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

ELEANOR CHERRY	:	CIVIL ACTION
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	:	
v.	:	
	:	
	:	
ROBERT GARNER	:	No. 03-cv-01696

M E M O R A N D U M A N D O R D E R

December 30, 2004

PRATTER, District Judge

I. INTRODUCTION

Plaintiff Eleanor Cherry ("Cherry") alleges violations of her federal Constitutional rights[1], state constitutional rights and state common law (assault, battery, unlawful detention, false arrest and false imprisonment) in her Complaint against Sergeant Robert Garner ("Garner"), a School District of Philadelphia Police Officer (a "School Police Officer"). For the reasons stated below, including the Court's finding that (a) Sgt. Garner had probable cause to detain Ms. Cherry until the Philadelphia Police could investigate Ms. Cherry's conduct and (b) Garner is entitled to qualified immunity for his actions, Garner's Motion for Summary Judgment is GRANTED as to

[1]Cherry's Complaint includes allegations of violations of the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as 42 U.S.C. §§ 1983 and 1988. Cherry seeks damages on behalf of herself, as well as her attorney's fees and costs pursuant to 42 U.S.C. § 1988(b).

the First Cause of Action of Cherry's Complaint and judgment shall be entered in Garner's favor on that cause of action. Furthermore, the Court declines to retain jurisdiction over the state law claims in the Second, Third, Fourth and Fifth Causes of Action and, therefore, the remaining causes of action are DISMISSED without prejudice to Ms. Cherry, who may choose to refile them in state court.

II. FACTUAL BACKGROUND

Ms. Cherry is a resident of Philadelphia, Pennsylvania. She is approximately 55 years old. Deposition of Eleanor Cherry, April 2, 2004, at 4. Ms. Cherry is a former Philadelphia Police Officer who retired in 1992, as a result of a work-related disability, after six (6) years with the Philadelphia Police Department. Cherry Deposition, at 53-54. Robert Garner is, and was at the time of the events described in the Complaint, a police officer with the School District of Philadelphia (the "District"). Neither the City of Philadelphia nor the District is a party in this action. Cherry alleges that Garner was acting under the color of state law in his capacity as a police officer when the altercation underlying the Complaint occurred.

The factual allegations, as laid out in the Complaint, are as follows. On March 22, 2001, at approximately 3:15 p.m., Ms. Cherry arrived at Edmond Elementary School (the "School") to pick up her grandson, Alex. Cherry was late picking Alex up and most of the school children and parents had already departed from the School premises. Because she was running late, Ms. Cherry attempted to enter the School through a side entrance, rather than properly through the front doors, and was thereafter approached by Gardner. Gardner informed Cherry that the use of the side entrance was improper and that Cherry needed to exit the School and properly reenter the

building through the front doors. In this instance, Cherry followed Garner's directions, saying "OK, thank you," Cherry Opposition, at 2,[2] and properly reentered through the front door. Cherry also claims that she received admonitions on previous occasions from Garner about entering the School building improperly. Cherry Opposition, at 2-3; Cherry Deposition, at 17-18. Nevertheless, Cherry alleges that she learned that another parent was not prevented from entering the School through the side door. In any event, on the day in question, Ms. Cherry, after locating Alex and while already on her way off of the School property, by her own admission, accosted Garner in the schoolyard to accuse Garner of treating her differently than other parents and guardians. Cherry Opposition, at 3-4. Garner alleges that Cherry's tirade against him lasted approximately five (5) minutes and was laced with profanity. In the Affidavit of Probable Cause for Arrest Warrant, DC #01-14-20877 (the "PPD Affidavit"), after investigating Garner's version of the events leading up to Ms. Cherry's detainment, the Philadelphia Police Department made an independent finding that two students from the school, Shaheed Haith and Steven Williams, ten (10) and nine (9) years old, respectively, observed Ms. Cherry "fighting with [Garner] and hitting [Garner] with her cell phone and kicking and swinging at the school officer. They also [saw] the female try to bite [Garner]."[3]

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[2]There are no page numbers in the document, so the Court has added them for the readers' benefit.

[3] The statements in the PPD Affidavit by the children who claimed to have seen the altercation between Cherry and Garner are certainly inadmissable as hearsay to prove the truth of the matter asserted, namely, that Cherry assaulted and battered Sgt. Garner; however the PPD Affidavit is admissible as evidence to support Garner's arguments that, as a matter of law, he is entitled to a finding by this Court, that Garner's actions were protected by qualified immunity and that the Philadelphia Police Department conducted an independent investigation into the allegations by Garner of disorderly conduct by Ms. Cherry. See Federal Rule of Evidence 803(6) and (8) ("Hearsay Exceptions; Availability of Declarant Immaterial"). The Court's finding of an

During Ms. Cherry's tirade against Garner, regardless of the dispute over its length and intensity, Cherry admits that she emphasized to Garner that "**Motherfucker, you are going to have to leave me alone**!" Complaint ¶ 12. At the time this vulgar statement was uttered, Cherry believes that she and Garner were "several feet away" from any children in the schoolyard. Cherry Deposition, at 30-31; Cherry Opposition, at 4. However, it appears from the PPD Affidavit that the schoolchildren, Haith and Williams, told the Philadelphia Police that they were close enough to observe what transpired.[4] See PPD Affidavit. Cherry alleges that, in response to

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independent investigation by the Philadelphia Police would relieve Garner of any liability for the allegations of false arrest and malicious prosecution. Id.

> Rule 803. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . .
> (6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
> . . .
> (8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

[4] Neither party attempted to depose these children with whom the Philadelphia Police spoke during their investigation of the altercation and whose statements the police thereafter used to prepare the PPD Affidavit. The Court notes the likelihood that deposing these alleged witnesses could have assisted either Ms. Cherry or Sgt. Garner with reference to the dispute

her profane remark, Garner grabbed her left arm, twisted it behind her back and told her that she was under arrest for disorderly conduct. Cherry Deposition, at 33; Cherry Opposition, at 4. Garner counters Cherry's claim by contending that only after repeated verbal abuse by Cherry did he tell her that she would be charged with disorderly conduct if her actions persisted. At some point immediately following Cherry's profane remarks, Garner admits to placing his hands on her arm to escort her into the School. Cherry claims that she asked Garner to release her and Garner responded by twisting her left arm behind her back and trying to handcuff her as Cherry attempted to use her right arm to dial the police. Complaint ¶14. Garner then took Cherry into the School, and, after being unsuccessful in handcuffing her, Cherry alleges that Garner grabbed her coat collar and she thought he was trying to choke her. Cherry Deposition, at 34-35. At her deposition, Cherry also alleged that two "NTAs" observed Cherry being taken by Garner into the School; however, these witnesses were not deposed by Cherry.[5] Cherry claims that as a result of Garner's actions, she sustained bruises and contusions to her left hand and arm as well as the soft tissue of her head and body. Complaint ¶ 17. Cherry was taken to Einstein Hospital following the incident on March 22. However, by her own admission, the doctors took no action, and Cherry has no documentation from the hospital to support her allegation that she sustained bruises and contusions. See Cherry Deposition, at pp. 64-67.

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involving the qualified immunity issue.

[5] In fact, the weakness of all of Cherry's arguments at this stage of the litigation is that she has provided no additional factual support for her claims. According to the facts presented, viewed by the Court in a light most favorable to Cherry, there may well be witnesses who may have bolstered her claims and, based on her allegations and in refutation of the facts presented by Garner, might have defeated the qualified immunity defense. However, no additional depositions, affidavits or other competent, helpful or supporting evidence was provided by Cherry.

Cherry next alleges that she was unlawfully detained at the School by Garner. Garner told the responding Philadelphia police officers that Cherry bit his finger during the above-mentioned altercation. Garner provided documentation that on March 22, 2001, he was treated at Albert Einstein Hospital for a bite wound and received a tetanus shot. See Albert Einstein Health Care Network Emergency Treatment Record for Robert Garner, dated March 22, 2001 (indicating a bite or puncture wound on left ring finger). As a result of Garner's statements, Cherry was detained on March 22, 2001 by officers from the Philadelphia Police Department and, after a subsequent investigation, charged with aggravated assault, simple assault, recklessly endangering another person, disorderly conduct and harassment.[6] Cherry Affidavit ¶ 12. She was released by the police within a few hours of her hospital release pending further investigation.

On May 11, 2001, the Philadelphia Police Department decided to reinitiate the charges against Cherry. In the Affidavit of Probable Cause filed by the Philadelphia Police Department (the "PPD Affidavit") before arresting Cherry on May 15, the affiant states:

> Other interviews were conducted for possible witnesses and **two students** from the school also were in the schoolyard and **observed** what happened. Two students (Shaheed Haith 10BM and Steven Williams 9BM) did observe **[Cherry] fighting with** [Garner] **and hitting [Garner]** with her cell phone and **kicking and swinging** at the school officer. They also [saw] the female **try to bite** the officer. (emphasis added)

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[6] It would be most correct to say that Sgt. Garner detained Ms. Cherry until the Philadelphia Police arrived at the School, who then took her to the police station for investigative purposes, without placing her in handcuffs, because they knew she was a former Philadelphia police officer. Ms. Cherry's husband is also a Philadelphia Police Officer. The Philadelphia Police released Cherry later that evening. Thereafter, following an investigation of the altercation, the Police arrested Ms. Cherry on May 15, 2001. See Cherry Deposition, at 60-70, 73.

Following a Preliminary Hearing on August 17, 2004, where the criminal court found that a prima facie case had been made out by the Commonwealth against Ms. Cherry, she was tried on criminal charges in the Court of Common Pleas for Philadelphia County on February 25, 2002. At the conclusion of the trial, Cherry was found by the court to be not guilty with respect to all charges, but only after an admonition by the presiding judge that, in the future, Ms. Cherry should abide by the rules, regardless of whether the person dictating those rules is a Philadelphia Police Officer or a School District Police Officer. See Commonwealth v. Eleanor Cherry, No. 0133, Criminal Trial Division, Transcript, Feb. 25, 2002, at 67-68.

As a result of the altercation between Sgt. Garner and Ms. Cherry on March 22, 2001, for which Cherry was criminally prosecuted and ultimately acquitted, Cherry alleges that because of Sgt. Garner's actions, taken pursuant to the color of state law, she suffered false arrest, eight (8) hours of false imprisonment, assault, battery, malicious prosecution and malicious abuse of process. See Complaint.

III. JURISDICTION

The court has original jurisdiction over the alleged violation of 42 U.S.C. § 1983 pursuant to 28 U.S.C. § 1331. The court maintains supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

IV. DISCUSSION

A. Standard for Summary Judgment.

Pursuant to Fed.R.Civ.P. 56(c), summary judgment is appropriate "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 a summary judgment as a matter of law." Celetox Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed.R.Civ.P. 56(c). To avoid a ruling pursuant to the summary judgment standard, disputes must be both (1) material, i.e., predicated upon facts that are relevant and necessary and that may affect the outcome of the matter pursuant to the underlying law and (2) genuine, i.e., the evidence must support a finding by the court that a reasonable jury could return a verdict for nonmovant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, because such a failure as to an essential element necessarily renders all other facts immaterial. Cella v. Villanova U., 2003 WL 329147 at *6 (Feb. 12, 2003) (citing Celetox, 477 U.S. at 322-23). In such circumstances, there is only one reasonable conclusion regarding the potential verdict under the governing law and judgment must be awarded to the moving party. Anderson, 477 U.S. at 250 (finding that the standard is the same as for a motion for judgment as a matter of law under Fed.R.Civ.P. 50(a)).

When making a determination on a party's motion for summary judgment, the moving party bears the primary responsibility of informing the court of the basis for its motion and for identifying those parts of the record demonstrating the absence of a genuine issue of material fact. Celetox, 477 U.S. at 323. Thus, the moving party is not required to produce any evidence negating the nonmovant's claim. Id. The burden therefore shifts to the nonmovant to produce, through affidavits and other evidentiary materials in the record, specific facts to show that there exists a genuine issue to be determined by the factfinder at trial. Id. at 324; Fed.R.Civ.P. 56(e).

The evidence provided by the nonmovant is to be believed and the court must draw all reasonable and justifiable inferences in the nonmovant's favor. Anderson, 477 U.S. at 255. However, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The nonmovant must present to the court **competent evidence** from which the court can draw such inferences. Cella, 2003 WL 329147 at *6 (emphasis added). Furthermore, the Court of Appeals for the Third Circuit, in Orsatti v. New Jersey State Police, 71 F.3d 480, 484 (3d Cir. 1995) (citing Celotex, 477 U.S. at 322), held that a nonmovant plaintiff cannot defeat a motion for summary judgment by merely "restating the allegations of his complaint," but instead, must "point to concrete evidence in the record that supports each and every essential element in his case."

B. Liability Under §1983.

Pursuant to 42 U.S.C. §1983, a private right of action exists for an individual who asserts that his/her civil rights under the Constitution or another federal law have been violated and deprived by a actor who allegedly violated those rights under the color of state law. The statute itself does not create any substantive rights, but instead protects rights established by the Constitution or through other federal laws. The statute reads:

> 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 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 . . . .

Cherry alleges in the first cause of action of her Complaint that Garner violated her civil rights by unlawfully detaining her, using excessive force, false arrest and being responsible for a malicious prosecution resulting from the underlying altercation.[7] Therefore, for Ms. Cherry to establish a claim under §1983, she must show the Court that Garner, (1) while acting under the color of the law of the Commonwealth of Pennsylvania as a School Police Officer, (2) deprived her of some right that Cherry was secured by the Constitution or another federal law. See Anderson v. Davila, 125 F.3d 148, 159 (3d Cir. 1997).

Ms. Cherry contends that Garner is liable under §1983 because his alleged actions caused the deprivation of her rights secured under the Fourth, Fifth[8], Eighth and Fourteenth[9] Amendments. The alleged deprivation of rights resulted from the March 22, 2001 altercation, between Cherry and Officer Garner on School property, which prompted Garner's subsequent

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[7] During oral argument before this Court, on November 30, 2004, counsel for Ms. Cherry clarified for the Court that Ms. Cherry intended to rely only upon the protections granted by the Fourth and Eighth Amendments to support her allegations against Sgt. Garner. Therefore, the civil rights allegations lodged against Sgt. Garner are unlawful arrest in violation of the Fourth Amendment and the unreasonable use of force in violation of the Eighth Amendment. See Oral Arg. Tr., at 11-12.

[8] Garner correctly notes that the Fifth Amendment is not applicable to Cherry's claims because the Fifth Amendment applies to a substantive due process analysis regarding actions of the federal government, whereas the Fourteenth Amendment protects individuals' rights regarding actions by a state or subdivision thereof. See Gottlieb v. Laurel Highlands Sch. Dist., 272 F.3d 168, 171-172 (3d Cir. 2001).

[9] The Equal Protection and Due Process clauses. Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

call to the Philadelphia Police Department, thus setting into motion the events that resulted in Cherry's detention, arrest and trial. In addition, Cherry alleges that Garner used excessive force during her initial detention at the School (before the Philadelphia Police arrived) on March 22, 2001, which allegedly caused her to sustain bruises and contusions to her left and arm. However, other than Cherry's own allegations of excessive force, no medical or other evidence was submitted to this Court to support Cherry's allegations. See Cherry Deposition pp. 62-67.[10]

1. Qualified Immunity and the "Shocks the Conscience" Standard.

Garner correctly argues that the proper analysis regarding Cherry's claims for (1) false arrest and (2) the use of excessive force is whether Garner's actions as a School Police Officer "shocks the conscience," as interpreted and applied by the Court of Appeals for the Third Circuit in the United Artists case, infra.[11] See Memorandum in Support of the Motion for Summary

[10] Apparently, on the night of the altercation between Ms. Cherry and Sgt. Garner, Cherry's husband took pictures of her left arm and hand. Those pictures were presented as evidence during her criminal trial and as exhibits during her deposition, however, the pictures were neither referenced by Ms. Cherry's counsel in the Cherry Opposition, mentioned at oral argument nor were copies provided to this Court. See Cherry Criminal Trial Tr., at 52-53; Cherry Deposition, at 84-86. However, as mentioned above, by her own admission, the doctors at Einstein Hospital took no action, and Cherry has no documentation from the hospital to support her allegation that she sustained bruises and contusions. See Cherry Deposition, at pp. 64-67. Furthermore, to avoid summary judgment, Ms. Cherry was required to present to this Court competent evidence from which the Court can draw inferences in her favor. See Cella, 2003 WL 329147 at *6. Moreover, Cherry was obligated to "**point to concrete evidence in the record** that supports each and every essential element in his case." See Orsatti, 71 F.3d at 484 (emphasis added). For whatever reason, counsel for Ms. Cherry, in compliance with the clear instructions of the Court of Appeals for the Third Circuit, has made no such specific references.

[11] In addition to the standard of objective reasonableness (or the prudent person standard), it is also necessary and appropriate for governmental officers, when determining whether probable cause exists, to make their own credibility determinations. See Kish v. Annville-Cleona Sch. Dist., 645 A.2d 361, 363 (Pa Cmwlth. Ct. 1994) (discussing that the school board was

Judgment, at 8. Garner also argues that he is not subject to legal liability for the actions underlying Cherry's Complaint because his actions as a School Police Officer are protected pursuant to the qualified immunity doctrine.[12]

In County of Sacramento v. Lewis, 523 U.S. 833 (1998), the Supreme Court established the "shocks the conscience" standard to be applied when a plaintiff alleges that actions taken by a government official violated substantive due process. Here, Garner would be considered a government official because he is a police officer for the School District, part of the government of the Commonwealth of Pennsylvania. As a Commonwealth employee, Garner's alleged altercation with Cherry can be seen as state actions, when viewed broadly, because Garner's actions may have set in motion the decision-making processes and actions resulting in Cherry's arrest and prosecution by the City of Philadelphia. However, just because there are actions by a

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properly empowered to judge the credibility of the complainant in determining whether he should be expelled for allegedly stealing school property). Here, the Philadelphia Police Department and the District Attorney's office had ample opportunity to decide not to pursue the Cherry matter. Nevertheless, on May 11, 2001, nearly three months after the incident, the Police Department decided to pursue charges against Cherry based on both Garner's statements surrounding the altercation and its own independent investigation that produced witnesses supporting Garner's accusations. See PPD Affidavit. Moreover, even after Cherry's arrest, at her arraignment before Judge Kirkland of the Municipal Court of Philadelphia, counsel for Ms. Cherry had the opportunity to cross examine Sgt. Garner, thus giving the prosecution and the criminal court an additional opportunity to decide that a criminal trial for Cherry was or was not warranted. See Cherry Criminal Trial Tr., at 10-23. Judge Kirkland found that a prima facie case existed and Ms Cherry was bound over for trial.

[12] The Supreme Court has emphasized that issues regarding qualified immunity should be resolved at the earliest stages of litigation. Anderson v. Creighton, 483 U.S. 635, 646 n.6. (emphasizing that "[o]ne of the purposes of the Harlow qualified immunity standard is to protect public officials from the 'broad-ranging discovery' that can be 'peculiarly disruptive of effective government.' Harlow v. Fitzgerald, 457 U.S. 800, 817. For this reason, we have emphasized that qualified immunity questions should be resolved at the earliest possible stage of a litigation." Id. at 818).

state-empowered person, does not mean that such an actor is not protected by the qualified immunity standard.

In Lewis, the Supreme Court found that "the core of the concept" of due process is "protection against arbitrary action" and that "**only the most egregious official conduct** can be said to be 'arbitrary in the constitutional sense.'" Id. at 845-46 (emphasis added). The Court then held that the substantive element[13] of the Due Process Clause is violated by government action only when it "can properly be characterized as arbitrary, or conscious shocking, in a constitutional sense." Id. at 847;United Artists Theatre Circuit, Inc. v. Township of Warrington , 316 F.3d 392, 399 (3d Cir. 2003); see also, Fagan v. Vineland, 22 F.3d 1296, 1303 (3d Cir. 1994) ("[T]he substantive component of the Due Process Clause can only be violated by governmental employees when their conduct amounts to an abuse of official power that 'shocks the conscience.'"). Furthermore, "the measure of what is conscience-shocking is no calibrated yard stick," and "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another." Lewis, 523 U.S. at 847, 850. However, in Fagan, the Court of Appeals for the Third Circuit held that even reckless indifference will not give rise to a cause of action for a violation of section 1983 regarding substantive due process rights. 22 F.3d at 1303-07.

The Court of Appeals for the Third Circuit, when discussing the "shocks the conscience" standard established by the Supreme Court in Lewis, noted that there were two parallel lines of cases within this circuit discussing whether **all** substantive due process claims should be assessed under a "shocks the conscience" standard or whether the less-demanding "improper motive"

[13]Substantive rights are general rights that are reserved to the individual and give the individual the power to possess or to do certain things, despite the state's desire to restrict those rights.

standard may sometimes be appropriate for finding a civil rights violation. United Artists, 316 F.3d at 399-400 (discussing Bello v. Walker, 840 F.3d 1124 (3d Cir. 1988) and its progeny, where the "improper motive" test was applied by the reviewing court).[14] However, in concluding that Lewis dictated a clearly established standard by the Supreme Court that "shocks the conscious" should be the benchmark for allegations regarding the deprivation of civil rights, the United Artists court emphasized that the "improper motive" line of cases is now clearly distinguishable and the less-demanding standard established by Bello was only appropriate for land-use cases. Id. at 400. Moreover, in contrast to "improper motive," United Artists noted the Supreme Court's emphasis in Lewis that the "shocks the conscience" standard encompasses "only the most egregious official conduct." Id. Therefore, United Artists found that, because in the common vernacular, the term "improper" encompasses a wide spectrum, the line of cases within this circuit that rely on the "improper motive" standard are "in direct conflict" with the very limiting "most egregious" language in Lewis. Id. Consistent with this rationale, United Artists reasoned that the concept of something being "improper" only if it shocks the conscience is clearly contradictory. Id. Thus, the Court of Appeals for the Third Circuit **expressly held** that in light of the Lewis decision, Bello and its progeny are no longer good law. Id. at 401. Therefore, all cases within the Third Circuit are to be evaluated under the "shocks the conscience" standard.[15]

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[14]Bello was decided approximately a decade before Lewis.

[15]This discussion of the development of the case law has been included because Ms. Cherry has urged the Court not to apply the "shocks the conscience" standard. However, the United Artists decision clearly and unequivocally refutes Cherry's argument that the "shocks the conscience" standard does not apply to the facts of this case.

Consistent with the standard established by United Artists, the Court evaluated whether Officer Garner's actions during the altercation with Ms. Cherry, including his physical detainment of her, and requiring her to go with him to the principal's office so that the police could be called, could be considered by a reasonable factfinder to not only be (a) egregious official conduct that was arbitrary in the constitutional sense, but also (b) shocking to the conscience. See Lewis, 523 U.S. at 845-46.

The defense of qualified immunity protects government officials from civil damages when they are performing discretionary functions related to their governmental duties.[16] United Artists, 316 F.3d at 398-99 (citing Harlow, 457 U.S. at 818 (discussing that the qualified immunity doctrine shields public officials from actions for damages unless their conduct was unreasonable in light of clearly established law). Qualified immunity is judged under a standard of objective reasonableness. Orsatti, 71 F.3d at 483-84 (3d Cir. 1995). Qualified immunity will protect government officials from liability if their conduct does not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id.; see also, Sterling v. Borough of Minersville, 232 F.3d 190, 193 (3d Cir. 2000) (A protected right is clearly established if "its outlines are sufficiently clear that a reasonable officer would understand that his actions violate the right.") Furthermore, the Supreme Court in Davis v. Scherer, 468 U.S. 183, 194 (1984), held that "[o]fficials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision." Qualified immunity will only be lost if the facts available to the officer are "so lacking in indicia

[16] Additionally, as a policy concern, qualified immunity "is designed to shield officials not only from ultimate liability, but also from the hardships of litigation itself." Torchinski v. Siwinski, 942 F.2d 257, 261 (4th Cir. 1991).

of probable cause as to render official belief in its existence unreasonable." Orsatti, 71 F.3d at 483 (citing Malley v. Briggs, 475 U.S. 335, 341 (1986)). At the stage of summary judgment, the mere fact that Cherry's allegations, even if they were true, state a claim "is an insufficient basis for the district court to deny [Sgt. Garner's] motion for summary judgment." See id. at 484. The real issue is whether a reasonable person would believe "that an offense has been or is being committed by the person to be arrested." Id. Here, Garner's belief that probable cause existed for Cherry's detention was not so lacking as to make his judgement unreasonable. See Davis, 468 U.S. at 194.

To summarize, the test within the courts of the Third Circuit for determining the possible applicability of qualified immunity is: "(1) whether the plaintiff has alleged the deprivation of an actual constitutional right, and if so, (2) whether the right was clearly established at the time of the alleged violation." United Artists, 316 F.3d at 398-99 (citing Saucier v. Katz, 533 U.S. 194, 200 (2001)); see also, Eddy v. Virgin Island Water and Power Authority, 256 F.3d 204, 208 (3d Cir. 2001). A specific right is clearly established in the law if "its outlines are sufficiently clear that a reasonable officer would understand that his actions violate the right." Sterling v. Borough of Minersville, 232 F.3d 190, 193 (3d Cir. 2000). Cherry's allegations of civil rights deprivations fit the United Artists test, so the Court has to determine whether Garner is protected by qualified immunity. In other words, the question becomes whether Cherry's right not to be detained by use of force was "clearly established at the time of the alleged violation." United Artists, 316 F.3d at 398-99.

Thus, consistent with rules discussed above and for the reasons discussed below, inter alia, Ms. Cherry's admission of her aggressive and vulgar reaction to Sgt. Garner on the day of

the altercation, and Sgt. Garner's obligation under 24 P.S. §7-778(c)(1), to "enforce good order in school buildings . . . and on school grounds," when construing the facts of this case in a light most favorable to Cherry, and in consideration of the defense of qualified immunity, the Court finds that Ms. Cherry did not have a clearly established right not to be detained as a result of the altercation. See United Artists, 316 F.3d at 398-99.

Garner bears the burden of establishing that he is entitled to qualified immunity. See Ryan v. Burlington County, 860 F.2d 1199, 1204 n.9 (3d Cir. 1988), cert denied sub nom, Fauver v. Ryan, 490 U.S. 1020 (1989). Whether Garner acted reasonablely regarding the events leading up to Cherry's arrest by the Philadelphia Police are judged under an objective standard. See Creighton, 483 U.S. at 641; see also, Sterling, 232 F.3d at 193; Orsatti,71 F.3d at 483-84. Moreover, as Cherry acknowledges in her Opposition, she has the burden of coming forward with some **competent evidence** that Garner engaged in conduct that violated a clearly-established federal right belonging to her and that the deprivation of that right was the proximate cause of her injuries. See Good v. Dauphin County Social Services for Children & Youth, 891 F.2d 1087, 1091-92 (3d Cir. 1989). Ms. Cherry is not permitted, at this stage in the litigation, to merely "restat[e] the allegations of [her] complaint," in her deposition and affidavit without "pointing to concrete evidence in the record that supports each and every essential element in [her] case." See Orsatti 71 F.3d at 484. As discussed further below, Ms. Cherry has not met her burden, with regard to either of the civil rights allegations of false arrest or the use of excessive force. Neither Cherry's Complaint, nor her specific deposition testimony and affidavit, as cited to in Cherry's Opposition, provided competent evidence to this Court to establish that, based on the circumstances surrounding the altercation and its aftermath, Sgt. Garner is not entitled to

qualified immunity.[17] See Good, 891 F.2d at 1091-92. Furthermore, it appears from the record that the Philadelphia Police conducted a competent, independent investigation into the altercation, and it was only after this investigation that Cherry was charged and prosecuted by the City of Philadelphia. Moreover, it is clear to this Court, pursuant to the instructive standards established by the Supreme Court and the Court of Appeals for the Third Circuit, respectively, that Sgt. Garner is entitled to a ruling in his favor. Garner has established that he is entitled to qualified immunity.

2. The Fourth Amendment and False Arrest.

The Fourth Amendment to the United States Constitution provides the following protections:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
>
> As a corollary, probable cause to arrest exists:
>
> if at the moment the arrest was made . . . the facts and circumstances within defendants' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that plaintiff had violated the law.

Olender v. Township of Bensalem, 32 F.Supp.2d 775, 788 (E.D. Pa. 1999), aff'd sub nom, Olender v. Rubenstein, 202 F.3d 254 (3rd Cir. 1999) (citing Hunter v. Bryant, 502 U.S. 224, 228

[17] The Court also finds that it is worth noting that Cherry failed to provide such factual evidence to support her allegations such as, inter alia, (a) deposing Sgt. Garner, (b) deposing the children interviewed in the PPD affidavit, (c) challenging the medical report of Sgt. Garner's wound or (d) proffering the deposition of any other witness(es) to the altercation indicating that Sgt. Garner may have acted in an unlawful manner towards her.

(1991) and quoting Beck v. Ohio, 379 U.S. 89, 91 (1964)) (internal quotations omitted)); see also, Merkle v. Upper Dublin School Dist., 211 F.3d 782, 789 (3d Cir. 2000).

According to the Pennsylvania Supreme Court, the elements for false arrest and imprisonment claims are (1) the detention of another person, and (2) the unlawfulness of the detention. Vazquez v. Rossnagle, 163 F.Supp.2d 494, 501 (E.D. Pa. 2001) (citing Fagan v. Pittsburgh Terminal Coal Corporation, 299 Pa. 109, 149 A. 159 (1930)); see also, McGriff v. Vidovich, 699 A.2d 797, 799 (Pa. Cmwlth.1997) (citing Pennsylvania Suggested Standard Civil Jury Instructions § 13.04) (indicating that, in Pennsylvania, a "false arrest is defined as 1) an arrest made without probable cause or 2) an arrest made by a person without privilege to do so.") Additionally, an arrest based upon probable cause is justified, regardless of whether the individual arrested is found guilty. Id. Furthermore, in Pennsylvania, "state law false arrest claims and federal constitutional false arrest claims are co-extensive both as to elements of proof and elements of damages." Russoli v. Salisbury Township, 126 F.Supp.2d 821, 869 (citing Patzig v. O'Neil, 577 F.2d 841, 851 (3d Cir. 1978)).

However, our court of appeals has found that a "tension exists as to the proper role of the judge and jury where qualified immunity is asserted." Russoli v. Salisbury Township, 126 F.Supp.2d 821, 841 (citing Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir.1997)). In the instant case, this tension exists because while "the application of qualified immunity is a question of law," Siegert v. Gilley, 500 U.S. 226, 232 (1991), whether probable cause exists in a § 1983 action is usually a question of fact, see Sherwood, 113 F.3d at 401; Groman v. Township of Manalapan, 47 F.3d 628, 635 (3d Cir. 1995); Velardi v. Walsh, 40 F.3d 569, 574 n.1 (2d Cir. 1994). Nevertheless, this Court may conclude that probable cause existed as a matter of law if

the evidence, viewed in a light most favorable to Cherry, "reasonably would not support a contrary factual finding." See Sherwood, 113 F.3d at 401.

In Dowling v. City of Philadelphia, 855 F.2d 136, 141 (3d Cir. 1988), the court held that "the proper inquiry in a section 1983 claim based on false arrest or misuse of the criminal process is not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense." See also, Losch v. Borough of Parkesburg, 736 F.2d 903, 907-08 (3d Cir. 1984); Patzig v. O'Neil, 577 F.2d 841, 848 (3d Cir. 1978); Bodzin v. City of Dallas, 768 F.2d 722, 724 (5th Cir. 1985). For example, in Merkle, 211 F.3d at 788, the court found that

> [p]robable cause to arrest existed when the facts and circumstances within the arresting officer's knowledge were sufficient in themselves to warrant a reasonable person to believe that an offense has been or is in the process of being committed by the person to be arrested. Orsatti v. New Jersey State Police, 71 F.3d 480, 482 (3d Cir. 1995). Generally, "the question of probable cause in a section 1983 damage suit is one for the jury." Montgomery v. De Simone, 159 F.3d 120, 124 (3d Cir. 1998); see also Sharrar v. Felsing, 128 F.3d 810, 818 (3d Cir. 1997); Deary v. Three Un-Named Police Officers, 746 F.2d 185, 190-92 (3d Cir. 1984). This is particularly true where the probable cause determination rests on credibility conflicts. See Sharrar, 128 F.3d at 818; Deary, 746 F.2d at 192. **However**, **a district court may conclude "that probable cause exists as a matter of law** if the evidence, viewed most favorably to plaintiff, reasonably would not support a contrary factual finding," and may enter summary judgment accordingly. Sherwood v. Mulvihill, 113 F.3d 396, 401 (3d Cir. 1997). (emphasis added).

Garner relies on the explicit language of the Commonwealth Code to support his argument that he had probable cause to detain Ms. Cherry and that he is therefore entitled to qualified immunity.[18] Under 24 P.S. §7-778(c)(1), a school police officer is obligated to "enforce

[18] Garner also argues that Kneipp v. Tedder, 95 F.3d 1199, 1205-06 (3d Cir. 1996), is applicable here for establishing the standard under which section 1983 claims are to be assessed. However, the standard in Kneipp is much more appropriate for factual matters akin to damages resulting from a high-speed police chase, not for a false arrest and malicious prosecution type

good order in school buildings . . . and on school grounds." Additionally, Cherry was cited by the Philadelphia Police Department[19] for disorderly conduct and was thereafter prosecuted by the Commonwealth for not only disorderly conduct, but also, aggravated assault, simple assault, recklessly endangering another person and harassment.

Pursuant to 18 Pa.C.S.A. § 5503(a), a person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, she:

> (1) engages in fighting or threatening, or in violent or tumultuous behavior;
> (2) makes unreasonable noise;
> (3) uses obscene language, or makes an obscene gesture; or
> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

Consistent with the plain wording of this disorderly conduct statute, Cherry has failed to present competent evidence that would establish for this Court the existence of a genuine issue of material fact to indicate how Garner's actions, pursuant to his duty to "enforce good order" at an elementary school (where danger attendant to inappropriate behavior by adults and children alike has, sadly, become a more common and more serious concern), and in reaction to Cherry's vulgar and hateful speech in the schoolyard, somehow "shocks the conscience." See 24 P.S. §7-778(c)(1); United Artists, 316 F.3d at 400-01. Furthermore, Cherry has failed to provide competent evidence to this Court that Garner did not act with objective reasonableness when he detained Cherry for yelling at him (with finger pointed), "Motherfucker, you are going to leave

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case, as we have here. In any event, United Artists, supra, represents the current governing standard in this Circuit for determining whether an official is entitled to a qualified immunity ruling in his favor, in light of an objective reasonableness determination.

[19] An entity wholly independent of Garner and the School District of Philadelphia.

me alone!" within earshot of young children.[20] At oral argument, counsel for Ms. Cherry confirmed that no one could corroborate Ms. Cherry's claim that her vulgar statement to Sgt. Garner was "at a sufficient distance from the nearest person in the schoolyard and beyond hearing range."[21] See Oral Arg. Tr., at 33-34. Pursuant to the plain language of the statute, an objective, reasonable person could consider such vulgar, hateful language in a schoolyard to be or to represent the speaker's intent (or, at a minimum, recklessly create a risk) of causing public annoyance and be considered: (1) fighting or threatening behavior; (2) unreasonable noise or (3) obscene language or an obscene gesture, especially at an elementary school. See 18 Pa.C.S.A. § 5503(a)(1)-(3). Moreover, the Pennsylvania Superior Court in Commonwealth v. Pringle, 450 A.2d 103 (Pa. Super. Ct. 1982) held that calling a police officer a "goddamn fucking pig" on a crowded public street was considered both obscene language and fighting words that created a risk of public inconvenience, annoyance, alarm and that those foul words served as an indication of lawless behavior that, by their very utterance, inflicted injury. Here, in comparison to Pringle, at the time of the altercation, the schoolyard was not full of children, nor did the altercation take place on a public street. However, there is no dispute that children were present to observe the violent altercation, if not hear it. See PPD Affidavit. Consistent with Sgt. Garner's duty under 24 P.S. §7-778(c)(1), he was entitled to "enforce good order in school buildings . . . and on

[20] It is undisputed that Garner, in light of Cherry's grandson's presence during the altercation and the boy's becoming visibly upset at the time, did not handcuff Cherry despite her actions. See Oral Arg. Tr., at 30. This also demonstrates to the Court that Garner was likely exercising his judgment, making objective determinations, and maintaining his ability to exercise prudent discretion throughout the incident.

[21] If such evidence was available, it would be of the type of "competent evidence" that Ms. Cherry needed to produce to forestall summary judgment and refute Sgt. Garner's claim that he is entitled to qualified immunity.

school grounds." Therefore, Sgt. Garner could have believed that Ms. Cherry's foul words and confrontational conduct served as an indication of potential lawless behavior that could have inflicted injury, see Pringle, 450 A.2d at 103, and thus, Garner's detention of Cherry until the Philadelphia Police arrived was lawful, see Vazquez, 163 F.Supp.2d at 501.

Garner thus makes a persuasive argument to the Court that his actions as a School Police Officer toward Cherry were pursuant to his obligations and consistent with the letter (and the spirit) of the law. The parties disagree on the number of times Cherry used hateful, foul language towards Garner. There is also disagreement regarding whether Cherry bit Garner's finger as Garner was attempting to detain her until the Philadelphia Police could make their own assessment of Cherry's actions. However, Garner has provided uncontroverted evidence of a puncture wound to his finger and treatment for it. See Garner Treatment Record (indicating a bite or puncture wound on left ring finger). Regardless, to grant summary judgment, it is not necessary to reach the issue regarding the frequency of Ms. Cherry's obscenities or the actions she took to resist her detainment. On the face of the allegations, and in light of Ms. Cherry's inability to provide competent evidence to the Court that she was not in violation of Commonwealth Code, Sgt. Garner had probable cause to detain Cherry for the Philadelphia Police and, reviewing the facts in a light most favorable to Cherry, a reasonable person could have presumed she was losing control and engaging in one or more of the following: (1) fighting or threatening behavior; (2) unreasonable noise or (3) obscene language or an obscene gesture, especially at an elementary school. See 18 Pa.C.S.A. § 5503(a)(1)-(3). Here, probable cause existed as a matter of law because the evidence regarding the altercation, viewed in a light most favorable to Cherry, "reasonably would not support a contrary factual finding." See Sherwood,

113 F.3d at 401.

3. The Independent Actions of the Philadelphia Police Department.[22]

Once Ms. Cherry had been escorted to the principal's office, the Philadelphia Police were summoned. See Affidavit of Eleanor Cherry, ¶¶ 9-12. Thereafter, upon hearing both parties' versions of the altercation and subsequent detainment by Sgt. Garner, the ultimate decision to arrest Cherry was made by the Police Department, an entity independent of the School District and over which Garner maintains no control nor influence and for which Garner does not work. Later, it was the City of Philadelphia, another independent entity, that determined Ms. Cherry should be prosecuted.[23] In Hector v. Watt, 235 F.3d 154, 161 (3d Cir. 2000), the majority declined reach the issue of whether intervening causation entitled the police officers to qualified immunity because there were other, sufficient grounds for resolving this case. However, Judge Nygaard, in his concurring opinion, argued that the chain of causation is broken where the facts supporting an arrest are put before an intermediate decision maker, such as a magistrate or grand

[22] As mentioned above, neither the Philadelphia Police Department nor the City of Philadelphia is a party to this action.

[23] Without providing any legal support for her argument, Cherry claims that the Police Department is obligated to accept a felonious complaint filed by one citizen against another. Furthermore, without providing any legal support, Cherry contends that the District Attorney does not, before approving charges, conduct an investigation into the truthfulness of allegations raised by one citizen against another. However, it is clear to this Court that Cherry's prosecution followed (1) an independent investigation by the Philadelphia Police, which resulted in the PPD Affidavit and the Warrant of Arrest, No. 259538, signed by Judge Hill on May 11, 2001 and (2) an arraignment hearing held before Judge Kirkland, where counsel for Ms. Cherry had an opportunity to cross-examine Sgt. Garner and challenge the City's case. See Cherry Criminal Trial Tr., at 10-23.

jury.[24] Id. at 164-65. Similarly, the Court of Appeals for the Ninth Circuit has held that the individual who is responsible for arresting the complainant is entitled to a break in the legal chain of causation regarding arrest and malicious prosecution when the district attorney subsequently decides to charge and prosecute the arrestee for her crimes. See Smiddy v. Varney, 665 F.2d 261 (9th Cir. 1981); see also, Ames v. United States, 600 F.2d 183, 185 (8th Cir. 1979); Dellums v. Powell, 566 F.2d 167, 192 (D.C.Cir. 1977); Rodriguez v. Ritchey, 556 F.2d 1185, 1193 (5th Cir. 1977) (en banc). Here, the City of Philadelphia had ample opportunity to decline to prosecute Cherry, a former Philadelphia Police Officer, but, nevertheless, chose to do so. Furthermore,

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[24] However, the case law here is, admittedly, unsettled. As Judge Nygaard delineated in Hector, **compare** Townes v. City of New York, 176 F.3d 138, 147 (2d Cir. 1999) (stating that "[i]t is well settled that the chain of causation between a police officer's unlawful arrest and a subsequent conviction and incarceration is broken by the intervening exercise of independent judgment"), Barts v. Joyner, 865 F.2d 1187, 1195 (11th Cir. 1989) (finding that intervening decisions of prosecutor, grand jury, judge, and jury supervene), Hand v. Gary, 838 F.2d 1420, 1427-28 (5th Cir. 1988) (finding that a decision of a magistrate or grand jury supervenes), Smiddy v. Varney, 665 F.2d 261, 266-68 (9th Cir. 1981), Ames v. United States, 600 F.2d 183, 185 (8th Cir. 1979) (finding that a decision of a grand jury supervenes), and Duncan v. Nelson, 466 F.2d 939, 943 (7th Cir. 1972) (finding that a ruling of a sentencing judge supervenes), **with** Sherwin Manor Nursing Ctr., Inc. v. McAuliffe, 37 F.3d 1216 (7th Cir. 1994), Hale v. Fish, 899 F.2d 390 (5th Cir. 1990), Borunda v. Richmond, 885 F.2d 1384 (9th Cir. 1988) (en banc) (stating that a "plaintiff who establishes liability for deprivations of constitutional rights actionable under 42 U.S.C. § 1983 is entitled to recover compensatory damages for all injuries suffered as a consequence of those deprivations" and holding that the decision to prosecute the charge did not supervene), Kerr v. City of Chicago, 424 F.2d 1134, 1142 (7th Cir. 1970) (stating that a "plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a ... criminal action where the expenditure is a foreseeable result of the acts of the defendant."), Carter v. Georgevich, 78 F.Supp.2d 332, 334 (D.N.J. 2000) (stating that "[r]ather than the acts of a prosecutor and judge being considered intervening causes which interrupted or destroyed the causal connection between the wrongful act and injury to the plaintiff, it appears to the Court that such subsequent acts were reasonably foreseeable by the officer. A tortfeasor is not relieved from liability for his wrongful conduct by the intervention of third persons if these acts are reasonably foreseeable"), Schiller v. Strangis, 540 F.Supp. 605, 621 (D.Mass. 1982), Lykken v. Vavreck, 366 F.Supp. 585 (D.Minn. 1973), Brooks v. Moss, 242 F.Supp. 531 (W.D.S.C.1965), and McArthur v. Pennington, 253 F.Supp. 420 (E.D.Tenn. 1963).

counsel for Ms. Cherry concedes that there is no indication in the record that Garner played any active role in Cherry's arrest or prosecution following her detainment at the School on the day of the altercation. See Oral Arg. Tr., at 16-18. Therefore, it can not be said that Garner is responsible for the independent actions of the Police Department and the City, respectively, because the chain of causation was broken by (1) the independent investigation of the Philadelphia Police, (2) the subsequent authorization to arrest Ms. Cherry provided by a Commonwealth judge, based on the investigation by the Philadelphia Police, and (3) Judge Kirkland's decision that Ms. Cherry should be tried because a prima facie case had been made out by the government against her on all charges, Commonweath v. Eleanor Cherry, MC 0105-5184, transcript of Aug. 17, 2001, at 23. See Hector, 235 F.3d at 164-65.

4. Ms. Cherry's Failure to Establish a Genuine Issue of Material Fact.

Many of the facts presented by Garner in support of his Motion for Summary Judgment, including those supporting his qualified immunity defense, have not been countered with competent evidence that would otherwise transform Garner's versions of the events that transpired on March 22, 2001 into genuine issues of material fact that would be properly determined by a jury. For instance, Ms. Cherry has not offered any counter-explanation for (1) the findings of the Philadelphia Police Department based on the statements by the witnesses to the PPD Affidavit that Cherry was fighting with and attempted to bite Garner or (2) that she was, in fact, being disorderly by arguing with vulgar language in the schoolyard with Garner.[25] Instead, Cherry claims that Garner overreacted and that she committed no crime. However, she

[25] Additionally, the Cherry Opposition makes no counter-argument that the puncture wound on Garner's finger could have been caused by Ms. Cherry's ring, a fact intimated in her deposition. See Cherry Deposition, at 57-61.

has provided no evidence to show (a) that the signs restricting her access to the school do not exist, (b) that she was not in violation of the plain meaning or the spirit of the disorderly conduct statute, especially with regard to orderly behavior in a city schoolyard peopled with young children and (c) that an independent investigation by the Philadelphia Police did not support probable cause for her detainment, including the fact that she may have been fighting with Garner as described in the PPD Affidavit.[26]

Nevertheless, Ms. Cherry contends in her Opposition that she has "easily met" her burden of providing competent evidence that Garner's actions on March 22, 2001 constituted violations that were the proximate cause of her injuries. See Good, 891 F.2d at 1091-92. However, the actual evidence provided by and pointed to in support of Ms. Cherry's side of the story is scant, as are her legal arguments in opposition to the motion for summary judgment. As a result of Cherry's failure to present to this Court competent evidence and, at a minimum, persuasive case law outlining the bounds of Sgt. Garner's duties and authority, she has not convinced this Court that a genuine issue of material fact exists with regard to whether Sgt. Garner is entitled to qualified immunity or whether he had probable cause to detain her. See Celetox, 477 U.S. at 322; see also, Sherwood, 113 F.3d at 401; Fed.R.Civ.P. 56(c). Therefore, consistent with the evidence and arguments presented to this Court, no reasonable factfinder could rule in Ms. Cherry's favor. See Anderson, 477 U.S. at 250.

5. The Fourth and Eighth Amendments and the Use of Excessive Force.

The language of the Fourth Amendment is set out above.

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[26] As an aside, and as intimated by Judge Rau during Cherry's criminal trial, as a former Philadelphia Police Officer, Cherry should have shown more respect for a law enforcement official or taken her complaints against Garner through the proper administrative channels.

To address a plaintiff's excessive force claim brought under § 1983, the Court must identify the specific constitutional right(s) allegedly infringed. Lesher v. Colwyn Borough, 2002 WL 31012959, at *3 (E.D. Pa. Sept. 6, 2002) (citing Baker v. McCollan, 443 U.S. 137, 140 (1979)). Here, Ms. Cherry alleges that the force used by Sgt. Garner in detaining her at the School and bringing her to the principal's office until the Philadelphia Police arrived deprived her of rights protected by the Fourth and Eight Amendments. Pursuant to the Supreme Court's holding in Graham v. Connor, 490 U.S. 386 (1989), the Fourth Amendment, rather than the substantive due process rights derived from the Fifth and Fourteenth Amendments, serves as the appropriate constitutional source for an excessive force claim. Lesher found that, in Graham, "the Supreme Court unequivocally decided that the Fourth Amendment governs claims that law enforcement officials used excessive force in the course of an arrest, investigatory stop, or other 'seizure' of a person." 2002 WL 31012959, at *4; Graham, 490 U.S. at 390. In Graham, the Supreme Court held that the Fourth Amendment and its reasonableness standard, not the substantive due process provisions of the Fifth and Fourteenth Amendments, was the proper ground for allegations of excessive force, because "the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." Id.

The Supreme Court refined its ruling Graham by stating in subsequent opinions that Graham

> does not hold that all constitutional claims relating to physically abusive government conduct must arise under either the Fourth or Eighth Amendments; rather, Graham simply requires that if a constitutional claim is covered by a specific constitutional

> provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.

Lewis, 523 U.S. at 843 (quoting United States v. Lanier, 520 U.S. 259, 272 n.7 (1997)).

The Fourth Amendment covers searches and seizures. A Fourth Amendment "seizure" results only if a government actor, "by means of physical force or [a] show of authority, . . . in some way restrain[s] the liberty of a citizen." Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968). A show of authority results when the words and/or actions of a government actor indicate to a reasonable person that she is not free to disregard the government actor and "'go about [her] business.'" Florida v. Bostick, 501 U.S. 429, 437 (1991) (quotation omitted).

The Court of Appeals for the Third Circuit has also noted that the Fourth Circuit provides the most commonly cited test fo excessive force in public school cases:

> As in the cognate police brutality cases, the substantive due process inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience. Not every violation of state tort and criminal assault laws will be a violation of this constitutional right, but some of course may.

Gottlieb ex rel. Calabria v. Laurel Highlands School Dist., 272 F.3d 168,173 (3d Cir. 2001) (quoting Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980)).

Here, Cherry's excessive force claim arises from her allegations that Sgt. Garner, when he detained her, caused Cherry to sustain "bruises and contusions to her left hand and left arm as well as the soft tissues of her head and body." See Complaint ¶¶ 13-17. Specifically, Cherry alleges that immediately after calling Sgt. Garner a "motherfucker" he grabbed her left hand tightly and told her she was under arrest. Complaint ¶ 13. Next, Cherry alleges that, in response

to her "request" that Garner release her, Garner began to twist Cherry's arm behind her back and tried to handcuff her. Complaint ¶ 14. Cherry also alleges that Garner grabbed her by her coat collar and pulled her by the collar to the School principal's office and she thought Garner was trying to choke her. Complaint ¶ 16. Garner admits that he grabbed Cherry in order to detain her, but denies that he used excessive force to do so. Additionally, it is uncontroverted that Garner chose not to handcuff Cherry because Cherry's grandson became very upset during the altercation. See Oral Arg. Tr., at 30. Nevertheless, as stated above in the sections discussing Garner's qualified immunity for the false arrest claim and that Garner established probable cause for detaining Cherry, she cannot defeat Garner's Motion for Summary Judgment by merely "restating the allegations of [her] complaint," but instead, must "point to concrete evidence in the record that supports each and every essential element in [her] case." See Orsatti, 71 F.3d at 484 (citing Celotex, 477 U.S. at 322). The concrete evidence that is missing is evidence that supporting Cherry's allegations of the harm she claims was inflicted at Garner's hands. Cherry has provided no corroborating witnesses to support her allegation that Garner twisted her arm behind her back and dragged her in such a way to cause bruises and contusions to her body. See Celetox, 477 U.S. at 324 (indicating that, pursuant to Fed.R.Civ.P. 56(e), the burden was on Ms. Cherry to produce and point to, through affidavits and other evidentiary materials in the record, specific facts to show that there exists a genuine issue to be determined by the factfinder at trial). Furthermore, no evidence has been provided to the Court that Sgt. Garner's actions were inspired by malice rather than a possible careless or unwise excess of zeal. See Gottlieb, 272 F.3d at 173. Moreover, despite the fact that the Philadelphia Police took Cherry to the hospital after the altercation, no records exist to corroborate her allegation that she was, in fact, injured both (a) on

the date of and (b) as a result of the altercation. See Cherry Deposition, at pp. 64-67. By Ms. Cherry's own admission, when she was taken to Einstein Hospital following the altercation on March 22, 2001, the doctors took no action and Cherry has no documentation from the hospital. Id.[27] Therefore, because Cherry has not met her burden in opposition to the Motion for Summary Judgment on her Fourth Amendment excessive force claim, that claim will also be dismissed.

Finally, according to Lesher, 2002 WL 31012959, at *4, the Eighth Amendment "suggests an intention to limit the power of those entrusted with the criminal law function of government" and is "designed to protect those convicted of crimes." Ingraham v. Wright, 430 U.S. 651, 664 (1977). Thus, the Eighth Amendment applies "only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." Id. at 671 n.40 (citation omitted). Therefore, because Cherry has not alleged that she was a convicted prisoner at the time of the altercation with Sgt. Garner, Cherry's Eighth Amendment claim in the first cause of action of the Complaint is not properly pled and will be dismissed. See Lesher, 2002 WL 31012959, at *4.[28]

V. DECLINATION TO MAINTAIN JURISDICTION OVER THE STATE CLAIMS

The Court only maintains jurisdiction over the Second, Third, Fourth and Fifth Causes of

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[27] As mentioned above, Ms. Cherry claims that pictures were taken of her alleged injuries, however, no argument regarding these pictures has been presented to the Court (by either party) nor were these pictures presented to the Court during its consideration of the Motion for Summary Judgment and Cherry's Opposition.

[28] It also confounds the Court that counsel for Ms. Cherry would try to latch onto the Eighth Amendment as a basis for liability against Sgt. Garner when the law, with regard to cruel an unusual punishment, is so clear that the Eighth Amendment is "designed to protect those convicted of crimes." See Ingraham, 430 U.S. at 664.

Action of Cherry's Complaint pursuant to 28 U.S.C. § 1367. However, because the Court has determined that the federal question claims pursuant to 42 U.S.C. § 1983 fall to summary judgment, Cherry's remaining state law claims in the Second, Third, Fourth and Fifth Causes of Action, which are before this Court only pursuant to its supplemental jurisdiction, will be dismissed pursuant to 28 U.S.C. § 1367(c)(3). See Iupko v. Washington Mut. Bank, 2004 WL 2297400, at *5 (E.D. Pa. Oct. 13, 2004) (citing Borough of West Mifflin v. Lancaster, 45 F.3d 780, 788 (3d Cir. 1995) (holding that a district court should decline to exercise supplemental jurisdiction when all federal claims have been dismissed unless considerations of judicial economy and fairness counsel otherwise)); see also, Rhames v. Sch. Dist. of Philadelphia, 2002 WL 1740760, at *5 n.10 (E.D. Pa. July 17, 2002). Therefore, these state law claims, including any applicable punitive damages, shall be dismissed without prejudice, recognizing that Ms. Cherry may refile these claims in state court, if appropriate.

VI. CONCLUSION

Many of the facts in the record surrounding the altercation (and its aftermath) between Sgt. Garner and Ms. Cherry on March 22, 2001, are undisputed. There is no dispute that Garner merely asked Cherry to exit the school and reenter through the proper doors. There is also no dispute that Cherry obliged Garner's request without incident and subsequently picked up her grandson and exited the School. It is also undisputed that Cherry, upon her own volition, chose to alter her path from taking her grandson home and instead deliberately accosted Garner to request a conversation with him. During that conversation, Cherry admits she became heated and agitated with Garner and laced her commentary with inflammatory expletives. There is no

dispute that Garner, in light of Cherry's grandson's presence during the altercation and his becoming visibly upset at the time, did not handcuff Cherry despite her actions. Finally, there is no dispute that subsequent events were in the discretionary hands of the Philadelphia law enforcement and judicial authorities.

Taking into consideration the uncontroverted facts of the case, Cherry has "fail[ed] to make a showing sufficient to establish the existence of an element essential to [her] case, and on which [she] will bear the burden of proof at trial." Celotex, 477 U.S. at 322. It was Cherry's burden to produce and point to evidence to support her allegations against Garner, that her detention by him and subsequent arrest was not premised upon the Garner's reasonable belief that she had violated the law, but, rather, was part of an overt decision by Garner to violate her constitutional rights. Specifically, Rule 56(e) of the Federal Rules of Civil Procedure requires that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth **specific facts** showing that there is a genuine issue for trial." See Celotex, 477 U.S. at 324 (emphasis added); Tilden, 596 F.2d at 607-08; Robin, 345 F.2d at 613-14. No such genuine issue of material fact has been presented to this Court regarding Cherry's section 1983 allegations. Ms. Cherry cannot defeat the Motion for Summary Judgment by merely restating the allegations in her Complaint without pointing to concrete evidence in the record supporting each and every essential element in her case. See Orsatti, 71 F.3d at 484 (citing Celotex, 477 U.S. at 322). Thus, Ms. Cherry has failed to include or point to any supporting materials to convince this Court that, under the circumstances, Garner did not act reasonably, objectively and with

probable cause in his belief that Cherry was violating the law by being disorderly on school property. None of Garner's actions, as stated in the record, "shock the conscience." United Artists, 316 F.3d at 399.

Garner maintained the privilege to detain Cherry as a School Police Officer. See Fagan, 149 A. 159 (Pa. 1930); 24 P.S. §7-778(c)(1). And, during that detention, no specific facts, see Celetox, 477 U.S. at 323, or competent evidence, see Cella, 2003 WL 329147 at *6, has been provided to this Court supporting Ms. Cherry's allegation against Sgt. Garner that she sustained "bruises and contusions to her left hand and left arm as well as the soft tissues of her head and body," Complaint, ¶¶ 13-17.

Conversely, Garner's supporting materials established that he had probable cause to detain Cherry. In fact, Cherry admitted material facts that supported her arrest. Therefore, despite the possibility that Garner may have overreacted to Cherry's inflamed speech, setting in motion her eventual prosecution (in which she was ultimately acquitted after an admonition by the criminal court), there is no genuine issue of material fact regarding whether Garner's actions "shock the conscience" to justify a trial on the first cause of action of Cherry's Complaint. See Dowling, 855 F.2d at 143. See also, Peterson v. United States, 694 F.2d 943, 946 (3d Cir. 1982); Fireman's Insurance Co. v. DuFresne, 676 F.2d 965, 969 (3d Cir. 1982). Under no reasonable interpretation could Garner's behavior rise to a level above reckless indifference (if that) to Cherry's rights. See Brown, 318 F.3d at 479-480. Thus, there is only one reasonable conclusion regarding a potential verdict under the governing law and, therefore, the Court is obliged to find that Garner is entitled to qualified immunity for his actions. See Anderson, 477 U.S. at 250.

Because the section 1983 claims fall to summary judgement, this Court also declines to

maintain jurisdiction over the supplemental state claims and finds it unnecessary to discuss them further here. The state claims are thereby dismissed for lack of jurisdiction under 28 U.S.C § 1367(c)(3).

Therefore, for the reasons stated above, summary judgment shall be entered as to the First Cause of Action of the Complaint. For the reasons stated above, the Second, Third, Fourth and Fifth Causes of Action will be DISMISSED, without prejudice. An appropriate order follows.

BY THE COURT:

/S/
Gene E.K. Pratter, J.
UNITED STATES DISTRICT JUDGE

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

ELEANOR CHERRY	:	CIVIL ACTION
	:	
	:	
v.	:	
	:	
	:	
ROBERT GARNER	:	No. 03-cv-01696

O R D E R

December 30, 2004

PRATTER, District Judge

AND NOW, this 30th day of December, 2004, upon consideration of the Complaint, filed by Eleanor Cherry against Robert Garner on March 21, 2003 (Docket No. 1), the Answer filed by Robert Garner on July 17, 2003 (Docket No. 3), the Motion for Summary Judgment and Memorandum of Law filed by Garner on July 6, 2004 (Docket No. 9), the Answer to the Motion for Summary Judgment and Memorandum of Law filed by Ms. Cherry on July 19, 2004 (Docket No. 11), the Reply Brief in Support of the Motion for Summary Judgment filed by Garner on November 8, 2004 (Docket No. 19) and following oral argument on November 30, 2004, it is hereby ORDERED:

1. Summary Judgment is entered as to the civil rights claims brought pursuant to 42 U.S.C. § 1983 in the First Cause of Action of the Complaint because Sgt. Garner had probable cause to detain Ms. Cherry and Garner is entitled to qualified immunity with regard to Cherry's allegations of false arrest and the use of excessive force; and

2. The remaining state law claims in the Second, Third, Fourth and Fifth Causes of Action are DISMISSED without prejudice because the Court declines to maintain jurisdiction over these state law claims pursuant to 28 U.S.C. § 1367(c)(3).

It is so ORDERED.

BY THE COURT:

/S/
Gene E.K. Pratter, J.
UNITED STATES DISTRICT JUDGE