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

THERESA E. THORNTON and JEREMIAH C. MITCHELL, as Co-Administrators of the Estate of Curtis L. Mitchell, deceased; Plaintiffs, v. CITY OF PITTSBURGH; ROBERT J. MCCAUGHAN; MARK A. BOCIAN; RONALD V. ROMANO; JOSIE DIMON; ANDREW LAGOMARSINO; KIM LONG; NORMAN AUVIL; RON CURRY; ALLEGHENY COUNTY; and COUNTY OF ALLEGHENY DEPARTMENT OF EMERGENCY SERVICES, Defendants.	CIVIL DIVISION No: 10-cv-01436 Judge Gary L. Lancaster **Brief in Support Of Motions to Dismiss Plaintiffs' Amended Complaint** Filed on Behalf of Defendants: City of Pittsburgh; Robert J. McCaughan; Mark A. Bocian; Ronald V. Romano; Josie Dimon; Andrew Lagomarsino; Kim Long; Norman Auvil; and Ron Curry.

BRIEF IN SUPPORT OF MOTIONS TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

I. INTRODUCTION

Simply stated, Plaintiffs herein, despite 228 paragraphs of legal and factual assertions, have failed to state any cognizable claim against the City of Pittsburgh or a single named employee thereof. Notwithstanding bald, conclusory observations to the contrary, properly disregarded at this juncture by this Court, Plaintiffs have pled little more than a baseless suit sounding in common negligence.

Secondly, Plaintiffs federal claims, pursuant to 42 U.S.C. § 1983, fail for, *inter alia*, lack of pleading any affirmative act on the part of the government or any agents thereof. For example, Plaintiffs conclusively assert that the Decedent relied on the forthcoming assistance of EMS yet plead facts throughout that undermine this legal conclusion. In addition to the federal claim, Plaintiffs assert gross negligence in a state that does not recognize such a claim, and against an entity which, along with its employees, is immune from negligence under state statutory law. Plaintiffs also assert willful misconduct while conspicuously

neglecting to state any underlying claim on which to base this assertion or even facts sufficient to withstand dismissal in the event there was some cognizable theory at its base.

Finally, Plaintiffs assert vicarious liability and seek punitive damages against the City of Pittsburgh despite settled state and federal law precluding such a theory or such damages on any of the asserted bases.

Therefore, Plaintiffs' Amended Complaint may be aptly read as 228 paragraphs describing negligent omissions, however legally incomplete, and assertions of those claims against a government agency and its employees upon whom the Commonwealth of Pennsylvania General Assembly has seen fit to bestow general immunity. For these reasons, as discussed in the Defendants' Motion and this Brief, the Amended Complaint must be dismissed.

II. STATEMENT OF FACTS

The pertinent facts, as described by Plaintiffs in their Amended Complaint, concern a series of occurrences beginning at 2:00 a.m. on February 6, 2010. (Amended Complaint ¶ 20). At that time, Decedent, Curtis Mitchell, allegedly began experiencing abdominal pain prompting Decedent's girlfriend, Sharon Edge, to call Allegheny County 9-1-1 to request an ambulance. (Amended Complaint ¶ 20). A City of Pittsburgh Emergency Medical Services ("EMS") ambulance was dispatched to the Decedent's residence, but the City EMS vehicle was unable to cross the nearby Elizabeth Street Bridge due to heavy snow. (Amended Complaint ¶¶ 21-22).[1] After informing Decedent of this fact and requesting that he walk to waiting medics, Decedent informed the 9-1-1 operator that he would not do so, and therefore the ambulance was discharged. (Amended Complaint ¶¶ 23-25). Plaintiffs suggest Medics were not informed that Decedent was in "too much pain to walk to them." (Amended Complaint ¶ 42).

[1] Snow began falling in the area at approximately 4:30 pm on Friday February 5, 2010. By midnight that night, about 11.4 inches of snow had accumulated. Throughout the course of the following day, February 6, an additional 9.7 inches of snow fell for a total accumulation of 21.1 inches, making this storm the fourth largest snowstorm on the climatological record for Allegheny County. *See* FINAL REPORT AND RECOMMENDATIONS OF THE CITY COUNCIL TASK FORCE ON EMERGENCY OPERATIONS AND SNOW PREPAREDNESS, 7 (October 1, 2010).

Later that morning, Decedent again contacted 9-1-1 requesting an ambulance, and the 9-1-1 dispatcher informed him that a second ambulance had been dispatched, this ambulance headed by Medic, Defendant, Josie Dimon (Amended Complaint ¶¶ 27-28). The second ambulance, like the first, could not cross the Elizabeth Street Bridge. (Amended Complaint ¶ 28). A 9-1-1 operator notified Decedent that an EMS ambulance could not cross the bridge and relayed the request that he walk to meet the waiting medic. (Amended Complaint ¶ 29). After Decedent stated he could not do so, the second ambulance departed. (Amended Complaint ¶¶ 30-32). Again, medics were not informed that Decedent was in "too much pain to walk to them." (Amended Complaint ¶ 42).

Sometime later, Decedent requested a third ambulance, headed by Defendant, Medic Andrew Lagomarsino, which crossed the troublesome bridge but could not travel to Decedent's home; it stopped approximately one block from Decedent's residence, where EMS again requested that Decedent walk to the waiting ambulance. (Amended Complaint ¶¶ 34-35). However, Decedent's girlfriend informed 9-1-1 that Decedent was sleeping and, therefore, he did not come out so the third ambulance departed. (Amended Complaint ¶¶ 36-37).

At approximately 8:00 a.m. the following day, February 7, 2010, Ms. Edge called 9-1-1 to inform authorities that Decedent had passed away, whereby 9-1-1 dispatched firefighters to the scene who arrived at Decedent's home within two minutes. (Amended Complaint ¶¶ 38-39).

Throughout these events, Decedent and his girlfriend, Ms. Edge, allegedly made ten calls to 9-1-1 and spoke with Kim Long, who was working the dispatch center and who also telephoned Decedent and Ms. Edge on several occasions. (Amended Complaint ¶¶ 40-41). Defendant Long on at least one occasion, suggested to Ms. Edge, Decedent's girlfriend, that Decedent "needed to take a bus." (Amended Complaint ¶ 42). In addition to Defendant Long, during the course of these events, Defendants Norman Auvil and Ron Curry were working in the dispatch center, and they did not receive any information about the contact with

Decedent or Ms. Edge and did not conduct any research or review any of the circumstances surrounding the series of telephone calls initiated by Decedent or his girlfriend. (Amended Complaint ¶¶ 44).

III. CRITERIA FOR EVALUATING A RULE 12(B)(6) MOTION TO DISMISS

First, Federal Rule of Civil Procedure 12(b)(6) provides that a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." See, Fed. R.Civ.P., Rule 12(b)(6). The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. See, ***Holder v. City of Allentown***, 987 F. 2d 188, 194 (3d Cir. 1993) (*dicta*).

When considering a 12(b)(6) motion, the court must accept as true all facts alleged in the complaint and reasonable inferences that can be drawn from them. See, e.g. ***H.J. Inc. v. Northwestern Bell Tel. Co.***, 492 U.S. 229, 249-50, 106 L.Ed.2d 195, 109 S.Ct. 2893 (1989) (*dicta*); ***Doe v Delie***, 257 F.3d 309, 313 (3d. Cir. 2001) (*dicta*); ***Lake v. Arnold***, 232 F.3d 360, 365 (3d Cir. 2000) (*dicta*).The Motion should be granted only if "it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief. See, ***Conley v. Gibson***, 355 U.S. 41, 45-46, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957) (*dicta*). However, the fact that a Court must assume as true, all facts alleged, does not mean the Court must accept as true "unsupported conclusions and unwarranted inferences." See, ***Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Company Co.***, 113 F.3d 405, 417 (3d Cir. 1997) (*dicta*). In particular, the United States Supreme Court reformulated federal notice pleading standards in ***Bell Atlantic Corp. v. Twombly***, 550 U.S. 544 (2007). The ***Twombly*** Court announced:

> While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations [citations omitted], a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *see* ***Papasan v. Allain***, 478 U.S. 265, 286 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

Twombly, 550 U.S. at 555.

As further elaborated in ***Ashcroft v. Iqbal***, _U.S._, 129 S.Ct. 1937, 1950 (2009), the United States Supreme Court explained ***Twombly*** to hold that in order to withstand a Rule 12(b)(6) motion to dismiss, a complaint must set forth facts showing that a claim is "plausible":

> [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss. [***Twombly***, 550 U.S.] at 556. . . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

Ashcroft v. Iqbal, _ U.S. _, 129 S.Ct. 1937, 1950 (2009).

More specifically, in ***Iqbal*** the Supreme Court clarified its decision in ***Twombly*** making clear that generalized, conclusory factual allegations are not sufficient to withstand a Rule 12(b)(6) motion to dismiss. "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." ***Iqbal***, 129 S.Ct. at 1950. Once this principle is applied to the allegations in Plaintiffs' Amended Complaint, each claim against the City of Pittsburgh and its employees must be dismissed.

Plaintiffs have attempted to state claims sounding in both federal law and Pennsylvania tort law. This Court has exercised proper subject matter jurisdiction over the federal claims asserted in this case pursuant to 28 U.S.C. § 1331, while 28 U.S.C. § 1367 vests this Court with supplemental jurisdiction over the pendant state tort claims. In federal courts, except in matters governed by the Constitution or acts of Congress, state substantive law provides the rules of decision for all state-law causes of action. ***Erie R. Co. v. Tomkins***, 304 U.S. 64, 78 (1938). When ascertaining Pennsylvania law, the decisions of the Pennsylvania Supreme Court are the authoritative source. *See* ***State Farm Mut. Auto. Ins. Co. v. Coviello***, 233 F.3d 710, 713 (3d Cir. 2000), *citing* ***Connecticut Mut. Life Ins. Co. v. Wyman***, 718 F.2d 63, 65 (3d. Cir. 1983). If the Pennsylvania Supreme Court has not passed on an issue, then this Court must consider the pronouncements of the lower state courts. ***Id.***

As to the state claims, the Court of Appeals for the Third Circuit held in ***Bright v. Westmoreland County***, 443 F.3d 276, 286 (3d Cir. 2006), that municipal immunity afforded under state statutory law at 42 Pa.C.S.A. §§ 8541 *et seq*.[2] serves a strong public interest, and pursuant to that interest, should be addressed early in the suit, disposing of costly litigation that would otherwise burden the state and its employees with unnecessary proceedings. This important interest prompted the Supreme Court of the United States to advise that immunity issues should be addressed "early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive." ***Saucier v. Katz***, 533 U.S. 194, 200 (2001). Thus, as in ***Bright***, which held that it was appropriate for the District Court to dismiss the state tort claims against the city simultaneously with the § 1983 claims in order to avoid any further delay rather than to remand the action to the state court, this Court may exercise its supplemental jurisdiction, address the City's state statutory immunity defense and dismiss Plaintiffs' tort claims against the City and its employees.

IV. ARGUMENT

A. Fed.R.Civ.P. 12(b)(6) Failure To State A Claim Upon Which Relief May Be Granted Under 42 U.S.C. § 1983

To begin, 42 U.S.C. § 1983 does not itself create any substantive rights. ***City of Oklahoma v. Tuttle***, 471 U.S. 808 (1985). Instead, Section 1983 provides a civil remedy to those individuals who have sustained a deprivation of their rights established by the United States Constitution or federal law caused by persons acting under *color of state law*. *See* ***Baker v. McCollan***, 443 U.S. 137, 144 n.3 (1979). Therefore, we start by focusing on two (2) essential elements of any Section 1983 action:

1. Whether a person acting under color of state law engaged in the conduct forming the basis of the complaint; and

2. Whether the conduct deprived a person of his or her rights, privileges or immunities secured by the Constitution of the United States.

[2] Commonly referred to as the Political Subdivisions Tort Claims Act.

See, ***Parratt v. Taylor***, 451 U.S. 527, 535 (1981); ***Daniels v. Williams***, 474 U.S. 327 (1986); ***Fagan v. City of Philadelphia***, 22 F.3d 1283, 1292 (3d Cir. 1994) (en banc).

Here, the Amended Complaint identifies eleven (11) individuals or persons who allegedly acted under color of state law. The Motion to Dismiss and this Brief address the conduct of nine (9) of those individuals, specifically (1) Robert J. McCaughan (McCaughan), Chief, Bureau of EMS; (2) Mark A. Bocian (Bocian), Deputy Chief, Bureau of EMS; (3) Ronald V. Romano (Romano), Ambulance Division Chief, Bureau of EMS; (4) Norman Auvil (Auvil), District Chief, Bureau of EMS; (5) Ron Curry (Curry) District Chief, Bureau of EMS; (6) Kim Long (Long), Crew Chief, Bureau of EMS; (7) Andrew Lagomarsino (Lagomarsino), Acting Crew Chief, Bureau of EMS; (8) Josie Dimon (Dimon), Acting Crew Chief, Bureau of EMS; and (9) the City Of Pittsburgh. Municipalities are considered "persons" for purposes of claims brought under Section 1983. ***Monell v. Dep't of Social Servs.***, 436 U.S. 658, 690 (1978).

Turning to the Amended Complaint and the identification of the parties, the Plaintiffs aver that on the dates and at the times in question Defendants McCaughan, Bocian, Romano, Auvil, Curry, Long, Lagomarsino and Dimon were employed by the City of Pittsburgh and acting in his or her official capacity (i.e., within the course and scope of his or her employment as a member of the City of Pittsburgh, Department of Public Safety, Bureau of Emergency Medical Services). (Amended Complaint, ¶¶ 12 – 19.) Assuming as we must at this stage that all factual allegations identified within the Amended Complaint are true, Plaintiffs have identified defendants employed by the City of Pittsburgh, acting within the course and scope of their employment and arguably, acting under color of state law while engaged in the conduct forming the basis of the complaint.

Thus in analyzing the pleading, we must initially identify the conduct that forms the basis of the complaint against these defendants prior to determining whether or not the conduct deprived Curtis Mitchell of his rights, privileges or immunities secured by the Constitution of the United States.

The "conduct" in question is an alleged failure to rescue the Decedent, Curtis Mitchell, following his telephone call to 9-1-1 and request for an ambulance for transportation from his home and to a local hospital. (See Amended Complaint, generally, ¶¶ 20-47.) An analysis of the Amended Complaint reveals assertions that merely *implicate* the Fourteenth Amendment's substantive due process protection, which provides that "[n]o state shall deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV § 2, and further confirms the pleading is devoid of a specific or particular constitutional deprivation

Conspicuously absent from the Amended Complaint is any act which may be said to have caused Decedent's injuries. To the Contrary, the Amended Complaint is replete with repetitive—at times nonsensical—allegations of various *omissions*, which at best illustrate no more than carelessness or negligence in the periodic failure to identify and correct potential problems with the operation of the Bureau of Emergency Medical Service and/or the County of Allegheny Department of Emergency Services, 9-1-1 Administration as those problems emerged during a snow emergency.

Unfortunately for these Plaintiffs their claims must fail because the United States Supreme Court has announced in no uncertain terms that *the Due Process clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security*. Specifically, the Due Process Clause forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. *See,* ***DeShaney v. Winnebago County Dep't of Social Servs.***, 489 U.S. 189, 195 (1989). More explicitly, our Appellate Courts have announced that bureaucratic breakdowns and systemic failures, especially of the magnitude described by Plaintiffs, do not impose a duty on the municipal service-provider to take corrective action. *See,* ***Brown v. Pennsylvania Dep't of Health Emergency Medical Servs. Training Inst.****, 318 F.3d 473, 478 (3d Cir. 2003*); ***Bright v. Westmoreland County***, 443 F.3d 276 (3d Cir. 2006); ***Ye v. United States***, 484 F.3d 634 (3d Cir. 2007).

Furthermore, the Third Circuit Court of Appeals has subsequently applied with greater particularity the fundamental principle underlying the ***DeShaney*** conclusion—that the Due Process clause does not provide any "guarantee of certain minimal levels of safety and security"—to cases such as the instant claim that involve the provision of emergency services. *See,* ***Brown v. Pennsylvania Dep't of Health Emergency Medical Servs. Training Inst.****,* 318 F.3d 473, 478 (3d Cir. 2003) (*where the Third Circuit declared unambiguously there is "no federal constitutional right to rescue services, competent or otherwise."*)Thus, the practical legal operation of this doctrine is an assurance that, if a municipality chooses to provide emergency services, it is under no obligation to do so competently and may proceed free from suits predicated on periodic acts of negligence.

Therefore, absent some heretofore unrecognized federal constitutional right to rescue services, the Amended Complaint does not state any cause of action against either the City of Pittsburgh or its employees for the deprivation of rights not guaranteed to the Decedent, Curtis Mitchell. *Accord*, ***Brown, id.***

B. Fed.R.Civ.P. 12(b)(6) Failure To State A Claim Upon Which Relief May Be Granted Under 42 U.S.C. § 1983 Concerning An Alleged State Created Danger

Notwithstanding the general principle—there is "no federal constitutional right to rescue services, competent or otherwise"—***DeShaney*** and subsequent courts have recognized only two (2) exceptions to this no-duty rule which becomes applicable in only those narrow instances whereby some "special relationship" exists between the state and the individual,[3] or, in the alternative, where the state has placed the individual in a dangerous position he would have not otherwise faced. *See* ***Kneipp v. Tedder***, 95 F.3d 1199, 1209 (3d Cir. 1996) (*whereby the Third Circuit adopted the latter "state-created danger" theory*).

[3] Not implicated by Plaintiffs' instant factual allegations, the "special relationship" exception imposes a duty on a state actor to care for an individual pursuant to the exceptional taking of the individual into custody and thereby depriving him of the ability to care for himself. *See e.g.* ***Youngberg v. Romeo***, 457 U.S. 307 (1982) (*state, in taking custody of involuntarily committed mental patients, has a duty to ensure their safety*); ***Estelle v. Gamble***, 429 U.S. 97 (1976) (*when the state takes custody of inmates, it assumes a duty to provide them with medical care*); *compare* ***Ye v. United States***, 484 F.3d 634 (3d Cir. 2007) (*assurances of aid* do not *create a special relationship sufficient to impose a duty on the state*)

This latter "state created danger" theory provides for the narrow, exceptional imposition of a duty to a specific individual only under those rare and limited circumstances whereby "the state, through its affirmative conduct, creates or enhances a danger for the individual." ***Brown***, 318 F.3d at 483. Notably, negligence, the alleged failure to act or in the alternative, the failure to act appropriately, standing alone is insufficient to trigger this exceptional obligation as "[o]nly state action that shocks the conscience can constitute a violation of substantive due process." *See* ***County of Sacramento v. Lewis***, 523 U.S. 833, 846 (1998). Thus, absent some conscience-shocking affirmative act on the part of the state, which is held to have proximately caused the alleged injury, the state is under no affirmative obligation to protect its citizens and is not liable simply because it failed to act or failed to act appropriately.

The state-created danger exception requires a showing of four (4) conjunctive elements, each of which must be supported by sufficient factual averments to withstand a motion to dismiss:[4]

1. there existed some relationship between the state and the plaintiff;

2. the state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all;

3. the harm ultimately caused was foreseeable and fairly direct; and

4. the state actor acted with a degree of culpability that shocks the conscience.

*See****, Sanford v. Stiles***, 456 F.3d 298, 304-05 (3d Cir. 2006).

Once again, a thorough analysis of the Amended Complaint exposes the absence of any allegation suggesting the City of Pittsburgh and/or its employees are liable to these Plaintiffs. At best, Plaintiffs have, in each count leveraged against the City and its employees, included the mere recitation of each of the four (4) elements (*See, e.g.* Count IV, Amended Complaint ¶¶ 69-72). However, the bare, conclusory iteration or "mere recitation" of the elements of a cause of action absent any factual support is insufficient to

[4] As a conjunctive test, the failure to establish even one of the four elements is fatal to a plaintiff's claim under the state-created danger theory of liability. Plaintiff's herein fail to satisfy *any*.

overcome a motion to dismiss. ***Twombly***, 550 U.S. at 555; ***Iqbal***, 129 S.Ct. at 1960. Those recitations, which are nothing more than legal conclusions or naked assertions, are "not entitled to the assumption of truth" and must be disregarded; a Court must assess only the "well-pleaded, non-conclusory factual allegations ***Iqbal***, 129 S.Ct. at 1950.

The Relationship Element

Turning to the first element, no special relationship existed between the state and the Decedent. To illustrate this point, the Defendants refer this Court to ***Brown***, cited above for its legal pronouncements, because those facts closely mirror Plaintiffs' allegations. In ***Brown***, a Mother repeatedly summoned an ambulance to assist a small child who was choking on a grape, and the operator continuously assured the caller "rescue is on the way." 318 F.3d at 475. The child later died of asphyxiation, prompting his parents to file a claim. ***Id.*** The District Court cited the aforementioned lack of any right to rescue services and granted—and the Third Circuit affirmed—the City's motion for summary judgment. ***Id***. at 478. The ***Brown*** Court announced that, even accepting Plaintiffs allegations as true, the City is "under no constitutional obligation to provide competent rescue services," because the plaintiffs did not provide any facts suggesting the existence of any relationship between the child and the City. ***Id***. at 483.

To further elaborate this point, several courts in our Circuit have refused to recognize a special relationship absent some showing that the state impermissibly limited the Plaintiffs' freedom to act on their own behalf. *See* ***Bright v. Westmoreland County***, 443 F.3d 276 (3d Cir. 2006) (*expressions of intent to help the victim did not impose a duty on the state or the state actors, prompting dismissal*); ***Ye v. United States***, 484 F.3d 634 (3d Cir. 2007) (*an expression of intent to help, relied upon by the victim to his detriment, was insufficient to impose a duty*); ***Perez v. City of Philadelphia***, 701 F. Supp.2d 658 (E.D.Pa. 2010) (*dismissing claims against the City, as repeated, even mendacious assurances of forthcoming assistance did not create a special relationship*). Absent any special relationship, the claims against the City and its employees must be dismissed.

Second, the Amended Complaint contains no allegations that any state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all. ***Kneipp v. Tedder***, 95 F.3d 1199, 1209 (3d Cir. 1996). Although Plaintiffs aver, "Defendant affirmatively created a danger to Curtis Mitchell, or made Curtis Mitchell more vulnerable, in that Curtis Mitchell relied upon information and belief that emergency aide [sic] was forthcoming and therefore did not seek alternative forms of assistance" (Amended Complaint ¶ 72), this claim is hardly distinguishable to the theory explored in ***Brown*** where the 9-1-1 operator continuously assured the caller "rescue is on the way" despite the fact the operator knew help was not immediately forthcoming. ***Brown***, 318 F.3d at 483 (*the City is "under no constitutional obligation to provide competent rescue services"*); see also ***Perez***, 701 F. Supp.2d 658 (E.D.Pa. 2010) (*explicitly holding that assurances of forthcoming assistance does not constitute an affirmative act for purposes of state-created danger*).

Thus, relying on Third Circuit precedent, Plaintiffs' Amended Complaint must be dismissed because the facts as alleged therein identify *no affirmative act* as the state-created danger theory requires. Any plausible claim requires some allegation that the state actor "affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger that had the state not acted at all." ***Sanford v. Stiles***, 456 F.3d 298, 304-05 (3d Cir. 2006). Although the state-created danger theory may find support on the basis of affirmative acts, a City's alleged *failure to act* provides no such foundation. *See* ***Walter v. Pike County***, 544 F.3d 182, 194 (3d Cir. 2008); ***Ye v. United States***, 484 F.3d 634 (3d Cir. 2007).

The Affirmative Act Requirement

As alluded above, Plaintiffs, in a manner not entitled to any presumption of truth, conclusorily assert only one such affirmative act: that Mr. Mitchell "relied on information and belief that emergency aide [sic] was forthcoming and therefore did not seek alternative forms of assistance" (See e.g. Amended Complaint ¶ 72). Assuming *arguendo* this lone conclusory assertion is true, Plaintiffs nevertheless fail to

state a claim under the state-created danger theory on two (2) fatal bases. First, as noted above, "a mere assurance cannot form a basis of a state created danger claim." ***Ye***, *supra*, 484 F.3d at 641; and Second, the "nonconclusory factual allegations" (i.e., admissions) contained in Plaintiffs' Amended Complaint, the only allegations permissibly considered by the Court at this juncture, directly contradict and irreversibly undermine this groundless legal conclusion. Taken together, either of these two defects is fatal to Plaintiffs' cause of action and demands dismissal of this claim.

As to the first point, the Court of Appeals for the Third Circuit explicitly held in ***Ye v. United States***, 484 F.3d 634, 640 (3d Cir. 2007), that the state's duty or obligation is triggered only upon an affirmative act, which in turn occurs only when the state acts to restrain the individual in a manner analogous to institutionalization or incarceration. *See also* ***Bright v. Westmoreland County***, 443 F.3d 276, 282 3d Cir. 2006 ("*It is misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause*"). It is at this juncture, alluded at the outset, that the state-created danger and special relationship exceptions merge analytically, yet here Plaintiffs fail to provide any facts that suggest Decedent's freedom of action was limited by some affirmative act of the state other than their conclusory opinion that Decedent relied on assurances of rescue to his detriment. Even if believed, as the ***Ye*** court made clear, this assertion is legally insufficient to constitute the requisite affirmative act. 484 F.3d at 641 (*the Third Circuit, in rejecting plaintiff's claim, held that "an assurance, in this case an expression of intent to help, is not an affirmative act sufficient to trigger constitutional obligations.*"); see also ***D.R. by L.R. v. Middle Bucks Area Vocational Tech. Sch.***, 972 F.2d 1364, 1374 (3d Cir. 1992) (*en banc*) (*liability under the state created danger theory is predicated on the states' affirmative act, which exposes plaintiffs to danger*).

Applying this general principle to the instant context, the District Court for the Eastern District of Pennsylvania held that even the mendacious assurance by a 9-1-1 operator of impending rescue, causing parents to forgo potentially life-saving self-help in reliance on statements that "emergency aide [sic] was forthcoming" (Amended Complaint ¶ 72) was a categorically insufficient basis for a due process claim

under the state-created danger exception. ***Perez v. City of Philadelphia***, 701 F. Supp. 2d 658, 671 (E.D.Pa. 2010). It follows, *a fortiori*, that where the intentionally misleading assurances of the state actor were insufficient to impose liability, the merely erroneous assurance complained of in this instance falls well short of a constitutional deprivation.

Turning now to the alternative basis for dismissal to which this Brief alluded above, even if this Court was to ignore the indisputable circuit precedent precluding recovery in those cases where the only alleged "affirmative act" is an unintentionally—or even intentionally—erroneous statement of forthcoming assistance, this assertion, as discussed in the foregoing, is no more than a *legal* conclusion, which is entitled to no assumption of veracity by this Court. Among the nonconclusory *factual* allegations actually relevant to the Court's assessment of Plaintiffs' Amended Complaint are numerous contrary averments—*admissions*—which sufficiently undermine any claim of detrimental reliance asserted by Plaintiffs.

Specifically, as detailed in Plaintiffs' Amended Complaint, each call to the 9-1-1 operator elicited an assurance that help was *not* forthcoming. For example, with the first ambulance unable to cross the Elizabeth Street Bridge, the Decedent was informed the ambulance was unable to make it to him and "requested that [he] walk approximately one-quarter mile to meet the ambulance." (Amended Complaint ¶ 23). The second team arrived at the same location as the first and again, stating their inability to reach his location, "asked that Mr. Mitchell walk to meet their ambulance." (Amended Complaint ¶ 29). Similarly, the third ambulance stopped short of the Decedent's residence and asked that he come outside for assistance, but was informed that Decedent was sleeping. (Amended Complaint ¶ 36).

Contrary to Plaintiffs' misplaced legal assertions, a critical analysis of the factual allegations reveals a very different story. Not only did the state actors refrain from providing erroneous information to Decedent on which he could have reasonably relied, allegedly restraining him from pursuing alternative means of self-help—still legally insufficient in the Third Circuit—but on at least one occasion identified in the Amended Complaint, **Plaintiffs admit the 9-1-1 operator actually *encouraged* the Decedent to seek**

alternative means of assistance when Defendant Long "told [Ms. Edge] that Mr. Mitchell needed to take a bus." (Amended Complaint ¶ 42).

The Conscience-Shocking Element

Finally, the Third Circuit has interpreted the Supreme Court's holding in ***County of Sacramento v. Lewis***, 523 U.S. 833 (1997) to stand for the proposition that in order "to establish liability, a state official's action must be so ill conceived or malicious that it shocks the conscience." ***Brown***, 318 F.3d at 480 (quoting ***Miller v. City of Philadelphia***, 174 F.3d 368, 368 (3d Cir. 1999) (internal quotations omitted)). To the contrary, the "indefensible passivity" and "nonfeasance" of which Plaintiffs complain here "do not rise to the level of a constitutional violation." ***Brown***, 318 F.3d at 479 (*quoting* ***D.R. v. Middle Bucks Area Vocational Tech. Sch.***, 972 F.2d at 1376.

Thus, rather than plead any *act* which may be said to have caused Decedent's injuries, Plaintiffs' Amended Complaint is replete with repetitive allegations of various *omissions*, which at best illustrate no more than carelessness or negligence in the periodic failure on the part of each of the named Defendants to identify potential problems and correct them as they emerged. Bureaucratic breakdowns and systemic failures, especially of the magnitude described by Plaintiffs, impose no duty on the municipal service-provider to take corrective action; to do so would discourage all government agencies from attempting to provide otherwise valuable public services to its citizens. For this and other reasons, the keystone of any due process analysis of this type is firmly rooted in the anterior principal, cited at length above, there is "no federal constitutional right to rescue services." ***Brown***, 318 F.3d at 478

As noted at the outset, the mere conclusory recitation of the elements of a cause of action absent any further factual enhancement will not withstand a motion to dismiss. ***Twombly***, 550 U.S. at 555; ***Iqbal***, 129 S.Ct. at 1960. Applying this standard to the Amended Complaint, Plaintiffs not only *omit* any factual allegations of an affirmative act, a relationship between the parties or conscience shocking behavior as required to overcome a motion to dismiss, they *concede*, contrary to their baseless legal assertions, that

Mr. Mitchell, were he to have relied on anything, must have relied on the repeated assertions that rescue was not forthcoming, which includes the Defendant's direct, explicit instruction that Decedent pursue alternative means of assistance. Based on the foregoing, Plaintiffs § 1983 claim against the City of Pittsburgh must be dismissed for failure to state a claim upon which relief may be granted.

2. Fed.R.Civ.P. 12(b)(6) Failure To State A Claim Upon Which Relief May Be Granted: Each Separate § 1983 Action Against Each Employee Of The City Of Pittsburgh Must be Dismissed

A finding of personal liability of an *official* requires an identical showing that the official, acting under color of law, caused the deprivation of a federal right. ***Taylor v. Altoona Area Sch. Dist.***, 513 F. Supp.2d 540, 571 (W.D.Pa. 2007) (*citing* ***Kentucky v. Graham***, 473 U.S. 159, 166 (1985)). To reiterate, Plaintiffs must plead at a minimum a relationship with the Plaintiffs in conjunction with some *affirmative conduct* which is so egregious or outrageous as to shock the contemporary conscience. ***Lewis***, 523 U.S. at 847. Applying this well-established standard to the factual averments provided in Plaintiffs' Amended Complaint with respect to each named individual employees of the City, it becomes patently clear that Plaintiffs have fallen far short of stating an actionable claim against any official for the unconstitutional deprivation of a vested right.

The only named Defendants who may be fairly said to have participated in any way in the alleged events are the two EMTs, Andrew Lagomarsino and Josie Dimon and the 9-1-1 operator, Kim Long, discussed *infra*. Plaintiffs' remaining claims against Defendants, Robert J. McCaughan, Mark A. Bocian, Ronald V. Romano, Norman Auvil and Ron Curry contain nothing more than conslusory conjecture, which bears no weight in this Court's determination, or, at best, vague descriptions of these Defendants' various omitted actions. In fact, other than to name McCaughan, Bocian and Romano as parties to this action (Amended Complaint ¶ 12-14), Plaintiffs have included no other reference to these three Defendants among their factual allegations.

As to Defendants Auvil and Curry, other than the conclusory inclusion of various alleged failures to discover problems and take corrective action, Plaintiffs aver no specific act that could fairly be deemed to have caused Decedent's alleged injury. As discussed throughout this brief, however, although the state-created danger theory may find support on the basis of *affirmative acts*, a City's alleged *failure to act* provides no such foundation. ***Walter v. Pike County***, 544 F.3d 182, 194 (3d Cir. 2008). Said differently, "[t]he guarantee of due process has never been understood to mean that the State must guarantee due care on the part of its officials." ***Davidson v, Cannon***, 474 U.S. 344, 348 (1986), and negligence is "categorically insufficient to constitute conscience shocking conduct for purposes of the Due Process Clause." ***Taylor***, 513 F. Supp.2d at 565 (*citing* ***Daniels***, 474 U.S. at 332).

Therefore, given the absolute paucity of factual allegations that could be fairly applied to the actions of McCaughan, Bocian, Romano, Auvil and Curry and given that even if this Court were to unearth some small measure of factual substance from Plaintiffs' mere conslusory assertions despite the standard described in ***Twombly*** and ***Iqbal***, the settled law of this Circuit has consistently refused to impose an affirmative duty to provide competent rescue services on its municipalities or officials. As our Court of Appeals noted in ***Bright***, 443 F.3d at 282 the Third Circuit has "never found a state-created danger claim to be meritorious without an allegation and subsequent showing that state authority was *affirmatively exercised*." (*emphasis added*). Absent any affirmative showing, Plaintiffs' claims against Defendants, Robert J. McCaughan, Mark A. Bocian, Ronald V. Romano, Norman Auvil and Ron Curry must be dismissed.

As for the remaining Defendants, It is plain from the Amended Complaint that Plaintiffs are content to present copied and pasted boilerplate assertions against each of the named parties, notwithstanding the alleged discrete involvement of each in differing ways from the City to its policymakers to its common employees. Count X, alleging various inactions on the part of Josie Dimon and Andrew Lagomarsino is no different. For example, Plaintiffs assert the basis for the claim as these crew chiefs' failure to proactively

establish certain remedial policies or to train EMTs to engage in various behaviors, thought by Plaintiffs to be necessary for the affirmative protection of the public. (Amended Complaint ¶ 119).

Setting aside for a moment the aforementioned lack of any duty to provide any—much less competent or effective—rescue services, *see* ***Brown****, supra*, Plaintiffs seem to presume that even if any such responsibility existed, a paramedic-employee would be equally inclined to train and establish procedures as would the City's highest-ranking policymakers. This lazy repetition of claims without alteration suggests that the Plaintiffs posses the same faith in the strength and viability of their case as does the City and the law—which is to say, very little at all.

Beyond these curious allegations suggesting that entry-level City of Pittsburgh employees are somehow empowered to train each other or to enact policies governing EMS procedure, Plaintiffs include two additional allegations that, at least on their face, appear to apply to EMS personnel such as Defendants Dimon and Lagomarsino: that they were each "aware of a breakdown in communication or rescue efforts," and both "fail[ed] to render assistance to Mr. Mitchell." (Amended Complaint ¶¶ 119 h.-i.). Despite the facial reasonableness of these allegations, further examination of the Amended Complaint and applicable law betray the insufficiency of these averments and demand dismissal.

With respect to the assertion that Defendants were "aware of a breakdown in communication or rescue efforts," it must be reiterated that mere conclusory assertions are not binding on the Court, even at this nascent stage in the litigation. *See* ***Twombly***, *supra*, 550 U.S. 555. Rather, the controlling allegations are those that state with particularity some supportive factual context from which the Court could conclude the existence of some claim for relief. ***Id***. Perusing those material portions of Plaintiffs' Amended Complaint, however, reveals Plaintiffs' contrary allegations that throughout the period of the alleged "ongoing emergency," the 9-1-1 dispatcher failed to relay relevant information to the paramedics in their ambulances. (See Amended Complaint ¶ 42). Thus, Plaintiffs' *admit* that Defendants Dimon and

Lagomarsino were without the requisite information to have concluded that there had been a "breakdown in communication or rescue efforts" (Amended Complaint ¶ 119h).

Even assuming, *arguendo*, these Defendants did have some knowledge of an ongoing defect in communication and were empowered to address it, the law imposes no duty whatsoever on these employees or on the state itself to affirmatively work to correct the problem and protect this Decedent. As discussed at length in the foregoing, the Due Process Clause bestows no right to rescue services, and, in the event that a governmental entity endeavors to provide such services, certainly imposes no obligation that those services be competent, much less perfectly executed under all circumstances. *See* ***Brown***, *supra*, 318 F.3d at 481 (*affirming dismissal of Plaintiff's claims against EMTs holding the Decedent had no constitutional right to be rescued*).

The conduct described at ¶ 119 of Plaintiffs' Amended Complaint sounds in negligence consisting as it does of no more than various legal conclusions that the Defendants, Dimon and Lagomarsino, unreasonably failed to act. This alleged failure to measure up to the conduct of a reasonable person under the circumstances, however, is "categorically insufficient to constitute the conscience shocking conduct for purposes the Due Process Clause." ***Taylor***, 513 F. Supp.2d at 565 (*citing* ***Daniels***, 474 U.S. at 332); ***Davidson v, Cannon***, 474 U.S. 344, 348 (1986) ("*due process has never been understood to mean that the State must guarantee due care on the part of its officials*"); ***Bright***, 443 F.3d 276, 282 (3d Cir. 2006) (*it is the "misuse of state authority, rather than the failure to use it, that can violate the Due Process Clause"*).

In light of the foregoing legal standard, Plaintiffs' claims against Defendant Kim Long, the 9-1-1 dispatcher, fare no better. Consistently with each of the claims against other named Defendants, Plaintiffs include a litany of naked assertions consisting of a boilerplate recitation of legally insufficient omissions, which fail to rise above common negligence, absent any factual support whatsoever. Although an affirmative act may form the basis for a constitutional claim, a failure to act may not. ***Walter v. Pike County***, 544 F.3d 182, 194 (3d Cir. 2008).

Cleverly styled as a factual allegation, Plaintiffs' lone attempt to assert an affirmative act—alleging conclusorily that "Defendant affirmatively created a danger…in that Curtis Mitchell relied upon information and belief that emergency aide [sic] was forthcoming and therefore did not seek alternative forms of assistance" (Amended Complaint ¶ 142)—is both legally insufficient and contrary to Plaintiffs' own factual *admissions*.

As to legal insufficiency, and assuming *arguendo* that this Court were compelled to entertain conclusory legal assertions, it is settled law in the Third Circuit that the mere assurance of forthcoming aid must not form the basis of a state-created danger claim; rather, an affirmative act occurs only where the state affirmatively imposes a restraint on the individuals freedom of action in a manner similar to incarceration or institutionalization. ***Ye***, *supra*, 484 F.3d at 640-41. Lower courts facing this question in contexts indistinguishable from the instant case have not veered from this principle. For example in ***Perez v. City of Philadelphia***, 701 F. Supp. 2d 658 (E.D.Pa. 2010), discussed *supra*, the court explicitly held that even the false assurances of impending rescue communicated by the 9-1-1 operator were not affirmative acts for purposes of the state-created danger analysis before dismissing that plaintiff's claims.

Even setting aside the contrary law of this Circuit, once again Plaintiffs' own *admissions* fatally undermine their naked assertion that the Decedent relied on Long's assurances of impending rescue. Specifically, as detailed in the Amended Complaint, Plaintiffs admit that each call to and from the 9-1-1 operator elicited the contrary assurance—that help was indeed *not* forthcoming—and concede that Decedent was actually encouraged to seek alternative means of self-help when he was counseled to take a bus (Amended Complaint ¶¶ 23, 29, 36 and 42).

As the preceding suggests, Plaintiffs' legal assertions and factual averments tell two very different stories. Moreover, as has been variously noted above, the Supreme Court has held that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." ***Twombly***, 550 U.S. at 555. *A fortiori*, **a "threadbare" recitation "of the elements of a cause of action"**

appended with numerous, contradictory, factual admissions *must* not suffice to overcome a motion to dismiss

Finally, despite Plaintiffs' factual inconsistencies, because the Third Circuit has never found a valid state-created danger claim absent some allegation of affirmatively exercised state authority, ***Bright***, 443 F.3d at 282, even Plaintiffs conclusory assertions against Defendants Josie Dimon, Andrew Lagomarsino and Kim Long, insufficient to overcome ***Twombly*** and ***Iqbal***, fail to clear the minimum threshold required of Plaintiffs to state a claim for a constitutional violation under the law and must be dismissed.

B. STATE LAW CLAIMS OF WILLFUL MISCONDUCT AND (GROSS) NEGLIGENCE SUBJECT TO IMMUNITY PROVISIONS UNDER THE POLITICAL SUBDIVISIONS TORT CLAIMS ACT, 42 PA. C.S.A. § 8541 *ET SEQ*.

1. Fed.R.Civ.P. 12(b)(6) Failure To State A Claim For Which Relief May Be Granted: Recovery Against The City of Pittsburgh and Its Agents For Gross Negligence Is Barred By The Political Subdivisions Tort Claims Act, 42 Pa. C.S.A. §§ 8541 *et seq*.

Acting consistently with numerous Superior Court holdings, the Pennsylvania Supreme Court has announced that the Commonwealth of Pennsylvania does not recognize varying degrees of negligence. ***Ferrick Excavating & Grading Co. v. Senger Trucking Co.***, 484 A.2d 744, 749 (Pa. 1984). Additionally, the Court of Appeals for the Third Circuit has recognized that "even where an employee acts with a degree of culpability equivalent to recklessness, Pennsylvania law nevertheless affords him immunity." ***Bright v. Westmorland County***, 443 F.3d 276, 287 (3d Cir. 2006) (*citing* ***Williams v. City of Philadelphia***, 569 A.2d 419, 421-22 (Pa. Commw. Ct. 1995) (*reckless behavior constitutes wanton, not willful, misconduct, preserving official immunity under the PSTCA*). Therefore, Plaintiffs' multiple counts of "gross negligence" against the City of Pittsburgh and its employees (*See* Amended Complaint, Counts II, VI, IX, XII and XV) are not sustainable in the present action and must be dismissed.

If, in the alternative, this Court chooses to interpret these claims as simple negligence, which are consequently recognized under the laws of the Commonwealth, Plaintiffs claims are statutorily barred under the Political Subdivisions Tort Claims Act, 42 Pa. C.S.A. §§ 8541 *et seq*.

As the Plaintiffs aptly concede, the City of Pittsburgh is a local municipal agency of the Commonwealth. (See Amended Complaint, ¶ 7) The General Assembly has extended sovereign immunity to the local agencies of the Commonwealth, including municipalities such as the City of Pittsburgh and any employees thereof acting within the scope of their duties, enacted under the Political Subdivisions Tort Claims Act (PSTCA) and codified at 42 Pa. C.S.A. §§ 8541 *et seq*. The immunities described therein are absolute and non-waivable, and not subject to any procedural device that could render a municipality liable beyond the exceptions permitted by the Commonwealth. ***Forgione v. Heck***, 736 A.2d 759 (Pa. Commw. Ct. 1999), *appeal denied*, 897 A.2d 462 (Pa. 1999). The absolute immunity defense is properly raised during the preliminary stages of the litigation. ***Chester Upland Sch. Dist. v. Yesavage***, 653 A.2d 1319, 1327 (Pa. Commw. Ct. 1994). Thus, without expressing any opinion as to the merits of this particular claim, the Commonwealth has deemed recovery against any local agency of the Commonwealth barred absent the successful pleading within one of the eight (8) exceptional categories for which immunity has been categorically waived.

These eight (8) narrow exceptions to immunity are included at § 8542 of the PSTCA,[5] and Plaintiffs have failed to aver sufficient facts to permit their state claims to proceed under any of these narrowly

[5] 42 Pa. C.S.A. § 8542(b) defines those eight (8) acts which may impose liability on the local agency:

(1) Vehicle Liability: requires that the operation of a City vehicle was the actual and proximate cause of the injury, discussed at length, *infra*;

(2) Care, custody or control of personal property: recognizing liability for *property* loss suffered while that property is in the custody of the agency, *see e.g.* ***Sweeney v. Merrymead Farm, Inc.***, 799 A.2d 972 (Pa. Commw. Ct. 2002);

(3) Real property: applies only to those injuries caused by an actual defect of land owned by the agency, ***Gaylord ex rel Gaylord v. Morris Tp. Fire Dep't***, 853 A.2d 1112 (Pa. Commw. Ct. 2004), *appeal denied* 864 A.2d 1205 (Pa. 2004);

(4) Trees, traffic controls and street lighting: requires a dangerous condition created by one of the foregoing that caused a subsequent injury ***Robinson v. City of Phila***., 666 A.2d 1141 (Pa. Commw. Ct. 1995);

(5) Utility service facilities: necessitating a dangerous condition derived or originating from the agency's utility realty, ***Metropolitan Edison Co. v, Reading Area Water Auth.***, 937 A.2d 1173 (Pa. Commw. Ct. 2007);

construed exceptions, and among them, only the Vehicle Liability Exception merits a closer examination. However, upon thoughtful inspection, Plaintiffs' claims fail to meet the strict circumstantial conditions imposed by state law and required by the legislature to recover against a political subdivision such as the City of Pittsburgh.

It should be noted at the outset that the vehicle liability exception—like each of the categorical exceptions to governmental immunity—must be construed narrowly in keeping with the legislature's intent to insulate local agencies from liability. ***Regester v. County of Chester***, 797 A.2d 898, 903 (Pa. 2002), *citing* ***Love v. City of Phila***, 543 A.2d 531, 532 (Pa. 1988). For purposes of pursuing a claim under the vehicle exception, the courts have required at minimum that a moving vehicle, operated by an agent of the local agency, be the proximate cause of the alleged injury. ***Swartz v. Hilltown Tp. Volunteer Fire Co.***, 721 A.2d 819 (Pa. Commw. Ct. 1998), *appeal denied* 745 A.2d 1227 (Pa. 1998). As the cases illustrate, the mere tangential involvement of a city vehicle is insufficient to attach municipal liability, because the exception does not extend to the "panopoly of functions served by governmental vehicles" but is strictly limited to those narrow classes of injuries *actually caused by the physical operation of the vehicle*.. ***Regester***, 797 A.2d at 904 (*firemen were not liable in negligently failing to timely respond to a fire, as the negligence related, not to the operation of the vehicle, but to the provision of public emergency services, not excepted under the Act*); ***Keesey by Keesey v. Longwood Volunteer Fire Co.***, 601 A.2d 921, 924 (Pa. Commw. Ct. 1992), *appeal denied*, 611 A.2d 713 (Pa. 1992) (*negligent disregard of a dispatcher's slow-down order, which caused a vehicular accident, was due to the dispatcher's negligence, not the driver's, and therefore not within the vehicle exception*).

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(6) Streets: requires a defect of the streets to cause rather than merely facilitate an injury or arises from some condition other than a defect in the realty of the street itself, ***Osborne v. Cambridge Tp.***, 736 A.2d 715 (Pa. Commw. Ct. 1999), *appeal denied* 759 A.2d 925 (Pa. 2000), *certiorari denied* 531 U.S. 1113 (2001);

(7) Sidewalks: imposing secondary liability on a local agency for injuries caused by some defect of the sidewalk for which the agency had sufficient notice, and finally;

(8) Care, custody or control of animals: demanding, unsurprisingly, that the injury be caused by an animal in the custody of the agency before liability will attach, *see e.g.* ***Sweeney***, *supra*, 799 A.2d 972.

Apparent from the cases, when the sovereign endeavors to provide valuable public services to its citizens, it remains immune from legal recourse for negligence. In extending immunity to its numerous political subdivisions, the Legislature recognized that any system predicated on unlimited tort liability for municipal negligence would paralyze cities and counties to the point of inaction, ultimately serving the interests of no one.[6]

Here, as in each of the foregoing cases, Plaintiffs contend that carelessness in the provision of public services caused the decedent's injuries, not the operation of the ambulance itself. As the Pennsylvania Supreme Court noted in ***Regester****, supra*, the improper subjugation of agencies to tort liability for the negligent performance of public services such as the provision of emergency medical care would defeat the purpose of the General Assembly, which clearly intended to limit liability to injuries directly occasioned by the negligent physical operation of the subject vehicle. 797 A.2d at 904.

Where, as here, a cause of action sounding in tort fails to successfully plead one of the eight (8) aforementioned exceptions, the City—any city of the Commonwealth, subdivision or agent thereof—is compelled by the General Assembly to submit to state law, which demands that each of Plaintiffs' negligence claims be dismissed with prejudice.

2. <u>Fed.R.Civ.P. 12(b)(6) Failure To State A Claim Upon Which Relief May Be Granted: Failure to Plead Legally Sufficient Facts Constituting Willful Misconduct Under Pennsylvania Law.</u>

a. Failure to Plead Any Underlying Statutory or Common Law Cause of Action for Willful Misconduct

[6] By way of illustration, were this Court to recognize Plaintiffs' cause of action, each of the families of the roughly 35 individuals to which Defendants successfully attended during the approximately thirty (30) hours constituting Decedent's alleged ongoing emergency, would have actionable claims against the City and its agents had those agents, compelled against their better judgment, attempted to proceed toward the Decedent's residence and been either individually incapacitated or had their vehicle been immobilized in the deep snow, just as the first ambulance called to the scene had been. Any other conclusion is inconsistent with Plaintiffs' theory of recovery, and represents a direct contravention of the will of the General Assembly as evinced by the text of the PSTCA and subsequent decisional law regarding municipal immunity.

Although, under § 8545 of the PSTCA, employees of any local agency enjoy official immunity coextensive with that of the employing municipality,[7] the PSTCA, while preserving municipal immunity, explicitly withdraws from employees its blanket immunization for otherwise tortious conduct, when those acts are deemed to have risen to such an egregious level as to constitute willful misconduct.[8] However, as with any sustainable legal action, the PSTCA requires, at minimum, an underlying cause of action sounding in negligence of which "willful misconduct" merely characterizes an element. ***Steiner v. City of Pittsburgh***, 509 A.2d 1368, 1370 (Pa. Commw. Ct. 1986) (*affirming judgment for the City on the pleadings*). Plaintiffs have pled no such cause of action.

Willful misconduct, contrary to the representations of Plaintiffs' counsel, is not an independent cause of action but is merely an adjective claim. Only the intentional or malicious breach of some cognizable duty may constitute "willful misconduct." ***Morris v. Musser***, 478 A.2d 937, 939-40 (Pa. Commw. Ct. 1984) (*affirming dismissal in favor of both the city and its agents*). Here, however, Plaintiffs aver neither any duty—the breach of which by the City or its agents could constitute willful misconduct—nor do they allege sufficient facts to constitute an intentional tort. Without an underlying statutory or common law cause of action, "willful misconduct" is a meaningless characterization—an adjective, which modifies no noun.

This threshold requirement is established under the plain terms of the Act itself, which requires that the "damages be recoverable under common law or statute" and that "the injury was caused by the

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[7] The inclusion of counts alleging "willful misconduct" implies an attempt on behalf of the Plaintiffs to plead around the strict limitations imposed under the PSTCA, but as discussed, *infra*, the mere invocation of the term absent any underlying theory of recovery is insufficient to attach liability to a municipality or any agents thereof.

[8] The Act states in pertinent part:

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

42 Pa. C.S.A. § 8550.

negligent acts of the local agency or an employee thereof." 42 Pa. C.S.A. § 8542.[9] Therefore, § 8550 of the PSTCA, although it does abrogate the application of several provisions of the Act, does not relieve the Plaintiffs of the threshold requirement that the claim must first be recoverable under common law or statute and caused by the negligent acts of a local agency employee.[10]

Therefore, to pursue willful misconduct, Plaintiffs must identify some underlying theory sounding in negligence. The necessary elements to maintain an action in negligence under Pennsylvania law are: (1) a duty or obligation at law, requiring the actor to conform to a particular standard of conduct; (2) a failure to conform to the required standard; (3) a causal connection between the conduct and the resulting injury, and; (4) actual damage or loss as a result. ***Morena v. South Hills Health Sys.***, 462 A.2d 680 (Pa. 1983). Plaintiffs plead no such underlying cause of action and, most conspicuously, identify no duty or obligation owed to the Decedent or the Decedent's family by any individual or by the City. In the absence of any duty, the Plaintiffs' cause must fail for lack of a cognizable claim.

For example, although the Commonwealth Court held that an officer's behavior, in knowingly failing to render assistance to victims of an assault, if proved at trial, would constitute willful misconduct, the

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[9] (a) Liability imposed.--A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):[9]

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

42 Pa. C.S.A. § 8542(a).

[10] Although Plaintiffs assert in their Amended Complaint that the City and its employees violated the Emergency Medical Services Act (EMSA), 35 P.S. §§ 6921 *et seq.*, the EMSA does not provide a private right of action constituting an underlying claim for Plaintiffs' willful misconduct allegations. The EMSA provides for uniformity in the minimum standards of ambulance services and delegates the administration of the statute to the Secretary of Health. Thus the complete object of the act concerns the imposition of standards and the oversight of subsequent operations via a licensing scheme administered by the state. Violations of the EMSA, for example, prompt written notice from the Secretary and, if compliance is not reasonably forthcoming, the suspension or revocation of the license. *See* 35 P.S. § 6932(o). Thus, notwithstanding Plaintiffs' contrary implications, violations hereunder prompt sanctions imposed by the Secretary of Health, not civil liability of any sort.

officer's lack of immunity under § 8550 did not relieve the plaintiffs from establishing what duty, if any, the police officer owed the victims. ***Morris***, *supra*, 478 A.2d at 938-40 (*affirming dismissal of claims against the City and the officer*)

The simple explanation for Plaintiffs failure to include allegations of any duty imposed on the City or its employees is revealed in the general rule of the Commonwealth that there is none. *See e.g*. ***Thomas v. City of Philadelphia***, 574A.2d 1205 (Pa. Commw. Ct. 1990), *appeal denied*, 593 A.2d 429 (Pa. 1990). Although there exists a very narrow "special relationship" exception to the no-duty rule, it requires circumstances not alleged here. Specifically, the aggrieved individual must demonstrate that the Defendants were:

> (1) aware of the individual's particular situation and unique status; (2) had knowledge of the potential for the particular harm which the individual suffered, and; (3) voluntarily assumed, in light of that knowledge, to protect the individual from the precise harm which was occasioned.

Id. at 1206 (*quoting* ***Melendez v. City of Philadelphia***, 466 A.2d 1060, 1064 (Pa. Super. Ct. 1983)); ***City of Philadelphia v. Dennis***, 636 A.2d 240, 243 (Pa. Commw. Ct. 1993) (*responding to a call for aid does not create the relationship required to impose a legal duty on the state*) (*citing* ***Yates v. City of Philadelphia***, 578 A.2d 609 (Pa. Commw. Ct. 1990), *appeal denied*, 593 A.2d 430 (Pa. 1991)). Thus without pleading an explicit, individual promise of protection by the state, constituting the voluntary assumption of responsibility for a particular individual, plaintiffs fail to meet their burden of establishing a predicate duty from which a negligence action may flow. ***Rankin v. Southeastern Pa. Trans. Auth.***, 606 A.2d 536, 537 (Pa. Commw. Ct. 1992) (*upon the finding of an underlying duty predicated on the officer's voluntary assumption of responsibility, rescuing then abandoning an injured individual, the case was remanded for trial on willful misconduct claims*).

In cases similar to Plaintiffs' instant claim involving state causes of action against emergency response personnel for actions or omissions deemed "willful misconduct," the courts have been equally

unwilling to impose any specific duty on the state owed to a particular member of the public. *See e.g.* ***Morena v. South Hills Helath System***, 462 A.2d 680, (*holding EMS drivers had no duty to resume care of an injured victim*); ***Steiner v. City of Pittsburgh***, 509 A.2d 1368 (Pa. Commw. Ct. 1986) (*affirmed dismissal on the pleadings as 9-1-1 operator's inaction did not comprise a recognizable common law claim so as to impose liability on the city*)

Although Plaintiffs herein have admitted that the ambulance drivers lacked the requisite knowledge of Mr. Mitchell's predicament, as that information was never relayed to them, and they could, therefore, not be aware of the Decedent's particular situation, unique status or knowledge of the potential for the particular harm suffered (See Amended Compaint ¶ 42), even if Defendant's had made some assurance of forthcoming assistance—which Plaintiffs specifically admit was not the case—Plaintiffs aver no facts supportive of a specific duty required for the imposition of liability on a state actor.

Because Plaintiffs fail to allege such facts in support of an underlying claim from which willful misconduct may flow, each Count claiming willful misconduct against the City and its employees must be dismissed.

b. Failure to Plead Sufficient Facts of Intentionality to Constitute Willful Misconduct.

Even in the unlikely event that this Court were able to discern some heretofore unrecognized foundational claim upon which to build a charge of willful misconduct, Plaintiffs allege no set of facts that might be construed to overcome the high legal hurdle to state a claim against an actor for willful misconduct. The Pennsylvania Supreme Court has defined the term to mean conduct whereby the actor desired to bring about the subsequent result, or at least was sufficiently aware that it was substantially certain to follow, such that a desire may be implied. ***Robbins v. Cumberland County Children & Youth Servs.***, 802 A.2d 1239, 1252 (Pa. Commw. Ct. 2002) (*citing* ***Evans v. Phila. Transp. Co.***, 212 A.2d 440

(Pa. 1965). In other words, in order to prove willful misconduct, the Plaintiffs must establish specific intent. ***Robbins***, 802 A.2d at 1253 (*citing* ***Diaz v. Houck***, 632 A.2d 1081 (Pa. Commw. Ct. 1993).

The Third Circuit has since recognized that "willful misconduct," has acquired the same meaning as the term "intentional tort." ***Brown v. Muhlenberg Twp.***, 269 F.3d 205, 214 (3d Cir. 2001) (*citing* ***Delate v. Kolle***, 667 A.2d 1218, 1221 (Pa. Commw. Ct. 1995). Thus, contrary to Plaintiffs' assertions, neither "reckless" behavior nor "wonton" misconduct are considered sufficiently intentional to abrogate official immunity under the PSTCA. ***Bright***, 443 F.3d at 287; ***Williams v. City of Philadelphia***, 569 A.2d 419, 421-22 (Pa. Commw. Ct. 1995). Therefore, despite Plaintiffs' persistent presentation of repetitive legal boilerplate, asserting wanton and reckless behavior, neither is sufficient to abrogate the immunities afforded under the PSTCA. (*See e.g*. Amended Complaint ¶¶ 50, 52, 58, 62, 65).

In addition to these assertions, Plaintiffs claim alternatively that "Decedent's death was due to the intentional, malicious, willful … conduct of Defendant City of Pittsburgh." (*See e.g*. Amended Complaint ¶¶ 50, 52, 58, 62, 65). However, this repeated assertion is conslusory rather than factual, and the conclusory nature of these claims "disentitles them to the presumption of truth" and are not alone sufficient to withstand a Rule 12(b)(6) motions to dismiss." ***Iqbal***, 129 S.Ct. at 1950. Because Plaintiffs' aver no *facts* suggesting that any party acted with a degree of culpability approaching willfulness—and indeed allege sufficient facts strictly to the contrary—all claims of willful misconduct against the City and its employees must be dismissed.

As noted immediately above, willful misconduct requires a showing that Defendants specifically intended to cause harm to Decedent as a result of their conduct. *See* ***Bright***, 443 F.3d at 287. Although Plaintiffs' Amended Complaint contains allegations that emergency personnel failed to take additional steps to protect the Decedent, it identifies nothing to suggest any party to the instant action intended the result. In all other such instances, the courts have roundly rejected similar claims and dismissed the compliant. *See e.g.* ***Higby Development, LLC v. Sartor***, 954 A.2d 77, 87-88 (Pa. Commw. Ct. 2008) (*dismissed, as*

although defendants' conduct was willful, outrageous and even illegal, plaintiff failed to include any factual allegations that defendants specifically intended to cause harm through their conduct).

Plaintiffs' persistence in the presentation of legal boilerplate, asserting repetitively, "intentional, malicious, willful, wanton, reckless and/or other liability producing conduct" is not controlling here, and the controlling factual allegations tell a very different story, undermining Plaintiffs' claims for relief.

First, Plaintiffs allege that paramedics, Defendants Dimon and Lagomarsino, lacked the requisite knowledge to have acted willfully: "Defendant Long did not inform the ambulance workers that Mr. Mitchell was in too much pain to walk to them…" (Amended Complaint ¶ 42). Without knowing of Mr. Mitchell's predicament, neither could have been substantially certain of the resultant outcome to a degree remotely sufficient to imply desire. ***Robbins***, 802 A.2d at 1252 (*citing* ***Evans***, 212 A.2d 440.

As to Defendant Long, Plaintiffs, fail to aver any facts that suggest that she intended for Mr. Mitchell to die as a result of her failure to faithfully relay all pertinent information to the waiting paramedics. Instead, again at paragraph 42, Plaintiffs allege that Long suggested that Mr. Mitchell "take a bus," or engage in alternative avenues of self-help. (Amended Complaint ¶ 42). Although this allegation is purportedly included to demonstrate Long's callousness, what it successfully demonstrates is Long's honest appraisal of the situation and a straightforward suggestion that he attempt to find another way to the hospital.

Because Plaintiffs have neglected to include any facts which could constitute willful misconduct, Counts I, V, VIII, XI and XIV against the Defendants must be dismissed.

3. Fed.R.Civ.P. 12(b)(6) Failure To State A Claim Upon Which Relief May Be Granted: Willful Misconduct Claims Against The City Of Pittsburgh Barred By The Political Subdivisions Tort Claims Act, 42 Pa. C.S.A. §§ 8541 *et seq*.

This point requires little discussion. Assuming, *arguendo*, this Court considers it appropriate to establish some heretofore unrecognized duty *and* simultaneously divines sufficient facts from Plaintiffs' scarce pleading to establish an inference of intentionality constituting willful misconduct, the PSTCA states

with explicit precision that political subdivisions are statutorily immune from liability for acts deemed willful misconduct. *See* 42 Pa. C.S.A. § 8550.

Thus, any finding of willful misconduct on the part of an agent of the City simultaneously immunizes the city from liability and indemnity. *See* ***Lory v. City of Philadelphia***, 674 A.2d 673 (Pa. 1996) (*city may not be liable for willful misconduct under the Act*); ***Petula v. Mellody***, 631 A.2d 762 (Pa. Commw. Ct. 1993) (*finding of willful misconduct of an agent instantaneously immunizes the local agency*); ***Hardy v. Big Beaver Falls***, 9 Pa. D. & C.5th (Pa. Com. Pl. Berks County 2009); s*ee also* ***Thomson v. Wagner***, 631 F. Supp. 2d 664, 689 (W.D.Pa. 2008) (*"the same maliciousness or willfulness that makes an employee liable on a claim simultaneously places that claim outside the category of claims for which a local agency can be held liable"*).

Said otherwise, if this Court fails to discern sufficient factual allegations of willful misconduct in Plaintiffs' Amended Complaint, all state claims against the City of Pittsburgh *and its employees* must be dismissed, as any acts with a degree of culpability short of willful misconduct, including recklessness, are absolutely immune from liability under the PSTCA. ***Bright v. Westmorland County***, 443 F.3d 276, 287 (3d Cir. 2006) (*citing* ***Williams v. City of Philadelphia***, 569 A.2d 419, 421-22 (Pa. Commw. Ct. 1995) (*reckless behavior constitutes wanton, not willful, misconduct, preserving official immunity under the PSTCA*)).

Alternatively, any finding by this Court of allegations sufficient to support willful misconduct simultaneously immunizes the City from liability and demands that all state claims against the City of Pittsburgh be dismissed. *See* ***Lory v. City of Philadelphia***, 674 A.2d 673 (Pa. 1996); ***Thomson v. Wagner***, 631 F. Supp. 2d 664, 689 (W.D.Pa. 2008) (*"the same maliciousness or willfulness that makes an employee liable on a claim simultaneously places that claim outside the category of claims for which a local agency can be held liable"*). Therefore, no matter the determination of this Honorable Court, *all state claims against the City of Pittsburgh are barred by statutory immunity as provided under the Political Subdivision Tort Claims Act* and Plaintiffs' state tort claims must be dismissed.

C. Fed.R.Civ.P. 12(b)(6) Failure To State A Claim Upon Which Relief May Be Granted: Vicarious Liability Claims Against The City Of Pittsburgh Improper Under Both 42 U.S.C. § 1983 and The Political Subdivisions Tort Claims Act, 42 Pa. C.S.A. §§ 8541 *et seq.*

It has been long established under § 1983 that a municipal entity "cannot be held liable solely because it employs a tortfeasor." ***Monell v. Dep't of Social Servs***., 436 U.S. 658, 691-92 (1978). Based on this well-established legal principle, Plaintiffs' claims against the City of Pittsburgh for vicarious liability with respect to 42 U.S.C. § 1983 must be dismissed for failure to state a claim.

Plaintiffs fare no better under state law. Municipal liability in the Commonwealth, as discussed at length in the preceding sections, is governed exclusively by the Political Subdivisions Tort Claims Act, 42 Pa. C.S.A. §§ 8541 *et seq*., which states at the outset:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or any employee thereof or any other person.

42 Pa. C.S.A. § 8541.

Official liability is coextensive with that of the employing local agency, imposing the same immunities on the agents or employees of the municipality for acts considered within the course and scope of his or her employment. 42 Pa. C.S.A. § 8545. This general immunity is abrogated only when the act complained of falls into one of the limited categorical exceptions enumerated at § 8542 or where it is judicially determined that the act of the employee constituted "a crime, actual fraud, actual malice or willful misconduct" as described at § 8550. In neither instance is the employer deemed otherwise vicariously liable. As discussed above, none of the narrowly construed categories where liability may be imposed applies in the instant action, therefore, only if the acts of the employees is determined to be willful misconduct may the employee be stripped of the immunities bestowed by the legislature. However, also discussed immediately above, a finding of willful misconduct immediately frees the City of any obligation to indemnify or otherwise take vicarious responsibility for the employee's actions. 42 Pa. C.S.A. § 8550. A

willful misconduct finding is akin to a determination that the official in question was not acting within the course and scope of his or her employment and thereby falls outside the coverage of *respondeat superior*. *See* ***Lory v. City of Philadelphia***, 674 A.2d 673 (Pa. 1996); ***Thomson v. Wagner***, 631 F. Supp. 2d 664, 689 (W.D.Pa. 2008) (*"the same maliciousness or willfulness that makes an employee liable on a claim simultaneously places that claim outside the category of claims for which a local agency can be held liable"*). Therefore, Plaintiffs' of vicarious liability claims against the City of Pittsburgh must be dismissed.

V. CONCLUSION

Wherefore Plaintiffs herein have failed to provide sufficient facts to withstand this Motion to Dismiss, Defendants, City Of Pittsburgh, Robert J. McCaughan, Mark A. Bocian, Ronald V. Romano, Norman Auvil, Ron Curry, Kim Long, Andrew Lagomarsino and Josie Dimon hereby move this Honorable Court to dismiss Plaintiffs' Amended Complaint with prejudice.

Respectively Submitted,

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