual and official capacity, John Does 1–10, who are known by name to the Defendants but as of yet are not fully known to the Plaintiffs, Office of the Suffolk County Medical Examiner, James C. Wilson, M.D., Deputy Medical Examiner, in his individual and official capacity, Southampton Village Volunteer Ambulance (a.k.a. Southampton E.M.T. Unit), Melissa Croke, EMT, in her individual and official capacity, Keith Phillips, EMT, in his individual and official capacity, Tim Campbell, EMT, in his individual and official capacity, and James Moore, Ambulance Driver, in his individual and official capacity, Defendant(s).

No. CV04–4052(WDW). | May 13, 2010.

Attorneys and Law Firms

Lewis Johs Avalone Aviles, LLP, Marcy D. Sheinwold, Esq., Christina L. Geraci, Esq., Melville, NY, for Southampton Village Ambulance and EMTs.

Law Offices of Frederick K. Brewington, Frederick K. Brewington, Esq., Hempstead, NY, for Plaintiffs Mary Jane Glowczenski and Jean Griffin.

Opinion

MEMORANDUM & ORDER

WALL, United States Magistrate Judge.

***1** Before the court is a motion for summary judgment by defendants Southampton Village Volunteer Ambulance, Inc., s/h/a Southampton Village Volunteer Ambulance, EMT Melissa Croke, EMT Tim Campbell (a/k/a Thomas A. Campbell), EMT Keith Phillips, and Ambulance Driver James Moore (the "SVVA defendants"). DE[107] & [132]. The motion is opposed by the plaintiffs. DE [137]. The parties to this action have consented to my jurisdiction for all purposes. For the reasons set forth herein, the motion is **GRANTED.**

BACKGROUND

This lawsuit arises from the death of plaintiffs' decedent, David Glowczenski, on February 4, 2004. There are currently four motions for summary judgment before the court, by four sets of defendants, each focusing on different aspects of the facts underlying Mr. Glowczenski's death. Here, the salient facts involve the actions of the SVVA defendants when they responded to a call for emergency medical help for Mr. Glowczenski. The larger factual context, involving the police defendants and the use of a Taser to subdue Glowczenski, will be mentioned only as needed, if at all. The facts herein are taken primarily from the account set forth by the plaintiffs in their Memorandum of Law in Opposition to the SVVA motion and from documentary evidence in the motion papers. Where there is a difference of opinion as to a fact, such difference is noted.

David Glowczenski was a 35 year old man with a history of schizophrenia. At 10:42 a.m. on February 4, 2004, the defendant ambulance company received a call to go to the street outside of Our Lady of the Hamptons School in Southampton, NY, where the police had subdued Glowczenski. Defendant EMT Croke, who was not traveling in the ambulance, was the first to arrive, at 10:44 a.m. Defendant EMT Campbell arrived at 10:47 a.m. The ambulance, driven by defendant Moore and carrying defendant EMT Phillips, also arrived at 10:47 a.m. Prior to the arrival of the EMT defendants and the ambulance, Glowczenski had been handcuffed with two or more sets of handcuffs, put on wrist to cuff to cuff to cuff to wrist, with his hands behind his back and his legs "zipped tied,"

and he was lying face down. The defendants say that he was turned to a supine position when EMT Croke arrived. The plaintiffs say that he was not turned over until the ambulance arrived. In any event, Mr. Glowczenski was "blue and unresponsive" and without a pulse or respiration when the SVVA defendants arrived. *See* Defs. Exs. D & J, 79:20–25. The Prehospital Care Report ("the Report"), prepared by a defendant EMT, indicates that CPR was started at 10:46 a.m. *See* Defs. Ex. D. The plaintiffs note that the Report states both that Glowczenski was in a prone position when EMT Croke first arrived, and, "conversely," that CPR had already started when she arrived. What the Report actually says is that "[patient] presented prone on lawn upon EMS 7–18–80 arrival. pd rolled to supine position." Def. Ex. D. Neither party explains in their motion papers what "EMS 7–18–80" is, but defendant Phillips, in his deposition testimony, stated that "7–18–80 is a Ford Explorer driven by Melissa Croke." Pls. Ex. F, 26:11–12.

***2** The Report indicates Glowczenski's "presenting problem" as cardiac arrest, and notes that Glowczenski had no pulse or respiration at either 10:45 a.m.or 10:55 a.m. His level of consciousness was indicated as unresponsive, and his "GCS" was listed as a "3." "GCS" apparently refers to the Glascow Coma Scale, which is a neurological assessment of a person's level of consciousness through tests of eye, verbal and motor responses. Mr. Glowczenski's score of three is the lowest possible, indicating a state of deep coma. His blood pressure was expressed as a circle with a line through it, indicating, the court assumes, that it was not taken. There is no indication of his body temperature, and no line on the Report for entry of that information, but his skin was described as cool and moist.

The plaintiffs allege that the Police Officers, and not the EMTs, administered CPR to Glowczenski, with one of the defendant officers initiating the CPR and continuing it until Glowczenski's arrival at the hospital. The Report states that CPR was begun by a police officer prior to the arrival of the EMTs, and the defendants state that the CPR was administered "with the assistance of" Southampton Village Police Officers. Mem. in Supp. at 4, Ex. D. The defendants further state that Glowczenski's airway was cleared with suction at the scene, and ventilation provided with a bag-valve mask device. *See* Defs. Ex. D.

An Automatic External Defibrillator ("AED") was also used in the resuscitation efforts. *See* Defs. Ex. E. The defendants say that it was attached at the scene. The plaintiffs maintain that the AED was not turned on until 10:57 a.m., while the Report notes that the ambulance left the scene at 10:56 a.m. The defibrillator report indicates that the power to it was turned on at 10:57:40, and the Report states that the ambulance left the scene at 10:56 a.m. The record does not indicate who determined the ambulance departure time, but the defibrillator time report appears to have been machine generated. The defibrillator report indicates that four attempts to analyze the heart rhythm were made, with the first three resulting in a "no shock advised" prompt. The fourth attempt resulted in a "motion detected" result. Defs. Ex. E. After each attempt, CPR continued, but Glowczenski's pulse did not return. The defibrillation ceased, according to the printout, at 11:08:12 a.m., after Glowczenski had been moved into the Emergency Room.

Glowczenski was transferred to the ambulance on a long board, with the handcuffs and zip ties still in place, and, according to the Report, the ambulance departed the scene at 10:56 a.m., with the police officer continuing to apply CPR. It arrived at the hospital at 10:59 a.m., at which time the right rear door jammed, and Glowczenski had to be removed through the side door, on the backboard. The plaintiffs say that this caused a delay of several minutes, while the defendants say that it took only one minute. The court notes that the references to deposition transcripts relied on by the plaintiffs to support their claim of a longer delay do not support that claim. The deponents-defendants Campbell, Philips and Donovan are either unsure of how long it took to get him out, or, in the case of Phillips, say that it took one minute. *See* Pls. Exs. E, 53:17–54:12; F, 26:22–27:6; and J, 87:20–89:7. All are agreed that when he was removed from the ambulance, Glowczenski was still handcuffed and zip tied. The plaintiffs claim that emergency room personnel were "enraged" by that, but the only citation that suggests support for that allegation is Keith Phillips' deposition testimony that nurse Wilson used profanity toward the officers in regard to removing the handcuffs. Pls. Ex. F, 29:12–25. The deposition testimony does establish that the Emergency Room personnel wanted the restraints removed.

***3** Despite efforts in the Emergency Room of Southampton Hospital, David Glowczenski was pronounced dead at 11:20 a.m. on February 4, 2004.

DISCUSSION

Summary Judgment Standards

" 'Summary judgment is appropriate where there are no genuine disputes concerning any material facts, and where

the moving party is entitled to judgment as a matter of law.' " *Jamaica Ash & Rubbish Removal Co. v. Ferguson,* 85 F.Supp.2d 174, 180 (E.D.N.Y.2000) (quoting *In re Blackwood Assocs., L.P.* 153 F.3d 61, 67 (2d Cir.1998) and citing Fed.R.Civ.P. 56(c) and *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986)). In deciding a summary judgment motion, the district court must resolve all ambiguities and draw all reasonable inferences in the light most favorable to the opposing party. *See Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.,* 150 F.3d 132, 137 (2d Cir.1998). If there is evidence in the record as to any material fact from which an inference could be drawn in favor of the non-movant, summary judgment is unavailable. *See Holt v. KMI–Continental, Inc.,* 95 F.3d 123, 128 (2d Cir.1996). The applicable substantive law determines which facts are critical and which are irrelevant. *See Anderson v. Liberty Lobby,* 477 U.S. 242, 248 (1986).

The trial court's responsibility is " 'limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined at this point to issue-finding; it does not extend to issue-resolution.' " *B.F. Goodrich v. Betkoski,* 99 F.3d 505, 522 (2d Cir.1996) (quoting *Gallo v. Prudential Residential Servs., L.P.,* 22 F.3d 1219, 1224 (2d Cir.1994)). The court "is not to weigh the evidence, but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty America v. Town of W. Hartford,* 361 F.3d 113, 122 (2d Cir.2007). When, however, there is nothing more than a "metaphysical doubt as to the material facts," summary judgment is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). "Rather, there must exist 'specific facts showing that there is a genuine issue for trial' in order to deny summary judgment as to a particular claim." *Jamaica Ash & Rubbish,* 85 F.Supp.2d at 180 (quoting *Celotex,* 477 U.S. at 322). A moving party may obtain summary judgment by demonstrating that little or no evidence may be found in support of the non-moving party's case. "When no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." *Marks v. New York Univ.,* 61 F.Supp.2d 81, 88 (S.D.N.Y.1999).

The Plaintiffs' Claims

In the Amended Complaint, the plaintiffs assert claims against the SVVA defendants pursuant to Section 1983 and common law negligence and wrongful death. DE[9]. The Section 1983 claim was dismissed by District Judge Feuerstein prior to the parties' consent to my jurisdiction, and I will not address it here, despite the plaintiffs' argument directed to that point. New York Public Health Law Section 3013 provides that volunteer emergency medical technicians "may not be held liable for injuries or death related to their emergency medical care unless the injuries or death were caused by gross negligence," and the parties agree that a gross negligence standard applies to the claims against the SVVA defendants.

Gross Negligence Standards

***4** Gross negligence has "often been equated with recklessness in the Second Circuit," and is " 'the kind of conduct ... where [the] defendant has reason to know of facts creating a high degree of risk of physical harm to another and deliberately acts or fails to act in conscious disregard or indifference to that risk.' " *See Poe v. Leonard,* 282 F.3d 123, 140 (2d Cir.2002) (quoting *Bryant v. Mafucci,* 932 F.2d 979, 985 (2d Cir.1991)). Gross negligence is "conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing ... [or] the commission or omission of an act or duty owing by one person to a second party which discloses a failure to exercise slight diligence. In other words, the act or omission must be of an aggravated character as distinguished from the failure to exercise ordinary care." *Greenberg v. Rubin,* 2001 WL 1722886, *4 (Sup.Ct. Kings County, Oct. 17, 2001) (internal quotation marks and citations omitted). The exercise of diligence by the alleged grossly negligent party "is judged by the diligence ... which a person of common sense, not a specialist or expert in a particular field should exercise in such a field." *Id.* (citations omitted). And, the determination of whether that standard of care has been violated "generally remains a matter for the jury." *Id*.

Here, the plaintiffs argue that the SVVA defendants were grossly negligent and displayed deliberate indifference "by failing to abide by **any** of the New York protocols required to be followed by EMS and EMT services, including failure to render any basic medical care such as taking David Glowczenski's vital signs." DE[137], Pls. Mem. in Opp. at 10–11 (emphasis in original); *and see* Pls. Ex. P, the New York State Department of Health Statewide Basic Life Support Adult & Pediatric Treatment Protocols ("the BLS Protocols"). The plaintiffs list numerous other ways in which the SVAA allegedly deviated from protocols, some of which are so irrelevant to Glowczenski's condition at the time, or so secondary in importance to his primary medical needs, that

the court need not address them.[1] The defendants say that the main complaints based on protocol failure are that the defendants (1) failed to provide medical care to Glowczenski; (2) failed to monitor Glowczenski's vital signs; (3) failed to promptly apply the defibrillator; (4) failed to note and treat Glowczenski's external injuries and (5) failed to remove his handcuffs and zip ties. DE[132–1] at 6. The court agrees that these are the primary complaints. Each of these failures, the plaintiffs argue, amounted to gross negligence. They did not.

The defendants, in support of their claim that there is no evidence whatsoever of gross negligence, have submitted the affidavit of Mark Silberman, M.D. Defs. Ex. F. Dr. Silberman is board certified in Internal Medicine, Emergency Medicine, Pulmonary Medicine and Critical Care, and is the medical director of four volunteer ambulance companies. *See* Defs. Ex. W. The plaintiffs have not challenged Dr. Silberman's credentials as an expert or the admissibility of his affidavit. Dr. Silberman opines that the SVVA defendants "at no time deviated from relevant standards of acceptable emergency medical care, and that their actions were not, in any way, a proximate cause of the decedent's injuries."[2] Defs. Ex. F. at ¶ 2. He further states that there is "no evidence of medical malpractice or negligence on their part or evidence of gross negligence in their provision of emergency medical services" to David Glowczenski. *Id.* In his affidavit, Dr. Silberman reviews the various steps that were taken by the EMTs to aid Mr. Glowczenski, and finds that there was a timely response, that the EMTs were properly trained, that appropriate CPR and AED were used, that the retention of the handcuffs while CPR was performed was proper, that the EMTs properly evaluated Glowczenski, that he was timely transported to the hospital, that he was properly transferred from the ambulance to the Emergency Room, and that, overall, the "SVVA and treating EMTs did everything that reasonably could have been done, to the best of their ability, and within the scope of their training, to resuscitate" Glowczenski. The failure of resuscitative measures, he claims, "was due to the patient's underlying condition and was in no way related to the EMTs technique or timeliness." *Id.*

***5** The defendants argue that because they have come forward with expert evidence, the plaintiffs must counter it with their own expert evidence, which they have failed to do. The plaintiffs argue that they are not required to submit expert affidavits in opposition to the motion, relying on the proposition that the "exercise of diligence by the alleged grossly negligent party is judged by the diligence ... which a person of common sense, not a specialist or expert in a particular field, should exercise in such a field." DE[137], Pls. Mem. in Opp. at 17 (citing *Greenberg,* 2001 WL 1722886 at *4.) *Greenberg* also notes, however, that "[g]enerally, in cases involving medical malpractice, expert testimony is necessary because the standard for acceptable medical care is not within the experience of an ordinary juror," and the need for expert testimony "is not necessarily affected by the fact that liability in this case must be determined under a gross negligence standard of care." *Greenberg,* 2001 WL 1722886 at *5. With these principles in mind, the *Greenberg* court found that in the absence of expert proof with regard to the standard of care required by the defendant EMTs, a juror would not be able to judge whether the defendant EMT exercised "at least slight diligence." *Id.* In that case, the third party defendant EMT, who had moved for summary judgment, did not submit an expert affidavit, but the third party plaintiff did submit one in opposition to the motion, and the court found that the plaintiff's expert's description of departures from protocol was sufficient to raise material issues of fact.

Nonetheless, I have not found-and the defendants have not cited to-any cases identical to this one, where the summary judgment movant has come forward with expert testimony and the plaintiff has not, and I decline to address the question of whether a plaintiff opposing a motion for summary judgment in a medical gross negligence context must always respond to expert testimony with expert testimony. Here, such a finding is not necessary, because, considering the defendants' evidence and the plaintiff's evidence, I find as a matter of law that no reasonable juror, that is, no person of common sense, could find that the SVVA defendants were grossly negligent or liable on a wrongful death theory, even resolving all ambiguities and drawing all reasonable inferences in the light most favorable to the plaintiffs.

First, the plaintiff's allegation that the defendants failed to render medical care or take vital signs is patently wrong. The Report clearly shows that Glowczenski received CPR and defibrillation, and that his airway was cleared with suction at the scene, and ventilation provided with a bag-valve mask device. Defs. Ex. D. Further, his vital signs-pulse rate and respiration-are documented. *Id.* Although his blood pressure and temperature (commonly listed as vital signs) apparently were not taken, given Mr. Glowczenski's condition-his lack of consciousness, respiration or pulse-the EMTs had far more urgent tasks to attend to. Glowczenski received more than basic medical care, and his significant vital signs and Glascow Coma Scale ratings were taken and recorded. In short, the SVVA defendants exercised far more than slight diligence.

Part of the basis for the plaintiffs' allegation that the EMTs did not render medical care is based on the fact that CPR administered by the police, not by the EMTs, violates the BLS Protocols. The record does show that CPR was administered by a police officer, while the EMTs performed other tasks. That fact does not, as a matter of law, rise to the level of an act of gross negligence, and no rational juror could so find. As the defendants point out, the BLS Protocols note that:

> ***6** These protocols are not intended to be absolute and ultimate treatment doctrines, but rather standards which are flexible to accommodate the complexity of the problems in patient management presented to Emergency Medical Technicians (EMTs) and Advanced Emergency Medical Technicians (AEMTs) in the field. These protocols should be considered as a model or standard by which all patients should be treated. Since patients do not always fit into a "cook book" approach, these protocols are not a substitute for GOOD CLINICAL JUDGMENT, especially when a situation occurs which does not fit these standards.

Pls. Ex. P, p. 3 (all caps in original).

The SVVA defendants were faced with a man who was unconscious, with no pulse or respiration, and they and the police officers worked together to try to revive him. The plaintiffs have offered no evidence that allowing the police officer to administer CPR, even if it was a deviation from protocol, was conduct that "evinces a reckless disregard for the rights of [Mr. Glowczenski] or 'smacks' of intentional wrongdoing," the standard for gross negligence. *See Greenberg,* 2001 WL 1722886, at * 4 (citing *Colnaghi, U.S.A., Ltd. v. Jewelers Protection Services, Ltd.,* 81 N.Y.2d 821, 823–24 (1993).

The plaintiffs' other allegations of protocol failures rising to the level of gross negligence also fall far short of that high standard. For example, the defibrillator was applied close to the time that the ambulance left the scene, but it is impossible to verify with certainty whether it was at the scene or in the ambulance. Even assuming that it was not applied until Glowczenski was in the ambulance, the defendants have offered expert testimony that the AED procedures were perfectly proper, and the plaintiff has offered no evidence, other than the argument that there were deviations from protocol, to raise an issue of fact as to whether the AED timing constituted gross negligence. The same is true of the failure to note Glosczenki's external injuries and the delay in opening the ambulance door, whether it was one minute or three.

The plaintiffs have come forward with no evidence that could lead to a finding of gross negligence or to a finding that the SVVA defendants proximately caused David Glowczenski's death, and the motion for summary judgment is granted.

SO ORDERED.

Footnotes

1 The court is mystified as to why the plaintiffs would even mention some of these issues. For example, the allegation that the SVVA defendants failed to verbally communicate with the unconscious Glowczenski is odd, to say the least. The court can find nothing in the record that would support a claim that Mr. Glowczenski was capable of verbal communication when the SVVA defendants arrived on the scene.

2 Expert witness statements embodying legal conclusions exceed the permissible scope of opinion testimony under the Federal Rules of Evidence, and to the extent that Dr. Silberman's affidavit contains such conclusions, I have not relied on them. *See Miller Marine Services, Inc. v. Travelers Property Casualty Insurance Co.,* 2006 WL 2672083, *1 (2d Cir.2006).

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2012 WL 554453
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Elijah GREEN, Plaintiff,
v.
CITY OF YONKERS, NEW YORK, City of Yonkers Police Department, Police Officer D. Lyons, individually and in his capacity as a Police Officer in the City of Yonkers Police Department, Police Officer Thomas Cleary, individually and in his capacity as a Police Officer in the City of Yonkers Police Department, Sergeant Susan Pinto-Tulino, individually and/or in her capacity as a Sergeant in the Yonkers Police Department, and Lieutenant Henry Trabucco, individually and/or in his capacity as a Lieutenant in the Yonkers Police Department, Defendants.

No. 10 Civ. 3653(JFK). | Feb. 21, 2012.

Attorneys and Law Firms

Mark A. Rubeo, Jr., Esq., Reisman, Rubeo & McClure, LLP, Hawthorne, N.Y., for Plaintiff.

Mark W. Blanchard, Corporation Counsel, Yonkers, N.Y., for Defendants.

Opinion

OPINION AND ORDER

JOHN F. KEENAN, District Judge.

*1 Before the Court is the City of Yonkers, Yonkers Police Department, Officers David Lyons ("Lyons") and Thomas Cleary ("Cleary"), Sergeant Susan Pinto Tulino ("Tulino"), and Lieutenant Henry Trabucco's ("Trabucco") (collectively, "Defendants") motion for summary judgment on each of Plaintiff Elijah Green's ("Green" or "Plaintiff") various claims under 42 U.S.C. § 1983 (" § 1983") and state law. For the reasons that follow, the motion is granted in all respects.

I. Background

On July 8, 2008, just before 7 p.m., the Yonkers Police Department received an anonymous report that an unattended child was on the fire escape of 189 Saratoga Street in Yonkers, New York. (Def.'s Rule 56.1 Statement ¶ 1). Two of the Defendants, Lyons and Cleary, responded to the report. Once the officers arrived at 189 Saratoga Street, they observed Green's daughter Alyssa, who was then two-and-a-half-years old, on the fifth-floor fire escape, but state that they were unable to climb the fire escape to bring her to safety. (*Id.* ¶ 2). Ultimately, a neighbor retrieved Alyssa and carried her into her bedroom in the fifth-floor apartment uninjured. (Pl.'s Rule 56.1 Statement ¶ 4). It was later discovered that the screen on the window in Alyssa's room had been torn, leaving an opening about the size of a basketball. (*Id.*).

The officers state that, unable to climb the fire escape, they entered Green's apartment through the front door, walked into Alyssa's room, and then questioned Green and the neighbor. (Def.'s Rule 56.1 Statement ¶¶ 3, 6–7). According to Green, however, Cleary and Lyons climbed into Alyssa's bedroom through the window, and immediately yelled at Green and the neighbor to get against the wall. There, they conducted a patdown of Green and his neighbor, and proceeded to question the men. (Pl.'s Rule 56.1 Statement ¶ 4).

During the questioning at Green's apartment, Green told the officers that he had returned home from work thirty minutes earlier, and Alyssa's mother, LaToya McNeill ("McNeill"), informed him that she had put Alyssa to sleep. (*Id.* ¶¶ 3, 5, 9). Green told the officers that he drank one beer while reviewing the mail and watching television, but never heard any noises from Alyssa's room, nor did he in any way check on her. (*Id.* ¶ 9). Cleary and Lyons reported that they observed two to three cans or bottles of beer on a table in the bedroom, although they could not determine whether any were empty. (Def.'s Rule 56.1 Statement ¶ 9). After completing the questioning, the officers placed Green under arrest. (*Id.* ¶ 11).

Green states that McNeill was in their bedroom when the questioning began, and later came into Alyssa's bedroom. (Pl.'s Rule 56.1 Statement ¶ 8). Green and McNeill both allege that the officers told Green that "someone's got to pay for this," referring to Alyssa's being on the fire escape. (McNeill Aff. ¶ 14). After the officers arrested Green, McNeill confronted the officers and asked them why Green was being arrested. Green and McNeill allege that the police

replied, "Do you want us to take you too? If we take you we are taking the kids." (*Id.* ¶ 15).

*2 At the Yonkers Police Department, the Lieutenant on duty, Trabucco, assisted Cleary and Lyons in determining the charges against Green. Cleary and Lyons then prepared a Crime Investigation Report and Domestic Incident Report, which was reviewed and certified by the Sergeant on duty, Tulino. Green was charged with reckless endangerment of a child in the second degree and endangering the welfare of a child. (Pl.'s Rule 56.1 Statement ¶¶ 12–13).

Green was arraigned in Yonkers City Court. The arraignment court set bail at $1500 and imposed a one-year protective order, mandating that Green stay away from Alyssa. (*Id.* ¶ 15). Green was incarcerated for twenty-one days before his family could raise sufficient funds to post bail. (*Id.*). The Westchester County District Attorney's Office prosecuted Green in Yonkers City Court on July 16, 2009. After a two-day jury trial, Green was acquitted of all charges.

According to Green, the arrest and subsequent prosecution caused him to lose two months of employment and wages. (*Id.*) Because the order of protection barred him from seeing Alyssa, Green could not return to his home. As a result, he alleges, he slept on the streets or at friends' homes during the period he could not return home. (*Id.*).

II. Discussion

Green brings claims under 42 U.S.C. § 1983 (" § 1983") for false arrest, malicious prosecution, abuse of process, and deprivation of liberty without due process against all individual defendants. He has also alleged that Cleary and Lyons, Trabucco, and Tulino conspired to violate his rights under § 1983. Green extends his § 1983 claim to the City of Yonkers and the Yonkers Police Department, made applicable to municipalities under *Monell v. Dept. of Social Services of the City of N.Y.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Finally, Green has asserted state law claims for malicious prosecution against all defendants except Trabucco.

A. Summary Judgment Standard

Summary judgment is warranted when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A genuine issue exists for summary judgment purposes "where the evidence is such that a reasonable jury could decide in the non-movant's favor." *Beyer v. County of Nassau,* 524 F.3d 160, 163 (2d Cir.2008) (citing *Guilbert v. Gardner,* 480 F.3d 140, 145 (2d Cir.2007)). Thus, when determining...

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... that 'personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983' " and that a complaint must allege such personal involvement. *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994) (quoting *Moffitt v. Town of Brookfield,* 950 F.2d 880, 885 (2d Cir.1991)). In the context of § 1983, personal involvement consists of direct participation or "failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates." *Id.*

If it is determined that a § 1983 violation occurred, both Trabucco and Tulino would satisfy "personal involvement" requirement for liability. While not directly involved in Green's arrest, they prepared the post-arrest report and determined the charges against Plaintiff, permitting the arrest and detention of Plaintiff to move forward. *See Warheit v. City of New York,* 271 F. App'x 123 (2d Cir.2008) ("[A] supervisory official may be held liable for a subordinate's conduct in several ways, such as failing to 'remedy the wrong' upon learning of the violation, creating or ... acting with 'gross negligence' or 'deliberate indifference' in relation to the subordinate's constitutional violations." (quoting *Wright v. Smith,* 21 F.3d 496, 501 (2d Cir.1994))).

ii. Probable Cause

The existence of probable cause is "a complete defense to [a civil rights action arising from an arrest]," whether brought under state law or § 1983. *Bernard v. United States,* 25 F.3d 98, 102 (2d Cir.1994). "Probable cause exists when [one] ha[s] knowledge of, or reasonably trustworthy information as to, facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that an offense has been or is being committed by the person to be arrested." *Williams v. Town of Greenburgh,* 535 F.3d 71, 79 (2d Cir.2008). A district court must analyze the "totality of the circumstances" then known to the arresting officers in deciding whether probable cause existed. *Caldarola v. Calabrese,* 298 F.3d 156, 162 (2d Cir.2002); *Howard v. City of New York,* No. 08 Civ. 6085, 2010 WL 1914747,

at *1 (S.D.N.Y. May 5, 2010) ("In considering whether there is probable cause for an arrest, courts 'must consider those facts available to the officer at the time of the arrest and immediately before it.' " (quoting *Lowth v. Town of Cheektowaga,* 82 F.3d 563, 569 (2d Cir.1996))).

*4 Because the facts relating to the inquiry into probable cause are not in dispute, there is no issue of material fact that precludes summary judgment. The only genuine factual dispute pertains to the manner in which the officers entered the Plaintiff's apartment—this issue, however, is not material to the question of whether probable cause existed. The parties agree that the officers observed Plaintiff's two-and-a-half-year-old...

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... was met." *Amore v. Novarro,* 624 F.3d 522, 536 (2d Cir.2010) (citing *Walczyk v. Rio,* 496 F.3d 139, 163 (2d Cir.2007)) (defining the qualified immunity standard as "arguable probable cause").

*5 Cleary and Lyons proceeded reasonably in arresting the Plaintiff after discovering Alyssa on the fire escape. An officer who responds to a 911 report, observes a child on a fire escape five floors above the pavement, and learns that the father was drinking beer in his bedroom and did not check on his daughter, could reasonably reach the conclusion that the father had either recklessly created a risk of injury to his child or failed to exercise reasonable diligence in caring for his child. Therefore, Cleary and Lyons are entitled to qualified immunity for their arrest of Green. Similarly, Trabucco and Tulino are protected by qualified immunity because there is no evidence that the Defendants learned any new information subsequent to the arrest that would make the decision to detain and charge Green unreasonable.

C. §§ 1983, 1985 Conspiracy Claims

To prove a § 1983 conspiracy, a plaintiff must show: (1) an agreement between two or more state actors or between a state actor and a private entity; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages. *Pangburn v. Culbertson,* 200 F.3d 65, 72 (2d Cir.1999). The elements of a claim under § 1985 are: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, ...; (3) an act in furtherance of the conspiracy; (4) whereby a person is ... deprived of any right of a citizen of the United States." *Mian v. Donaldson, Lufkin & Jenrette Secs. Corp.,* 7 F.3d 1085, 1087 (2d Cir.1993). The conspiracy must also be motivated by racial animus. *Brown v. City of Oneonta,* 221 F.3d 329, 341 (2d Cir.1999). A plaintiff "must provide some factual basis supporting a meeting of the minds, such that defendants entered into an agreement, express or tacit, to achieve the unlawful end." *Romer v. Morgenthau,* 119 F.Supp.2d 346, 363 (S.D.N.Y.2000).

Plaintiff has not presented any reason to support his allegation that there was an agreement among the Defendants to violate Green's constitutional rights. The Plaintiff has not alleged, except in the most conclusory fashion, that any such meeting of the minds occurred among any or all of the Defendants. For example, he asserts only three reasons to believe that the individual Defendants were members of a conspiracy, without even alleging any communication among the parties. Moreover, he has not demonstrated that these actions were motivated by racial animus. Therefore, his conspiracy allegation must fail under both § 1983 and § 1985. *See Webb v. Gord,* 340 F.3d 105 (2d Cir.2003) (granting summary judgment where Plaintiff set forth only conclusory, vague, and general allegations of a conspiracy).

D. Monell Claim

Municipalities, such as the City of Yonkers, can be liable under § 1983 "if the alleged offending conduct was undertaken pursuant to 'a policy statement, ordinance, regulation, or decision officially adopted and promulgated by [the municipal] officers ..., [or] governmental 'custom' even though such a custom has not received formal approval through the ... [municipality's] official decisionmaking channels.' " *Thomas v. City of New York,* No. 09 Civ. 3162, 2010 WL 5490900, at *14 (S.D.N.Y. Dec. 22, 2010) (quoting *Monell v. New York City Dep't of Social Servs.,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)) (alterations in original). A plaintiff need not point to an express rule or regulation, but can show "that a discriminatory practice of municipal officials was so 'persistent or widespread' as to constitute 'a custom or usage with the force of law,' or that a discriminatory practice of subordinate employees was 'so manifest as to imply the constructive acquiescence of senior policy-making officials.' " *Patterson v. County of Oneida, New York,* 375 F.3d 206, 226 (2d Cir.2004) (quoting *Sorlucco v. New York City Police Dep't,* 971 F.2d 864, 870–71 (2d Cir.1992)). In other words, Plaintiff must prove "that the municipality took some action that caused his injuries beyond merely employing the misbehaving officer." *Thomas,* 2010 WL 5490900, at *14.

*6 Green has not adduced sufficient evidence to defeat summary judgment on his *Monell* claim against the City of Yonkers. In the relevant parts of the Complaint, Green alleges that the City "had in effect *de facto* policies, practices and customs exhibiting deliberate indifference to the Constitutional right of individuals ..." (Complaint ¶ 53). These conclusory allegations, however, are unsupported by any evidence in the record. Indeed, Green has not pointed to any specific policy, practice, or custom that would support this *Monell* claim. Therefore, the City of Yonkers is entitled to summary judgment on this claim.

Plaintiff has named the Yonkers Police Department a Defendant in his malicious prosecution and *Monell* claims. Defendant accurately contends that these claims cannot stand. "[A] police department is an administrative arm of the municipal corporation," and cannot be sued for malicious prosecution or under *Monell* "because it does not exist separate and apart from the municipality and does not have its own legal identity." *Baker v. Willett,* 42 F.Supp.2d 192, 198 (N.D.N.Y.1999) (citations omitted) (addressing malicious prosecution claims); *Griffith v. Sadri,* No. 07 Civ. 4824, 2009 WL 2524961 (E.D.N.Y. Aug. 14, 2009) (addressing *Monell* claims). Therefore, the Yonkers Police Department is entitled to summary judgment with respect to all the causes of action in which it is named.

E. State Malicious Prosecution Claim

Plaintiff's final cause of action seeks relief under state law for malicious prosecution. Under New York law, "[t]he elements of an action for malicious prosecution are (1) the initiation of a proceeding, (2) its termination favorably to plaintiff, (3) lack of probable cause, and (4) malice." *Colon v. City of New York,* 60 N.Y.2d 78, 468 N.Y.S.2d 453, 455, 455 N.E.2d 1248 (1983). As the Court explained above, the Defendants acted on probable cause. Moreover, even in the absence of probable cause, the Defendants are also entitled to qualified immunity for the reasons discussed above. *Phillips v. DeAngelis,* 331 F. App'x 897, 897 (2d Cir.2009) ("[E]ven if the plaintiffs made out a prima facie case of malicious prosecution ... defendants would be entitled to the defense of qualified immunity."). Therefore, Defendants are entitled to summary judgment on Plaintiff's malicious prosecution claim.

III. Conclusion

For the foregoing reasons, Defendants' motion for summary judgment is granted with respect to all counts. The Clerk of Court is directed to close this case.

SO...

2011 WL 2446428
Only the Westlaw citation is currently available.
United States District Court,
E.D. New York.

Mary HOLLMAN, Individually and as the Administrator of the Estate of Samuel A. Cox, and the Estate of Samuel A. Cox, on behalf of decedent John Cox, Plaintiff,
v.
COUNTY OF SUFFOLK, Suffolk County Police Department, Suffolk Homicide Commander Det. Lieutenant Jack Fitzpatrick, in his individual and official capacity, Police Officers "John Doe" 1 through 10, whose names are known by the Defendants but as of yet are not known by Plaintiffs, Office of the Suffolk County Medical Examiner, Charles Wetli, M.D., Medical Examiner, in his individual and official capacity, James C. Wilson, M.D., Deputy Medical Examiner, in his individual and official capacity, Brookhaven Memorial Hospital Medical Center, South Country Ambulance, Emt L. Smith, in his individual and official Capacity, Emt D. Totong, in his individual and official capacity, Emt S. Al Qadri, in his individual and official capacity, and Ambulance Driver M. Sneed, in his individual and official capacity, Defendants.

No. 06–CV–3589 (JFB)(ARL). | June 15, 2011.

Attorneys and Law Firms

Frederick K. Brewington, Esq. of the Law Offices of Frederick K. Brewington, Hempstead, NY, for plaintiff.

South Country Ambulance, EMT Smith, EMT Totong, EMT Al Qadri and Ambulance Driver Sneed is Jeffrey B. Siler of Siler & Ingber, LLP, Garden City, NY, for Defendants.

Opinion

MEMORANDUM AND ORDER

JOSEPH F. BIANCO, District Judge.

*1 Plaintiff Mary Hollman (hereinafter, "plaintiff") brought the instant action on behalf of decedent John Cox (hereinafter, "Cox" or "decedent") regarding the incidents surrounding Cox's death on April 22, 2005. Plaintiff seeks damages against a number of defendants, including the County of Suffolk, certain Suffolk County Police Officers, the Office of the Suffolk County Medical Examiner and several of its employees, Brookhaven Hospital Memorial Medical Center, and South Country Ambulance and certain emergency medical technicians ("EMTs") who are members of the South Country Ambulance company, under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, 42 U.S.C. §§ 1981, 1983, 1985 and 1986, and various New York state law causes of action, including negligence and wrongful death. Defendants South Country Ambulance, EMTs Smith, Totong, Al Qadri and Ambulance Driver Sneed (collectively, "Ambulance Defendants") now move for summary judgment on all claims, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure. For the reasons stated below, the motion is granted in its entirety, and the Ambulance Defendants are terminated from the above-captioned case. [1]

I. BACKGROUND

A. Facts

The facts described below are taken from the parties' depositions, affidavits, and exhibits, and the parties' respective Rule 56.1 statement of facts ("Defs.' 56.1" and "Pl.'s 56.1"). Unless otherwise noted, the facts are undisputed. Upon consideration of the motions for summary judgment, the Court shall construe the facts in the light most favorable to plaintiff, the non-moving party. *See Capobianco v. New York,* 422 F.3d 47, 50 (2d Cir.2001).

On April 22, 2005, Cox, a thirty-nine year old African American male, was visiting his girlfriend at a residence in Bellport, New York. (Am. Comp. ¶ 43; Defs.' 56.1 ¶ 1; Pl.'s 56.1 ¶ 1.) At some point prior to 8 p.m., individuals present at the residence called the Suffolk County Police Department, requesting assistance because Cox was agitated. (Am. Compl. ¶ 44; Defs.' 56.1 ¶ 2; Pl .'s 56.1 ¶ 2.) The police arrived at the residence around 8:00 p.m ., and arrested Cox. (Am. Compl. ¶ 45; Defs.' 56.1 ¶ 3; Pl.'s 56 .1 ¶ 3.)

The parties dispute the extent to which Cox struggled with the police officers when they attempted to arrest him. (Defs.' 56.1 ¶ 4; Pl.'s 56.1 ¶ 4.) Plaintiff's complaint alleges that the officers ordered the other residents outside the house, closed the blinds, and assaulted Cox. (Am.Compl.¶¶ 47–48.) Specifically, plaintiff claims that the officers stomped on Cox's head and body, kicked him in the groin, and shocked

him with a Taser gun multiple times, which caused third-degree burns. (Am.Compl.¶¶ 49–50.)

Sergeant Kevin Lixfield of the Suffolk County Policy Department was the senior officer at the scene during the incident and made a radio call for an ambulance. [2] (Defs.' 56.1 ¶¶ 5–6.) The Ambulance Defendants arrived on the scene at approximately 8:27 p.m. (Pl.'s Counter–Statement of Material Facts In Dispute (hereinafter, "Pl.'s Counter 56.1") ¶ 42.) Sergeant Lixfield was standing outside the residence when the Ambulance Defendants arrived, and reported to EMT Smith that Cox was an emotionally disturbed person, and violent. [3] (Pl.'s Counter 56.1 ¶ 43.) EMT Smith entered the bedroom of the residence, where he witnessed four to five police officers restraining Cox on the bed, while placing him in handcuffs. (Pl.'s Counter 56.1 ¶¶ 46–47.) While EMT Smith was in the residence, he did not witness Cox striking the police officers, but did observe the officers using a Taser on Cox. (*Id.* ¶¶ 50, 76, 148, 160–61.) Upon request, EMTs Smith and Totong brought a stretcher to the main area of the house, and the police placed Cox face down on the stretcher, with his hands and legs cuffed. (*Id.* ¶¶ 48–49, 51.) EMTs Smith and Totong applied straps to secure Cox to the stretcher. (*Id.* ¶¶ 51, 61.) During the time that the EMTs were in the residence, EMT Smith prepared a rebreather mask to supply oxygen to Cox, but the officers ordered him not to apply the mask. (*Id.* ¶¶ 59, 60.)

***2** EMTs Smith and Totong assisted the police in carrying Cox, on the stretcher, to the ambulance. (*Id.* ¶ 61.) Cox was positioned incorrectly in the ambulance, face down on the stretcher, with his head facing the rear doors of the ambulance. (*Id.* ¶¶ 34, 62 .) EMT Smith advised the police officers at the scene that Cox should be repositioned so that he was face up, with his head at other end of the stretcher, but he was rebuffed by the police officers, who reported that repositioning Cox would be unsafe. (*Id* . ¶¶ 62, 63.)

Cox remained in police custody during the ambulance ride to Brookhaven Memorial Hospital Medical Center. (Defs.' 56.1 ¶ 10; Pl.'s 56.1 ¶ 10.) Smith and Totong rode in the back of the ambulance with three police officers who were restraining Cox. (Defs.' 56.1 ¶ 12; Pl.'s 56.1 ¶ 12.) Specifically, plaintiff alleges that one police officer was sitting on Cox's lower back, another was sitting on his legs, and another was restraining his neck by applying pressure on the back of his neck for the entire journey to the hospital. (Pl.'s Counter 56.1 ¶ 20.) During the ambulance ride, the police officers directed Smith to not provide Cox with medical treatment. (Defs.' 56.1 ¶¶ 11, 14; Pl.'s 56.1 ¶¶ 11, 14.) Smith attempted to apply the rebreather mask a second time, but was again ordered not to by the police officers, because they advised him that Cox was still combative. (Pl.'s Counter 56.1 ¶ 64; Pl.'s Ex. G at 93.)

The ambulance arrived at the hospital at approximately 8:42 p.m. (*Id.* ¶ 67.) After Cox was removed from the ambulance, he was no longer combative. (*Id.* ¶ 72.) Cox was brought into the trauma room at the hospital, but the police would not allow a registered nurse to transfer Cox to a hospital stretcher without hospital restraints because they claimed Cox to be combative. (*Id* . ¶¶ 70, 146.) While the hospital staff retrieved restraints, Smith observed that Cox was not moving or speaking, and that the police officer was still holding the back of Cox's neck. (*Id.* ¶ 71.) After the hospital staff returned with restraints, Cox was uncuffed, turned over, and it was discovered that he was in cardiac arrest. (*Id.* ¶ 73.) The EMTs were then instructed to leave the room. (*Id.* ¶ 73.) At approximately 8:50 p.m., Cox had no recordable blood pressure, no pulse and a respiratory rate of zero. (*Id.* ¶ 74.) Cox was officially pronounced dead at 9:37 p.m. (*Id.* ¶ 97.)

EMT Smith did not leave a Prehospital Care Report at the hospital when Cox was admitted. (*Id.* ¶ 79.) While at the hospital, EMT Smith contacted the chief of his company, who instructed him not to submit any statements until the ambulance company's attorney was notified. (*Id.* ¶¶ 66, 79.) That report was submitted at a later date, and included as the chief complaint a description that "[a]s per PD, emotionally disturbed person, violent." (*Id.* ¶ 43.) The report only indicated injuries to Cox's hands and arms. (*Id.* ¶ 162.) EMT Smith also completed an Incident Report Form which indicated that "the police department was advising me that it was, in my opinion, in my best interest that I didn't interact with the patient." (*Id.* ¶ 65.)

B. Procedural History

***3** Plaintiff filed the complaint in the instant action on July 21, 2006. An amended complaint was filed on November 10, 2006. On April 29, 2009, the Ambulance Defendants filed the instant motion for summary judgment. Plaintiff filed opposition papers to the motion for summary judgment on July 1, 2009, and the Ambulance Defendants filed their reply papers on July 28, 2009. The Court held oral argument on the instant motion, and other related motions on August 24, 2009. On November 24, 2009, plaintiff filed a supplemental declaration in support of plaintiff's memorandum of law in opposition and, on January 15, 2010, the Ambulance Defendants filed a sur-reply. This matter is fully submitted. [4]

II. STANDARD OF REVIEW

The standards for summary judgment are well settled. Pursuant to Federal Rule of Civil Procedure 56(a), a court may only grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of showing that he or she is entitled to summary judgment. *See Huminski v. Corsones,* 396 F.3d 53, 69 (2d Cir.2005). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c)(1). The court "is not to weigh the evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." *Amnesty Am. v. Town of W. Hartford,* 361 F.3d 113, 122 (2d Cir.2004) (internal quotation marks omitted); *see Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986) (summary judgment is unwarranted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party").

Once the moving party has met its burden, the opposing party " 'must do more than simply show that there is some metaphysical doubt as to the material facts.... The nonmoving party must come forward with specific facts showing that there is a *genuine issue for trial.' " Caldarola v. Calabrese,* 298 F.3d 156, 160 (2d Cir.2002) (emphasis in original) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586–87 (1986)). As the Supreme Court stated in Anderson, "[i]f the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson,* 477 U.S. at 249–50 (internal citations omitted). Indeed, "the mere existence of *some* alleged factual dispute between the parties" alone "will not defeat an otherwise properly supported motion for summary judgment." *Id.* at 247–48 (emphasis in original). Thus, the nonmoving party may not rest upon mere conclusory allegations or denials but must set forth " 'concrete particulars' showing that a trial is needed." *R.G. Grp ., Inc. v. Horn & Hardart Co.,* 751 F.2d 69, 77 (2d Cir.1984) (quoting *SEC v. Research Automation Corp.,* 585 F.2d 31, 33 (2d Cir.1978)). Accordingly, it is insufficient for a party opposing summary judgment " 'merely to assert a conclusion without supplying supporting arguments or facts.' " *BellSouth Telecomms., Inc. v. W .R. Grace & Co.,* 77 F.3d 603, 615 (2d Cir.1996) (quoting *Research Automation Corp.,* 585 F.2d at 33).

III. DISCUSSION

***4** Plaintiff alleges federal causes of action for violations of Cox's civil rights under 42 U.S.C. §§ 1981, 1983, 1985 and 1986 against the Ambulance Defendants. In addition, plaintiff alleges causes of action under New York common law for negligence and wrongful death. For the reasons discussed below, the Court finds that summary judgment should be granted on all of plaintiff's claims as against the Ambulance Defendants.

A. Claims Arising Under 42 U.S.C. § 1983

In order to prevail on a federal civil rights action under Section 1983, a plaintiff must demonstrate: (1) the deprivation of any rights, privileges, or immunities secured by the Constitution and laws; (2) by a person acting under the color of state law. 42 U .S.C. § 1983. "Section 1983 itself creates no substantive rights; it provides only a procedure for redress for the deprivation of rights established elsewhere." *Sykes v. James,* 13 F.3d 515, 519 (2d Cir.1993). However, even if a plaintiff has adequately alleged a constitutional injury, a Section 1983 claim cannot be successful unless it can be demonstrated that such injury was caused by a party acting under the "color of state law," and thus the central question is whether the alleged infringement of federal rights is "fairly attributable to the state." *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 937 (1982); *Wyatt v. Cole,* 504 U.S. 158, 161 (1992) ("The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."); *Tancredi v. Metro Life Ins. Co.,* 316 F.3d 308, 312 (2d Cir.2003) ("A plaintiff pressing a claim of violation of his constitutional rights under § 1983 is thus required to show state action.").

As a baseline matter, private citizens and entities are not generally subject to Section 1983 liability. *See Ciambriello v. County of Nassau,* 292 F.3d 307, 323–34 (2d Cir.2002); *Reaves v. Dept. of Veterans Affairs,* No. 08–CV–1624

(RJD), 2009 WL 35074, at *3 (E.D.N.Y. Jan. 6, 2009) ("Purely private conduct is not actionable under § 1983, 'no matter how discriminatory or wrongful.' " (quoting *Am. Mfrs. Mut. Ins. Co v. Sullivan,* 526 U.S. 40, 50 (1999))). However, "the actions of a nominally private entity are attributable to the state when: (1) the entity acts pursuant to the 'coercive power' of the state or is 'controlled' by the state ('the compulsion test'); (2) when the state provides 'significant encouragement' to the entity, the entity is a 'willful participant in joint activity with the [s]tate,' or the entity's functions are 'entwined' with state policies ('the joint action test' or 'close nexus test'); or (3) when the entity 'has been delegated a public function by the [s]tate.' ('the public function test')." *Sybalski v. Indep. Gr. Home Living Program, Inc.,* 546 F.3d 255, 257 (2d Cir.2008) (citing *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n,* 531 U.S. 288, 296 (2001)); *see also Luciano v. City of N.Y.,* No. 09–CV–0539 (DC), 2009 WL 1953431, at *2 (S.D.N.Y. July 2, 2009) (stating that a private entity may only be considered a state actor for the purposes of § 1983 if the private entity fulfills one of the "state compulsion," "public function" or "close nexus" tests); *accord Faraldo v. Kessler,* No. 08–CV–0261 (SJF), 2008 WL 216608, at *4 (E.D.N.Y. Jan. 23, 2008). "It is not enough, however, for a plaintiff to plead state involvement in *'some activity* of the institution alleged to have inflicted injury upon a plaintiff'; rather, the plaintiff must allege that the state was involved 'with the *activity that caused the injury'* giving rise to the action." *Sybalski,* 546 F.3d at 258 (citing *Schlein v. Miford Hosp., Inc.,* 561 F.2d 427, 428 (2d Cir.1977) (emphasis in original). A plaintiff "bears the burden of proof on the state action issue." *Hadges v. Yonkers Racing Corp.,* 918 F.2d 1079, 1083 n. 3 (2d Cir.1990), *cert. denied,* 499 U.S. 960 (1991).

***5** In the instant case, it is undisputed that South Country Ambulance Company and its volunteer EMTs are private parties. Plaintiff argues, however, that the Ambulance Defendants should be considered to be acting under the color of state law under the public function and "symbiotic relationship" tests.[5] For the reasons stated below, even crediting plaintiff's evidence and drawing all reasonable inferences in plaintiff's favor, there is insufficient evidence from which a rational jury could find that the Ambulance Defendants acted under the color of state law. Thus, her § 1983 claims cannot survive summary judgment.

1. Public Function Test

The public function exception to the rule that private conduct is not ordinarily actionable under § 1983 is narrow. As the Supreme Court has instructed, "the relevant question is not simply whether a private group is serving a 'public function' ... [T]he question is whether the function performed has been 'traditionally the *exclusive* prerogative of the State.' " *Rendell–Baker v. Kohn,* 457 U.S. 830, 842 (1983) (quoting *Jackson v. Metro. Edison Co.,* 419 U.S. 345, 353 (1974)) (emphasis added); *accord Sybalski,* 546 F.3d at 259; *Horvath v. Westport Library Ass'n,* 362 F.3d 147, 152 (2d Cir.2004) (finding no state action under public function test where function at issue not "traditionally associated with sovereignty") (internal citation and quotation marks omitted).

First, that ambulatory services may be subject to extensive regulation by the New York State Health Department, and subject to other testing and certification requirements, does not establish such services as traditional state services for the purposes of the public function test. Although New York may regulate ambulatory services, the plaintiff has not shown that these regulations require the state or any local municipality to provide ambulance services. *See Blum v. Yaretsky,* 457 U.S. 991, 1011 (1982) (finding nursing home services not public function, despite extensive New York state regulation, where no regulatory provisions required State to provide services itself); *see also McKinney v. West End Voluntary Ambulance Ass'n,* 821 F.Supp. 1013, 1018 (E.D.Pa.1992) (volunteer ambulance services not public function by virtue of Pennsylvania Emergency Medical Services Act, where the regulations promulgated under that statute did not impose an obligation on the Commonwealth of Pennsylvania to provide ambulance services).[6]

Similarly, plaintiff's argument that the Ambulance Defendants fall under the public function exception because they receive some government funding support through a special ambulance tax district is without merit; it is well-settled that "receipt of state funds [alone] is ... insufficient to transform ... private actions into state actions." *Alcena v. Raine,* 692 F.Supp. 261, 267 (S .D.N.Y.1998); *see Rendell–Baker v. Kohn,* 457 U.S. at 840–43 (finding private school, which received ninety percent of funds from government and was extensively regulated, was not a state actor within meaning of Section 1983); *see also Blum,* 457 U.S. at 1011–12 (finding no state action notwithstanding fact that state paid medical expenses of more than ninety percent of the patients and subsidized the operating and capital costs of the nursing homes); *Arons v. State of N.Y.,* No. 04–CV–0004 (DLC), 2004 WL 1124669, at *6 (S.D.N.Y. May 20, 2004) ("The

receipt of public funds by a private entity, no matter how extensive, is insufficient in and of itself to establish state action."); *Archer v. Economic Opp. Comm'n of Nassau Co., Inc.,* 30 F.Supp.2d 600, 605 (E.D.N.Y.1998) ("The United States Supreme Court has repeatedly held that a private entity's dependence on government funding does not make the organization a state actor.").

*6 Plaintiff also argues that the public function exception applies because the Ambulance Defendants perform particular activities which plaintiff claims to be "public," including patrolling county parks and federal parks within the district, and providing medical aid in such districts. As a threshold matter, the Supreme Court has rejected the argument that provision of services to the public converts an action into a public function. *See Jackson,* 419 U.S. at 352–54 (rejecting broad principle under public function test that all businesses affected with the public interest are state actors); *McKinney,* 821 F.Supp. at 1019 ("[T]he relevant inquiry under this standard is not just whether the private entity is serving a public function, but whether such a function is " 'traditionally the *exclusive* prerogative of the State.' ") (quoting *Rendell–Baker v. Kohn,* 457 U.S. at 842) (emphasis in original). Moreover, even assuming *arguendo* that providing ambulatory services on county or federal land is traditionally the exclusive prerogative of the state, these activities are wholly unrelated to the alleged injury at issue in the instant case—plaintiff's injuries did not arise from the Ambulance Defendants' patrols of such public land—and therefore are inapplicable to the state action analysis. *Cf. Schlein,* 561 F.2d at 428 (plaintiff must alleged that state was involved "with the activity that caused the injury" giving rise to the action). Similarly, that the Ambulance Defendants receive calls through a county-run emergency 911 dispatch system does not convert them into state actors where the dispatch is itself unrelated to the alleged constitutional harm in the instant case. *See, e.g., Doe v. Harrison,* 254 F.Supp.2d 338, 344–45 (S.D.N.Y.2003); *see also McKinney,* 821 F.Supp. at 1020 ("[R]eceiving emergency calls through a government-operated system is no more persuasive than the fact of regulation or funding in demonstrating that the government was responsible for [a private party's] conduct.").

Finally, the Court notes that whereas plaintiff has failed to point to a single instance in which a court has determined ambulatory services to fall within the ambit public function exception, a number of courts have held otherwise. *See, e.g., Groman v. Township of Manalapan,* 47 F.3d 628, 641 (3d Cir.1995) (holding that a volunteer first aid squad was not a state actor under public function test); *Gallegos v. Slidell Police Dept.,* No. 07–CV–6636, 2008 WL 1794170 (E.D.La. Apr. 18, 2008) (finding medical services of ambulance driver not exclusive prerogative of state for public function test); *McKinney,* 821 F.Supp. at 1018–20 (holding volunteer ambulance company not state actor under public function test); *Krieger v. Bethesda–Chevy Chase Rescue Squad,* 599 F.Supp. 770, 773 (D.C.Md.1984) (rescue or ambulance service not a public function), *aff'd without opinion,* 792 F.2d 139 (4th Cir.1986); *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.,* 569 F.Supp. 1344, 1350–51 (E.D.Va.1983) (finding emergency transportation service more akin to a private function, and not a function that is traditionally the exclusive prerogative of the government), *aff'd without opinion,* 742 F.2d 1448) (4th Cir.1984).

*7 Accordingly, the undisputed facts in this case demonstrate as a matter of law that the Ambulance Defendants cannot be considered to have been operating under the "color of state law" pursuant to the public function test, and, thus, any claim under that test cannot survive summary judgment.

2. Symbiotic Relationship Test

The Court also concludes that no rational jury could conclude that the Ambulance Defendants are state actors for § 1983 purposes under the "symbiotic relationship" test established by the United States Supreme Court in *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 81 S.Ct. 856 (1961).

According to *Burton,* actions of a private party can be considered state action if the state has "so far insinuated itself into a position of interdependence with [the acting party] that it must be recognized as a joint participant in the challenged activity ..." 365 U.S. at 725. The Supreme Court applied this test in *Burton* to find that a private restaurant located within a public parking garage, which discriminated based on race, was involved in state action because mutual benefits were conferred, and the restaurant operated physically and financially "as an integral part of a public building devoted to a public parking service." *Id.* at 724. In the other case cited by plaintiff, *Janusaitis v. Middlebury Volunteer Fire Department,* 607 F.2d 17, 23 (2d Cir.1979), the Second Circuit applied the *Burton* symbiotic relationship test to find state action on the part of a volunteer fire department, where there the state was extensively involved and intertwined with the fire company, noting that the fire company occupied land and buildings owned by the town, used equipment owned by the town, and had its operations overseen by the locality

(which retained final approval regarding the selection of the company's chief in command).

In the instant case, there is no evidence that the Ambulance Defendants and the state were so interdependent such that the symbiotic test is applicable. First and foremost, there is no indication that the state had a *direct proprietary* interest in the operations of the South Country Ambulance company, a requirement which has been deemed critical by subsequent Supreme Court and Second Circuit precedent. *See Rendell–Baker,* 457 U.S. at 842–43 (declining from finding symbiotic relationship, distinguishing *Burton* on the basis that the private party in that case was located on public property and rent payments directly supported the public entity); *Hadges,* 918 F.2d at 1082 ("In contrast to *Burton,* the State in the instant case does not have a proprietary interest in [private party defendant]."); *accord Calderon v. Burton,* 457 F.Supp.2d 480, 488 (S.D.N.Y.2006); 1 Martin A. Schwartz, *Section 1983 Litigation: Claims and Defenses* § 5.13[A] at 5–90–5–91, 5–94 (4th ed. 2003) ("The lower federal courts generally follow the present Supreme Court's reading of *Burton* that the most significant fact that led to the finding of state action was the public authority's profiting from the restaurant's discrimination."). In the instant case, unlike *Janusaitis,* there is no indication that the state owned the land or all the equipment used by the South Country Ambulance company, or that it was directly managed or operated by government officials. *Forbes v. City of N.Y.,* No. 05–CV–7331 (NRB), 2008 WL 3539936, at *7 (S.D.N.Y. Aug. 12, 2008) ("[T]he weight of authority suggests that *Burton* itself is highly circumscribed authority ... [w]hen courts do apply the symbiosis factor, they often examine whether the government has control over the private actor's 'day-to-day' operations and whether the government shares in any profits the private entity has generated *from the challenged conduct.*") (internal citations and quotation marks omitted) (emphasis in original); *McKinney,* 821 F.Supp. at 1019 (rejecting application of *Burton* symbiotic relationship doctrine to volunteer ambulance company that owned building equipment, and did not have its membership appointed by government officials). Plaintiff can only point to the fact that the Ambulance Defendants are regulated by the State and receive funding support from an ambulance tax district, but such facts alone are insufficient to satisfy the symbiotic relationship test as a matter of law, and (as discussed *supra*) are insufficient to characterize a private party's activities as state action for the purposes of § 1983. *See, e.g., Blum v. Yatresky,* 457 U.S. 991 (1982) (rejecting argument that state subsidization of operating and capital costs of nursing homes, payment of the medical expenses of more than 90% of the patients, and the licensing of such facilities created symbiotic relationship between the State and homes); *Archer v. Economic Opportunity Com'n of Nassau Co., Inc.,* 30 F.Supp.2d 600, 605 (E.D.N.Y.1988) (rejecting application of symbiotic relationship test where private entity received 95 percent of funding from state and was subject to regulation; "[t]he United States Supreme Court has repeatedly held that a private entity's dependence on government funding does not make the organization a state actor").

***8** Accordingly, even accepting plaintiff's evidence as true and drawing all reasonable inferences in her favor, no rational jury could find that the Ambulance Defendants should be considered to have been operating under the "color of state law" pursuant to the symbiotic relationship test and, thus, any claim under that test cannot survive summary judgment.

3. Joint Action/Compulsion Test

The Court notes that the plaintiff did not raise the compulsion test in support of its contention that the Ambulance Defendants were acting under the "color of state law" for § 1983 purposes. However, because the Constitutional harm in the instant case allegedly caused by the defendants involved a failure to provide medical care, and that alleged harm was a result of the officers' direct orders that the Ambulance Defendants not provide medical care to decedent, a discussion of the joint action and compulsion tests is warranted. For the reasons stated below, the Court finds that, even if plaintiff had adequately raised these tests, any arguments for the application of the joint action doctrine or compulsion tests would be without merit. Specifically, even accepting plaintiff's evidence as true, no rational jury could conclude that the Ambulance Defendants *willingly* participated in denying decedent medical care where it is undisputed that the EMTs repeatedly requested to render medical care and were denied by the police officers who had the decedent in custody.

Under the "joint action" doctrine, a private actor can be found "to act under color of state law for § 1983 purposes if ... [the private party] is a willful participant in joint action with the State or its agents". *Dennis v. Sparks,* 449 U.S. 24, 27 (1980). "The touchstone of joint action is often a 'plan, prearrangement, conspiracy, custom, or policy' shared by the private actor and the police." *Forbes,* 2008 WL 3539936, at *5 (citing *Ginsberg v. Healey Car & Truck Leasing, Inc.,* 189 F.3d 268, 272 (2d Cir.1999)). To establish joint action, "a plaintiff must show that the private citizen and the state official shared a common unlawful goal." *Bang v. Utopia Restaurant,* 923 F.Supp. 46, 49 (S.D.N.Y.1996);

see also Burrell v. City of Mattoon, 378 F.3d 642, 650 (7th Cir.2004) (under joint action requirement, plaintiff must show that "both public and private actors share a common, unconstitutional goal").

Here, any contention for the application of the joint action doctrine would be without merit, because it is uncontested that the Ambulance Defendants did not *willingly* participate in joint action with the defendant police officers in denying decedent medical treatment while in custody. Specifically, the undisputed record reflects that EMT Smith attempted several times to render medical care, but was repeatedly ordered not to provide such assistance by the police officers who had Cox in custody. The Court concluded previously, with respect to defendant Brookhaven, that it cannot be said that the Ambulance Defendants shared a common, unconstitutional goal where they would have provided care but for explicit police orders to stand down. *See* January 27 Mem. & Order, at *8; *See, e.g., Harvey v. Plains Twp. Police Dept.,* 421 F.3d 185, 195–196 (3d Cir.2005) (finding that private landlord defendant was not acting under "color of state law" based on joint action because private party was not *willful* participant; "a private citizen acting at the orders of a police officer is not generally acting in a willful manner, especially when that citizen has no self-interest in taking the action"). Where as here, the decedent was in police custody, and it is undisputed that the police officers ordered the Ambulance Defendants to stand down from attempting to provide medical treatment, the Ambulance Defendants cannot be said to be willful participants. Thus, any claim that the Ambulance Defendants should be considered to have been operating under the "color of state law" pursuant to the "joint action" doctrine test cannot survive summary judgment.

***9** Moreover, although it can be fairly said from the above that the record supports the proposition that the alleged Constitutional violation was *compelled* by the state—insofar as the police officers ordered the Ambulance Defendants not to provide medical treatment—the Court finds that the Ambulance Defendants cannot be held liable for such compelled acts resulting from a police order, absent evidence of willfulness. Although the Second Circuit has not directly confronted this issue, the Court agrees with the approach taken by the Third and Ninth Circuits, which have found that a private party cannot be held liable based on alleged unconstitutional actions that are the result of government compulsion alone. *See Harvey,* 421 F.3d at 196 (finding private party not liable for alleged unconstitutional act which was performed pursuant to a police order; "[the private party] would therefore not be liable here because she had not wilfully participated in the state action, as compulsion by the state negates the presence of wilfulness"); *see also Sutton v. Providence St. Joseph Medical Center,* 192 F.3d 826, 838, 843 (9th Cir.1999) (holding that "a plaintiff must show 'something more' than state compulsion, typically willful participation, in order to hold a private defendant liable as a government actor"). This is not to say that no party may be held accountable for the alleged violation of constitutional rights by a private party; as noted by the Ninth Circuit in *Sutton,* the Supreme Court has plainly held that the *government* may be held liable, where it compels a private party to violate constitutional rights. *See id.* (citing *Peterson v. City of Greenville,* 373 U.S. 244, 247–48 (1963) (holding that city could not escape liability for racial discrimination committed by private entity, where discrimination was compelled by city ordinance requiring segregation); *Harvey,* 421 F.3d at 196 n. 13 ("[I]t seems entirely proper to find that the state actor engaged in state action, including whatever actions the private party was compelled to take."). In circumstances in which the government pressures another party to commit an unlawful act, "the state is undeniably the party who is 'responsible for that act.' " *Sutton,* 192 F.3d at 838. However, it is inequitable to hold the private party liable, where, as here, the undisputed record supports the proposition that the private party would not have committed the alleged unconstitutional act but for the direct police order. As discussed by the Ninth Circuit in *Sutton:*

> [W]e would expect that the private defendant is *not* responsible for the government's compulsion: "The logical conclusion of [*Peterson v. City of Greenville,* 373 U.S. 244 (1963)] is that only the state actor, and not the private party, should be held liable for the constitutional violation that resulted from the state compulsion. When the state compels a private party to discriminate against members of a racial minority, it is the state action, not the private conduct, which is unconstitutional ... [A] private party in such a case is 'left with no choice of his own' and consequently should not be deemed liable."

***10** *Id.* (quoting Barbara Rook Snyder, *Private Motivation, State Action, and the Allocation of Responsibility for Fourteenth Amendment Violations,* 75 Cornell L.Rev. 1053, 1067, 1069 (1990) (footnote omitted)).

Accordingly, because the alleged constitutional violation in the instant case was compelled by the orders of the police officers, and it cannot be fairly said that plaintiff willingly participated in the alleged deprivation, the alleged unlawful

acts are fairly imputed to the officers and not the Ambulance Defendants. *See Harvey,* 421 F.3d at 196 n. 13 (holding private party not liable for alleged unconstitutional actions unwillingly committed by private individual based upon police order; imputing action committed by private party to officers for liability purposes). The police officers are defendants to the instant action, and are the appropriate parties which may be potentially held liable for the alleged constitutional deprivation of medical treatment to decedent while he was in their custody, if proven at trial.

* * *

In sum, even crediting plaintiff's evidence and drawing all reasonable inferences in her favor, there is insufficient evidence from which a rational jury could find the South Country Ambulance Company, and its volunteer EMTs, were acting under "color of state law" for the purposes of 42 U.S.C. § 1983. Accordingly, summary judgment is granted with respect to all claims alleged against the Ambulance Defendants under § 1983. [7]

B. Plaintiff's Claims Arising Under 42 U.S.C. §§ 1981, 1985, and 1986

Plaintiff also alleges that defendants discriminated against Cox in violation of 42 U.S.C. §§ 1981, 1985, and 1986. As set forth below, summary judgment is warranted because plaintiff has provided no evidence of discriminatory intent on the part of the Ambulance Defendants, beyond conclusory allegations, that would allow any of these claims to survive summary judgment.

"To establish a claim under § 1981, a plaintiff must allege facts in support of the following elements: (1) the plaintiff is a member of a racial minority; (2) an intent to discriminate on the basis of race by the defendant; and (3) the discrimination concerned one or more of the activities enumerated in the statute (i.e., make and enforce contracts, sue and be sued, give evidence, etc.)." *Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 7 F.3d 1085, 1087 (2d Cir.1993); *Albert v. Carovano,* 851 F.2d 561, 571–72 (2d Cir.1998) ("Essential to an action under Section 1981 are allegations that the defendants' actions were purposefully discriminatory, and racially motivated."). Plaintiff's claim fails as a matter of law because she has not produced *any* evidence indicating that the Ambulance Defendants had the intent to discriminate based upon race, other than noting that the Ambulance Defendants were *aware* that Cox was an African–American and a conclusory allegation that their acts were discriminatory. *See, e .g., Brown v. City of Oneonta, N.Y.,* 221 F.3d 329, 339 (2d Cir.2000) (dismissing § 1981 claim for failure to adequately allege discriminatory intent); *Washington v. City of New York,* No. 05–CV–8884 (LAP), 2009 WL 1685947, at *7 (S.D.N.Y. June 5, 2009) (granting summary judgment dismissing § 1981 claim where plaintiff had no evidence of discriminatory animus other than speculation and conclusory allegations); *accord Nasca v. Town of Brookhaven,* No. 05–CV–0122 (JFB), 2008 WL 4426906, at *15 (E.D.N.Y. Sept. 25, 2008); *Carson v. Lewis,* 35 F.Supp.2d 250, 269 (E.D.N.Y.1999) ("[N]aked assertion[s] by plaintiff[s] that race was a motivating factor without a fact-specific allegation of a causal link between defendant's conduct and the plaintiff's race [are] too conclusory ..."). Because a reasonable jury could not find that the Ambulance Defendants intended to discriminate based on race merely based on the EMTs' awareness that Cox was African–American, summary judgment for the Ambulance Defendants on the Section 1981 claim is appropriate.

***11** Section 1985(3) prohibits two or more persons from conspiring for the purpose of depriving any person of the equal protection of the laws, or of equal privileges and immunities under the laws. [8] In order to establish a claim under § 1985(3), plaintiff must establish four elements: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the laws; [and] (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of a citizen of the United States." *Mian,* 7 F.3d at 1087. The conspiracy must be motivated "by some racial or perhaps otherwise class-based, invidious discriminatory animus behind the conspirators' action." *Id.* (quoting *United Bhd. of Carpenters, Local 610 v. Scott,* 463 U.S. 825, 829, 103 S.Ct. 3352, 77 L.Ed.2d 1049 (1983)). As with the § 1981 claim, plaintiff only offers conclusory allegations that the actions involved discriminatory animus, merely asserting that the Ambulance Defendants knew that Cox was both African–American and disabled. Because there is no evidence of racial or other class-based animus on the record, the Ambulance Defendants are entitled to summary judgment on plaintiff's § 1985 claim. *See Graham v. Henderson,* 89 F.3d 75, 82 (2d Cir.1996) (holding that district court properly granted summary judgment dismissing § 1985 claim where plaintiff only offered conclusory allegations of racial discrimination); *Nasca,* 2008 WL 4426906, at *15 (granting summary judgment, dismissing § 1985 claim based on lack of evidence on record of any racial or class-

based animus); *accord Datri v. The Incorporated Village of Bellport,* No. 04–CV–3497 (DRH), 2006 WL 2385429, at *7 (E.D.N.Y. Aug. 17, 2006), *aff'd,* 308 F. App'x. 4665 (2d Cir.2008).

Finally, the Ambulance Defendants are also entitled to summary judgment on plaintiff's § 1986 claim because it is well-settled that "a § 1986 claim must be predicated upon a valid § 1985 claim." *Mian,* 7 F.3d at 1088. Because the Court has found that plaintiff's § 1985 claim against the Ambulance Defendants must be dismissed, the § 1986 claim must be dismissed as well. *See Nasca,* 2008 WL 4426906, at *15 (dismissing § 1986 claim where no valid § 1985 claim existed); *accord Lehman v. Kornblau,* 134 F.Supp.2d. 281, 289 (E.D.N.Y.2001); *Altschuler v. Univ. of Pa. Law School,* No. 95–CV–0249 (LLS), 1997 WL 129394, at *17 (S.D.N.Y. Mar. 21, 1997); *Augustine v. Reid,* 882 F.Supp. 50, 54 (E.D.N.Y.1995).

Accordingly, summary judgment for the Ambulance Defendants is warranted on plaintiff's claims arising under 42 U.S.C. §§ 1981, 1985, and 1986.

C. New York Negligence and Wrongful Death Claims [9]

Plaintiff alleges claims for negligence and wrongful death under New York state law. For the reasons discussed below, the Court concludes that summary judgment is warranted, dismissing all of plaintiff's state law claims against the Ambulance Defendants. Specifically, as a threshold matter, the Ambulance Defendants are entitled to summary judgment because the plaintiff failed to plead *gross* negligence as required under Public Health Law § 3013 and never sought leave to amend the complaint. Furthermore, even if the plaintiff had properly pled gross negligence in the amended complaint, plaintiff's claims would still fail as a matter of law, because the unsworn expert report submitted by plaintiff is inadmissible on summary judgment and, thus, plaintiff has failed to adduce any evidence regarding the applicable standard of care owed by the Ambulance Defendants. Finally, even assuming that the proffered unsworn report was admissible, the Court concludes that the expert testimony would be insufficient to allow this claim to survive summary judgment because it fails to offer the appropriate standard of care where police officers direct the EMTs not to provide medical treatment. Moreover, even if plaintiff's expert had established the relevant standard of care, plaintiff has failed to offer sufficient evidence from which a rational jury could conclude that the Ambulance Defendants' conduct constituted a gross deviation from such standard.

***12** In New York, in an action for negligence, a plaintiff must prove three elements: " '(1) the existence of a duty on defendant's part to plaintiff; (2) a breach of this duty; and (3) injury to the plaintiff as a result thereof.' " *Alfaro v. Wal–Mart Stores, Inc .,* 210 F.3d 111, 114 (2d Cir.2000) (quoting *Akins v. Glens Falls City Sch. Distr.,* 53 N.Y.2d 325, 333, 441 N.Y.S.2d 644, 424 N.E.2d 531 (N.Y.1981)). The negligence determination is also determinative of the plaintiff's wrongful death claim, because "[t]o succeed on a cause of action to recover damages for wrongful death, the decedent's personal representative must establish, *inter alia,* that the defendant's wrongful act, neglect, or default caused the decedent's death." *Eberts v. Makarczuk,* 52 A.D.3d 772, 772–73, 861 N.Y.S.2d 731 (N.Y.App.Div.2008); *see also Chong v. N.Y. City Tr. Auth.,* 83 A.D.2d 546, 547, 441 N.Y.S.2d 24 (N.Y.1981) (defining elements of wrongful death claim as: (1) death of a human being; (2) negligence of a defendant causing death; (3) survival of distributees suffering pecuniary loss because of the death; and (4) appointment of a personal representative of the decedent).

The parties do not dispute that in order for the Ambulance Defendants to be liable under either of plaintiff's New York law claims, the plaintiff must demonstrate *gross* negligence, rather than plain vanilla negligence. Under New York Public Health Law § 3013(1), a volunteer ambulance company and its members can only be held liable for their acts or omissions causing injury or death arising from gross negligence. *Kowal v. Deer Park Fire Dist.,* 13 A.D.3d 489, 491, 787 N.Y.S.2d 352 (N.Y.App.Div.2004) ("[D]efendants, in view of their status as a voluntary ambulance service, would not be liable unless it is established that the plaintiff's decedent's injury and death were caused by their gross negligence") (citing N.Y. Public Health Law § 3013(1)); *accord Rider v. Gaslight Tavern Corp,* 125 A.D.2d 144, 147, 512 N.Y.S.2d 553 (N.Y.App.Div.1987). Accordingly, since the South Country Ambulance company and its EMTs are volunteers, plaintiff is required to demonstrate gross negligence, which "evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing." *Colnaghi, USA v. Jeweler's Protection Services,* 81 N.Y.2d 821, 823–24 (N.Y.1993). "[G]ross negligence has been termed failure to exercise even slight care." *Food Pageant, Inc. v. Consolidated Edison Co., Inc.,* 54 N.Y.2d 167, 172, 445 N.Y.S.2d 60 (N.Y.1981).

As a threshold matter, the Ambulance Defendants are entitled to summary judgment because the Amended Complaint

does not include any allegations of *gross* negligence on the part of the Ambulance Defendants, in either the negligence or wrongful death claims. *See, e.g., O'Leary v. Greenport Fire Dept.,* 276 A.D.2d 539, 540–41, 714 N.Y.S.2d 451 (N.Y.App.Div.2000) (granting summary judgment to defendant volunteer EMTs where N.Y. Public Health Law § 3013(1) required a showing of gross negligence and "plaintiffs failed to plead gross negligence, and never sought leave to amend the complaint"). However, for the reasons discussed below, even if the plaintiff had properly pled gross negligence in the amended complaint, her claims would still fail as a matter of law because she has failed to produce sufficient evidence regarding the applicable standard of care owed by the Ambulance Defendants, or that the Ambulance Defendants were grossly negligent, to survive summary judgment.

***13** As stated above, in order to prevail on her state law causes of action, plaintiff needs to demonstrate the relevant standard of care owed by the Ambulance Defendants to decedent and a gross deviation from such standard. Under New York law, in cases involving injuries arising from medical acts or omissions, it is generally incumbent on the plaintiff to present expert testimony on the relevant standard of care. *Cregan v. Sachs,* 879 N.Y.S.2d 440, 446 (N.Y.App.Div.2009) (" 'To establish what the existing standard is or that there has been a departure from it, because laymen ordinarily are not deemed possessed of a sufficient knowledge, training or experience to have attained the competence to testify on this subject, a plaintiff nearly always will be required to produce expert testimony .' ") (quoting *Topel v. Long Is. Jewish Med. Ctr.,* 55 N.Y.2d 682, 689 (N.Y.1981)); *see, e.g., Mann v. Western Area Volunteer Emergency Srvs., Inc.,* 816 N.Y.S.2d 697 (N.Y.Sup.Ct.2006) (denying summary judgment where plaintiff submitted expert affidavits creating a question of fact whether volunteer ambulance company was grossly negligent for responding with an ambulance not equipped with a heart defibrilator).

In the instant case, plaintiff has submitted the unsworn expert report of Dr. John L. Coulehan, dated November 19, 2009. (Pl.'s Supp. Decl., Ex. B.)[10] The Ambulance Defendants argue the Dr. Coulehan's unsworn opinion is inadmissible as expert testimony and, in any event, is insufficient to raise an issue of fact on this claim that survives summary judgment. For the reasons set forth below, the Court agrees.

As an initial matter, courts in the Second Circuit have consistently held that "unsworn expert reports do not satisfy the admissibility requirements of Fed.R.Civ.P. 56(e), and cannot be used to defeat a summary judgment motion without additional affidavit support." *Berk v. St. Vincent's Hosp. and Med. Ctr.,* 380 F.Supp.2d 334, 352 (S.D.N.Y.2005)); *see also Gotlin v. Lederman,* 616 F.Supp.2d 376, 389 (E.D.N.Y.2009); *accord Brazier v. Hasbro, Inc.,* No. 99 Civ. 11258, 2004 WL 1497607, at *2 (S.D.N.Y. July 6, 2004) ("The submission of unsworn letters is an 'inappropriate response' to a summary judgment motion, and factual assertions made in such letters are 'properly disregarded by the court.' " (quoting *United States v. All Right, Title & Interest in Real Property & Appurtenances,* 77 F.3d 648, 657–58 (2d Cir.1996))). However, an exception to the rule arises when the *defendants* have submitted a plaintiff's unsworn expert report in support of their motion for summary judgment and relied upon it in their moving papers, thereby waiving any objections to the admissibility of such report. *See Capobianco v. City of New York,* 422 F.3d 47, 55 (2d Cir.2005) (emphasis added); *see also* ***Glowczenski*** *v. Taser Intern. Inc.,* No. CV04–4052 (WDW), 2010 WL 1957289, *3 (E.D.N.Y. May 13, 2010). Here, the report of Dr. Coulehan, offered in the form of a letter addressed to plaintiff's counsel, was submitted by plaintiff and is unsworn, and, thus, it is inadmissible on summary judgment.[11] Accordingly, even if the plaintiff had properly pled gross negligence in the amended complaint, her claims would still fail as a matter of law because she has failed to produce admissible expert testimony to demonstrate the relevant standard of care owed by the Ambulance Defendants to decedent and a gross deviation from such standard.

***14** Furthermore, even assuming that Dr. Coulehan's unsworn report was admissible, the Court concludes that it would still be insufficient to allow plaintiff's claim to survive summary judgment because plaintiff's expert does not offer any expert testimony regarding the proper standard of care, let alone that the Ambulance Defendants grossly departed from such standard, under the particular circumstances of this case—specifically, where decedent was in police custody and the police officers repeatedly rebuffed the Ambulance Defendants' attempts to provide medical care to decedent. Instead, Dr. Coulehan claims that the relevant standard of care is established by New York State EMS and EMT protocols.[12] However, after reviewing the rules and protocols submitted by plaintiff and exclusively relied upon by Dr. Coulehan, the Court concludes that, even with his testimony, no rational juror could conclude that the Ambulance Defendants grossly departed from the proper standard of care under the undisputed facts of this case.[13]

Dr. Coulehan points to the New York Bureau of EMS Policy Statement 98–05, which states:

> Pursuant to the provisions of Public Health Law, the individual having the highest level of prehospital certification and who is responding with authority, 'has a duty to act' and therefore is responsible for providing and/or directing emergency medical care and the transportation of a patient.

(Pl.'s Supp. Decl. in Opp., Ex. B at 8–9; Pl.'s Mem. in Opp. at 12 & Ex. P.) In addition, Dr. Coulehan claims that the Ambulance Defendants failed to comply with a number of specific requirements dictated by EMS protocols, including, requirements that EMTs: (1) interact with a patient upon arrival to the scene to determine patient orientation; (2) frequently obtain vital signs and conduct other important assessments relevant to the patient's care; (3) administer oxygen to patients in need, including patients with a altered mental status; and (4) leave a properly completed Prehospital Care Report with the hospital when a patient is admitted. (*Id.* at 9–10; *Id.* at 13–14 & Ex. P.)

However, in reviewing the rules and protocols submitted by plaintiff as exhibits in their entirety, and cited by Dr. Coulehan, the Court concludes that they do not delineate the standard of care for EMTs responding to the specific circumstances provided by the facts posed here, *where it is undisputed that the patient is in custody of police officers who ordered the EMTs to not provide treatment,* based on their characterization of the patient as being violent and emotionally disturbed.

First, EMS Policy Statement 98–05, which Dr. Coulehan points to as establishing that the Ambulance Defendants, rather than the police officers, had chief responsibility for providing medical care, includes language which contemplates police command over potentially dangerous situations:

> It is recognized that patient care may be provided in a variety of hazardous conditions and that overall scene command is the responsibility of locally designated officials (Police, Fire, Health, Municipal, etc.).

***15** (Pl.'s Mem. in Opp., Ex. P.) Second, the specific EMS protocol regarding dealing with patients who have an altered mental status specifically dictates that EMTs should stand down and remain at a safe distance if there exists "potential or actual danger," and that the police should be involved for safety purposes:

> Assess the situation for potential or actual danger. If the scene/situation is not safe, retreat to a safe location, create a safe zone and obtain additional assistance from a police agency.

(Pl.'s Mem. in Opp., Ex. P.; Defs.' Reply Aff., Ex. A.) The same policy then reiterates, in bolded text, set apart from the remainder of the policy within a shaded text box:

> All suicidal or violent threats or gestures must be taken seriously. These patients should be in police custody if they pose a danger to themselves or others.

(*Id.*)

Based on the foregoing, the EMS policy statement and protocols, upon which plaintiff and her expert exclusively rely to prove the claim, do not establish the relevant standard of care for EMTs where police have custody of individuals who are emotionally disturbed, who are violent or potentially violent and where the police have ordered the EMTs not to provide medical care. [14] Accordingly, because the EMS policy statement and protocols relied upon by the expert do not establish the relevant standard of care, the Court concludes that the proffered report is insufficient to raise a genuine issue of fact on that question that survives summary judgment.

Finally, even assuming that the rules and protocols cited by the expert establish the relevant standard of care, plaintiff has failed to adduce any evidence that there was a gross deviation from such standard by the Ambulance Defendants as required under New York Public Health Law § 3013(1). *See Kowal,* 13 A.D.3d at 491 ("[D]efendants, in view of their status as a voluntary ambulance service, would not be liable unless it is established that the plaintiff's decedent's injury and death were caused by their gross negligence.") Here, it is undisputed that the decedent was an emotionally disturbed person and violent. (Pl.'s Counter 56.1 ¶ 43; *see supra* footnote 3.) Furthermore, it is undisputed that the EMTs

continually attempted to provide medical care to Cox from the time that they arrived at the residence until the ambulance arrived at the hospital. First, after arriving at the residence, EMT Smith prepared a rebreather mask to supply oxygen to Cox but the officers ordered him not to apply the mask. (Pl.'s Counter 56.1 ¶¶ 59, 60.) EMT Smith then advised the police officers that Cox should be repositioned on the stretcher so that he was face up, with his head at the other end of the stretcher, but he was rebuffed by the police officers who told him that repositioning Cox would be unsafe. (*Id.* ¶¶ 62, 63.) During the ambulance ride, there were three police officers restraining Cox and the police officers directed EMT Smith to not provide Cox with medical treatment. (Pl.'s 56.1 ¶¶ 11, 14.) After EMT Smith again attempted to apply a rebreather mask, the police again ordered him not to do so because Cox was combative. (Pl.'s Counter 56.1 ¶ 64; Pl.'s Ex. G at 93.) Finally, once the ambulance arrived at the hospital, the police officers would not allow medical treatment and Cox to be transferred to a hospital stretcher without hospital restraints. (*Id.* ¶¶ 70, 146.) Except for the very last line of his report, in which he concludes that "[the EMTs] behavior was a gross departure from good and acceptable standards for emergency medical personnel," Dr. Coulehan fails to state any behaviors that were a gross deviation from the standard of care established by the rules and protocols. (*See* Pl.'s Supp. Decl. in Opp., Ex. B at 12.) It appears that Dr. Coulehan bases his conclusion on his opinion that "the patient's welfare should have outweighed considerations of personal safety," and that the EMTs could have made further attempts to provide medical care, including attempts to administer oxygen. (*See* Pl.'s Supp. Decl. in Opp., Ex. B at 8.) First, these conclusory remarks do not sufficiently establish what the relevant standard of care is, or that there has been a *gross* departure from it, for the circumstances presented in this case—namely, the evaluation and treatment of a patient in police custody where officers repeatedly refused the EMTs' attempts to provide medical care. Furthermore, it is undisputed that the EMTs made numerous attempts to provide medical care, including, specifically, attempts to provide oxygen in the form of a rebreather mask. Second, Dr. Coulehan's opinion that the EMTs should have disregarded considerations of personal safety is inapposite. The undisputed record demonstrates that the EMTs did not withhold medical care because of concerns for their personal safety, but rather because they were *ordered* not to provide medical care by the police officers who had the decedent in custody the entire time the EMTs were with him.[15] Indeed, the undisputed record demonstrates that the EMTs continued to attempt to provide medical care despite previously being ordered to stand down because Cox was violent. In short, plaintiff has failed to provide any evidence that the EMTs "evince[d] a reckless disregard for the rights [of the decedent] ... or intentional wrongdoing.' " *Colnaghi, USA v. Jeweler's Protection Services,* 81 N.Y.2d 821, 823–24 (N.Y.1993); *see also See Food Pageant,* 54 N.Y.2d at 172 ("[G]ross negligence has been termed failure to exercise even slight care."); *accord Harvey v. Plains Twp. Police Dept.,* 421 F.3d 185, 195–196 (3d Cir.2005) ("[A] private citizen acting at the orders of a police officer is not generally acting in a willful manner, especially when that citizen has no self-interest in taking the action.")

***16** Thus, even if the expert report was admissible, plaintiff has failed to demonstrate that the Ambulance Defendants were grossly negligent where it is undisputed that they repeatedly attempted to render medical care, and were denied by the police officers who had the decedent in custody. Accordingly, because plaintiff failed to develop evidence from an expert witness to establish a critical component of their prima facie case, summary judgment is warranted. *Deadwyler v. North Shore Univ. Hosp. at Plainview,* 866 N.Y.2d 306, 307 (N.Y.App.Div.2008) (affirming judgment as a matter of law because "plaintiff presented no evidence from an expert witness as to the applicable standard of care" and therefore "failed to establish a prima facie case of medical malpractice"); *see also Harper v. Findling,* 832 N.Y.S.2d 266, 267 (N.Y.App.Div.2007).

In sum, pursuant to Public Health Law § 3013, the Ambulance Defendants could be held liable only if their emergency medical technicians were grossly negligent in rendering emergency medical assistance to decedent. As a threshold matter, the Ambulance Defendants are entitled to summary judgment because the plaintiff failed to plead *gross* negligence and never sought leave to amend the complaint. In addition, even if the plaintiff had properly pled gross negligence in the amended complaint, plaintiff's claims would still fail as a matter of law, because the unsworn expert report submitted by plaintiff is inadmissible on summary judgment and, thus, plaintiff has failed to produce sufficient evidence regarding the applicable standard of care owed by the Ambulance Defendants and that the Ambulance Defendants were grossly negligent. Finally, even assuming that the proffered unsworn report was admissible, the Court concludes that it would be insufficient to raise a triable issue of fact that survives summary judgment because the rules and protocols upon which it relies fail to establish the applicable standard of care under the particular circumstances of this case. Moreover, even if it did establish the standard of care, plaintiff's evidence fails to provide a sufficient basis for a

rational jury to conclude that the Ambulance Defendants were grossly negligent in failing to provide care where it is undisputed the police officers directed them not to provide care. Accordingly, summary judgment is granted on plaintiff's state law claims for negligence and wrongful death as against the Ambulance Defendants.

IV. CONCLUSION

For the foregoing reasons, the Ambulance Defendants' motion for summary judgment is granted in its entirety. The Clerk of the Court shall terminate South Country Ambulance, EMT L. Smith, EMT D. Totong, EMT S. Al Qadri and Ambulance Driver M. Sneed as defendants from this civil action.

SO ORDERED.

Footnotes

1 Brookhaven Memorial Hospital Medical Center ("Brookhaven") was terminated from the above-captioned case pursuant to this Court's Memorandum and Order, dated January 27, 2011 (the "January 27 Memorandum and Order"), in which this Court granted in its entirety Brookhaven's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

2 The parties dispute whether the initial purpose of Sergeant Lixfield's call for an ambulance was to transport Cox to a hospital. (Pl.'s 56.1 ¶ 6.) In particular, plaintiff points to the fact that Lixfield testified at his deposition that he also called for a police van to respond to the residence at the same time. (*Id.*)

3 Plaintiff alleges that Cox had been diagnosed with schizophrenia and acute bipolar mania on or around 1986, and had been receiving medical treatment for his mental conditions since at least April 2005. (Am.Compl.¶ 38.)

4 In particular, at the February 7, 2011 conference, the Ambulance Defendants orally renewed their motion for summary judgment and counsel for the Ambulance Defendants and plaintiff both agreed, as discussed *infra,* that although discovery related to plaintiff's expert submissions was ongoing, those submissions did not pertain to the claims against the Ambulance Defendants. Thus, the parties agreed that the Ambulance Defendants' motion for summary judgment was fully submitted and ready for a decision by the Court.

5 Plaintiff actually asserts that the Ambulance Defendants are state actors under the "close nexus" test, but in support of such proposition focuses on *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961) and *Janusaitis v. Middlebury Volunteer Fire Department,* 607 F.2d 17 (2d Cir.1979), which both addressed the more specific "symbiotic relationship" test instead. (Pl.'s Mem. of Law in Opp. to Ambulance Defs.' Mot. for Summ. J. (hereinafter, "Pl.'s Mem. in Opp.") at 4–5.) It is clear from the case law that the "symbiotic relationship" test is one mechanism by which a plaintiff can prove the requisite "joint action" or "close nexus" for state action under Section 1983. *See, e.g., Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.,* 985 F.2d 102, 105 (2d Cir.1993) ("There must be either a *symbiotic relationship* between the state and the defendant, such as, for example, a direct financial stake by the state in a business, or a *close nexus* between the state and alleged wrongful conduct.") (emphasis added). Thus, the Court construes plaintiff's argument as one made under the "symbiotic relationship" test. In any event, even if plaintiff also is asserting state action separately under the "close nexus"/ "joint action" test, or the "compulsion" test, the Section 1983 claims still cannot survive summary judgment, for the reasons discussed *infra.*

6 Along a similar vein, plaintiff's citation to the United States Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985) does not support the proposition that ambulatory services are a function that are traditionally left to the exclusive prerogative of the state for the purposes of the "public function" test. That case merely stands for the fact that the *regulation* of ambulatory services by governmental entities is traditional, for the purposes of Tenth Amendment state government immunity from federal regulation under *National League of Cities v. Usery,* 426 U.S. 833 (1976) and its progeny. Whether or not the *regulation* of ambulatory services is traditionally performed by state government is not the central question; rather, the issue is whether the *services* themselves have traditionally been *provided* exclusively by the state.

7 The Court rejects the Ambulance Defendants' argument that the claims arising under 42 U.S.C. §§ 1981, 1985, and 1986 must also be dismissed by virtue of the fact that they are private parties not operating under "color of state law"; it is well-settled that the state action requirement is not applicable to claims brought under those civil rights statutes. *Patterson v. Balsamico,* 440 F.3d 104, 113 (2d Cir.2006) (holding that defendant was not acting under color of state law for purposes of § 1983 does not affect liability under § 1981); *Dunk v. Brower,* No. 07–CV–7087 (RPP), 2009 WL 650351, at *5 (S.D.N.Y. Mar. 12, 2009) ("Section 1981 regulates private conduct as well as government action.") (citing *Runyon v. McCrary,* 427 U.S. 160, 170 (1976)); *FriersonHarris v. Hough,* No. 05–CV–3077 (DLC), 2006 WL 298658, at *5 (S.D.N.Y. Feb. 7, 2006) ("Unlike Section 1983, Section 1985 creates a cause of action against private actors as well as those acting under color of state law."); *Puglisi v. Underhill Park Taxpayer Assoc.,* 947 F.Supp. 673, 689 (S.D.N.Y.1996) (noting that § 1985 does not include a state action requirement). However, as noted below, those claims cannot survive summary judgment on other grounds.

8 Although plaintiff has failed to specify which subsection of 42 U.S.C. § 1985 he brings his claim under, it is clear from the facts that only § 1985(3) would be potentially applicable to the present case.

9 Although the Court has dismissed all the federal claims against the Ambulance Defendants, the Court continues to possess supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(a), over the claims alleged under New York state law against the remaining defendants because federal claims remain against them (including claims under § 1983 against the county and police officer defendants), and those claims "form part of the same case or controversy," as the state law claims against the Ambulance Defendants. *Ciambriello v. Cnty. of Nassau,* 292 F.3d 307, 325 (2d Cir.2002) (vacating dismissal of state law claims against defendant where § 1983 claim remained against other defendants) (citing 28 U.S.C. § 1367(a) ("[S]upplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.")).

10 At oral argument on August 24, 2009, plaintiff requested an opportunity to submit expert testimony regarding the standard of care provided by the defendants-namely, Dr. Lone Thanning would provide expert testimony that the care provided by the Ambulance Defendants and defendant Brookhaven was insufficient. Although the Court granted plaintiff's request, the Court agrees with the parties that the only proffered expert testimony on behalf of the plaintiff is the unsworn expert report by Dr. John L. Coulehan. First, on November 24, 2009, plaintiff filed a supplemental declaration in support of plaintiff's memorandum of law in opposition to the Ambulance Defendants' motion for summary judgment, which included the declaration of Dr. Thanning and an unsworn expert report by Dr. John L. Coulehan. Second, at the conference held on November 10, 2010, plaintiff's counsel informed the Court and the parties that he intended to replace Dr. Thanning with another expert, Dr. William L. Manion. Finally, as noted *supra,* at the conference held on February 7, 2011, the Ambulance Defendants orally renewed their motion for summary judgment and counsel for the Ambulance Defendants and plaintiff both agreed that Dr. Manion's expert testimony is not related to the Ambulance Defendants. Therefore, the Court concludes, for the reasons stated above, that the only proffered expert testimony provided by plaintiff, was provided through the unsworn report by Dr. John L. Coulehan.

11 In fact, even after the Ambulance Defendants raised the issue of the report being unsworn in their Reply Affirmation, dated January 14, 2010, plaintiff's counsel did not request an opportunity to re-submit a sworn report, but rather stated during the telephone conference of February 7, 2011, that the matter was fully submitted for the Court's determination.

12 The Court notes that the opinions within Dr. Coulehan's purported expert report, submitted as part of plaintiff's supplemental declaration on November 24, 2009, are nearly identical to the arguments within plaintiff's opposition papers submitted four months prior on July 28, 2009—namely, the relevant standard of care is established by New York State EMS and EMT protocols. (Pl.'s Mem. in Opp. at 12–19 & Ex. P.)

13 Defendants also argue that Dr. Coulehan lacks sufficient qualifications to testify regarding the applicable standard of care owed to decedent by the defendants and whether the defendants grossly departed from such standard. Under Rule 702, the Court must determine whether the expert is qualified "by knowledge, skill, experience, training, or education." Fed.R.Evid. 702. A court should look at the totality of the witness' qualifications in making this assessment. *See, e.g., Rosco, Inc. v. Mirror Lite Co.,* 506 F.Supp.2d 137, 144–45 (E.D.N.Y.2007) ("A court must consider the 'totality of a witness' [ ] background when evaluating the witness'[ ] qualifications to testify as an expert.") (quoting 29 Wright & Gold, Fed. Prac. & Proc. § 6265, at 246 (1997)); *accord Keenan v. Mine Safety Appliances Co.,* No. CV–03–0710(TCP)(ARL), 2006 WL 2546551, at *2 (E.D.N.Y. Aug. 31, 2006). Here, it is undisputed that Dr. Coulehan is not a doctor specializing in emergency medical care. Dr. Coulehan states that, from the time of the completion of his residencies to his retirement in 2007, he has "directed the ethics and humanities program at Stony Brook Medical School and chaired the ethics committee and ethics case consultation service at Univeristy Hospital." (Pl.'s Supp. Decl. in Opp., Ex. B at 2.) Furthermore, Dr. Coulehan has "authored over 200 articles and book chapters in medical literature ranging in topic from clinical trials of depression treatment in primary care and studies of heart disease among Navajo Indians to essays on medical humanities and the physician client relationship." *Id.* Besides not being a doctor specializing in emergency medical care or certified as an EMT, Dr. Coulehan has not submitted any other form of documentary proof attesting to his qualifications to opine on the subject matter at hand. Thus, defendants contend that, as a medical ethicist, Dr. Coulehan would not be competent to testify regarding the relevant standard of care owed to the decedent under the specific circumstances of this case—namely, the standard of care owed by the EMTs where it is undisputed that the patient was in custody of police officers, the EMTs repeatedly attempted to provide medical assistance, and the police officers repeatedly ordered the EMTs not to provide treatment based on their characterization of the patient as being violent and emotionally disturbed. *See Stagl v. Delta Air Lines, Inc.,* 117 F.3d 76, 80 (2d Cir.1997) ("In some circumstances, therefore, a district court may properly conclude that witnesses are insufficiently qualified despite the relevance of their expertise is too general or too deficient."). However, the Court need not address this issue because, even assuming *arguendo* that Dr. Coulehan was qualified to testify about the applicable standard of care, no rational jury could conclude that the defendants grossly departed from such standard under the circumstances of this case given the rules and protocols exclusively relied upon by Dr. Coulehan and the other undisputed facts in this case.

14 The Court notes that plaintiff also cites violation of several EMS protocols unrelated to the alleged failure of the Ambulance Defendants to provide medical care at the residence and in the ambulance, all involving the Prehospital Care Report ("PCR"). Specifically, plaintiff alleges that the PCR was deficient in content, and should have been left at the hospital on the day of the incident, as required by EMS policy. (Pl.'s Mem. in Opp. At 12–13, 17–18, Ex. P.) However, assuming *arguendo* that the EMS policy establishes the proper standard of care, the plaintiff has not produced *any* evidence which indicates that the late filing and other technical defects in the PCR caused the exacerbation of decedent's injuries or proximately caused his death. Indeed, the Court finds that no reasonable jury could find that the defects in the PCR were the cause of the injuries at issue, because: (1) it is undisputed that the police officers ordered the Ambulance Defendants to stand back and not treat Cox, thereby depriving them of the opportunity to collect meaningful information for the PCR; and (2) any information that was or could have been included in the PCR could not have had any impact on the hospital's treatment of decedent, given that it is undisputed that he was in cardiac arrest by the time the police officers allowed Cox to be accessed or treated by hospital employees. Accordingly, to the extent that plaintiff has attempted to state claims for gross negligence and wrongful death related to improper handling of the PCR, summary judgment is warranted. *See, e.g., Siegel v. Metro–North Commuter Railroad Co.*, No. 07--CV--6025 (DC), 2009 WL 889985, at *1 (S.D.N.Y. Apr. 1, 2009) (granting summary judgment where no reasonable jury could find that plaintiff proved causation); *accord Fragrance Express Dot Com, Inc. v. Standard & Poor's Corp.*, 314 F.Supp.2d 189, 195 (S.D.N.Y.2003).

15 Furthermore, for the reasons discussed *supra,* the rules and protocols cited by plaintiff do not provide the authority for medical personnel to ignore orders by the police, and based on its own independent research, the Court is unaware of any law that exempts EMS professionals from following police orders.

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2001 WL 968996
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Barbara MORSE a/k/a Reba Kalish, Plaintiff,
v.
CITY OF NEW YORK, et al., Defendants.

No. 00 Civ. 2528(TPG). | Aug. 24, 2001.

Opinion

OPINION

GRIESA, J.

*1 Plaintiff Barbara Morse (a/k/a Reba Kalish) sues *pro se* and brings this action against 44 defendants, including Mayor Giuliani, former Police Commissioner Safir, Fire Commissioner VonEssen, various police officers and other New York City employees (the "City defendants"), District Attorney Morganthau and other defendants associated with his office, a number of state court judges, and other parties. The action arises out of plaintiff's arrest on July 24, 1996 and subsequent criminal trial and conviction. Morse seeks declaratory and injunctive relief, including an injunction preventing the payment of salary to the defendant officials and judges. She seeks the "immediate arrest" of the defendant officials and judges. Finally, Morse requests compensatory damages in the sum of $2.5 billion and punitive damages in the same amount.

The current pleading before the court is the amended complaint. It was verified by Morse on October 31, 2000.

There are fourteen causes of action alleged in the amended complaint, denominated as follows:

First:	False Arrest
Second:	False Imprisonment
Third:	Malicious Prosecution
Fourth:	Assault and Battery
Fifth:	Discrimination
Sixth:	Negligence
Seventh:	Abandonment
Eighth:	Breach of Contract
Ninth:	Harassment
Tenth:	Slander and Defamation
Eleventh:	Fraud
Twelfth:	RICO-Obstruction of Justice
Thirteenth:	Failure to Supervise
Fourteenth:	Respondeat Superior

Obviously Morse is asserting a number of common law causes of action. However, in the course of her lengthy recitation, Morse lists numerous provisions of the United States Constitution and certain federal statutes which she seeks to rely upon for federal subject matter-jurisdiction.

Six motions to dismiss the amended complaint have been made. These have been filed on behalf of: (1) the state court judges, (2) the Patrolmen's Benevolent Association, (3) the Legal Aid Society defendants, (4) the defendants associated with the District Attorney's Office, (5) the defendants associated with the Beth Israel Medical Center, and (6) attorney Ira Raab. Morse has filed opposition to the motions of the state judges, the Patrolmen's Benevolent Association, and Beth Israel Medical Center defendants. There is no opposition to the motions filed by the Legal Aid Society defendants, the defendants associated with the District Attorney's Office and defendant Ira Raab.

The city defendants have made no motion but have advised that they will do so shortly.

Motion of State Court Judges

The state court judges who are sued are: Criminal Court Judges Betsy Barros, Margaret Finnery, Eugene Oliver, Eileen Rakower, Donna Recant, Robert Sackett. Judge Recant has not been served and is therefore not joined in the motion. However, the ruling which the court makes applies to the issues which involve Judge Recant. The state court judges are named in the third, sixth, eighth, ninth, eleventh and twelfth causes of action.

*2 The Assistant Attorney General, representing the state court judges, has filed an affidavit supported by police and court records. This court is relying to a large extent on these materials, and will therefore treat the motion of the state court judges as one for summary judgment. On May 22, 2001 the court sent Morse a letter explaining its intent to decide the state court judge's motion as a motion for summary judgment rather than a motion to dismiss. Attached to the letter were copies of Rule 56 of the Federal Rules of Civil Procedure and Local Civil Rule 56.1, which describe how to respond to a motion for summary judgment. The court gave Morse until June 4, 2001 to submit any additional materials in opposition to the motion for summary judgment. She did not submit such materials.

Morse was arrested on July 24, 1996 and was charged with resisting arrest, disorderly conduct and harassment in the second degree. The misdemeanor complaint against her stated that she was standing in the middle of an intersection, yelling and obstructing vehicular and pedestrian traffic.

The prosecution was brought by the District Attorney for New York County. Morse was represented by Ira J. Raab, Esq., who is a defendant in the present action.

A series of court appearances took place beginning July 30, 1996. It appears that after negotiation an adjournment contemplating dismissal ("ACD") was granted to Morse. Morse at some point decided that she did not want an ADC, and she applied *pro se* to withdraw from the ADC.

The court record shows that Morse's application was to be reviewed and determined by Judge Recant. However, Judge Recant did not handle the matter. There is a note indicating that Judge Oliver made some statement about the ACD being dismissed, but apparently Judge Oliver was not the judge who resolved the matter. On January 16, 1997 Judge Barros granted Morse's motion to withdraw the ACD, and restored the charges against her.

Morse then moved to dismiss the charges. On March 10, 1997 her motion was denied by Judge Barros. Apparently, Morse was again offered an ACD. She rejected this on April 8, 1997 before Judge Barros.

On May 12, 1997 Morse advised Judge Oliver that she had an ankle injury, and as a result a warrant of some kind was stayed. It is not clear what this warrant related to.

Prior to her trial, Morse applied to be allowed to proceed *pro se,* and on July 23, 1997 Morse was declared *pro se* by Judge Sackett. On August 20, 1997 Morse made a motion for additional discovery.

At some point, Morse's case was placed on a trial list. On September 25, 1997 the case was adjourned to October 7 because of motion practice and because Morse had called the court, stating that she "had better things to do." On October 7, 1997 the trial was adjourned to November 5, 1997. On November 5, 1997 the case was adjourned to November 7, 1997 because the court had never assigned a "legal advisor" to Morse. Dru Carey was appointed legal advisor to Morse on November 7, 1997. Carey is a defendant in the present action.

*3 The case was sent to a trial part by Judge Sackett on December 8, 1997. The case was tried by Judge Finerty to a jury beginning December 10, 1997. A verdict was handed down on December 15, 1997, finding Morse guilty on all three charges-resisting arrest, disorderly conduct, and harassment in the second degree. Judge Finerty then ordered Morse to undergo a psychiatric evaluation. Apparently Morse was due in court for sentencing on February 17, 1998. However, Morse sent Judge Finerty a note dated February 16, 1998 stating that she would be unable to attend the sentencing on the 17th and requesting an adjournment until the end of March. The note contains further comments as follows:

Meanwhile, you lack jurisdiction related to this case. I question whether the court is unbiased & unprejudiced.

Will the court please take note that when lacking jurisdiction, it has no power & authority to order a psychiatric evaluation or sentence.

Lacking jurisdiction a judge has no judicial immunity from prosecution.

Morse did not attend on the 17th. However, Assistant District Attorney Davidson, who is also a defendant in the present case, observed Morse outside the court building that day.

A bench warrant was issued on February 20, 1998. Morse was arrested on June 30, 1998. The exact circumstances of the arrest are unclear. Apparently Morse voluntarily appeared at 80 Centre Street and was arrested there. However, a misdemeanor complaint was issued charging that she violently resisted arrest. She was also charged with bail jumping.

An attorney by the name of Paul B. Dalnoky, not a defendant in the present action, entered the case in some way and moved to dismiss two of the counts upon which Morse was convicted on December 15, 1997, and also moved to dismiss the June 30, 1998 misdemeanor complaint. Apparently, that motion was unsuccessful. The court record shows that there was a plea of guilty to the June 30, 1998 charges.

On July 10, 1998 Judge Oliver imposed sentence on both the December 15, 1997 conviction and the June 30, 1998 charges to which Morse had entered a guilty plea. Morse was given concurrent sentences of 15 days in jail and 3 years probation.

Apparently Morse served her jail sentence, but there were problems regarding Morse's probation. The court record indicates that warrants were issued for her arrest.

On October 31, 2000 Morse was arrested in the Fifth Precinct Station. While the police were attempting to arrest her on two open warrants, Morse resisted the arrest. The police finally succeeded in effecting the arrest. A misdemeanor complaint was filed, charging Morse with five crimes growing out of this incident.

The record before the court in the current federal action does not show what disposition, if any, has been made as to the October 31, 2000 arrest, except that the court record shows that on November 1, 2000, Morse appeared in criminal court and was ordered to reappear on November 3, 2000, at which time she failed to be in court. A bench warrant was issued on November 3, 2000.

*4 In the unnumbered paragraphs, which appear toward the beginning of the amended complaint, prior to the enumerated causes of action, there are certain allegations against the defendant judges. Morse alleges that Judge Barros denied Morse due process in denying a motion to preserve records and to dismiss the first criminal case. It is said that Judge Sackett signed two subpoenas duces tecum on July 23, 1997 and "deleted most of the due process requests." "Numerous judges" are alleged to have refused to compel the Police Department to produce a "command log." Morse alleges that the trial judge, Judge Finerty, concealed and covered up facts that would have controverted the evidence presented in the case.

In connection with the numbered causes of action, under the heading of Malicious Prosecution, it is alleged that the judge defendants, especially Judges Finerty and Oliver, provided a trial setting for malicious prosecution, and there is a general allegation that the defendant judges violated the rules and regulations of the Criminal Court. Under the Negligence heading, it is alleged that Judge Finerty improperly failed to dismiss the case at trial and Judge Rackower improperly incarcerated Morse at Riker's Island to serve the 15-day sentence, despite Judge Rackower being aware that she did not have lawful jurisdiction to hold Morse. There are conclusory allegations under the headings of Breach of Contract, Harassment, Fraud and RICO, charging illegal procedures and acts on the parts of the defendant Judges.

It is apparent that there is no merit whatever in Morse's claims against the defendant judges under either federal or state law. The start of all the trouble was the incident of July 24, 1996. It is evident from Morse's own pleading that the charges against her that grew out of this incident were not in the slightest degree falsely or maliciously contrived. Morse admits that she and her father were in a street trying to take photographs of an alleged defect in the street, and that they were requested by the police to halt this activity. Although Morse alleges that this request was unjustified, it is apparent from her pleading that she and her father failed to obey the police, thus leading to her arrest. Morse claims that the arrest was improper, and further claims that the police used unnecessary force, but the occurrence of an incident in which Morse disobeyed the police is basically admitted. See Pars. 44-51

Morse was surely entitled to defend herself against the charges and she had a right to due process of law in the New York Court system. The judicial officers of that system, of course, had a duty to ensure that she received due process. However, it is clear from the evidence discussed above that Morse received due process. There is no evidence to support Morse's assertions that the state court proceedings were procedurally deficient or that any of the state court judges lacked jurisdiction over her. There is also no evidence that the state court judges violated court rules or covered up exculpatory evidence. Morse had the opportunity to avoid trial and conviction entirely through the ACD process but refused this benefit. The motion of the state court judges is granted, and the amended complaint is dismissed as to them.

Motion of the Patrolmen's Benevolent Association

*5 At some point, Morse filed a complaint with the Civilian Complaint Review Board, apparently complaining of mistreatment by the police in connection with the July 24, 1996 incident. The Patrolmen's Benevolent Association is alleged to have represented the police before the CCRB. The

amended complaint in the present federal court action states in the introduction:

> PBA officials knew or should have known facts and circumstances prior to representing Pos [police officers] at the CCRB. PBA attorney conspired to suborn perjury, and obstructed justice to obtain the "exoneration" of Pos. The PBA is culpable for these felonious acts, and are accessories after the fact to the false arrest, etc.

In her eleventh cause of action, labelled "Fraud," Morse alleges:

> Def PBA ... knew of should have known facts and circumstances prior to representing Def Pos at Def CCRB "investigation," and that no accusations existed against Plaintiff instead also took part in a fraud upon the court, N.Y. City, State, Federal government and Plaintiff

In her fourteenth cause of action, "Failure to Supervise," Morse states:

> Def PBA and Attorney Def James Keegan did have specific knowledge of material evidence vindicating plaintiff. Instead the PBA suborned perjury of Def Pos who freely gave perjured statements and did obstruct justice with intent to conceal and cover up their felonious and negligent acts at the CCRB "investigation" involved the PBA as an accessory during and after the fact to the obstruction of justice.

The above-quoted portions of the amended complaint are the only allegations made by Morse against the PBA. The allegations are entirely lacking in the kind of facts necessary for a proper pleading. Statements about suborning perjury, obstructing justice, taking part in a fraud on the court, knowledge of material evidence vindicating plaintiff-all these are entirely conclusory without the slightest specification. There is no pleading of any valid cause of action against the Patrolmen's Benevolent Association.

Motion of the Beth Israel Defendants

Morse alleges that following her arrest on July 24, 1996 she was taken to the Beth Isreal Medical Center ("BIMC") for a psychiatric examination against her will. She claims that, while at BIMC, she requested medical treatment for injuries sustained during her arrest, but that BIMC personnel refused to administer treatment.

Specifically, Morse claims that defendant Dr. Prikhojan first spoke with her three hours after her arrival, and asked her about her impression of what had happened. Morse discussed the circumstances of her arrest, and complained that she had not received food, water or medical treatment. Dr. Prikhojan then left the room and returned 20-30 minutes later with food, accompanied by defendant Dr. Shenker. Dr. Prikhojan then declined to continue his conversation with Morse and left for the evening. Dr. Shenker apparently did not treat Morse's alleged injuries.

***6** Morse claims that defendant "Fran" Glennon, a supervising nurse, ordered another nurse not to administer care to Morse. In addition, Morse claims that defendant Dr. Holson, the director of emergency services insisted three times that Morse remove her clothing before any treatment would be administered. Morse states that she was already in a hospital gown. Morse was released into police custody untreated, although she claims she had an undiagnosed concussion and other injuries. Morse alleges that hospital records were falsified to conceal BIMC's involvement with the police.

Morse names the Beth Israel defendants in several of her listed causes of action. Within the listed causes of action, Morse makes reference to a variety of additional statutes and common law theories. The court has distilled the following claims against the Beth Israel defendants from Morse's recitation:

1. Claims under the Americans with Disabilities Act (42 U.S.C. § 12101);

2. Claims under the Violence Against Women Act (42 U.S.C. § 13981);

3. Discrimination on the basis of race (42 U.S.C. § 1981);

4. Deprivation of civil rights (42 U.S.C. § 1983);

5. Conspiracy to interfere with civil rights (42 U.S.C. § 1985);

6. Negligence in failing to prevent a conspiracy to interfere with civil rights (42 U.S.C. § 1986);

7. Claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") (18 U.S.C. § 1961 et seq.);

8. False Imprisonment;

9. Violations of the First, Fourth, Fifth, Eighth and Fourteenth Amendments of the United States Constitution;

10. Negligence;

11. False imprisonment.

The amended complaint does not clearly state how the factual scenario described above gave rise to each of these claims.

The Beth Israel defendants have moved to dismiss the amended complaint on the ground that it fails to state a claim against them. In addition, defendants Prikhojan, Shenker, Holson and Glennon assert that the court does not have personal jurisdiction over them because Morse failed to personally serve them with the summons and amended complaint. Morse opposes the motion to dismiss the amended complaint.

The court's record shows that Morse properly served defendants Holson, Shenker and Glennon. However, defendant Prikhojan was not properly served. Morse apparently attempted to serve Dr. Prikhojan by serving the law firm of Melito & Adolfsen. However, an affidavit submitted by Abe M. Rychik, an attorney with Melito & Adolfsen, states that "[n]either the law firm of Melito & Adolfsen nor I have ever been authorized to accept service of process on [Dr. Prikhojan's] behalf." The court's file contains a U.S. Marshal's Process Receipt and Return of Service unexecuted as to defendant Prikhojan. Therefore, the court lacks personal jurisdiction over Prikhojan, and the amended complaint is dismissed as to him. The remainder of this opinion will discuss the various causes of action asserted by Morse against Holson, Shenker, Glennon and BIMC. However, the reasoning applies as well to Prikhojan.

Americans with Disabilities Act

*7 To state a claim under the Americans with Disabilities Act ("ADA"), a Morse must allege that she is disabled as defined by the statute and that a person who operates a place of public accomodation discriminated against her on the basis of her disability. *Detko v. Blimpies Restaurant,* 924 F.Supp. 555, 557 (S.D.N.Y.1996). However, "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza." 29 C.F.R. Pt. 1630.2(j) App.

Morse claims that her fractured foot was a disability under the Americans with Disabilities Act. As stated in the guidelines, broken bones are usually not considered disabilities. *See also Rodriguez v. DeBuono,* 44 F.Supp.2d 601 (S.D.N.Y.1999). Morse has not indicated why she believes that her fracture should be treated differently. The court finds that Morse's fracture was not a disability under the ADA, and dismisses the claims against the Beth Israel defendants pursuant to the ADA.

Violence Against Women Act

In *United States v. Morrison,* the United States Supreme Court declared that the civil rights remedy of the Violence Against Women Act ("VAWA") was unconstitutional. 529 U.S. 598 (2000). Morse, in her brief, states that the Supreme Court decision was "improvident" and argues that "Congress was within its right to create VAWA."

This court is, of course, bound by the *Morrison* decision. Morse does not have a cause of action under VAWA. Her claims pursuant to VAWA are dismissed.

Section 1981

42 U.S.C. § 1981 is primarily a proscription of race discrimination in the execution, administration, and enforcement of contracts, including employment. *Goodman v. Lukens Steel Co.,* 482 U.S. 656, 670 (1987). The protection of the statute is not limited to minorities, but extends to white persons as well. *McDonald v. Santa Fe Trail Transp. Co.,* 427 U.S. 273, 274 (1976). Morse is white.

However, Morse's complaint does not state a claim for discrimination based on her race. The amended complaint alleges no facts from which a court could infer that Morse was the victim of racial animus. Indeed, the amended complaint never even mentions Morse's race. Morse's section 1981 claims are dismissed.

Section 1983

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State ... subjects, or causes to be subjected, any citizen of the United

> States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law....

To recover under section 1983, Morse must allege the deprivation of a Constitutional right by a person acting under color of state law. *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149 (1978). As a general rule, private hospitals do not act under color of state law for § 1983 purposes. *See, e.g., Blum v. Yaretsky,* 457 U.S. 991 (1982); *Schlein v. Milford Hosp.,* 561 F.2d 427 (2d Cir.1977); *Thomas v. Beth Israel Hosp. Inc.,* 710 F.Supp. 935 (S.D.N.Y.1989).

***8** Morse does not allege any circumstance indicating that the Beth Israel defendants should be viewed as acting under color of state law in this case. The fact that Morse was brought to the hospital from police custody and was released from the hospital into police custody is insufficient to transform this private hospital and its staff into state actors for section 1983 purposes. For this reason, Morse fails to state a cause of action under 42 U.S.C. § 1983.

Sections 1985 and 1986

42 U.S.C. § 1985 provides a cause of action against persons for conspiring to interfere with the civil rights of another. The amended complaint makes reference to §§ 1985(2) and (3) specifically. Both sections require a Morse to allege the existence of a conspiracy. Morse's amended complaint is rife with the conclusion that various of the defendants conspired against her. However, the amended complaint is devoid of any sufficient factual allegations.

42 U.S.C. § 1986 creates a cause of action for neglect in preventing the conspiracies prohibited in 42 U.S.C. § 1985. If no proper cause of action is alleged under 42 U.S.C. § 1985, none can exist under § 1986.

Section 1988

42 U.S.C. § 1988 provides for the award of attorney's fees to a prevailing Morse in a civil rights action brought under sections 1981, 1981a, 1982, 1983, 1985 or 1986. Because Morse's civil rights claims under the cited sections are dismissed, Morse's section 1988 claim must likewise be dismissed.

First, Fourth, Fifth, Eighth and Fourteenth Amendment

The First, Fifth and Fourteenth Amendments require state action as a necessary element for a cause of action. *Hudgens v. NLRB,* 424 U.S. 507 (1976); *Jackson v. Metropolitan Edison Company,* 419 U.S. 345 (1974). As discussed above, the Beth Israel defendants are not state actors. Therefore, Morse has no cause of action pursuant to the First, Fifth and Fourteenth Amendments.

Morse alleges nothing that is even remotely related to the Fourth Amendment, which protects the right of people to be free from unreasonable searches and seizures, or the Eighth Amendment, which protects the right of people to be free from cruel and unusual punishment. Morse's claims under these Amendments must be dismissed.

RICO

The Racketeer Influenced and Corrupt Organizations act ("RICO") prohibits various activities arising from or in connection with a "pattern of racketeering activity." 18 U.S.C. § 1962. A "[p]attern of racketeering activity requires at least two acts of racketeering activity[.]" 18 U.S.C. § 1961(5). Racketeering activity is defined as any of a list of predicate crimes set forth in 18 U.S.C. § 1961(1). Obstruction of justice is a predicate crime under RICO.

Morse appears to claim that the Beth Israel defendants are liable under RICO for obstruction of justice. "The Twelfth Cause of Action-Obstruction of Justice (RICO)" recites the following regarding the Beth Israel defendants:

> Defs EMS/EMTs and BIMC medical staff did obstruct justice by creating a false psychiatric and medical record without any means to conclude such determinations, omitting facts, evidence, and denied medical care.

***9** This language is devoid of facts that would show a cause of action under RICO. Even the allegation that records were falsified does not suggest how this worked to obstruct justice. Finally, there is no allegation whatsoever of a pattern of obstruction of justice, or a pattern of any other wrongdoing.

Negligence

In essence, the amended complaint alleges that the BIMC and its staff was negligent in denying Morse medical care and by falsifying her medical records. The Beth Israel defendants argue that these allegations are substantially a medical malpractice claim. The Beth Israel defendants move for the dismissal of this claim on the grounds that no physician-patient relationship existed between Morse and any of the

Beth Israel defendants and that the claim is barred by the statute of limitations. Morse argues that the claim is not a medical malpractice claim but a negligence claim, and is timely.

Whether the claim is one for medical malpractice or negligence, a plaintiff must allege that the defendant owed her a duty of care, that the defendant breached its duty, and that the breach resulted in damages to the plaintiff. When the duty arises from the physicianpatient relationship or is substantially related to medical treatment, the breach gives rise to an action sounding in medical malpractice, not simple negligence. *Stanley v. Lebetkin,* 507 N.Y.S.2d 468 (2d Dept.1986).

The amended complaint states that the Beth Israel defendants "released [Morse] approximately six hours after she arrived with an undiagnosed concussion and numerous untreated painful injuries." This allegation is the only language in the pleading which even begins to establish the elements of either negligence or medical malpractice, and it is clear from this language that the claim is substantially related to medical treatment. The claim will be evaluated, therefore, as one for medical malpractice.

The statute of limitations for medical malpractice claims in New York is two-and-a-half years. N.Y. C.P.L.R. § 214-a. Any cause of action that Morse might have against the Beth Israel defendants sounding in medical malpractice arose more than two-and-a-half years prior to the filing of her complaint. The complaint and the amended complaint are, therefore, untimely with respect to these claims.

False Imprisonment

Plaintiff alleges that the Beth Israel defendants falsely imprisoned her. To establish a cause of action for false imprisonment, a plaintiff must allege that: (1) defendant intended to confine her; (2) plaintiff was conscious of the confinement; (3) plaintiff did not consent to the confinement; (4) the confinement was not otherwise privileged. *Ferretti v. Town of Greenburgh,* 595 N.Y.S.2d 494 (2d Dept.1993). Here, the amended complaint alleges that Morse was brought to the hospital by the police for a psychiatric examination. The Beth Israel defendants dealt with Morse only at the bidding of the police and are not liable. Plaintiff does not have a cause of action against the Beth Israel defendants for false imprisonment.

Motions of Other Defendants

***10** The following defendants have made motions to dismiss which Morse has not opposed: the Legal Aid Society defendants, the defendants associated with the District Attorney's Office, and attorney Ira Raab. These motions to dismiss are granted as unopposed.

Conclusion

For the reasons stated above, the Amended Complaint is dismissed as to the State Judges, the Patrolmen's Benevolent Association, Sergio DeLaPava, the Legal Aid Society, The New York County District Attorney's Office, Robert Morganthau, the defendant Assistant District Attorneys, the Beth Israel Medical Center and its staff, and Ira Raab. The moving defendants should submit appropriate judgments of dismisal.

SO ORDERED.

End of Document

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Only the Westlaw citation is currently available.
This case was not selected for
publication in the Federal Reporter.
United States Court of Appeals,
Second Circuit.

John PARENT, individually and as natural parent of Child "A" and Child "B," and on behalf of parents similarly situated, aka Leon R. Koziol, Plaintiff–Appellant,

v.

State of NEW YORK, Jonathan Lippman, individually and as Chief Administrative Officer of the New York Unified Court System, Unified Court System of the State of New York, John W. Grow, individually and as State Court Judge, Charles C. Merrell, individually and as Family Court Judge, George S. Getman, individually and as Support Magistrate, David J. Swarts, individually and as Commissioner of Motor Vehicles for the State of New York, Brian J. Wing, individually and as Commissioner of the Office of Temporary and Disability Assistance for the State of New York, Lucille Soldato, individually and as Commissioner of the Oneida County Support Collection Unit, Darlene Chudyk, individually and as "Investigator" for Oneida County, Jane Doe, individually and as "Custodial Parent" for the State of New York, Keith Eisenhut, William Koslosky, individually and as "Attorney for the Child" for the State of New York, Michael Daley, individually and as Acting Judge, Justices of Theappellate Division, Fourth Department, Fifth Judicial District Grievance Committee, Mary Gasparini, individually and as investigator/attorney for the Grievance Committee, Sheryl Crankshaw, individually and as investigator for the Grievance Committee, Kathleen Sebelius, Secretary of Health and Human Services for the United States, Martha Walsh Hood, individually and as Acting State Court Judge, Gregory Huether, individually and as Chief Counsel/Complainant for the Fifth Judicial District, Justices of the Appellate Division, Third Department, C. Duncan Kerr, individually and as Deputy Tax Commissioner, County Of Oneida, Town of New Hartford, Kelly Hawse–Koziol, Charlotte Kiehle, and unknown enforcement agents of the state, County of Oneida and New Hartford Police, Donna Costello, Defendants–Appellees. *

No. 11–2474–cv. | June 18, 2012.

Appeal from a judgment of the United States District Court for the Northern District of New York (David N. Hurd, Judge).

Attorneys and Law Firms

Leon R. Koziol, Utica, NY, pro se.

Laura Etlinger, Assistant Solicitor General, for Eric T. Schneiderman, Attorney General, New York State Office of the Attorney General, Albany, NY, for DefendantsAppellees State of New York, Lippman, Unified Court System of the State of New York, Grow, Merrell, Getman, Swarts, Wing, Daley, Justices of the Appellate Division, Fourth Department, Fifth Judicial District Grievance Committee, Gasparini, Crankshaw, Walsh Hood, Huether, Justices of the Appellate Division, Third Department, Kerr, Kiehle, Costello.

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Paul G. Ferrara, Costello, Cooney & Fearon, PLLC, Syracuse, NY, for Defendants–Appellees Eisenhut, Koslosky.

Paula Ryan Conan, Assistant United States Attorney, for Richard S. Hartunian, United States Attorney for the Northern District of New York, Syracuse, NY, for Defendant–Appellee Sebelius.

Present GUIDO CALABRESI, JOSÉ A. CABRANES, and RAYMOND J. LOHIER, JR., Circuit Judges.

Opinion

SUMMARY ORDER

***1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the District Court is **AFFIRMED.**

Appellant Leon Koziol,[1] a suspended attorney proceeding *pro se,* appeals the District Court's judgment granting several motions to dismiss and/or for summary judgment filed by the defendants-appellees, denying his cross-motion for summary judgment, and dismissing both the lead and member complaints filed in his consolidated 42 U.S.C. § 1983 action. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

We review *de novo* a district court's grant of a Rule 12(b)(6) motion to dismiss, "accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff." *Litwin v. Blackstone Grp., L.P.,* 634 F.3d 706, 715 (2d Cir.2011) (quoting *ECA & Local 134 IBEW Joint Pension Trust v. JP Morgan Chase Co.,* 553 F.3d 187, 196 (2d Cir.2009)). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 547 (2007). Although all allegations contained in the complaint are assumed to be true, this tenet is "inapplicable to legal conclusions." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). A claim will have "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* We note that, although this Court usually affords *pro se* litigants "special solicitude" by, *inter alia,* liberally construing their pleadings, *see, e.g., Tracy v. Freshwater,* 623 F.3d 90, 101 (2d Cir.2010), as a suspended attorney with over twenty years of experience litigating civil rights cases, Koziol is not entitled to such "special solicitude," *see id.* at 102.

We review orders granting summary judgment *de novo* and focus on whether the district court properly concluded that there was no genuine issue as to any material fact and the moving party was entitled to judgment as a matter of law. In so doing, we construe the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in his favor. *See id.* Where parties have filed cross-motions for summary judgment, "each party's motion is examined on its own merits, and all reasonable inferences are drawn against the party whose motion is under consideration." *Chandok v. Klessig,* 632 F.3d 803, 812 (2d Cir.2011).

We are "free to affirm an appealed decision on any ground which finds support in the record, regardless of the ground upon which the trial court relied." *Leecan v. Lopes,* 893 F.2d 1434, 1439 (2d Cir.1990).

On appeal, Koziol argues, *inter alia,* that the District Court erred in: (1) dismissing, apparently on the basis of absolute judicial immunity, his claims for declaratory relief, which sought declarations regarding the alleged unconstitutionality of: (a) certain New York State child custody and child support laws; (b) the "processes" involved in state court divorce actions and related proceedings to determine child custody and support issues; and (c) the manner in which his state attorney disciplinary proceedings were conducted; (2) rejecting his arguments that certain judicial defendants were not entitled to judicial immunity because they purportedly acted in the absence of all jurisdiction; (3) failing to consider whether he had adequately pleaded a retaliation claim against a number of State tax compliance agents; and (4) dismissing a state law trespass claim against the Town of New Hartford based on his failure to comply with the municipal notice requirements set out in New York General Municipal Law § 50–i. We address each argument in turn.

***2** First, we affirm the District Court's dismissal of Koziol's declaratory judgment claims because, under the abstention doctrine set out by the Supreme Court in *Younger v. Harris,* 401 U.S. 37, 43–45 (1971), the District Court is without jurisdiction over those claims. Under *Younger,* abstention is mandatory where: "1) there is an ongoing state proceeding; 2) an important state interest is implicated; and 3) the plaintiff has an avenue open for review of constitutional claims in the state court." *Liberty Mut. Ins. Co. v. Hurlbut,* 585 F.3d 639, 647 (2000) (quoting *Philip Morris Inc. v. Blumenthal,* 123 F.3d 103, 105 (2d Cir.1997) (internal quotation marks omitted)). Although the *Younger* doctrine was originally formulated in the context of criminal proceedings, it now applies with equal force to civil proceedings, including state administrative proceedings that are "judicial in nature." *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.,* 477 U.S. 619, 627 (1986) (state administrative proceedings); *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass'n,* 457 U.S. 423, 433–34 (1982) (state bar attorney disciplinary hearings). The doctrine applies to claims for injunctive and declaratory relief. *See Hansel v. Town Court,* 56 F.3d 391, 393 (2d Cir.1995).

All three *Younger* requirements are met in this case. First, the record reflects that state proceedings are ongoing both in Koziol's divorce action and in the state attorney disciplinary matter. Second, the resolution of domestic relations matters has been recognized as an important state interest, *see Elk*

Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12–13 (2004) (" '[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.' " (internal alteration and citation omitted)), as has a state's interest in regulating the conduct of attorneys admitted to its bar, *see Middlesex Cnty. Ethics Comm.,* 457 U.S. at 432–34. Finally, despite Koziol's arguments to the contrary, he has not demonstrated that the state courts are an inadequate forum for raising his constitutional claims. Indeed, it appears that Koziol has repeatedly raised his constitutional claims before the state courts, albeit without receiving any favorable decisions. However, simply because the state courts have not issued decisions in his favor does not render them "inadequate" for purposes of *Younger* abstention. *See Hansel,* 56 F.3d at 394 ("So long as a plaintiff is not barred on procedural or technical grounds from raising alleged constitutional infirmities, it cannot be said that state court review of constitutional claims is inadequate for *Younger* purposes."). Because we find that *Younger* abstention is appropriate, we express no opinion regarding the merits of Koziol's arguments in support of his constitutional claims, which constituted the bulk of his appellate brief.

*3 Koziol claims that Justice Michael Daley of the New York Supreme Court and Family Court Judge Martha Walsh Hood were not entitled to judicial immunity because they were acting in the absence of jurisdiction when they presided over his divorce action. We hold this claim to be without merit, for substantially the reasons stated by the District Court in its memorandum decision. Additionally, a review of Koziol's pleadings reveals no error in the District Court's implicit determination that he had failed adequately to plead a retaliation cause of action against two State tax compliance agents, Charlotte Kiehle and Donna Costello, and State Deputy Tax Commissioner C. Duncan Kerr.

With respect to Koziol's notice-of-claim argument with regard to the District Court's dismissal of his state law trespass cause of action against the Town of New Hartford, our review of the record reveals that the District Court was incorrect in stating that Koziol failed to oppose New Hartford's notice-of-claim argument. Nonetheless, we conclude that dismissal of Koziol's state law trespass claim against New Hartford pursuant to New York General Municipal Law § 50–i was appropriate, inasmuch as the record reflects that neither Koziol's pleadings nor his motion papers establish that "at least thirty days have elapsed since the service of such notice," *see* N.Y. Gen. Mun. Law § 50–i(1)(b). Indeed, his notice of claim was dated October 29, 2010, and the relevant complaint was filed in the District Court on November 10, 2010).

Koziol also generally asserts that the District Court failed to consider the record in a light most favorable to him as a non-movant with respect to the defendants' motions. *See* Fed.R.Civ.P. 12(b)(6). After conducting an independent review of the record and the District Court's decision, we conclude that Koziol's argument is without merit.

We further conclude that Koziol has forfeited any other challenges to the District Court's decision. *See Tolbert v. Queens Col.,* 242 F.3d 58, 75 (2d Cir.2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks and citation omitted)).

CONCLUSION

We have considered all of Koziol's arguments on appeal and conclude that they are without merit. For the reasons stated above, the judgment of the District Court is **AFFIRMED.**

Footnotes

* The Clerk of Court is respectfully directed to amend the official caption as shown above.

1 Koziol proceeded under the fictitious name "John Parent" in the lead case of the consolidated action from which the instant appeal arises. Consistent with the District Court's memorandum decision and the majority of the parties' filings in this Court, this opinion refers to the plaintiff-appellant by his real name. We further note that, contrary to what the caption suggests, this case is not a class action.

End of Document

(2005)

CLARA TATE SPENCER, in her own right and as Administratix of the estate of LAMONT TATE, Plaintiff,

v.

GLENN ECKMAN, individually and in his capacities as an officer in the Police Department of Phoenixville, and Chief of the Lower Providence Community Center (improperly captioned as the Lower Providence Ambulance Company), and THE BOROUGH OF PHOENIXVILLE Defendants.

Civil Action 04-4974.

United States District Court, E.D. Pennsylvania.

March 28, 2005.

MEMORANDUM AND ORDER

J. JOYNER, District Judge.

Plaintiff brings this action on behalf of herself, and on behalf of the estate of her deceased son, Lamont Tate, for damages arising out of a motor vehicle accident between Decedent Tate and Defendant Glenn Eckman. Defendant Eckman, in his capacity as Chief of the Lower Providence Community Center, has moved to dismiss Plaintiff's Complaint. A joint motion to dismiss has also been filed by Defendants Eckman and the Borough of Phoenixville.[1] For the reasons that follow, Defendants' motions shall be granted in part and denied in part.

Facts

On October 24, 2002, Decedent Lamont Tate was involved in a motor vehicle accident with Defendant Glenn Eckman. Defendant Eckman, a Phoenixville police officer and chief of the Lower Providence Community Center ambulance squad, was in his police uniform but off-duty at the time of the collision. Decedent had a history of epileptic-like seizures, and Plaintiff alleges that Decedent was having a seizure at the time that the accident occurred. Plaintiff also alleges that Defendant Eckman knew Decedent personally, and was aware of his medical condition as a result of having responded, on a previous occasion, to an emergency call involving Decedent.

After the collision, Defendant attempted to approach Decedent's vehicle, but Decedent erratically drove into a vacant field. Defendant called 911, and also placed a call to one of the emergency medical technicians on the ambulance squad. Defendant allegedly stated that he did not want to be involved because he had just been a party to the accident.

When police officers arrived on the scene and removed Decedent from his vehicle, Defendant Eckman informed the officers that he knew Decedent, and that Decedent should be considered armed and dangerous. Plaintiff alleges that Defendant Eckman instructed the ambulance team not to approach Decedent.

Decedent was then placed face down on the ground and searched for weapons. None were found. By the time Decedent was turned over, he was unconscious. Upon observing that he was unconscious, Defendant Eckman permitted the ambulance team to attend to Decedent's medical needs.

Decedent was transported by ambulance to Phoenixville Hospital, and died at some point proximate to his arrival at the hospital. Plaintiff alleges that Decedent's death was caused by Defendants' having placed Decedent in a face down position and failing to provide emergency medical attention in a timely fashion.

Discussion

Count I: 42 U.S.C. § 1983 Unreasonable Use of Force

To state a claim for excessive use of force under the Fourth Amendment, a plaintiff must show that a "seizure" occurred and that it was unreasonable. Abraham v. Raso, 183 F.3d 279, 288 (3rd Cir. 1999) (citing Brower v. County of Inyo, 489 U.S. 593, 599 (1989)). A seizure triggering the Fourth Amendment's protections occurs only when a government actor has, by means of physical force or show of authority, in some way restrained the plaintiff's liberty. Graham v. Connor, 490 U.S. 386, 395 (1989) (citing Terry v. Ohio, 392 U.S. 1, 19, n. 16 (1968)).

Defendant Eckman, in his capacity as Chief of the Lower Providence Community Center ambulance team, moves to dismiss Count I of Plaintiff's Complaint on the grounds that Defendant was not a state actor at the time of the incident. Ambulance associations and their employees do not qualify as state actors for the purpose of § 1983 claims. McKinney v. W. End Voluntary Ambulance Ass'n, 821 F. Supp. 1013, 1019 (E.D. Pa. 1992); see also Mark v. Borough of Hatboro, 51 F.3d 1137, 1148 (3rd Cir. 1995) (citing Scrima v. Swissvale Area Emergency Serv., 599 A.2d 301, 303 (Pa. Commw. Ct. 1991)) (distinguishing volunteer fire companies, which are considered state actors in Pennsylvania, from volunteer ambulance associations, which are not). Thus, Count I of Plaintiff's Complaint fails to state a claim against Defendant Glenn Eckman in his individual capacity or in his capacity as ambulance chief.

Defendants Glenn Eckman and the Borough of Phoenixville likewise move to dismiss the unreasonable use of force claim in Count I of Plaintiff's Complaint. Defendants contend, first, that Fourth Amendment protection was not triggered because Decedent Tate was not "seized" by the officers. Furthermore, Defendants contend that even if such a seizure occurred, Defendants' use of force was reasonable under the circumstances. We must deny Defendants' motion to dismiss this claim on the following grounds.

Viewing the facts of the Complaint in the light most favorable to Plaintiff, the Decedent's liberty was indeed restrained by a government actor's physical force or show of authority. Plaintiff alleges that Defendant Eckman, in his capacity as a police officer, directed the Lower Providence Police Force to remove the Decedent, who was in the midst of an epileptic seizure, from his automobile. Plaintiff further alleges that Defendant Eckman ordered that Decedent be placed face down on the ground to be handcuffed and searched. Such action is a sufficient show of authority and physical force to qualify as a seizure for Fourth Amendment purposes.

The facts of the Complaint likewise support a contention that the force used to restrain Decedent was unreasonable. In determining whether a particular seizure was reasonable under the Fourth Amendment, a court must carefully balance the nature and quality of the intrusion on the individual's interests against the countervailing governmental interests at stake. Graham, 490 U.S. at 396. Proper application of the reasonableness standard requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. Graham, 490 U.S. at 396. In this action, Decedent was suffering from an epileptic seizure at the time that he was restrained by Defendants, and would have posed no immediate threat to their safety even if he had been armed, which he was not. Thus, Plaintiff has made out a legitimate § 1983 claim for unreasonable use of force against the Borough of Phoenixville and Defendant Eckman in his capacity as a Phoenixville police officer.

Count II: Negligence and Negligent Supervision

Municipal entities and their employees generally enjoy absolute immunity from tort liability under the Political Subdivision Tort Claims Act. 42 Pa. C.S.A. 8541. However, tort recovery may be permitted for negligent acts falling within one of the eight enumerated categories in 42 Pa. C.S.A. 8542.[2] In Count II of this action, Plaintiff alleges general negligence in the acts of the Defendants towards Decedent Tate, and negligent failure to properly supervise the police and ambulance team in the handling of an individual with a severe medical condition. Plaintiff's allegations do not fall

within any one of the eight categories. Furthermore, negligent supervision has been determined to be insufficient to impose liability under the exceptions to governmental immunity. See Sims v. Silver Springs-Martin Luther Sch., 625 A.2d 1297, 1301 (Pa. Commw. Ct., 1993); Hitchens v. County of Montgomery, No. 01-2564, 2002 U.S. Dist. LEXIS 2050 at 26-27 (E.D. Pa. 2002). Thus, Count II fails to state a valid cause of action against the Borough of Phoenixville or against Defendant Eckman in his capacity an officer in the Police Department of Phoenixville.[3] However, inasmuch as Count II alleges negligence on the part of Defendant Eckman in his individual capacity or in his capacity as ambulance chief, the claim will not be dismissed.[4]

Counts V and VI: Intentional and Negligent Infliction of Emotional Distress

To establish a claim of intentional infliction of emotional distress, a plaintiff must establish that the defendant intentionally committed "outrageous conduct," and that the plaintiff was present at the time the conduct occurred. Copenhaver v. Borough of Bernville, No. 02-8398, 2003 U.S. Dist. LEXIS 1315, 21 (E.D. Pa. 2003) (citing Johnson v. Caparelli, 625 A.2d 668, 671 (Pa. Super. Ct. 1993)). To establish a claim of negligent infliction of emotional distress, a plaintiff must establish the elements of a negligence claim, and must further prove at least one of the following four elements: (1) that the defendant had a contractual or fiduciary duty toward him; (2) that plaintiff suffered a physical impact; (3) that plaintiff was in a "zone of danger" and at risk of an immediate physical injury; or (4) that plaintiff had a contemporaneous perception of tortious injury to a close relative. Atamian v. Assadzadeh, No. 00-3182, 2002 U.S. Dist. LEXIS 6269, 17-18 (E.D. Pa. 2002) (citing Doe v. Philadelphia Cmty. Health Alternatives AIDS Task Force, 745 A.2d 25, 27 (Pa. Super. Ct. 2000)).

Plaintiff Clara Tate Spencer, in her individual capacity, does not allege that she observed the outrageous conduct or within the zone of danger, nor does she allege that Defendant had a contractual or fiduciary duty toward her, or that she personally suffered physical impact or injury. Thus, Counts V and VI must be dismissed inasmuch as they are brought by Plaintiff in her individual capacity. However, pursuant to 42 Pa. C.S. § 8302, Plaintiff is permitted, as the administratix of the estate of Lamont Tate, to bring a cause of action for negligent or intentional infliction of emotional distress on behalf of the decedent.

Punitive Damages

Municipalities and other governmental entities are immune from punitive damages for violations of § 1983, and for tort law violations pursuant to the Tort Claims Act. See City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1991); Toombs v. Manning, 835 F.2d 453, 463 (3rd Cir. 1987). However, punitive damages may be recoverable against an individual municipal employee where the individual's actions are the result of evil motive or intent, or involve reckless or callous indifference. Teed v. Hilltown Township, 2004 U.S. Dist. LEXIS 9477, 25-26 (E.D. Pa. 2004) (citing Smith v. Wade, 461 U.S. 30, 56 (1983)). Thus, Defendants' motion to dismiss the punitive damages claims against the Borough of Phoenixville only must be granted.

Defendant Eckman moves to dismiss Plaintiff's claims for punitive damages for failure to state a claim. However, viewing the Complaint in the light most favorable to Plaintiff, this Court cannot dismiss Plaintiff's punitive damages claims against Defendant Eckman. Plaintiff alleges that Defendant knew the decedent and harbored personal animus towards him. Plaintiff further alleges that Defendant knew from previous experience that the decedent had a medical condition causing epileptic-type seizures, and that Defendant observed decedent suffering from such a seizure at the scene of the accident. Finally, Plaintiff alleges that Defendant falsely informed the emergency medical team that the decedent was armed and extremely dangerous and instructed them not to approach him, and that, as a result of this delay, decedent was unconscious by the time the team began to administer medical care. On the basis of these facts and Plaintiff's claims that Defendant's conduct was willful, wanton, and outrageous, we must deny Defendant Eckman's motions to dismiss the punitive damages claims against him. See Martin v. Goodyear Tire & Rubber Co., No. 99-80, 1999 U.S. Dist. LEXIS 1318, 2-4 (E.D. Pa. 1999) (denying motion to dismiss punitive damages claim where complaint characterized defendant's conduct, without more, as "wanton, reckless, and outrageous").

Declaratory and Injunctive Relief

Equitable remedies, including declaratory and injunctive relief, are appropriate only where a plaintiff has no adequate remedy at law and will suffer irreparable injury if the relief is denied. Barnes v. Am. Tobacco Co., 989 F. Supp. 661, 667 (E.D. Pa. 1997) (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 381 (1992)); see also Nat'l Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 591 (1995). Plaintiff in this matter has failed to demonstrate that equitable relief is appropriate or that she will suffer irreparable injury if such relief is denied. Furthermore, it appears to this Court that Plaintiff has an adequate remedy at law. Thus, Defendants' motions to dismiss the claims for declaratory and injunctive relief will be granted.

An appropriate Order follows.

ORDER

AND NOW, this 28th day of March, 2005, upon consideration of the uncontested Motion of Defendants Glenn Eckman and the Borough of Phoenixville to Dismiss Counts I, II, V, and VI of Plaintiff's Complaint (Doc. No. 18), and the uncontested Motion of Defendant Glenn Eckman, in his capacity as Chief of the Lower Providence Community Center (improperly captioned as the Lower Providence Ambulance Company), to Dismiss Plaintiff's Complaint (Doc. No. 20), it is hereby ORDERED that the Motions are GRANTED in part and DENIED in part, as follows:

(1) Count I of Plaintiff's Complaint, alleging a § 1983 claim for unreasonable use of force and failure to provide medical attention, is DISMISSED only with respect to Defendant Eckman in his individual capacity and in his capacity as Chief of the Lower Providence Community Center;

(2) Count II, alleging negligence and negligent supervision, is DISMISSED only with respect to the Borough of Phoenixville and Defendant Eckman in his capacity an officer in the Police Department of Phoenixville;

(3) Counts V and VI, alleging intentional and negligent infliction of emotional distress, are DISMISSED only as brought by Plaintiff Clara Tate Spencer in her individual capacity;

(4) Count VI, alleging negligent infliction of emotional distress, is DISMISSED only with respect to the Borough of Phoenixville and Defendant Eckman in his capacity as an officer in the Police Department of Phoenixville;

(5) Plaintiff's claims for punitive damages are DISMISSED only with respect to the Borough of Phoenixville;

(6) Plaintiff's claims for declaratory or injunctive relief are DISMISSED.

With respect to all other claims, Defendants' Motions are DENIED.

[1] Plaintiff's responses to the instant motions have been stricken on the grounds that they were untimely filed. See Order dated March 28, 2005. This Court has discretion pursuant to Local Rule of Civil Procedure 7.1(c) to grant these motions as uncontested. However, because the bulk of Plaintiff's claims appear to be directed towards Defendant Eckman in his various capacities, and because this Court is reluctant to punish Plaintiff for her counsel's negligence, we will consider the instant motions on their merits.

[2] 42 Pa. C.S.A. 8542(b) permits tort recovery against a municipality, agency, or its employees where a negligent act relates to one of the following: vehicle liability; care, custody, or control of personal property; real property; trees, traffic controls, or street lighting; utility service facilities; streets; sidewalks; or care, custody, or control of animals. None of these are at issue in this case.

[3] For the same reasons, Count VI, alleging negligent infliction of emotional distress, fails to state a claim against the Borough of Phoenixville or against Defendant Eckman in his official capacity.

[4] Defendant Eckman, in his capacity as ambulance chief, has moved to strike Count II of Plaintiff's Complaint as duplicative of Count IV. Defendant does not, however, contend that Plaintiff has failed to state a cause of action. As Federal Rule of Civil Procedure 8(a) expressly permits parties to plead in the alternative, Defendant's Motion must be denied with respect to Count II.