

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

MICHAEL VINCENT PASCOCCIELLO and	:	CIVIL ACTION
CAROLYN Pascocciello	:	
	:	
v.	:	
	:	
INTERBORO SCHOOL DISTRICT and	:	
ROBERT J. CASTLE	:	NO. 05-5039

MEMORANDUM

Padova, J. **May , 2006**

Plaintiffs, Michael Vincent Pascocciello and Carolyn Pascocciello, have brought this action raising federal constitutional claims pursuant to 42 U.S.C. § 1983, a federal claim pursuant to the Racketeer Influenced and Corrupt Organization Act (“RICO”) and several supplemental state law claims. Before the Court is Defendants’ Motion to Dismiss. Oral Argument was held on the Motion on April 24, 2006. For the reasons that follow, the Motion is granted in part and denied in part.

I. PROCEDURAL AND FACTUAL BACKGROUND

In 2004, Plaintiffs, Michael Vincent Pascocciello (“Michael”) and his mother, Carolyn Pascocciello (“Carolyn”), filed a lawsuit in state court in West Virginia against Edgar Friedrichs (“Friedrichs”), the principal at Michael’s elementary school in Fayette County, West Virginia, alleging that Friedrichs sexually abused Michael and also caused Michael emotional distress when he sexually abused and killed Michael’s friend, Jeremy Bell, while the two boys were on a camping trip with Friedrichs in 1997. Plaintiffs also asserted claims against the Interboro School District (“Interboro”) and Robert J. Castle (“Castle”), a former principal at Prospect Park Elementary School because of their role in concealing alleged acts of pedophilia Friedrichs had committed against his students while teaching at Prospect Park Elementary School in 1973.

The case was removed to the United States District Court for the Southern District of West Virginia. Defendants Interboro and Castle successfully challenged personal jurisdiction in West Virginia and the case against them was transferred to this Court in November 2005. Pascocciello v. Interboro School Dist., Civ. A. No. 04-1085, 2005 WL 2994296 (S.D.W. Va. Nov. 8, 2005). In December 2005, the Court ordered Plaintiffs to file a Third Amended Complaint. They did so on January 6, 2006.

In the Third Amended Complaint (“the Complaint”), Plaintiffs allege that Defendants knew of Friedrichs’s pedophilia but failed to report it. After Friedrichs stopped working at Prospect Park Elementary School, Castle wrote a reference letter for Friedrichs in September 1974; the letter failed to disclose Friedrichs’s pedophilia and was relied upon by the Fayette County school district when it hired Friedrichs in 1975.¹ In addition, in September 1975, the superintendent of Interboro confirmed to the Fayette County school district that Friedrichs had worked at Interboro for nine years and two months. Plaintiffs maintain that Interboro should have disclosed Friedrichs’s pedophilia in this correspondence.²

Based on the allegations in the Complaint, Plaintiffs advance seven causes of action. In Count 1, they allege that Defendants violated a common law duty to warn prospective employers of Friedrichs’s history of pedophilia. In Count 2, they allege that Defendants engaged in a conspiracy to commit racketeering in violation of 18 U.S.C. § 1962(c), (d). In Count 3, they allege that Defendants violated Michael’s right to bodily integrity under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In Count 4, they allege that Defendants violated Michael’s

¹A copy of Castle’s letter is attached to the Complaint as an exhibit.

²A copy of this correspondence is attached to the Complaint as an exhibit.

constitutional right to association by causing the death of his friend, Jeremy Bell. In Count 5, they allege that Defendants' outrageous conduct resulted in Michael suffering the intentional infliction of emotional distress. In Count 6, they allege that Defendants aided and abetted Friedrichs's assault and battery of Michael. In Count 7, Plaintiffs allege that Defendants breached the constitutional duty of trust they owed Michael. Plaintiffs seek punitive and/or treble damages against Defendants in addition to compensatory damages, attorney's fees, costs and prejudgment interest.

II. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Rule 12(b)(6), the Court may look only to the facts alleged in the complaint and its attachments. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994). The Court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985). However, the Court "need not credit a complaint's 'bald assertions' or 'legal conclusions.'" California Pub. Employee Ret. Sys. v. The Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004) (citing Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997)). A Rule 12(b)(6) motion will be granted when a plaintiff cannot prove any set of facts, consistent with the complaint, which would entitle him or her to relief. Ransom v. Marrazzo, 848 F.2d 398, 401 (3d Cir. 1988).

III. DISCUSSION

A. Federal Constitutional Claims

Plaintiffs raise constitutional claims against both Defendants in Counts 3, 4 and 7 of the Complaint. In Count 3, Plaintiffs allege that Defendants violated Michael's Due Process Clause right to bodily integrity by adopting a policy of concealing acts of pedophilia committed by

Friedrichs and, instead of revealing his pedophilia, assisting him in finding employment as a teacher. They further allege that Defendants' use of this policy resulted in Friedrichs being hired by the Fayette County school district and ultimately resulted in him sexually abusing Michael. In Count 4, Plaintiffs allege that Defendants violated Michael's constitutional right to associate with his friend, Jeremy Bell. Plaintiffs allege that Michael's right to associate with Jeremy was ended when Friedrichs killed Jeremy, which they allege was the result of the unconstitutional policy alleged in Count 3. In Count 7, Plaintiffs allege that Defendants breached a constitutional duty of trust they owed to Michael to protect him from Friedrichs.

Castle initially moved to dismiss all three of these Counts on the ground of qualified immunity. He also argued that any claims against him in his official capacity were invalid. Because it was not clear to the Court whether Interboro also intended to move to dismiss these Counts of the Complaint, the Court afforded the parties the opportunity for additional briefing on this question and heard oral argument on April 24, 2006. In its supplemental brief, Interboro has moved to dismiss all three counts on the ground that Plaintiffs' allegations do not state violations of the federal constitution.

In their supplemental brief, Plaintiffs acknowledge that they do not state a claim of violation of a protected constitutional right in Count 4 and they concede that Count 4 should be dismissed with respect to both Defendants. At oral argument, Plaintiffs further acknowledged that Counts 3 and 7 actually seek to state the same claim; for this reason, the Court will treat them as one claim, a claim alleging violation of the Due Process Clause right to bodily integrity. With respect to Castle, Plaintiffs argue that they have alleged affirmative acts by Castle which will defeat his claim of qualified immunity concerning the Due Process claim. They also state that they have sued Castle

only in his individual capacity. With respect to Interboro, Plaintiffs argue that they have stated a claim under the state-created danger theory of Due Process liability.

1. Castle

Castle argues that he is entitled to qualified immunity with respect to all of Plaintiffs' constitutional claims. The first step in qualified immunity analysis is whether Plaintiffs' allegations, if true, establish a constitutional violation. Hope v. Pelzer, 536 U.S. 730, 736 (2002). The next step is whether Castle's actions violated clearly established constitutional rights of which a reasonable person would have known. Id. at 739. To find that a right is clearly established, "there must be sufficient precedent at the time of the action, factually similar to the plaintiff's allegations, to put the defendant on notice that his or her conduct is constitutionally prohibited." McKee v. Hart, 436 F.3d 165, 171 (3d Cir. 2006) (quoting McLaughlin v. Watson, 271 F.3d 566, 572 (3d Cir. 2001)). In making this determination, the Supreme Court has emphasized that it is important to look at the state of the law at the time the official acted. Hope v. Pelzer, 536 U.S. at 739. This inquiry is necessary because public officials need to be given fair warning that their conduct is unlawful. Id. at 739-40.

The Court must first consider whether Plaintiffs' allegations, if true, establish a constitutional violation. Hope v. Pelzer, 536 U.S. at 736. Castle has explained why Plaintiffs' claim in count 4 that Michael had a constitutional right to associate with his friend Jeremy Bell is not supported by any precedent. In addition, Plaintiffs have acknowledged that Count 4 does not state a constitutional violation and they concede it should be dismissed. Therefore, the Court finds that Castle has qualified immunity with respect to Count 4. With respect to Count 3, Castle concedes that Michael does have a constitutional right to bodily integrity. See Stoneking v. Bradford Area School Dist., 882 F.2d 720, 726-27 (3d Cir. 1989). This right is based upon the Fourteenth Amendment's Due

Process Clause. D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364, 1368-69 (3d Cir. 1992) (en banc); Gremo v. Karlin, 363 F. Supp. 2d 771, 781 (E.D. Pa. 2005).

The next step in qualified immunity analysis is whether Castle's actions violated clearly established constitutional rights of which a reasonable person would have known. Hope v. Pelzer, 536 U.S. at 739. In making this determination, it is important to look at the state of the law at the time the official acted. See id. The critical question is when the constitutional right to bodily integrity for students was first recognized. In Stoneking, the Third Circuit traced the right back to Ingraham v. Wright, 430 U.S. 651 (1977). Since Ingraham was not decided until three years after Castle wrote the letter which is alleged to have caused Michael's harm, a student's right to bodily integrity was not clearly established at the time Castle acted and, therefore, he is entitled to qualified immunity. See Hope v. Pelzer, 536 U.S. at 739-40.

Castle also argues that any constitutional claims brought against him in his official capacity are invalid. Plaintiffs concede that they are pursuing their constitutional claims against Castle only in his individual capacity. Therefore, the Motion is granted in this respect.

2. Interboro

Plaintiffs have acknowledged that Count 4 does not state a constitutional violation and they concede it should be dismissed. Therefore, Count 4 is dismissed with respect to Interboro.

Interboro argues that it cannot be liable for a violation of the Due Process Clause right to bodily integrity. In order to hold a municipal governmental entity liable under 42 U.S.C. § 1983, a plaintiff must establish two elements: (1) that his harm was caused by a constitutional violation; and

(2) that the municipality is responsible for the constitutional violation.³ Collins v. Harker Heights, 503 U.S. 115, 120 (1992).

In this case, Plaintiffs seek to hold Interboro liable for the actions it took (through Castle and the Interboro superintendent) which allowed Friedrichs to abuse Michael. Interboro argues it cannot be liable for the harm Michael suffered because Plaintiffs have not pled facts which will support holding Interboro liable under the Due Process Clause for the actions taken by Friedrichs, a third party with respect to Interboro. Because the sexual assault Michael suffered was committed by Friedrichs, rather than Interboro, Interboro can only be liable under the Fourteenth Amendment's Due Process Clause for the harm committed by Friedrichs if Interboro had a special relationship with Michael or under the state-created danger theory. Morse v. Lower Merion School Dist., 132 F.3d 902, 907 (3d Cir. 1997); Gremo, 363 F. Supp. 2d at 782.

Interboro argues that it cannot be liable under the special relationship theory. Liability under the special relationship theory is predicated on the defendant having custodial or custodial-like

³With respect to the second element, a municipality can only be held liable for the constitutional violations committed by its employee if the employee acted pursuant to some municipal policy. Id. at 121 (citing Monell v. New York City Dept. Of Social Services, 436 U.S. 658, 691 (1978)). The existence of a municipal policy is required because a municipality is not liable for the acts of its employee under § 1983 simply based on respondeat superior. Id. However, if the municipal employee has policy-making authority with respect to the actions he took, then the municipality can be liable for his actions, even if there was no prior policy governing his actions. Id. at 122 (citing Pembaur v. Cincinnati, 475 U.S. 469, 483-84 (1986)). In addition, when a municipality's action does not directly inflict a constitutional deprivation, the municipality can only be liable for an employee's violation of a constitutional right when the municipality's action constituted deliberate indifference to the particular constitutional deprivation which ultimately occurred. See Board of County Commissioners of Bryan Co. v. Brown, 520 U.S. 397, 405, 411 (1997). In its briefs to this Court, Interboro has not clearly addressed whether it is free from liability on the ground that Plaintiffs have failed to allege a policy, practice or custom which constituted deliberate indifference to Michael's Due Process Clause right to bodily integrity. The Court expects that, after discovery, this question will be addressed on summary judgment.

control over the plaintiff. D.R., 972 F.2d at 1370-71. At oral argument, Plaintiffs conceded that they could not plead the necessary facts to satisfy the custodial-like control required by the Third Circuit to establish liability under the special relationship theory. In light of this concession, the Court finds that Interboro cannot be liable under the special relationship theory.⁴

Interboro also argues that it cannot be liable under the state-created danger theory. Liability under this theory has four components:

- (1) the harm ultimately caused was foreseeable and fairly direct;
- (2) the state actor acted in willful disregard for the safety of the plaintiff;
- (3) there existed some relationship between the state and the plaintiff;
- [and] (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Morse, 132 F.3d at 908 (citing Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996) and Mark v. Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995)). In its supplemental brief, Interboro only addressed the third part of this test and argued that it could not be liable to Michael because it had no contact with him. At oral argument, Interboro also addressed the first part of the test and argued that the harm that ultimately befell Michael was not foreseeable. Based on Interboro's failure to address the other two parts of the test, Plaintiffs assert that they have clearly established the second and fourth parts

⁴If Plaintiffs had not made this concession at oral argument, the Court would have concluded that they could not satisfy the special relationship test because, even if Michael had attended an Interboro school and had been assaulted by a third party, Interboro would not be liable for that assault under the special relationship theory. See D.R., 972 F.2d at 1372-73 (holding that a school district was not liable to its student under the special relationship theory for a sexual assault committed by the victim's fellow students during school hours and on school grounds because the requirement of compulsory school attendance was not sufficiently custodial so as to create the required special relationship). Since Michael was not a student at Interboro, there is simply no reason to conclude that Interboro exercised any custodial-like control over him at the time Friedrichs sexually assaulted him. Absent that type of control over Michael, there can be no special relationship liability on the part of Interboro. D.R., 972 F.2d at 1370-71.

of the test. They also argue that they can establish the first and third parts of the test because Michael was a reasonably foreseeable victim.

The first part of the test requires that the harm ultimately caused was a foreseeable and fairly direct result of Defendants' actions. Morse, 132 F.3d at 908. Plaintiffs argue that it was certainly foreseeable to Interboro in 1974, when Castle wrote his letter, and in 1975, when the Interboro superintendent wrote his letter, that, if given access to children, Friedrichs would abuse again. Based on the allegations in the Complaint, Interboro was aware of Friedrichs's dangerous proclivities. In the Court's view, it was foreseeable that Friedrichs might abuse children again if given the chance.

Plaintiffs must also allege that Michael's injury was a fairly direct result of Interboro's actions. Id. Interboro argues that the lengthy passage of time between its actions in 1974 and 1975 and Michael's harm in 1997 serves to attenuate causation and, as a matter of law, the Court should find that Interboro's actions did not cause Michael's harm. At oral argument, Interboro cited three cases in which it argued that delays between a defendant's actions and a plaintiff's harm had caused the courts to conclude that the plaintiff's harm was not a fairly direct result of the defendant's actions. As explained in the margin, the Court finds that the cases relied upon by Interboro are distinguishable and declines to dismiss the Due Process claim on this ground.⁵

⁵Interboro relies upon Shrum v. Kluck, 249 F.3d 773 (8th Cir. 2001), Riddick v. School Bd. of the City of Portsmouth, 238 F.3d 518 (4th Cir. 2000) and Doe v. Methacton School Dist., 914 F.Supp. 101 (E.D. Pa. 1996). Shrum is distinguishable because, in that case, the court did not even address the first part of the state-created danger theory of liability. Instead, the court first found that the plaintiffs were unable to demonstrate that the school district acted with deliberate indifference to the victims' constitutional right. Shrum, 249 F.3d at 780. When the court did address the state-created danger theory of liability, it resolved the case against plaintiffs on the third, not first, part of the test. Id. at 781. Riddick is distinguishable because, in that case, the court did not address the state-created danger theory of liability at all. Instead, the court resolved the case on the ground that the school board could not be liable for the acts of its superintendent and principal because, as a matter of state law, they were not final decision-makers. Riddick, 238 F.3d at 523. In the

The second part of the test is whether the state actor acted with willful disregard or deliberate indifference to Plaintiff's safety. Morse, 132 F.3d at 910. Based on the allegations in the complaint, Castle and the Interboro superintendent were not required to act with urgency, thus, the standard for determining liability is deliberate indifference rather than conduct which "shocks the conscience." Gremo, 363 F. Supp. 2d at 788.

Plaintiffs argue that the two letters sent by Interboro constituted deliberate indifference to Michael's safety. Because the Court has concluded that the harm which befell Michael was foreseeable, this part of the test turns on the degree to which Castle and the Interboro superintendent actually appreciated the risk of harm they were creating by concealing Friedrichs's pedophilia. See Morse, 132 F.3d at 910 n.10. The Court concludes that proper resolution of this question requires

alternative, the court also concluded that, for several reasons, the acts of the principal and superintendent could not be deemed to have caused the alleged constitutional deprivation. Id. at 525-26. The court did not rely on the length of delay between the acts and the injury as the sole reason, or even main reason, for this conclusion. Id. Doe is distinguishable for two reasons. First, like Riddick, it did not address the state-created danger theory of liability. Instead, Doe held that a delay of 14 years between the school district's alleged wrongful acts and the alleged constitutional deprivation was too long to permit a finding that the school district's alleged wrongful acts were the but for cause of the alleged constitutional deprivation. Doe, 914 F.Supp. at 103. Second, Doe reached this conclusion without the benefit of the Supreme Court's subsequent decision in Board of County Commissioners of Bryan Co. v. Brown, 520 U.S. 397 (1997), which was decided the year after Doe. In Brown, the Supreme Court noted that but for causation was not a stringent standard of causation and illustrated the point as follows: "Every injury suffered at the hands of a municipal employee can be traced to a hiring decision in a 'but-for' sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury." Brown, 520 U.S. at 410. This illustration of but for causation strikes the Court as being inconsistent with the approach taken in Doe. For this reason, the Court also declines to accept Interboro's argument in its initial brief to this Court that Doe establishes, as a matter of law, that Interboro's actions were not the but for cause of Plaintiffs' harm. Interboro also argued in its initial brief that Doe established, as a matter of law, that its actions were not the proximate cause of Plaintiffs' harm. Interboro's argument is untenable because Doe was resolved on but for causation, 914 F.Supp. at 103, and did not address proximate causation.

factual development.⁶ Therefore, the court declines to dismiss the Due Process claim on this ground.

The third part of the test is whether there existed some relationship between the state and Plaintiff. Morse, 132 F.3d at 912. The relationship that is required is not identical to the special relationship required under the special relationship theory of liability. Id. Instead, the question for the state-created danger theory of liability is whether Plaintiff ““was a foreseeable victim of the defendant’s acts in a tort sense.”” Id. (quoting Kneipp, 95 F.3d at 1209 n. 22). To satisfy this requirement, Plaintiff must be “a member of a discrete class of persons subjected to the potential harm brought about by the state’s actions.” Morse, 132 F.3d at 913. This is necessary so that state actors are not held liable simply for risks of harm which are posed to the public at large. Id.

Plaintiffs maintain that the risk of harm Interboro created was indeed limited to a discrete class of persons, namely young students who would unknowingly be exposed to Friedrichs’s future pedophilia. Interboro counters that the required contact does not exist because Michael was not born at the time Interboro acted. At oral argument Interboro also argued that it was not liable under this part of the test because it owed no duty to an out-of-state student like Michael, and because Michael never had any knowledge of Interboro’s two letters until after Friedrichs had harmed Michael.

Interboro’s arguments misunderstand the relationship requirement. What is required is that the complaint allege that Michael was part of a discrete class of persons subject to the potential harm brought about by Interboro’s actions. Morse, 132 F.3d at 913. Here, the potential harm was that Friedrichs would abuse other children who were his students. Michael was one of those unfortunate

⁶In Morse, the Third Circuit was able to conclude on a motion to dismiss that no state defendant acted with deliberate indifference because the court had found, as a matter of law, that the plaintiff’s harm was not foreseeable. Morse, 132 F.3d at 910. Here, the Court has found that Michael’s harm was foreseeable and so this case is distinguishable from Morse and resolution of the second part of the test at this stage of the litigation is not appropriate.

students. Thus, Michael was part of the relevant discrete class.

The fourth part of the test is whether the state actor used his authority to create an opportunity which otherwise would not have existed for the specific harm to occur. Morse, 132 F.3d at 914. This part of the test requires determining whether the state has placed Plaintiff in a dangerous position that was foreseeable. Id. at 915. That is, the Court must determine whether Interboro created a dangerous situation or made Plaintiff more vulnerable to danger than if Interboro had done nothing. Gremo, 363 F. Supp. 2d at 789 (citing Kneipp, 95 F.3d at 1209)).

Plaintiffs argue that Interboro clearly created a danger to Michael by concealing Friedrichs's pedophilia and aiding Friedrichs in finding a new teaching position. In the complaint, Plaintiffs allege that the Fayette County school district relied upon the 1974 and 1975 correspondence from Interboro to hire Friedrichs. That correspondence failed to disclose Friedrichs's prior pedophilia. Plaintiffs argue that, if Interboro had revealed Friedrichs's pedophilia, Friedrichs would not have been hired by the Fayette County school district, let alone any other school district. In the Court's view, the allegations in the complaint allow for the reasonable inference that Friedrichs was hired by the Fayette County school district because Interboro concealed his past pedophilia. Whether the Fayette County school district actually would have hired Friedrichs if Interboro had revealed his past pedophilia seems unlikely but it is an issue that may be pursued in discovery. Therefore, the court declines to dismiss the Due Process claim on this ground.

Interboro also argues that, as a municipal entity, it is immune from punitive damages in § 1983 cases. Plaintiffs concede that the Supreme Court precedent that is directly on point, City of Newport v. Fact Concerts, 453 U.S. 247 (1981), supports Interboro's argument. Nonetheless, Plaintiffs argue that the Supreme Court's recent decision in Cook County v. U.S. ex rel. Chandler,

538 U.S. 119 (2003) calls the continued viability of City of Newport into question.

The Court concludes that City of Newport still governs the question of whether municipal entities are subject to punitive damages and it holds that they are not. Cook County does not purport to overrule City of Newport. Indeed, Cook County, which concerns whether a municipality is a person under the False Claims Act, not the extent of municipal liability under § 1983, notes that the rule of City of Newport is still valid. See Cook County, 538 U.S. at 129. Therefore, Plaintiffs' claim for punitive damages against Interboro is dismissed.

B. RICO Claim

In Count 2 of the Complaint, Plaintiffs raise a claim under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. §§ 1961-68, against both Defendants. Interboro argues that the Third Circuit has expressly held that municipal entities are not subject to civil liability under RICO. Plaintiffs concede that the Third Circuit decision, Genty v. Resolution Trust Corp., 937 F.2d 899 (3d Cir. 1991), would bar their RICO claim. However, they argue that Genty's rationale is based on City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) and that City of Newport has been undermined by a subsequent decision, Cook County v. U.S. ex rel. Chandler, 538 U.S. 119 (2003). Thus, they argue Genty is no longer good law and their RICO claim against Interboro should proceed.

Genty concluded that municipalities could not be civilly liable under RICO because civil RICO liability mandates treble damages, which are punitive in nature. Genty, 937 F.2d at 914. The court so held because it did not believe that Congress intended to abrogate the long-standing common law principle prohibiting punitive damage awards against municipalities. Id. In the course of its decision, the court cited City of Newport as reflecting this common law principle. Id. at 910.

The court also noted that it was not always the case that a statute which mandated multiple damages was punitive. Id. at 912 n.7 (citing United States v. Bornstein, 423 U.S. 303 (1976)). As an example, the court cited the multiple damages provision contained in the False Claims Act, which the Supreme Court has viewed as compensatory, not punitive.⁷ Id. This example is relevant to Plaintiffs' argument because the case they rely upon, Cook County, concerns the False Claims Act.

In Cook County, the Supreme Court concluded that a municipality was a person subject to liability under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-33. Cook County, 538 U.S. at 122. In the course of reaching this decision, the Supreme Court addressed whether the treble damages provision in the FCA was punitive. Id. at 129-34. The Supreme Court reaffirmed the common law principle that municipalities are not subject to punitive damages, which it had recognized in City of Newport. Id. at 129. The Supreme Court then explained that the FCA's treble damages provision was not completely punitive, given the qui tam nature of FCA actions. Id. at 130. That is, in FCA cases, the government might have to remit up to 30% of its damage award to private plaintiffs. Id. at 131. Even if there is no qui tam realtor to pay, the treble damage feature might still possess a make-whole feature because the FCA contains no provision for pre-judgment interest, which is considered essential to compensation, and which might be substantial because the FCA has a long statute of limitations. Id.

The Court concludes that Plaintiffs' argument lacks merit for two reasons. First, Cook County does not undermine City of Newport, but instead, Cook County reaffirms the common law

⁷At the time Bornstein was decided, the False Claims Act mandated double damages. Genty, 937 F.2d at 912 n.7. However, at the time Cook County was decided, the False Claims Act allowed for treble damages, which could be reduced to double damages if the defendant cooperated. Cook County, 538 U.S. at 122-23 (citing 31 U.S.C. § 3729(a)).

principle that municipalities are immune from punitive damages. Cook County, 538 U.S. at 129. Second, Cook County explains why the FCA's treble damages feature is not necessarily punitive in nature. Id. at 130-32. This serves to distinguish the FCA from RICO, a point the Third Circuit noted in Genty. Genty, 937 F.2d at 912 n.7. Thus, the Court concludes that Genty is still good law and will dismiss Plaintiffs' RICO claim (Count 2) against Interboro.

Castle also argues that Plaintiffs fail to state a RICO cause of action because they have not alleged a pattern of racketeering activity. The Court need not address this argument because the Complaint contains another, fundamental flaw. The Complaint seeks to recover RICO damages for personal injuries Plaintiffs suffered.⁸ However, the statute expressly authorizes a civil RICO cause of action only to remedy injuries to business or property. 18 U.S.C. § 1964(c). The Third Circuit has construed this provision strictly and has held that a plaintiff cannot pursue a personal injury claim under RICO. Genty, 937 F.2d at 918-19; see also Giannone v. Ayne Institute, 290 F. Supp. 2d 553, 565 (E.D. Pa. 2003). Therefore, the Court dismisses Plaintiffs' RICO claim (Count 2) in its entirety.

C. State Law Claims

Plaintiffs allege state law tort claims of breach of the duty to warn (Count 1), intentional infliction of emotional distress (Count 5) and assault and battery (Count 6). Defendants present several reasons why these state law tort claims should be dismissed. They argue that: (1) the claims are barred by Pennsylvania's Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa. Cons. Stat. Ann. §§ 8541-64; (2) Plaintiffs cannot establish proximate cause; (3) Carolyn states no claims

⁸Count 2 of the complaint actually states "plaintiff" without identifying Michael or Carolyn. (Third Am. Compl. ¶¶ 36, 38.) Since it will not make any difference to the disposition of the RICO claim, the Court assumes that Plaintiffs intended to refer to both Michael and Carolyn.

against them; (4) to the extent Carolyn does state claims against them, the claims are barred by the statute of limitations; and (5) Plaintiffs have failed to state claims based on duty to warn, intentional infliction of emotional distress and assault and battery. The Court will begin by addressing Defendants' argument concerning the PSTCA.

1. Political Subdivision Tort Claims Act

Defendants argue that Plaintiffs' state law tort claims (Counts 1, 5 and 6) are barred by the PSTCA. Plaintiffs argue that they have alleged Castle's actions constitute willful misconduct such that he loses the immunity provided by the PSTCA.

a. Interboro

Plaintiffs allege that Interboro is liable for the torts committed by Castle and the Interboro superintendent. However, Interboro is immune from liability on Plaintiffs' state law tort claims because: (1) under the PSTCA, municipalities are immune from the intentional torts committed by their employees,⁹ see Lakits v. York, 258 F. Supp. 2d 401, 405 (E.D. Pa. 2003); and (2) the negligent acts performed by Castle and by Interboro's superintendent are not ones covered by the PSTCA's limited waiver of municipal immunity.¹⁰ See 42 Pa. Cons. Stat. Ann. § 8542(b); Lakits, 258 F. Supp.

⁹Intentional infliction of emotional distress and assault and battery are intentional torts.

¹⁰Plaintiffs' failure to warn claim sounds in negligence. See R.W. v. Manzek, 888 A.2d 740, 746, 747 (Pa. 2005). The PSTCA allows for municipal liability for negligence committed by a municipal employee with respect to: (1) operation of a municipality's motor vehicle; (2) care, custody or control of personal property of other in the possession or control of the municipality; (3) care custody or control of the municipality's real property; (4) care custody or control of the municipality's trees, traffic controls and street lighting; (5) dangerous condition of the municipality's utility service facilities; (6) dangerous condition of the municipality's streets; (7) dangerous condition of the municipality's sidewalks; and (8) care, custody and control of the municipality's animals. 42 Pa. Cons. Stat. Ann. § 8542(b). Castle's action and the Interboro superintendent's action, which were writing letters, do not involve any activities covered by § 8742(b).

2d at 406. Therefore, all of Plaintiffs' state law tort claims (Counts 1, 5 and 6) against Interboro are dismissed.

b. Castle

The PSTCA provides that Castle's liability for negligence is the same as that of Interboro. See 42 Pa. Cons. Stat. Ann. § 8545. In addition, Castle may raise the defense of official immunity with respect to any negligence claim for which Interboro may be liable pursuant to 42 Pa. Cons. Stat. Ann. § 8542(b). See 42 Pa. Cons. Stat. Ann. § 8546. However, if Castle's acts constitute a crime, actual fraud, actual malice or willful misconduct, he loses the immunity provided by the PSTCA. See 42 Pa. Cons. Stat. Ann. § 8550. It has been held that an intentional tort constitutes willful misconduct. See Lakits, 258 F. Supp. 2d at 405.

Plaintiffs' failure to warn claim sounds in negligence. See R.W. v. Manzek, 888 A.2d 740, 746, 747 (Pa. 2005). As explained above, this negligence claim is one for which Interboro is not liable under 42 Pa. Cons. Stat. Ann. § 8542(b). Therefore, like Interboro, Castle is not liable for this claim. See 42 Pa. Cons. Stat. Ann. § 8545. Plaintiffs' other claims, assault and battery and intentional infliction of emotional distress, are intentional torts. Castle is not entitled to immunity under the PSTCA with respect to those claims. See Gremo, 363 F. Supp. 2d at 793 (citing 42 Pa. Cons. Stat. Ann. § 8550). The Court will now consider Castle's other arguments with respect to Plaintiffs' intentional torts.

2. Assault and Battery

In Count 6, Plaintiffs allege that Castle is liable for the intentional tort of assault and battery. However, Plaintiffs do not allege that Castle assaulted or battered Michael, that he was present when Friedrichs assaulted and battered Michael in 1997, or that he instructed or encouraged Friedrichs to

assault and batter Michael in 1997. See Lakits, 258 F. Supp. 2d at 407-08 (listing the elements for assault and battery). Based on the allegations in the Complaint, Castle cannot be liable for assault and battery. Plaintiffs seek to avoid this result by arguing that Castle aided and abetted Friedrichs. They rely upon a federal criminal case, United States v. Peoni, 100 F.2d 401 (2d Cir. 1938), to support their claim that aiding and abetting an assault or battery does not require the elements identified in Lakits. The flaw in Plaintiffs' argument is that Peoni did not construe Pennsylvania law at all, whereas Lakits does. Since it did not, Peoni is inapposite. The Court concludes that Plaintiffs' can prove no set of facts consistent with the allegations in the Complaint that would entitle them to relief. Therefore, Plaintiffs' assault and battery claim (Count 6) against Castle is dismissed.

3. Intentional Infliction of Emotional Distress

In Count 5 of the Complaint, Plaintiffs allege that Castle subjected them to intentional infliction of emotional distress by writing the letter which caused the Fayette County school district to hire Friedrichs, which in turn allowed Friedrichs to sexually abuse Michael and sexually abuse and kill his friend, Jeremy Bell. The Supreme Court of Pennsylvania has not yet decided whether it will adopt this tort, which is contained in Section 46 of the Restatement (Second) of Torts, as the law of Pennsylvania. See Taylor v. Albert Einstein Med. Ctr., 754 A.2d 650, 652 (Pa. 2000); Hoy v. Angelone, 720 A.2d 745, 753 n.10 (Pa. 1998). Nonetheless, the Third Circuit has predicted that the state supreme court will someday recognize this tort as the law of Pennsylvania and looks to Pennsylvania cases to determine the state of intentional infliction of emotional distress law.¹¹ See Clark v. Township of Falls, 890 F.2d 611, 623 (3d Cir. 1989). The Third Circuit has identified the

¹¹This Court is bound to follow the Third Circuit's prediction unless the state supreme court actually holds that it will not adopt the tort of intentional infliction of emotional distress as the law of Pennsylvania. See e.g., Sprague, Levinson & Thall v. Advest, 623 F. Supp. 11, 14 (E.D. Pa. 1985).

four elements of the tort as: (1) extreme and outrageous conduct; (2) conduct which is intentional or reckless; (3) conduct which causes emotional distress; and (4) emotional distress which is severe. Williams v. Guzzardi, 875 F.2d 46, 52 (3d Cir. 1989). The state supreme court has explained that the elements of the tort require the plaintiff to show that the defendant's actions were outrageous, extreme and beyond the bounds of decency. Hoy, 720 A.2d at 754. Tortious, malicious or criminal intent alone are not enough. Id. Further, the plaintiff must present expert medical evidence to support a claim of emotional distress. Kazatsky v. King David Memorial Park, Inc., 527 A.2d 988, 995 (Pa. 1987). In addition, if a plaintiff seeks to recover for intentional infliction of emotional distress when the victim of the outrageous conduct is not the plaintiff but, instead, is a third person, the plaintiff must have observed the outrageous conduct being performed. Taylor v. Albert Einstein Medical Center, 754 A.2d at 652-53.

Plaintiffs allege that Castle's decision to write the 1974 reference letter which concealed Friedrichs's alleged, prior pedophilia caused Michael's harm. This letter was not directed at Plaintiffs, nor do Plaintiffs allege that they knew about it before Friedrichs abused Michael in 1997.¹² With respect to Carolyn's claim, her failure to allege that she knew of Castle's letter and her failure to allege that she actually saw Friedrichs abuse Michael means that she could not possibly establish an intentional infliction of emotional distress claim against Castle.¹³ See Taylor, 754 A.2d at 652-53. Thus, the Court will address the claim of harm to Michael.

¹²The Complaint does not specify when Plaintiffs learned of Castle's 1974 letter.

¹³Although the Plaintiffs have not briefed the question, the Court assumes for the purpose of resolving Carolyn's claim that, if Carolyn had witnessed Friedrichs's 1997 act of abusing her son Michael, Castle could be held liable for the emotional distress Friedrichs's 1997 act of abusing Michael caused her.

The first question raised by Michael's claim is whether a school official's decision to write a letter in 1974 which concealed a teacher's pedophilia would have been considered by society as being outrageous in 1974. It is this court's role to initially determine whether Castle's conduct could reasonably be regarded as so extreme and outrageous that it could permit recovery. Miller v. Hoffman, Civ. A. No. 97-7987, 1999 WL 415397, at *8 (E.D. Pa. June 22, 1999) (citing Restatement (Second) of Torts, § 46 cmt. h (1965) and Motheral v. Burkhart, 583 A.2d 1180, 1188 (Pa. Super. 1990)). In 1974, Pennsylvania law did impose a duty on teachers to report child abuse.¹⁴ This reporting requirement did not specifically mention sexual abuse. For this reason, there may be some question whether Castle was required to report Friedrichs's pedophilia. However, Castle did have the more general duty to report abuse of his students in 1974. Therefore, the Court concludes that Plaintiff's have pled sufficient facts which would allow a reasonable jury to conclude that Castle's decision to conceal Friedrichs's pedophilia, rather than to report it, was outrageous.

Michael's claim still faces difficulty based on: (1) the lengthy delay between Castle's action in writing the 1974 letter and Michael's harm in 1997; and (2) the existence of other factors which also contributed to Michael's harm. These issues raise the question of whether a jury could fairly conclude that Castle's action was the proximate cause of Michael's emotional distress.

Pennsylvania courts use Section 433 of the Restatement (Second) of Torts to determine

¹⁴The parties did not initially address whether, in 1974, there was some requirement on teachers or school officials to report sexual abuse of children rather than to conceal it. However, in their supplemental brief Plaintiffs did address how, in 1967, Pennsylvania first required doctors to report child abuse or neglect. See Act No. 91 of 1967, § 3. This requirement was extended to teachers when the 1967 act was amended in 1970. See Act No. 299 of 1970, § 3. In 1975, a new reporting statute was enacted and this statute explicitly required teachers and school officials to report sexual abuse of students. See Act No. 124 of 1975, § 4(c). The current statute also requires teachers and school officials to report sexual abuse of students. See 23 Pa. C.S.A. § 6311.

whether a defendant's conduct is the proximate cause of a plaintiff's injury. Brown v. Philadelphia College of Osteopathic Medicine, 760 A.2d 863, 869 (Pa. Super. 2000). Section 433 provides:

The following considerations are in themselves or in combination with one another important in determining whether the actor's conduct is a substantial factor in bringing about harm to another:

(a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;

(b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;

(c) lapse of time.

All of these factors are relevant to Michael's claim. According to the allegations in the complaint, Castle's 1974 letter, the Interboro superintendent's 1975 letter, the Fayette County school district's decision to hire Friedrichs in 1975 and Friedrichs's 1997 sexual abuse of Michael and sexual abuse and murder of Michael's friend, Jeremy Bell, all contributed to cause Michael's alleged emotional distress. Of these factors, any reasonable person would conclude that the most direct and most important factor in causing Michael's emotional distress was Friedrichs's 1997 sexual abuse of Michael and his sexual abuse and murder of Jeremy Bell. Castle's 1974 letter pales in comparison to Friedrichs's abusive, criminal actions. Thus, § 433(a) counsels against finding Castle's 1974 letter proximately caused Michael's emotional distress. Further, the 1974 letter did not create a force or series of forces which were in continuous and active operation until the time of Michael's harm. Instead, the 1974 letter created a situation which needed to be acted upon by the Fayette County school district and, more importantly, by Friedrichs before any harm could occur to Michael.¹⁵ Thus,

¹⁵The Court acknowledges that, based on the allegations in the complaint, the situation Castle's 1974 letter created was potentially harmful, not harmless. If it is true that Friedrichs had committed acts of pedophilia while employed by Interboro and that Castle knew of Friedrichs's acts of pedophilia at the time he wrote the 1974 letter, his letter would create a risk that other children

§ 433(b) counsels against finding that the 1974 letter proximately caused Michael's emotional distress. Finally, there is a lengthy lapse of time between Castle's 1974 letter and the harm Michael suffered in 1997. Given the lengthy delay, § 433(c) also counsels against finding the 1974 letter proximately caused Michael's emotional distress. In sum, based on the considerations raised in § 433, the Court concludes, as a matter of law, that Michael can prove no set of facts, consistent with the allegations in the complaint, to demonstrate that Castle's 1974 letter proximately caused his alleged emotional distress. Therefore, Michael's claim of intentional infliction of emotional distress (Count 5) is dismissed.

The Court grants the Motion with respect to all counts in the Complaint as against Castle. The Court also grants the Motion with respect to Counts 1, 2, 4, 5 and 6 as against Interboro. The Court denies the Motion with respect to Counts 3 and 7 as against Interboro. An appropriate order follows.

would be harmed by Friedrichs. Nonetheless, for Michael's alleged harm to occur, Friedrichs would have to be hired by another school district and Friedrichs would then have to abuse Michael and Jeremy Bell. These two, later events are not part of a continuous and active operation, rather, they are discrete events.

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

MICHAEL VINCENT PASCOCCIELLO and	:	CIVIL ACTION
CAROLYN PASCOCCIELLO	:	
	:	
v.	:	
	:	
INTERBORO SCHOOL DISTRICT and	:	
ROBERT J. CASTLE	:	NO. 05-5039

ORDER

AND NOW, this day of May, 2006, upon consideration of Defendants’ Motion to Dismiss the Third Amended Complaint (Docket No. 24), the papers filed in connection therewith, and the Oral Argument held on April 24, 2006, **IT IS HEREBY ORDERED** that the Motion is granted in part and denied in part as follows:

1. Said Motion is **GRANTED** with respect to all Counts of the Complaint as against Robert J. Castle and all Counts are **DISMISSED** as against him;
2. Said Motion is **GRANTED** with respect to Counts 1, 2, 4, 5 and 6 as against Interboro School District and these counts are **DISMISSED** as against it; and
3. Said Motion is **DENIED** with respect to Counts 3 and 7 as against Interboro School District.

BY THE COURT:

s/John R. Padova

John R. Padova, J.