IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

PHYLLIS MAY, Administrator of the Estate of Deborah Kirk,	:	
	:	**Case No. 2:00-cv-1081**
Plaintiff,	:	**Judge Holschuh**
v.	:	**Magistrate Judge Kemp**
FRANKLIN COUNTY BOARD OF COMMISSIONERS, et al.,	:	
Defendants.	:	

MEMORANDUM & ORDER

Phyllis May, Administrator of the Estate of Deborah Kirk, filed suit in state court against numerous defendants, including several Franklin County officials, seeking to recover damages under 42 U.S.C. § 1983 for Deborah Kirk's death. Plaintiff also brought a wrongful death claim under state law. Defendants removed the case to federal court. This matter is currently before the Court on the Franklin County Defendants' motion for summary judgment (Record at 96). For the reasons stated below, the Court grants Defendants' motion with respect to the § 1983 claim and remands the wrongful death claim to the Franklin County Court of Common Pleas.

I. Factual Background

During the early morning hours of August 14, 1998, after calling 911 three times earlier that evening, Deborah Kirk was killed by her estranged boyfriend, Marvin Moss. At 11:06 p.m. on August 13, 1998, the Franklin County Sheriff's Office Communications Center ("Com Center") received the first 911 call from Ms. Kirk's apartment. However, after Ms. Kirk hung up before speaking to a dispatcher, Sergeant Earl Taylor called Ms. Kirk's apartment to ask if there was a problem. Ms. Kirk responded, "I dialed the 911. I'm trying to get the problem

straight myself. It's just domestic." When Sergeant Taylor asked her if the problem was taken care of, Kirk responded "Yes sir. I hope so." (Ex. 1 to Mem. Opp'n Mot. Summ. J.). Sergeant Taylor testified that because Ms. Kirk sounded calm and he heard no arguing or signs of physical violence, he did not send a cruiser to the apartment. (Taylor Dep. at 36, 49-51).

At 11:23 p.m., the Com Center received a second call from Ms. Kirk's apartment. This time, Com Technician Marino Susi answered the call. He did not know that Kirk had spoken to Sergeant Taylor a few minutes earlier. Susi said "911" but no one answered. In the background he could hear a male and female engaging in a verbal argument. (Susi Dep. at 24, 29). On the 911 tape, the male is heard to say, "Do you want to be slapped around?" Slaps are heard and the female can be heard screaming and crying "leave me alone," "get off of me" and begging "stop it, stop it." After one minute and 38 seconds, the line abruptly went dead. (Ex. 1 to Mem. Opp'n Mot. Summ. J.). Instead of calling back to see if everything was all right, Susi filled out a "run card" indicating that the call was a possible domestic disturbance and should be considered a "Priority 3," which meant that a cruiser should be dispatched within 10 minutes. The "run card" was then given to dispatcher Lisa Birkhead Clark who dispatched a cruiser. (Susi Dep. at 32).

At 11:31 p.m., Ms. Kirk called 911 a third time. Marino Susi again answered the call and, again, heard a male and female arguing. On the tape, Ms. Kirk is heard crying "please, he's trying to – he's done whooped me, please . . .," and then, "leave me alone . . . get out of here," and then "you're not ripping my phone out . . . get out of here." After 19 seconds, the line again went dead. (Ex. 1 to Mem. Opp'n Mot. Summ. J.). Susi shouted to Birkhead Clark to tell the officers responding to the scene that this was a "good domestic," which meant it was a serious call. (Susi Dep. at 33-35).

Franklin Township Police Officer David Ratliff responded to the call. He arrived at Ms. Kirk's apartment at approximately 11:37 p.m. He stopped outside the door and listened, but heard nothing inside. He knocked on the door but no one answered. He interviewed several neighbors, but none had heard a disturbance. He knocked again on Ms. Kirk's apartment door. When no one answered, he contacted the Com Center to see if the dispatchers had a call-back number. When he received no response, he cleared the scene. It was 11:47 p.m. (Ratliff Aff., Ex. E to Mot. Summ. J.). Unbeknownst to Officer Ratliff, Mr. Moss was inside the apartment, physically restraining Ms. Kirk. Some time after that, Moss killed her.

When Ms. Kirk failed to report to work the next day, family members reported her missing. Franklin Township police officers entered her apartment and found her dead. The autopsy report indicates that Kirk died of "blunt trauma to the neck . . . fractures of the hyoid bone and the thyroid cartilage, and contusions of the neck musculature." (Ex. H to Mot. Summ. J.). Marvin Moss later confessed to the killing, but hung himself in the Franklin County Jail before he was tried or convicted of the crime.

II. Procedural History

Plaintiff filed suit in the Franklin County Court of Common Pleas on August 10, 2000, bringing a wrongful death claim under Ohio Revised Code §§ 2125.01 and 2125.02. She also sought relief under 42 U.S.C. § 1983 for alleged violations of Deborah Kirk's Fourteenth Amendment substantive due process and equal protection rights. Defendants included: the Franklin County Board of Commissioners, Franklin County, Sheriff Jim Karnes, Marino Susi, and Earl Taylor (the "Franklin County Defendants"); and Franklin Township, Franklin Township Trustees Tim Guyton, Cheryl Schack and Ed Seeger, and Franklin Township Police Officer

David Ratliff (the "Franklin Township Defendants").[1] Defendants removed the case to this court based on federal question jurisdiction.

The Franklin Township Defendants then filed a motion to dismiss Plaintiff's claims. On August 17, 2001, Judge Kinneary, who was assigned to this case before he retired, issued an Opinion and Order: (1) denying the motion to dismiss the § 1983 claims against Franklin Township; (2) finding that the Franklin Township Trustees and Officer Ratliff were entitled to qualified immunity on the equal protection claim, but were not entitled to qualified immunity on the substantive due process claim; and (3) denying the motion to dismiss the wrongful death claim against Officer Ratliff, but granting the motion to dismiss the wrongful death claim against Franklin Township and its trustees.

Officer Ratliff then filed an interlocutory appeal challenging Judge Kinneary's denial of his motion to dismiss Plaintiff's substantive due process claim on the basis of qualified immunity. On appeal, the Sixth Circuit reversed, finding that Officer Ratliff was entitled to qualified immunity on the substantive due process claim. On November 12, 2003, by stipulation and order, all claims against the Franklin Township Defendants were dismissed with prejudice. This left only the claims against the Franklin County Defendants, who have now filed a motion for summary judgment. That motion has been fully briefed and is now ripe for decision.

III. Standard for Granting Summary Judgment

Federal Rule of Civil Procedure 56(c) provides:

[Summary judgment] . . . shall be rendered forthwith if the pleadings, depositions,

---

[1] Plaintiff also sued John Does I -X. However, since these defendants were not identified within 120 days as required by Fed. R. Civ. P. 4(m), they are dismissed from this action.

> 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.

"[T]his standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) (emphasis in original); Kendall v. Hoover Co., 751 F.2d 171, 174 (6th Cir. 1984).

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248. The purpose of the procedure is not to resolve factual issues, but to determine if there are genuine issues of fact to be tried. Lashlee v. Sumner, 570 F.2d 107, 111 (6th Cir. 1978). Therefore, summary judgment will be granted "only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is . . . [and where] no genuine issue remains for trial, . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try." Poller v. Columbia Broadcasting Sys., 368 U.S. 464, 467 (1962) (quoting Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944)); accord County of Oakland v. City of Berkley, 742 F.2d 289, 297 (6th Cir. 1984).

In making this inquiry, the standard to be applied by the Court mirrors the standard for what was formerly referred to as a directed verdict. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Anderson, 477 U.S. at 250.

> "The primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted." Bill Johnson's Restaurants, Inc. v. NLRB, 461

> U.S. 731, 745, n.11 (1983). In essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.

Anderson, 477 U.S. at 251-52. Accordingly, although summary judgment should be cautiously invoked, it is an integral part of the Federal Rules, which are designed "to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1). In a motion for summary judgment the moving party bears the "burden of showing the absence of a genuine issue as to any material fact, and for these purposes, the [evidence submitted] must be viewed in the light most favorable to the opposing party." Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (footnote omitted); accord Adams v. Union Carbide Corp., 737 F.2d 1453, 1455-56 (6th Cir.), cert. denied, 469 U.S. 1062 (1984). Inferences to be drawn from the underlying facts contained in such materials must also be considered in the light most favorable to the party opposing the motion. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962); Watkins v. Northwestern Ohio Tractor Pullers Ass'n, 630 F.2d 1155, 1158 (6th Cir. 1980). Additionally, "unexplained gaps" in materials submitted by the moving party, if pertinent to material issues of fact, justify denial of a motion for summary judgment. Adickes, 398 U.S. at 157-60.

If the moving party meets its burden and adequate time for discovery has been provided, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex, 477 U.S. at 322. The existence of a mere scintilla of evidence in support of the opposing party's position is insufficient; there must be evidence on which the jury could reasonably find for the opposing party. Anderson, 477 U.S. at 252.

> When 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 pleading, 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. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Fed. R. Civ. P. 56(e).

IV. Discussion

As noted earlier, Plaintiff has brought two claims against the Franklin County Defendants, one a claim of wrongful death, and the other seeking to recover damages under 42 U.S.C. § 1983. Plaintiff alleged that Defendants, acting under color of state law, violated Deborah Kirk's substantive due process rights and equal protection rights as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The Franklin County Defendants have moved for summary judgment on three grounds. They contend that Sheriff Jim Karnes is the only proper remaining defendant. They also claim that Plaintiff has failed to present sufficient evidence from which a reasonable jury could find that they are liable, under § 1983, for the alleged constitutional violations. Finally, Defendants contend that they are immune from liability on the wrongful death claim.

A. Section 1983 Claim

1. Relevant Law

Plaintiff seeks relief pursuant to 42 U.S.C. § 1983. That statute states in relevant part:

> 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 . . .

42 U.S.C. § 1983. This statute "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Graham v. Connor, 490 U.S. 386, 393-94 (1989)(quoting Baker v. McCollan, 443 U.S. 137, 144 n. 3 (1979)). In order to recover under this statute, Plaintiff must prove that Defendants, while acting under color of state law, violated rights secured by the Constitution or laws of the United States. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

In this case, it is undisputed that the Franklin County Defendants were acting under color of state law at the time Ms. Kirk's rights were allegedly violated. Plaintiff originally alleged that Defendants violated Ms. Kirk's Fourteenth Amendment rights to substantive due process and equal protection of the laws. However, in her memorandum in opposition to the motion for summary judgment, Plaintiff stated that she is abandoning her Equal Protection Clause claim. Therefore, the only remaining alleged constitutional violation concerns Ms. Kirk's substantive due process rights.

Plaintiff's § 1983 claims against Sheriff Karnes, Earl Taylor and Marino Susi are brought against them only in their official capacities.[2] As the Supreme Court noted in Kentucky v. Graham, 473 U.S. 159 (1985), a claim brought against a government employee in her or her *individual* capacity seeks to hold the employee personally liable. However, a claim brought against a government employee in his or her *official* capacity is the equivalent of a claim brought against the governmental entity itself because, if the plaintiff succeeds, the judgment is paid by the governmental entity. Id. at 165-66. Plaintiff acknowledges that the Supreme Court, in

[2] Susi was also sued in his individual capacity but, on October 17, 2002, the parties filed a stipulation voluntarily dismissing all individual capacity claims against him.

Graham, noted that there is no need to bring official capacity suits against local government officials since the governmental entity can be sued directly. Id. at 167 n.14. However, Plaintiff contends that while it may not be *necessary*, it is not *improper* to name officials in their official capacities.

The Court agrees that it was not improper to name the individuals as defendants in addition to Franklin County and the Franklin County Board of Commissioners. While for all practical purposes, in the context of Plaintiff's § 1983 claims, Franklin County is the "true defendant," Alkire v. Irving, 330 F.3d 802, 810 (6th Cir. 2003), it is not necessary to determine whether some or all of the individual defendants should be dismissed as parties with respect to the § 1983 claims. Franklin County admits that it is a "person" subject to potential liability under § 1983, and it does not claim to be entitled to Eleventh Amendment immunity.

While a governmental entity may be considered a "person" for purposes of § 1983, that entity cannot be held liable for the acts of its employees on a *respondeat superior* theory. See Monell, 436 U.S. at 691. A governmental entity may be held liable for constitutional violations only if those violations are the result of an official policy or custom. Id. at 694. See also City of Canton v. Harris, 489 U.S. 378, 389 (1989)(holding that an official policy or custom must be the "moving force" behind the alleged constitutional deprivation); Hafer v. Melo, 502 U.S. 21, 25 (1991)(holding that because the real party in interest in an official-capacity suit is the governmental entity, "the entity's 'policy or custom' must have played a part in the violation of federal law").

The existence of an official policy or custom may be proven in several ways. For

example, legislative actions taken by a governmental entity, or by a board or agency to whom the entity has delegated its authority, constitute "official government policy," Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986); Monell, 436 U S. at 661. Actions taken by a governmental entity employee with final decision-making authority may also constitute an official policy that could subject that entity to liability under § 1983. See Pembaur, 475 U.S. at 483. Even if there is no formal "policy," a governmental entity may be subject to liability if a custom exists that causes a constitutional violation. Id. at 481-82 n.10. In City of Canton v. Harris, the Supreme Court held that a governmental entity may also be held liable under § 1983 if it has a policy of inadequate training and supervision, and that failure to train or to supervise "amounts to deliberate indifference to the rights of persons with whom the [government employees] come into contact." 489 U.S. at 388.

2. Summary of Parties' Arguments

The Franklin County Defendants claim to be entitled to summary judgment on Plaintiff's § 1983 claim because Plaintiff has failed to present sufficient evidence from which a reasonable jury could find that the individual defendants violated Ms. Kirk's substantive due process rights.

In a response brief spanning 65 pages, Plaintiff argues that she has presented sufficient evidence to survive summary judgment on her "failure to train" claim. She claims that the "true essence of the Constitutional violation in this case is the County's failure to establish a program to train the Comm Techs in the proper handling of domestic violence calls." (Mem. Opp'n Mot. Summ. J. at 45).

Plaintiff notes that in order to prevail on a "failure to train" theory, she must prove that:

(1) the training program was inadequate for the tasks that officers must perform; (2) the inadequacy was the result of the county's deliberate indifference; and (3) the inadequacy was closely related to or actually caused Ms. Kirk's death. See Russo v. City of Cincinnati, 953 F.2d 1036, 1046 (6th Cir. 1992). Plaintiff alleges that Defendants failed to adequately train and supervise the Com Center employees concerning how to handle domestic violence calls. She presents evidence to support her claims that the training program was inadequate for the tasks the employees were required to perform and that the failure to train was the result of deliberate indifference. Plaintiff also claims that the inadequacy of the training program was closely related to Deborah Kirk's death. In support, she claims that Defendants engaged in affirmative acts which increased the risk that Marvin Moss would kill Ms. Kirk, thereby depriving Ms. Kirk of her substantive due process rights to life and liberty in violation of the Fourteenth Amendment. Plaintiff further contends that Defendants' conduct shocks the conscience.

In their reply brief, the Franklin County Defendants argue that Plaintiff conflates the issues. Plaintiff essentially argues that a "failure to train" constitutes a cause of action in its own right. Defendants contend that the Court need not consider whether the Sheriff failed to adequately train or supervise Com Center employees, because Plaintiff has failed to satisfy the threshold requirement of first establishing a constitutional violation by the individual defendants.

3. Substantive Due Process Violation

The Court agrees that Plaintiff has failed to present sufficient evidence from which a reasonable jury could find that any of the Franklin County Defendants violated Ms. Kirk's substantive due process rights. The Fourteenth Amendment to the United States Constitution prohibits States from depriving individuals of their life or liberty interests without due process of

law, and the initial question is whether the defendants violated a duty imposed on them by the Due Process Clause of the Fourteenth Amendment.

Citing DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989), Defendants claim that because they had no duty, under the Due Process Clause, to protect Ms. Kirk from violence at the hands of a third party, there was no substantive due process violation. In DeShaney, county authorities took temporary custody of a preschooler who had suffered physical abuse at the hands of his father. Shortly thereafter, the county returned him to his father's custody. During the next several months, the caseworker noted several other suspicious injuries, but took no further action. The father eventually beat the child so severely that the child suffered severe, permanent brain damage. The child's guardians filed suit against county officials, alleging substantive due process violations.

The Supreme Court, in DeShaney, noted that the purpose of the Due Process Clause was "to protect the people from the State, not to ensure that the State protected them from each other." Id. at 196. The Due Process Clause does not require the State to provide its citizens with protective services. Id.; see also Brown v. Commonwealth of Penn. Dep't of Health Emergency Med. Servs. Training Inst., 318 F.3d 473, 478 (3d Cir. 2003)(holding that there is "no federal constitutional right to rescue services, competent or otherwise"). Therefore, "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney, 489 U.S. at 197. The Court noted that in limited circumstances, such as when an individual is in the State's custody, the State may have a duty to assume some responsibility for that individual's safety. Id. at 199-200. However, the Court concluded that because this preschooler was not in the State's custody, the State had no constitutional duty to

protect him from his father. Id. at 201.

The Sixth Circuit has noted:

> [T]wo exceptions have been recognized to the general rule that the Due Process Clause does not create an affirmative duty to protect. The first, or "special relationship" exception, occurs when the state restrains an individual so as to expose the individual to harm. . . The second, or "state created danger" exception, occurs when the state through some affirmative conduct places the individual in a position of danger.

Jones v. Union County, Tennessee, 296 F.3d 417, 428 (6th Cir. 2002)(internal citations omitted). See also Cartwright v. Marine City, 336 F.3d 487, 491 (6th Cir. 2003).

The first exception is clearly inapplicable in this case. Because Ms. Kirk was never in the custody of the Franklin County Defendants, there was no "special relationship" that would give rise to a duty to protect her. On appeal, the Sixth Circuit specifically rejected Plaintiff's claim that the adoption of a 911 system displaced other means of help and created a "special relationship" giving rise to a duty to protect.

It is the second exception, the "state-created danger" theory, that is potentially at issue in this case. The DeShaney court implied that a duty to protect could arise in a *non-custodial* setting if the state takes affirmative action to either create the danger or to render an individual more vulnerable to danger. See 489 U.S. at 201. This "state-created danger" theory was expressly recognized by the Sixth Circuit in Kallstrom v. City of Columbus, 136 F.3d 1055 (6th Cir. 1998).

A plaintiff seeking to establish a substantive due process violation under a "state-created-danger" theory must prove: (1) an affirmative act by the state which either creates or increases the risk that an individual will be exposed to a private act of violence; (2) a "special danger" to that individual wherein the state's actions placed that individual specifically at risk, as

distinguished from a risk that affects the public at large; and (3) the state knew or should have known that its actions specifically endangered that individual. Id. at 1066; Cartwright, 336 F.3d at 493. Even if Plaintiff proves that the state had a duty to protect Ms. Kirk from Mr. Moss, no substantive due process violation will exist unless she also proves that the conduct of the state actor was so egregious that it "shocks the conscience." Sperle v. Michigan Dep't of Corrections, 297 F.3d 483, 491 (6th Cir. 2002).[3]

The threshold issue is whether an affirmative act by the Franklin County Defendants either created or increased the risk that Ms. Kirk would be exposed to violence at the hands of Mr. Moss. Plaintiff initially argues that no affirmative act need be shown. She reasons that municipal liability may be imposed based on an *omission*, as evidenced by the recognition of liability based on a *failure* to train. As noted earlier, however, Plaintiff improperly conflates the issues. While municipal liability may be based on a failure to train, no municipal liability can exist at all unless the plaintiff first proves that a state actor violated someone's constitutional rights. These are two separate inquiries. If the plaintiff fails to establish a constitutional violation, there is no need to inquire about whether that violation was caused by a municipality's failure to train. See Weeks v. Portage County Executive Offices, 235 F.3d 275 (6th Cir. 2000)(because the deputy's actions did not violate plaintiff's constitutional rights, "there can be no § 1983 liability on the part of the municipal defendants as a matter of law"); Doe v. Claiborne

[3] On appeal, with respect to Plaintiff's substantive due process claim against Officer Ratliff, the Sixth Circuit held that a jury might be able to find that Officer Ratliff's actions -- knocking on the door of the apartment and then leaving without forcing entry – may have emboldened Moss and increased Ms. Kirk's vulnerability to harm. However, the Court held that even if this gave rise to a duty to protect, the officer's actions did not "shock the conscience." Because Plaintiff had failed to establish a substantive due process violation, the Court concluded that Officer Ratliff was entitled to qualified immunity.

County, 103 F.3d 495, 505-06 (6th Cir. 1996)(noting that for municipal liability to attach, plaintiff must prove: (1) a constitutional violation; and (2) municipal responsibility for that violation).

In this case, Plaintiff cannot establish a substantive due process violation without proving that an affirmative act by the Franklin County Defendants either created or increased the risk that Ms. Kirk would be injured or killed by Mr. Moss. While Plaintiff cites to numerous failures to act, she identifies only two affirmative acts on the part of the Franklin County Defendants: (1) the act of dispatching Officer Ratliff; and (2) the subsequent clearing of his call. (Mem. Opp'n Mot. Summ. J. at 47). The second of these, however, can be quickly disposed of because it was Officer Ratliff, not one of the county employees, who "cleared the call." The Com Center technicians and dispatchers have no authority over an officer's decision to conclude the investigation and leave the scene. (Taylor Dep. at 40).

This leaves just one affirmative act, the act of dispatching Officer Ratliff to the scene. Defendants argue that the act of dispatching Officer Ratliff did not create or increase the risk of danger, but instead was simply an appropriate response to Ms. Kirk's calls for help. The Court agrees. The act of dispatching Officer Ratliff to the scene certainly did not *create* the risk of danger. As is clearly evident from the transcript of the second 911 call, Mr. Moss was already engaged in a physical confrontation with Ms. Kirk when Lisa Birkhead Clark dispatched Officer Ratliff.

Nor could a reasonable jury find, based on the evidence presented, that the act of dispatching Officer Ratliff *increased* the risk of danger to Ms. Kirk. Plaintiff's expert, Dr. Reid

Meloy, testified that when a victim of violence seeks help by calling 911, this often escalates the situation and increases the risk of further violence. (Meloy Dep. at 109-110). While this may be true, the affirmative act of calling for help is attributable to Ms. Kirk, not the Franklin County Defendants.

Neither can it be argued that the act of dispatching an officer emboldened Mr. Moss and increased the risk of violence to Ms. Kirk. On appeal, the Sixth Circuit found that Officer Ratliff's conduct in knocking on the apartment door and then leaving the scene without forcing entry could have emboldened Mr. Moss and increased the danger to Ms. Kirk. However, while the "emboldening" theory might be applicable to Officer Ratliff's conduct at the apartment, it cannot logically be extended to the mere act of dispatching the officer to the scene. No reasonable person could find that sending a police officer to respond to an emergency 911 call in itself would be an affirmative act exposing the dispatcher to liability.

Plaintiff contends that because the individual defendants did not tell Officer Ratliff about the specific content of the 911 calls, or the fact that two of the calls were unilaterally terminated when the phone line was apparently ripped from the wall, Officer Ratliff did not have the information he needed to protect Ms. Kirk. Plaintiff then claims that the County is liable "providing that the failure to give Ratliff the information he needed was 'closely related' to the County's failure to train." (Mem. in Opp'n to Mot. Summ. J. at 47). While Officer Ratliff may have handled the investigation differently if he had more information, Defendants' *failure* to provide him with additional information does not constitute an affirmative act that would subject

them to potential liability for a constitutional violation under a state-created danger theory.[4]

In short, based on the evidence presented, no reasonable jury could find that the affirmative act of dispatching an officer to the scene in response to Ms. Kirk's 911 calls either created the risk that she would be assaulted and killed by Mr. Moss or increased the risk of danger. Because Plaintiff has failed to show that Defendants owed Ms. Kirk a duty under a "state-created danger" theory of liability, she is unable to establish a substantive due process violation. Furthermore, because Plaintiff has failed to establish a constitutional violation, there is no need to discuss whether Franklin County could be held liable under a "failure to train" theory.

While this case is certainly tragic, the conduct of the Franklin County Defendants simply does not rise to the level of a constitutional violation. Finding no genuine issue of material fact, the Court concludes that the Franklin County Defendants are entitled to summary judgment on Plaintiff's § 1983 claim.

B. Wrongful Death Claim

Plaintiff also seeks to recover damages pursuant to Ohio Revised Code §§ 2125.01 and 2125.02 for Ms. Kirk's allegedly wrongful death. However, since the Court is granting summary judgment on Plaintiff's one remaining federal claim, it declines to exercise jurisdiction over Plaintiff's supplemental state law claim. See United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966)(holding that if the federal claims supporting supplemental jurisdiction are

[4] The Court makes no determination concerning whether such a failure provides an adequate basis for a wrongful death claim under Ohio Revised Code §§ 2125.01 and 2125.02, or whether the Franklin County Defendants would be statutorily immune from liability for such a claim pursuant to Ohio Revised Code Chapter 2744 or Ohio Revised Code § 4931.49.

dismissed prior to trial, the state claims should be dismissed as well); 28 U.S.C. § 1367(c); Weeks, 235 F.3d at 279-80 (finding no abuse of discretion in declining to exercise supplemental jurisdiction over wrongful death claim after granting defendants' motion for summary judgment on § 1983 substantive due process claim on the ground that the police officer owed plaintiff no constitutional duty to help). The wrongful death claim will be remanded to the Franklin County Court of Common Pleas.

V. Conclusion

For the reasons stated above, the Court **GRANTS** the Franklin County Defendants' motion for summary judgment (Record at 96) with respect to Plaintiff's § 1983 claim. The Court declines to exercise supplemental jurisdiction over the wrongful death claim and **REMANDS** it to the Franklin County Court of Common Pleas.

IT IS SO ORDERED.

Date: January 7, 2005

/s/ John D. Holschuh
John D. Holschuh, Judge
United States District Court