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

ELIZABETH STEWART, a minor,	:	
BY MARY LOUISE JOHNSON,	:	**CIVIL ACTION**
guardian ad litem	:	
	:	
v.	:	
	:	
POLICE OFFICER MICHAEL TRASK, BADGE #9636,	:	
POLICE OFFICER MARK DESIDERIO, BADGE #5902, and	:	
CITY OF PHILADELPHIA	:	**NO. 02-7703**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **June 27, 2003**

Plaintiff Elizabeth Stewart ("Stewart") was injured during a car chase involving her brother, Aubry Tillmon ("Tillmon")[1], and two Philadelphia police officers, Michael Trask ("Officer Trask") and Mark Desiderio ("Officer Desiderio"). This action, alleging federal constitutional violations against the individual officers, and state law claims against the officers and the City of Philadelphia, was removed by defendants from Pennsylvania state court; a motion by plaintiff to remand was denied. Before this court is the motion of Officers Trask and Desiderio for summary judgment on all federal claims.

I. FACTS

On November 23, 2001, Stewart was a back-seat passenger in a

[1]Aubry Tillmon ("Tillmon"), currently incarcerated, also was named as a defendant in this action along with the City of Philadelphia and the individual officers. By order dated December 11, 2002, default was entered as to Tillmon; however, the court chose to reserve the entry of default judgment until the conclusion of the action.

vehicle ("the Suburban") driven by her brother Aubry Tillmon, in which another one of her brothers, Donald, was a front-seat passenger. Amended Complaint ¶ 9. On that day, Officer Desiderio and Officer Trask were assigned to the Highway Patrol Division of the Philadelphia Police Department (Seat Belt Enforcement Detail), or "seatbelt duty," Lynch Dep. pp. 8-9. The Suburban's passengers were not wearing seatbelts, Trask Dep. pp. 7-8, and, Stewart alleges, their failure to do so prompted Officer Desiderio to pull over the Suburban. Amended Complaint ¶ 10; Stewart Dep. pp. 59-60.

Defendants claim the stop of the Suburban was not merely for a seatbelt violation, but also for a traffic violation. Officer Desiderio testified that, at approximately 3 p.m., he observed the Suburban traveling southbound on Frankford Avenue; while the signal remained red, Tillmon improperly passed stopped cars via the bike lane located on the right side of the highway, and then sped into the lawful lane immediately following the signal's change to green. Desiderio Dep. pp. 16-18. Officer Desiderio claims he pulled Tillmon over and informed him he was stopped for improper passing. Id. at 21-22.

Shortly after the stop, Officer Desiderio, in uniform and driving a marked vehicle, was joined by Officer Trask. Trask Dep. p. 13. Tillmon turned off the Suburban's motor and lowered the windows to speak with the officers, Stewart Dep pp. 50, 63; Officer Desiderio approached the driver's side and Officer Trask approached

the passenger side. Id. at 13-14. Stewart alleges she opened her door at Officer Trask's command and told him she was worried about getting her "meds" and hoped the officers would take her home. Id. at 44, 57-58, 64-65, 77. She was told to sit back and relax. Id. at 65, 77. Stewart's door remained open during the stop and car chase that followed. Id. at 46.

Officer Desiderio requested the driver's license and automobile registration, and Tillmon complied. When asked his name, Tillmon falsely responded that his first name was Donald, not Aubry, Stewart Dep pp. 58, 63-64. After processing the license and registration provided by Tillmon, the officers, troubled by responses received from Aubry and Donald Tillmon, Desiderio Dep. pp. 9-10, allegedly discussed whether to remove the passengers from the vehicle, and told the passengers they would be taken downtown for fingerprinting if they did not tell the truth. Id. at 9, 32-33. Tillmon told officers he had given them correct information.

As Officer Desiderio and Officer Trask were returning to the driver's side door, Stewart alleges Officer Trask's gun was drawn. Discharging the weapon, Officer Trask hit the left rear tire of the Suburban, and Tillmon fled. Stewart dep. pp. 64, 68; Roach Depo pp. 23, 35. Defendants claim that Officer Trask drew his weapon after Tillmon ignored commands to exit the Suburban; Tillmon shut and locked his door, and started the engine. Trask Dep. 16-17. It was only when Tillmon began to accelerate, defendants claim, that

Officer Trask's weapon discharged, and hit the rear left tire. Id. at 12-17; Desiderio Dep. p. 36. Trask claims he was bumped by the Suburban as it moved forward, and that his finger involuntarily pulled the trigger. Stewart alleges the stop itself lasted for at least five minutes. Roach Dep. p. 18; Williams Dep. p. 14.

The officers returned to their patrol cars and pursued the Suburban. Stewart Dep pp. 70-71. Officer Desiderio observed that the Suburban's right rear passenger door had not been closed after Stewart opened it to talk to the officers. Desiderio Dep. pp. 41, 50. During the chase, Stewart fell out the open door, struck a parked car and landed in the street. Stewart Dep. p. 72. Defendants claim Stewart did not fall but jumped from the moving Suburban at the direction of one of her brothers. Tillmon stopped the Suburban shortly thereafter, and he and Donald Tillmon attempted to flee on foot. Stewart suffered a cervical spine injury with tetraplegic paralysis and cervical spine dislocation, a brain injury and bladder injuries.

II. STANDARD OF REVIEW

A court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of

demonstrating there are no facts to support the plaintiff's claim; the plaintiff then must introduce specific, affirmative evidence that there is a genuine issue for trial. See Celotex v. Catrett, 477 U.S. 317, 322-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Plaintiff may not rest upon mere allegations or denials of the adverse party's pleading, but by affidavits or as otherwise provided in Rule 56, must set forth specific facts showing that there exists a genuine issue for trial. See Fed. R. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) ("The evidence of the non-movant is to be believed ... ."). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the non-moving party." Id. at 248. The non-movant must present evidence to establish each element for which it will bear the burden at trial. See Matsushita Elec. Indus. Co. v. Zenith Radio. Corp., 475 U.S. 574, 585-86, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

III. DISCUSSION

Stewart claims Officer Desiderio and Officer Trask are liable under 42 U.S.C. § 1983[2] for violating her civil rights under the

[2]Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

Fourth and Fourteenth Amendments. See U.S. Const. amends. IV, and XIV. Stewart alleges her Fourth Amendment rights were violated because she was "effectively seized, arrested or detained by law enforcement officers without reasonable cause, probable cause and or [sic] a warrant." Amended Complaint ¶ 46.

Stewart also claims Officer Desiderio and Officer Trask exhibited "deliberate intention to harm [her], deliberate indifference to the rights guaranteed [her]," and that they engaged in conduct that "shocks the conscience of the community," all in contravention of her substantive due process rights guaranteed by the Fourteenth Amendment. Id. at ¶ 54. Stewart alleges her substantive due process rights were denied by the following: 1) Officer Trask's use of excessive force in brandishing his handgun during the traffic stop; 2) Officer Trask's intent to harm Stewart, demonstrated "when he fired shots at the vehicle and its passengers," Amended Complaint ¶ 51; 3) the officers' intent to harm plaintiff by chasing the Suburban despite the presence of the minor plaintiff; 4) the officers' use of their patrol cars as instruments of excessive deadly force during the police chase; 5)

> citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. 42 U.S.C. § 1983.

the officers' misuse of police authority; and, 6) the officers' deliberate violation of City policies regarding police pursuits.

It is first necessary to determine whether those claims arise under the due process clause of the Fourteenth Amendment. The rule enunciated by the Supreme Court in Graham v. Connor, 490 U.S. 386, 395, 104 L. Ed. 2d 443, 109 S. Ct. 1865 (1989), requires that "where a particular amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims," Albright v. Oliver, 510 U.S. 266, 273, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994). Applying the rule in Graham, the Supreme Court held:

> Claims that law enforcement officials have used excessive force in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen are most properly characterized as invoking the protections of the Fourth Amendment, which guarantees citizens the right 'to be secure in their persons . . . against unreasonable seizures,' and must be judged by reference to the Fourth Amendment's 'reasonableness' standard.

490 U.S. at 395. Defendants concede Stewart was seized within the meaning of the Fourth Amendment when Tillmon submitted to Officer Desiderio's show of authority. See Defendants' Motion for Summary Judgment at 8-9. Thus, Stewart's claims that Officer Trask used excessive force in brandishing his handgun during the traffic stop and demonstrated an intent to harm her "when he fired shots at the

vehicle and its passengers," Amended Complaint, ¶ 51, are properly analyzed under the Fourth Amendment's "objective reasonableness" standard, rather than under a substantive due process standard. See Graham, 490 U.S. at 395; cf. Gause v. City of Philadelphia, et al., 2001 U.S. Dist. LEXIS 17428, at *5-6 (E.D. Pa. Sept. 27, 2001) (Surrick, J.).

A. Fourth Amendment Claims

Stewart claims the defendant officers subjected her to an unreasonable seizure, and displayed excessive force by brandishing a handgun and firing a shot during the course of that seizure, in deprivation of her rights under the Fourth Amendment.[3]

The Fourth Amendment guarantees the right of the people to be "secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend IV. Temporarily apprehending individuals during the course of a police vehicle stop, even if only for a brief period and for a limited purpose, constitutes a "seizure" of "persons" within the meaning of this provision, so the automobile stop must be "reasonable" under the circumstances.

[3]As discussed in footnote 5, infra, Stewart was not protected by the Fourth Amendment throughout the course of events on November 23, 2001. Once Tillmon fled the scene, any seizure and Fourth Amendment violations were over. See California v. Hodari D., 499 U.S. 621, 624, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991).

1. Initial Stop of the Suburban

Defendants do not dispute that, when they stopped the Suburban, Stewart was seized within the meaning of the Fourth Amendment. See United States v. Mendenhall, 446 U.S. 544, 553-54, 64 L. Ed. 2d 497, 100 S. Ct. 1870 (1980) (person is "seized" when a reasonable person would believe that he or she was not free to leave); see also Mays v. City of E. St. Louis, 123 F.3d 999, 1003 (7th Cir. 1997) ("A lawful stop of the car is a lawful seizure of all passengers."). Defendants argue that their detention of Stewart was a reasonable investigative stop authorized by Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), and its progeny, and that the stop did not ripen into an arrest requiring probable cause. Under Terry, a law enforcement officer may briefly stop and detain an individual for investigative purposes if he or she has a reasonable suspicion, supported by articulable facts, that criminal activity may be afoot, even if probable cause is lacking. 392 U.S. at 19.

But the Supreme Court has never held that effecting such a stop requires mere reasonable suspicion.[4] The decision to stop a

[4]As noted by one commentator, "The [Supreme] Court's treatment of the ... routine traffic violation stop has been so confusing and inconsistent that some lower federal and state courts incorrectly regard such stops as Terry stops requiring only reasonable suspicion, ..." Moran, David, Traffic Stops, Littering, and Police Warnings: The Case for a Fourth Amendment Non-Custodial Arrest Doctrine, 37 Am. Crim. L. Rev. 1143, 1145 (2000). For example, in Berkemer v. McCarty, 468 U.S. 420, 439, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984), the Supreme Court noted that a routine traffic stop is "more analogous to a so-called 'Terry stop' ... than to a formal arrest," though, as a caveat to its analogy, the Court added, "No more is implied by this

vehicle is reasonable when police have probable cause to believe that a traffic violation has occurred. Maryland v. Wilson, 519 U.S. 408, 413, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997) (where traffic stop is lawful and supported by probable cause, police may order driver and passengers out of vehicle); Whren v. United States, 517 U.S. 806, 809-10 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996) (internal citations omitted) (stop reasonable under the Fourth Amendment when officers had probable cause to believe a traffic violation occurred). Whren also makes clear that an officer's actual motivation for making a traffic stop is irrelevant to the constitutionality of that stop so long as there is probable cause to initiate the stop. 517 U.S. at 813. The relevant question is whether Officer Desiderio had probable cause to stop the Suburban.

Officer Desiderio stated that he observed the Suburban improperly pass stopped vehicles in violation of the Pennsylvania Motor Code. Desiderio Dep. at 20-21. Were this undisputed, it is clear that probable cause would have existed to stop the vehicle under Whren. But Stewart has offered evidence Officer Desiderio was assigned to the Seat Belt Enforcement Detail when he stopped the Suburban, and that she and her brothers were stopped because of

---

analogy than that most traffic stops resemble, in duration and atmosphere, the kind of brief detention authorized in Terry." Id. at 439 n.29. See also Knowles v. Iowa, 525 U.S. 113, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998) (officer's full search of defendant's car violated the Fourth Amendment when defendant had been issued a citation, but was not arrested).

"an alleged seatbelt violation of the Pennsylvania Motor Code." Amended Complaint ¶ 10, Stewart Dep. pp. 59-60 (Q: "Do you know why the police stopped your brother? A: "Seatbelts."), and under the relevant legal standard, "evidence of the non-movant is to be believed ... ." Anderson, 477 U.S. at 255.

According to Lieutenant Hugh Lynch, who was the traffic enforcement supervisor on November 23, 2001, "we wouldn't stop [vehicles] just for the seatbelt violation." Lynch Dep. at 8. Pennsylvania law makes clear that 75 Pa. Cons. Stat. § 4581(2), the law requiring motorists, front seat passengers, and rear seat passengers under 18, to wear seatbelts, does not provide a police officer with probable cause to stop a vehicle, because noncompliance with the seat belt law alone does not give an officer reasonable grounds to suspect a crime. See Commonwealth v. Henderson, 663 A.2d 728 (Pa. Super. 1995) (suppressing all evidence discovered after stop made solely based on seatbelt violation). In Henderson, the Superior Court stated:

> [E]ven the contemporaneous legislative history of the 1987 amendments to the seat belt laws demonstrate that a motor vehicle cannot be stopped by a police officer ... unless another provision of the Motor Vehicle Code is simultaneously violated.
>
> Finally, and perhaps most importantly, the consequences of interpreting the Motor Vehicle Code to allow police officers to stop motor vehicles solely because the seat belts ... are undesirable. Hundreds of thousands of motor vehicles could be stopped at random each day in this Commonwealth if the Motor Vehicle Code were interpreted

> to authorize police stops of all motor vehicles whose front-seat occupants were not using their seat belts. The potential for abuse under such an interpretation is unquestionable. For example, police officers would be able to stop motor vehicles under the pretext of a seat belt infraction. Hence, in the words of Representative Piccola, an 'unfair' enforcement of the seat belt laws would result. Clearly, the General Assembly did not intend this type of situation to spawn from its efforts to encourage the increased use of seat belts via its 1987 amendments to the seat belt laws of the Motor Vehicle Code. Therefore, when the enactment of the seat belt laws are viewed in this context, it is indisputable that the General Assembly never intended these laws to expand the frequency of motor vehicle stops by the police.

Id. at 736 (footnote omitted). Because there is a genuine issue of material fact regarding the reason for Officer Desiderio's stop of the Suburban, defendants are not entitled to summary judgment on the Fourth Amendment claim that the stop was unreasonable.

Defendants also maintain that they are entitled to summary judgment because they enjoy qualified immunity; "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1981). The standard for determining whether the affirmative defense of qualified immunity applies is well-established:

> First, [a court] must determine if the plaintiff has alleged a deprivation of a clearly established constitutional right. A right is clearly established if its outlines are sufficiently clear that a reasonable

> officer would understand that his actions violate the right. If a violation exists, the immunity question focuses on whether the law is established to the extent that "the lawfulness of the action would have been apparent to a reasonable official." The status of the right as clearly established and the reasonableness of the official conduct are questions of law.

Sterling v. Borough of Minersville, 232 F.3d 190, 193 (3d Cir. 2000). Stewart's allegations, if true, would establish a violation of her rights under the Fourth Amendment. So, "the next sequential step is to ask whether [those rights were] clearly established" on November 23, 2001, the time of the alleged violation. Saucier v. Katz, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001).

A right was clearly established if existing case law provided defendants with fair warning that their conduct violated the plaintiff's constitutional rights; "officials can still be on notice that their conduct violates established law even in novel factual circumstances." Hope v. Pelzer, 536 U.S. 730, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666. Here, Henderson, decided in 1995, held that in Pennsylvania, a vehicle occupant's failure to wear a seatbelt does not provide probable cause for a traffic stop; it has been cited for that holding consistently since. See, e.g., Commonwealth v. Rachau, 670 A.2d 731, 735 (Pa. Commw. 1996). Hugh Lynch, who supervised Officer Trask and Officer Desiderio on November 23, 2001, stated the police "wouldn't stop [vehicles] just for the seatbelt violation," Lynch Dep. at 8, because the Philadelphia Police Department knew the law and had a policy

consistent with that law. Because the law, if violated, was clearly established, the officers are not entitled to qualified immunity at this time.

2. Subsequent Detention

Stewart also alleges her Fourth Amendment rights were violated by excessive use of force during the stop, specifically by Officer Trask's brandishing and firing his handgun. The claim requires the court to draw a distinction between the traffic stop and the subsequent detention.

Probable cause is required for a constitutional initial stop of a vehicle. Maryland v. Wilson, 519 U.S. at 413. Whether it existed to stop the Suburban in which Stewart was a passenger presents a genuine issue of material fact.

A police officer may lawfully detain a stopped motorist for the period necessary to investigate a traffic violation. Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) ("an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop"); United States v. Johnson, 63 F.3d 242, 247 (3d Cir. 1995). If, during routine questioning related to a traffic stop, an officer identifies reasonable articulable facts that create a reasonable suspicion of additional criminal activity, the officer may continue to detain the vehicle and investigate the facts giving rise to his suspicion. See Berkemer, 469 U.S. at 439 (citing Terry, 392 U.S.

at 29). Because the subsequent detention of Stewart was distinct from the traffic stop itself, the principles of Terry guide the court's analysis; the issue is whether the detention effected by Officer Desiderio and Officer Trask, following the traffic stop, was a brief, investigatory stop within the bounds of Terry or a stop that ripened into an arrest because of the force displayed.

Under Terry, a law enforcement officer may briefly detain an individual for investigative purposes if he or she has a reasonable suspicion supported by articulable facts that there may be criminal activity, even if probable cause is lacking. 392 U.S. at 19. There is no bright-line test. "The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments--in circumstances that are tense, uncertain, and rapidly evolving." Graham, 490 U.S. at 396. Courts must look at the "totality of the circumstances" in making reasonable-suspicion determinations. United States v. Arvizu, 534 U.S. 266, 151 L. Ed. 2d 740, 122 S. Ct. 744, 750 (2002).

Subsequent detention must not be excessive in length or overly intrusive; the officers' actions must be reasonably related in scope to circumstances justifying the initial interference. Terry, 392 U.S. at 20. "An officer may use reasonable physical force under the circumstances to effect a Terry-stop without converting the stop into an arrest. So long as the circumstances warrant the precautions, such conduct ... does not necessarily exceed the

bounds of a Terry-stop." U.S. v. McGrath, 89 F. Supp. 2d 569, 577-78 (E.D. Pa. 2000). Some force is allowed, but "determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Lee v. Ferraro, 284 F.3d 1188, 1197-98 (11th Cir. 2002).

The court must view the facts in a light most favorable to plaintiff. Stewart claims Officer Trask had his gun out and was ready to fire before Tillmon attempted to flee the scene, and that the Suburban drove away after the weapon discharged, Stewart Dep. pp. 64, 68. Stewart testified that she "didn't see him actually pull his gun out and fire it," Stewart Dep. p.66, although Officer Trask's own testimony shows he did have his gun out before Tillmon fled. But there is no per se rule that pointing guns at people ... constitutes an arrest, Baker v. Monroe Township, 50 F.3d 1186, 1193 (3d Cir. 1995), and officers commonly do so in the interest of their own personal safety, United States v. Trullo, 809 F.2d 108 (1st Cir. 1987), cert. denied, 482 U.S. 916 (1987).

It is undisputed that Tillmon provided the officers with false information. Stewart Dep pp. 58, 63-64. As stated by Stewart, "I guess my brother thought he could get away with it by giving them a different name and address." Id. at 64. After processing the license and registration information Tillmon provided, the officers

were certain it was untruthful. "The policeman came back to the car [and] yelled to the other cop that was not right–that couldn't be the right name." Id. At this point, Tillmon's demeanor, coupled with confirmation he had given false information, reasonably might have caused the officers to suspect the Suburban was stolen or that the driver had some criminal motive for concealing his true identity and could be armed. See United States v. Thomas, 2003 U.S. App. LEXIS 1911 (3d Cir. Feb. 4, 2003) (reasonably necessary for police to point guns and order down man in high crime area who refused to heed police directives to "protect personal safety and maintain status quo"). Even if Officer Trask did take out his weapon before Tillmon fled the scene, there is no allegation that Trask pointed the gun at Stewart, or intended to discharge it.

"Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it." Graham, 490 U.S. at 396. The officers' actions were reasonably necessary, and there is no constitutional violation as a matter of law. Defendants are entitled to summary judgment on Stewart's claim that her Fourth Amendment rights were violated by the use of of excessive force.

B. Fourteenth Amendment Claims (Substantive Due Process)

Stewart claims the officers' initiation of the chase and their

use of patrol cars as instruments of deadly force evinced an intent to harm her in violation of her substantive due process rights. Stewart also alleges her substantive due process rights were violated by the officers' misuse of police authority and their deliberate violation of a City policy regarding police pursuits.

The seminal case addressing substantive due process rights in the context of a high-speed police chase is County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).[5] In Lewis, police were called to the scene of a fight. Id. at 836. After their arrival, defendant officers observed two boys speed by on a motorcycle. Id. Neither the driver of the motorcycle nor the passenger, plaintiffs' decedent, were involved in the fight that first prompted the officers to respond; however, the officers' suspicions were raised by the speeding motorcycle, and they initiated pursuit. Id. The chase, lasting approximately 75

[5]Stewart argues that "this is not a Fourteenth Amendment police pursuit case," Pl. Resp. to Summ. Judg. at 9, because the chase followed a Fourth Amendment seizure, but it is. Excessive force employed during the course of an arrest should be analyzed under the Fourth Amendment, see Graham, 490 U.S. 393-93; but Stewart was not "protected by the Fourth Amendment throughout the course of events described in the Amended Complaint." Once her brother decided to flee, Stewart was no longer subject to seizure under the Fourth Amendment or afforded its protections. See Hodari D., 499 U.S. at 624.

In addition, Stewart's contention that a different substantive due process standard should apply, such as "special custodial relationship" or "state-created danger," as discussed in Susavage v. Bucks County Schools Internediate Unit No. 22, 2002 WL 109615 (E.D. Pa. 2002) (shocks the conscience not applied in § 1983 action where special needs child strangled by improperly installed seatbelt harness), is unavailing. Officer Desiderio and Officer Trask did not assume responsibility for Stewart by, for example, removing her from the Suburban and placing her in a police car. Her brother chose to flee the scene with his sister in the car; he was responsible for her well-being. Because the facts make clear that a police chase took place, Lewis applies.

seconds at high speed, ended in a collision killing passenger Lewis. Id. at 837.

Lewis's parents, in an action under 42 U.S.C. § 1983, alleged a deprivation of their son's Fourteenth Amendment substantive due process right to life by Sacramento County, the Sacramento County Sheriff's Department, and Deputy James Everett Smith, driver of the vehicle causing the fatal injuries. See id.

Refusing to recognize a substantive due process violation under such circumstances, the Court in Lewis held that "high speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." Id. at 854. For recovery, the conduct complained of must "shock the conscience." Id.

Lewis governs this action. Viewing the facts in the light most favorable to plaintiff Stewart, and assuming she fell from the Suburban as police pursued the vehicle at high speeds through narrow residential streets, plaintiff has produced no evidence that either Officer Desiderio or Officer Trask intended to injure her or "worsen [her] legal plight." Id. Tragically, Stewart was seriously injured; however, there is no evidence of intent to harm Stewart, so the decision made by Officer Desiderio and Officer Trask to give chase does not "shock the conscience."

Allegations regarding the misuse of police authority and willful violation of City policies do not "shock the conscience" because the alleged conduct took place in connection with the police chase. Stewart claims that, under official policies and directives of the Philadelphia Police Department, "an officer should only begin a police pursuit of another vehicle if the suspected crime is a felony, in order to apprehend someone carrying a deadly weapon, or to recover a stolen car if the fleeing driver violates traffic laws in attempt to avoid arrest." Amended Complaint ¶ 21. Stewart states that "conducting a dangerous vehicular pursuit when such a tactic was completely unwarranted to meet the legitimate needs of law enforcement" shocks the conscience. Amended Complaint ¶ 57. But even if Officer Desiderio and Officer Trask did fail to comply with Philadelphia Police Department policies, Lewis "squarely refutes plaintiff's contention that the officers' violation of police department regulations, which might be probative of recklessness or conscious disregard of plaintiff's safety, suffices to meet the shocks-the-conscience test under the due process clause." Davis v. Township of Hillside, 190 F.3d 167, 170 (3d Cir. 1999) (summary judgment affirmed for officers involved in high-speed chase where officers evinced no intent to physically harm injured bystander).

The conduct alleged by Stewart to have violated her rights under the Fourteenth Amendment does not demonstrate a deliberate

attempt to harm her, and does not shock the conscience. There is no constitutional violation. Officer Desiderio and Officer Trask are entitled to summary judgment on the substantive due process claims.

IV. CONCLUSION

Defendant officers are not entitled to summary judgment or qualified immunity on Stewart's allegation that the officers violated the Fourth Amendment when they stopped the Suburban in which she was a passenger. Defendant officers are entitled to summary judgment as a matter of law on her claim she was subjected to excessive force during her subsequent detention by the officers. Officer Desiderio and Officer Trask's motion for summary judgment will be granted as to Stewart's claims of substantive due process violations.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT FOR

THE EASTERN DISTRICT OF PENNSYLVANIA

ELIZABETH STEWART, a minor,	:	
BY MARY LOUISE JOHNSON,	:	**CIVIL ACTION**
guardian ad litem	:	
	:	
v.	:	
	:	
POLICE OFFICER MICHAEL TRASK, BADGE	:	
#9636,	:	
POLICE OFFICER MARK DESIDERIO,	:	
BADGE #5902, and	:	
CITY OF PHILADELPHIA	:	**NO. 02-7703**

ORDER

AND NOW, this 27th day of June, 2003, on consideration of Michael Trask and Mark Desiderio's Motion for Summary Judgment (Paper #27) and Elizabeth Stewart's Response to Defendants'

Motion for Summary Judgment (Paper #31), and oral argument by counsel for all parties heard April 9, 2003, it is **ORDERED** that Defendants' Motion for Summary Judgment is **GRANTED IN PART** and **DENIED IN PART**:

1. Summary judgment is **DENIED** as to plaintiff's claim that the initial stop of the vehicle in which she was a passenger violated her Fourth Amendment rights. Defendants are not entitled to qualified immunity under plaintiff's version of the facts.

2. Summary judgment is **GRANTED** in favor of defendants as to plaintiff's allegation that her subsequent detention violated her Fourth Amendment rights.

3. Summary judgment is **GRANTED** in favor of defendants as to plaintiff's claim of deprivation of substantive due process under the Fourteenth Amendment.

_____

S.J.