

KNEIPP v. TEDDER

United States Court of Appeals, Third Circuit.

Samantha KNEIPP, an incompetent person by; Ronald A. Cusack, Sr.; Rosanne M. Cusack, Individually and as Guardians; Alexander August Dalmisano, a Minor, Appellants v. Wesley TEDDER, Individually and in his Official Capacity; John Doe and Others, Individually and in their official capacities; City of Philadelphia.

No. 95-2044.

Decided: September 18, 1996

Before: BECKER and MANSMANN, Circuit Judges, and BROTMAN, District Judge.* Howard K. Trubman (argued), Philadelphia, PA, for Appellants. Michael F. Eichert (argued), Chief Deputy City Solicitor Marie C. Lasota, Assistant City Solicitor Office of City Solicitor, Philadelphia, PA, for Appellees Tedder and City.

OPINION OF THE COURT

In a civil rights complaint brought against the City of Philadelphia and certain police officers, the parents and legal guardians of Samantha Kneipp allege that late one January evening when Kneipp, in an obvious state of severe inebriation, was attempting to return on foot to her nearby apartment, the police officers stopped her and sent her on alone.

We hold that, if proven, the facts alleged will sustain a prima facie case of a violation of Kneipp's Fourteenth Amendment substantive due process right and her liberty interest in personal security under the theory that city police officers increased the risk of harm to Kneipp which ultimately resulted in the severe damages she sustained. In so holding, we adopt the "state-created danger" theory as a viable mechanism for establishing a constitutional violation under 42 U.S.C. § 1983. On remand, the municipal liability claims against the City should be reexamined by the district court in light of the appropriate legal standard.

I.1

The events leading to the tragedy that befell Samantha Kneipp began in the late evening of January 23, 1993. Samantha and her husband Joseph were returning on foot from a night of drinking at a tavern in Bucks County, Pennsylvania.² According to Joseph, Samantha was visibly intoxicated-she smelled of urine, staggered when she walked and, at times, was unable to walk without assistance. Joseph testified that he had to carry Samantha a portion of the way home.

Shortly after midnight, now January 24, 1993, Philadelphia Police Officer Wesley Tedder stopped the Kneipp's for causing a disturbance on the highway.³ At this point, the Kneipp's were only one-third of a block from their home. Unable to stand by herself, Samantha was leaning on Officer Tedder's car.⁴ Officer Tedder questioned Samantha and Joseph separately; he stated in his deposition that he smelled alcohol on Samantha and found both of them to be intoxicated. He gave Samantha instructions to go

stand somewhere, which she did not follow.⁵ Joseph told Officer Tedder that he just wanted to get his wife into their apartment.

Shortly after Officer Tedder stopped the Kneipps, three other police officers arrived separately at the scene and positioned themselves across the street from Officer Tedder.⁶ Joseph left Officer Tedder and crossed over to the other side of the street where the police cars were situated. Joseph told one of the officers that he had a babysitter watching his son and that he was supposed to be home by now. Joseph then asked the officer if he could go home, to which the officer replied, "Yeah, sure." When Joseph left to walk home, Samantha was leaning on the front of a police car in the presence of several police officers. Joseph testified that he assumed that because Samantha was drunk, the police officers were going to take her either to the hospital or to the police station. His thoughts at the time were that Samantha should not be left alone in her inebriated state and that the police officers would take care of her,⁷ so he proceeded home without her.⁸ Officer Tedder, however, sent Samantha home alone;⁹ she never reached her apartment building.¹⁰

When his wife did not return to their apartment, Joseph went out to look for her.¹¹ He saw a police car parked in a Sunoco station not far from his apartment building. As Joseph approached the car, he discovered Officer Tedder inside, and asked him if he had locked up Samantha or had taken her to the hospital. According to Joseph, Officer Tedder told him "to get out of here before he locked [him] up." Because of a previous experience with the Philadelphia police, Joseph took Officer Tedder's remark seriously and left.¹² Joseph decided to continue looking for Samantha, and as he proceeded in the direction of a neighborhood convenience store, he thought he saw someone resembling Samantha, dressed in similar clothing, getting into an orange car. Because of Samantha's previous infidelity, Joseph thought that if it were Samantha, she was cheating on him again and would return when she was done. Joseph was never certain, however, that the woman he saw entering the car was Samantha. Joseph decided to forego his search and returned home.¹³

At approximately 1:51 a.m., Officer Francis Healy responded to a radio call reporting that an individual was found unconscious at the bottom of an embankment next to a parking lot at the shopping plaza across the street from the Kneipps' home. The unconscious individual was Samantha Kneipp. Joseph was awakened around 4:00 a.m. by Officer Healy, who informed him that Samantha had fallen and was in the hospital.

As a result of her exposure to the cold,¹⁴ Samantha suffered hypothermia, which caused a condition known as anoxia.¹⁵ Consequently, the anoxia resulted in permanent brain damage impairing many basic body functions.¹⁶

Samantha's legal guardians instituted this civil rights action under 42 U.S.C. § 1983 against the City of Philadelphia and several police officers, alleging that the police officers were aware of Samantha's intoxication and "the potential for her to suffer harm because of her profoundly impaired faculties." By voluntarily assuming responsibility for her protection when they told Joseph he could leave, it was alleged that the officers affirmatively created a danger and increased the risk that Samantha might be injured when they later abandoned her. It is further alleged that the police conduct made Samantha

“more vulnerable . [by] interfer[ing] with the efforts of Joseph [] to assist his wife to safety.” Because the police officers acted with “deliberate or reckless indifference, callous disregard, or in such an arbitrary or abusive manner so as to shock the conscience,” the legal guardians maintained that Samantha was deprived of her right to substantive due process and her liberty interest in personal security in violation of the Fourteenth Amendment of the United States Constitution.

In addition, the legal guardians contended that the City of Philadelphia, by acquiescing in the longstanding policy, custom, or practice of not posting “activity credits” for taking intoxicated pedestrians into custody, and by failing to adequately train its police officers in the proper care of intoxicated persons, acted with “deliberate or reckless indifference, callous disregard, or in an arbitrary and abusive manner so as to shock the conscience,” thereby also violating Samantha's right to substantive due process and her liberty interest in personal security.¹⁷

In granting the defendants' motion for summary judgment, the district court found that the legal guardians had failed to prove a constitutional violation under either the “special relationship” test or the state-created danger theory. The court also denied a motion for reconsideration.¹⁸

The legal guardians filed a timely notice of appeal from the order of the district court. We have jurisdiction pursuant to 28 U.S.C. § 1291; we exercise de novo review of the district court's grant of summary judgment. *Ideal Dairy Farms, supra*; *Antol v. Perry*, 82 F.3d 1291, 1294 (3d Cir.1996).

II.

We begin our analysis with a discussion of the requirements for establishing a constitutional claim under 42 U.S.C. § 1983. The pertinent language of section 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 does not, by its own terms, create substantive rights; it provides only remedies for deprivations of rights established elsewhere in the Constitution or federal laws. *Baker v. McCollan*, 443 U.S. 137, 144 n. 3, 99 S.Ct. 2689, 2694 n. 3, 61 L.Ed.2d 433 (1979); *Mark v. Borough of Hatboro*, 51 F.3d 1137, 1141 (3d Cir.), cert. denied, 516 U.S. 858, 116 S.Ct. 165, 133 L.Ed.2d 107 (1995) (citation omitted). In order to establish a section 1983 claim, a plaintiff “must demonstrate a violation of a right secured by the Constitution and the laws of the United States [and] that the alleged deprivation was committed by a person acting under color of state law.” *Mark*, 51 F.3d at 1141 (quoting *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir.1993)). Here, Samantha Kneipp's legal guardians have alleged that the City and police officers¹⁹ violated Samantha's right to substantive due process guaranteed by the Fourteenth Amendment.

In *DeShaney v. Winnebago Co. Dep't of Social Serv.*, 489 U.S. 189, 197, 109 S.Ct. 998, 1004, 103 L.Ed.2d 249 (1989), the Supreme Court considered whether the due process clause of the Fourteenth Amendment imposed upon the state an affirmative duty to protect an individual against private violence where a special relationship exists between the state and the private individual. The Court found that the special relationship which would impose affirmative duties of care and protection on the state existed only in certain limited circumstances, such as when the state takes a person into its custody and holds him there against his will. *Id.* at 199-201, 109 S.Ct. at 1005-06. The Court explained:

In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf-through incarceration, institutionalization, or other similar restraint of personal liberty-which is the "deprivation of liberty" triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.

Id. at 200, 109 S.Ct. at 1006 (footnote omitted). Applying this principle to the facts in *DeShaney*, the Court did not find a due process violation as the harms suffered by the child occurred while he was in the custody of his father, not in the state's custody. *Id.* at 201, 109 S.Ct. at 1006.

In the case before us, we agree with the district court that the special relationship required by *DeShaney* did not exist between Samantha and the police officers. We disagree, however, with the holding of the district court insofar as it adds a special relationship requirement to the state-created danger theory. In *DeShaney*, the Supreme Court left open the possibility that a constitutional violation might have occurred despite the absence of a special relationship when it stated: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201, 109 S.Ct. at 1006. Several of our sister courts of appeals have cited this comment by the Court as support for utilizing a state-created danger theory to establish a constitutional claim under 42 U.S.C. § 1983. See *Uhrig v. Harder*, 64 F.3d 567, 572 n. 7 (10th Cir.1995), cert. denied, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996); *Dwares v. City of New York*, 985 F.2d 94, 99 (2d Cir.1993); *Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir.), cert. denied, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993); *Freeman v. Ferguson*, 911 F.2d 52, 55 (8th Cir.1990). Moreover, two other courts of appeals, in decisions predating *DeShaney*, recognized the state-created danger theory as a basis for establishing a constitutional claim under section 1983. See *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir.1989), cert. denied, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), cert. denied, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990).

In previous cases, we have considered the possible viability of the state-created danger theory as a mechanism for establishing a constitutional claim pursuant to 42 U.S.C. § 1983. *Mark*, 51 F.3d at 1152 (citing *D.R. by L.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1373 (3d Cir.1992) (in banc), cert. denied, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993)); see also *Brown v. Grabowski*, 922 F.2d 1097, 1114-16 (3d Cir.1990), cert. denied, 501 U.S. 1218, 111 S.Ct. 2827, 115 L.Ed.2d 997 (1991). Until now, we have not, however, been presented with the appropriate factual background to support a finding that state actors created a danger which deprived an individual of her Fourteenth Amendment right to substantive due process. Samantha Kneipp's case presents the right

set of facts which, if believed, would trigger the application of the state-created danger theory. We turn first to our previous decisions in this area.

In the 1990 case of *Brown v. Grabowski*, *supra*, Deborah Evans had been abducted and murdered by her former live-in boyfriend, Clifton McKenzie. Prior to the abduction, McKenzie had held Evans hostage for three days, during which he repeatedly threatened and sexually assaulted her. Although Evans and her family reported this information to the local police, criminal charges were never filed. Shortly thereafter, Evans was abducted and imprisoned in the trunk of her car where she froze to death. The personal representative of Evans' estate filed a civil rights complaint against the borough and employees of the police department alleging, *inter alia*, that Detective Grabowski, in failing to file criminal charges against McKenzie and in failing to inform Evans of her right as a victim of domestic violence to obtain a restraining order against McKenzie, violated her constitutional rights to due process and of access to the civil and criminal courts.

The plaintiff in *Brown* relied upon *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989), and *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir.1989), in support of her argument that the state-created danger theory was a viable basis for imposing constitutional liability under section 1983. In *Wood*, a police officer stranded the female passenger of a drunk driver along the side of the road in a high-crime area at 2:30 a.m. While undertaking the five mile walk to her home, the passenger accepted a ride from a stranger who took her to a secluded area and raped her. The Court of Appeals for the Ninth Circuit held that the plaintiff had raised a triable issue of fact as to whether the police officer “‘affirmatively placed [her] in a position of danger.’” 879 F.2d at 589-90 (citation omitted). The court further held that the plaintiff was distinguishable from the general public and, therefore, the police had a duty to offer her some degree of peace and safety. *Id.* at 590 (citing *White v. Rochford*, 592 F.2d 381, 384 & n. 6 (7th Cir.1979)).

The Court of Appeals for the Eleventh Circuit in *Cornelius* validated the use of the “special danger” theory as a basis for establishing a constitutional violation under 42 U.S.C. § 1983. In that case, Mrs. Cornelius was abducted at knife-point by two prison inmates assigned to a community work squad at the town hall where she worked. Mrs. Cornelius was held hostage and terrorized for three days before being abandoned in another state. She subsequently commenced a civil rights action against various prison and town officials, alleging they owed her a duty to assign only properly classified prison inmates, *i.e.*, nonviolent-offenders, to the community work squads and to provide adequately skilled and trained officials to supervise the prison work squads. 880 F.2d at 352. In concluding that a triable issue of fact existed precluding summary judgment, the court found that the defendants affirmatively created a dangerous situation by establishing the work squad and assigning inmates to work around town hall. *Id.* at 356. Moreover, because of her position as town clerk, Mrs. Cornelius was regularly exposed to prison work squads, thereby increasing her vulnerability to harm. *Id.* These two factors taken together “effectively operated to place [Mrs. Cornelius] in a position of danger distinct from that facing the public at large” and were sufficient to impose a duty under section 1983. *Id.* at 357.

The court of appeals in *Cornelius* also imposed a nexus element to establish a triable issue as to special danger. Citing *Martinez v. California*, 444 U.S. 277, 100 S.Ct. 553, 62 L.Ed.2d 481 (1980), the court held that there must be a sufficiently close nexus between the defendant's conduct and the plaintiff's alleged due process violation under the Fourteenth Amendment to establish a constitutional claim based on the special danger theory. 880 F.2d at 353 and 358. The court of appeals found the employees at the town hall, including Mrs. Cornelius, "were well within the identifiable radius of harm known to defendants," and thus concluded that these facts created a triable issue as to special danger. *Id.* at 359.

We found *Wood* and *Cornelius* to be distinguishable from the facts in *Brown*—in the former cases, the state defendants affirmatively acted to create the danger to the victims; the plaintiff in *Brown*, however, failed to offer any evidence that the police officers acted to create or to exacerbate the danger that the former boyfriend posed to the victim. 922 F.2d at 1116. The plaintiff demonstrated only that Detective Grabowski failed to advise the victim of her right to seek a protective order. *Id.* Thus, we concluded in *Brown* that the plaintiff had failed to establish a cognizable constitutional claim under section 1983.

In 1992, sitting in banc, we considered the state-created danger theory in *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364 (3d Cir.1992). There two female students at a public high school alleged that they were physically, verbally and sexually molested by male students in a unisex bathroom and in a darkroom, which were parts of the graphic arts classroom. The students' parents brought a civil rights action against the school district and several school officials and employees, alleging that the defendants created the danger that resulted in a violation of the plaintiffs' constitutional rights. In support of this claim, plaintiffs argued that the school defendants "created a climate which facilitated sexual and physical abuse of students" and, having thrust plaintiffs into this situation, "were obligated to protect them from violations of their personal bodily integrity by other students who were also under defendants' control." *Id.* at 1373.

In *D.R.*, we recognized that the state-created danger theory had been utilized by several courts of appeals to find a constitutional violation under section 1983 in non-custodial settings. *Id.* We read the post-*DeShaney* decisions to frame the inquiry as "whether the state actors involved affirmatively acted to create plaintiff's danger, or to render him or her more vulnerable to it." *Id.* (citation omitted). We continued that "[l]iability under the state created danger theory is predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger." *Id.* at 1374. We quoted the following comment from the Court of Appeals for the Seventh Circuit:

We do not want to pretend that the line between action and inaction, between inflicting and failing to prevent the infliction of harm, is clearer than it is. If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.

Id. (quoting *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir.1982)).

We concluded in D.R. that the facts presented did not show that the defendants created the students' danger, increased their risk of harm, or made them more vulnerable to the assaults. *Id.* Moreover, we found the state-created danger line of cases to be factually distinguishable in a critical respect: in the cases where the courts imposed a constitutional duty based on a state-created danger, the state had affirmatively acted to create the danger. *Id.* In D.R., we found that the harm to the students resulted solely from the acts of private individuals, and not from the type of intermingling between state conduct and private violence that imposed liability in *Wood* and *Cornelius*. *Id.* at 1375. The acts or omissions of the school defendants in D.R., we concluded, did not rise to the level of affirmative action required to impose liability under the state-created danger theory.²⁰

In the 1994 case of *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir.1994) (in banc) (*Fagan II*), the plaintiffs claimed their constitutional rights to substantive due process were violated when police officers recklessly conducted a high speed pursuit in violation of the Attorney General's guidelines. The plaintiffs also alleged that the municipal defendant was liable because it followed a policy of not properly training and supervising police officers in conducting high-speed pursuits, and because it followed a policy of not enforcing the pursuit guidelines. The sole issue before us was the appropriate standard by which to judge police conduct in pursuit cases alleging a violation of substantive due process. *Id.* at 1299. We held that the appropriate standard to be applied in police pursuit cases involving an alleged violation of substantive due process is the "shocks the conscience" test. *Id.* at 1303.

In *Fagan II*, we declined to consider the applicability of the *DeShaney* line of cases which imposed a constitutional duty in limited situations, i.e., special relationship or custody cases, to police pursuit cases, as this issue was not raised by the parties or addressed by the district court. *Id.* at 1308 n. 9. Moreover, the plaintiffs in *Fagan II* did not advance the state danger theory as a basis for establishing a constitutional violation. Thus, neither the district court nor our court had the opportunity in *Fagan II* to review the viability of the state-created danger theory. We believe that the *Fagan II* shocks the conscience standard is limited to police pursuit cases, and accordingly, we are not bound to follow that standard in the case before us.

In the 1995 case of *Mark v. Borough of Hatboro*, *supra*, we suggested a test for applying the state-created danger theory. We found that cases predicating constitutional liability on a state-created danger theory have four common elements:

(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; (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.

51 F.3d at 1152. We further noted that "[t]he cases where the state-created danger theory was applied were based on discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury." *Id.* at 1153. Those courts which have recognized the state-created danger theory have employed a

deliberate indifference 21 standard. *Id.* at 1152 (quoting *Johnson v. Dallas Independent School Dist.*, 38 F.3d 198, 201 (5th Cir.1994), cert. denied, 514 U.S. 1017, 115 S.Ct. 1361, 131 L.Ed.2d 218 (1995); *Wood*, 879 F.2d at 588; *Cornelius*, 880 F.2d at 350).

We again declined to adopt the state-created danger theory in *Mark* because its facts were dissimilar to the courts of appeals cases which upheld its use. *Id.* at 1152. The alleged constitutional violation in *Mark* arose from the borough's "failure to follow adequate policies to ensure that applicants to the fire department were screened sufficiently for tendencies towards arson." *Id.* at 1140. We concluded that when the alleged violation involved a policy directed at the public in general, such as the one at issue in *Mark*, the basis for the state-created danger theory was obviated insofar as the defendant lacked specific knowledge of the plaintiffs' condition, and a relationship between the defendants and plaintiffs did not exist. *Id.* at 1153.

We turn now to the unique facts presented in the case before us.

III.

We begin by applying the four common elements we set forth in *Mark* for the state-created danger theory. First, the injuries to Samantha were foreseeable—Dr. Saferstein stated in his report that at a blood alcohol level of .25%, Samantha's muscular coordination was seriously impaired. Joseph's testimony as to how he had to help his wife walk, even carry her at times, also tends to show that Samantha's ability to walk was impaired. A reasonable trier of fact could conclude that in Samantha's state of intoxication, she would be more likely to fall and injure herself if left unescorted than someone who was not inebriated. Based on the facts and inferences most favorable to the legal guardians, we hold that a reasonable jury could find that the harm likely to befall Samantha if separated from Joseph while in a highly intoxicated state in cold weather was indeed foreseeable.

Second, we find the plaintiffs have adduced sufficient evidence to raise a material issue as to whether Officer Tedder acted in willful disregard for Samantha's safety. The plaintiffs presented evidence regarding Samantha's level of intoxication and impairment; by Officer Tedder's own testimony, he admitted that he knew Samantha was drunk. Moreover, Tedder's statement that he sent Samantha and Joseph home together is contradicted by the testimony of Joseph, Officer Healy and Tina Leone.

We also believe the legal guardians have proved the third element—a relationship between the state and the person injured (here Officer Tedder and Samantha and Joseph Kneipp) during which the state places the victim in danger of a foreseeable injury.²² *Mark*, 51 F.3d at 1153. Here it is alleged that Officer Tedder, exercising his powers as a police officer, placed Samantha in danger of foreseeable injury when he sent her home unescorted in a visibly intoxicated state in cold weather. A reasonable jury could find that Officer Tedder exerted sufficient control over Samantha to meet the relationship requirement.

Finally, there is sufficient evidence in the summary judgment record to show that Officer Tedder and the other police officers used their authority as police officers to create a dangerous situation or to make Samantha more vulnerable to danger had they not intervened. The conduct of the police, in allowing Joseph to go home alone and in detaining Samantha, and then sending her home unescorted in a

seriously intoxicated state in cold weather, made Samantha more vulnerable to harm. It is conceivable that, but for the intervention of the police, Joseph would have continued to escort his wife back to their apartment where she would have been safe. A jury could find that Samantha was in a worse position after the police intervened than she would have been if they had not done so. As a result of the affirmative acts of the police officers, the danger or risk of injury to Samantha was greatly increased. Thus, we believe that a reasonable jury could find that the fourth and final requirement of Mark was satisfied here.

We find additional support for our position in the courts of appeals' decisions previously cited. See *Reed v. Gardner*, 986 F.2d at 1127 (police officer who removed a sober driver and left behind a passenger whom he knew to be drunk with the keys to the car was subject to liability under 42 U.S.C. § 1983); *Freeman v. Ferguson*, 911 F.2d at 54 (police chief, by interfering with police officers' enforcement of restraining order, created the danger which resulted in the victims' deaths and thus deprived victims of their constitutional rights); *White v. Rochford*, 592 F.2d at 385 (police officers who arrested uncle for drag racing and left minor children alone in abandoned car on the side of a busy, limited-access highway in cold weather had deprived children of their constitutional rights to personal security where the abandonment resulted in physical and emotional injury to the children).

In contrast to the above cited authority stands the en banc decision of the United States Court of Appeals for the Eighth Circuit in *Gregory v. City of Rogers, Arkansas*, 974 F.2d 1006 (8th Cir.1992), cert. denied, 507 U.S. 913, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993). In that case, the plaintiffs brought a civil rights action against the municipality and one of its police officers on the basis that defendants had a duty to provide for the safety of the passengers of a drinking group after the police arrested their designated driver on an outstanding warrant. After detaining the designated driver along the road for several minutes, the police allowed the designated driver to drive the car to the police station. The intoxicated passengers remained in the car, which was parked in front of the police station, while the designated driver cleared up the outstanding warrant inside the station with the police. After waiting approximately thirty minutes, one of the intoxicated passengers, the owner of the car, drove the car away and subsequently was involved in a one-car accident, killing himself and seriously injuring his passenger. Plaintiffs contended that the police officer actively placed the passengers in danger by permitting them to stay in the car unattended while waiting for the designated driver at the police station “ ‘in spite of their obviously intoxicated condition.’ ” *Id.* at 1009-10.

In *Gregory*, the plaintiffs' argument turned on whether the police officer knew or should have known the passengers were intoxicated. The court of appeals found that the plaintiffs failed to submit sufficient evidence which would lead a reasonable trier of fact to conclude that the police officer knew or should have known that the passengers were intoxicated and unfit to drive, and thus, upheld the district court's grant of summary judgment. The court of appeals, however, did not end its analysis there. It went on to say that even if the police officers knew the passengers were intoxicated, a reasonable jury could not find that the police officer affirmatively placed the passengers in danger by leaving them unattended in the car at the station. *Id.* at 1011. The court explained that it was the designated driver who placed the passengers in danger by leaving the keys in the car when he went into the police station. *Id.* at 1012. To impose a duty on the police to take affirmative action to protect the

passengers, the court held, would circumvent the general rule that plaintiffs do not have a constitutional right to be protected by the police against harm inflicted by third persons. *Id.* (citing *Wells v. Walker*, 852 F.2d 368, 370 (8th Cir.1988), cert. denied, 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989); *DeShaney*, 489 U.S. at 195-96, 109 S.Ct. at 1002-04).

Gregory, however, is distinguishable from this case in two respects. First the court of appeals in Gregory found that the police officer did not know that the passengers were intoxicated-neither the testimony of the witnesses, nor the behavior of the two passengers observed during the traffic stop on the roadway indicated they were intoxicated. In contrast here, Officer Tedder admitted that he knew Samantha was drunk at the time he was questioning her, and Samantha was observed staggering, walking and standing with difficulty, requiring that she lean on parked cars or be carried by her husband.

The second distinction is who created the danger-in Gregory, the court found that the third party created the danger by leaving the keys in the car; in the case before us, the police officers intervened to cut off Samantha's private source of protection by giving Joseph permission to go home alone, thereby increasing the danger that Samantha would suffer harm in her visibly intoxicated state when they abandoned her. The affirmative acts of the police officers here created a dangerous situation, requiring that they take additional measures to ensure Samantha's safety. That they failed to take the appropriate measures, knowing that Samantha was severely intoxicated, shows that the police officers acted with reckless disregard for her safety. On the other hand, the conduct of the police officer in Gregory did not rise to a level of recklessness. He did not know the passengers were drunk; nor did he take any affirmative action to create the dangerous situation-leaving the keys in the car. Put another way, the passengers in Gregory were never abandoned; all they had to do was remain in the safety of the car and await the return of their driver. Samantha, however, was isolated from her husband and then abandoned by the police. Clearly then, because of these two important distinctions, Gregory is not dispositive of the issue before us.

At oral argument, we requested counsel for both sides to submit a letter brief under Fed.R.App.P. 28(j) on the issue of whether the Philadelphia police officers have a duty to arrest an intoxicated person as a basis for imposing liability for a constitutional tort under section 1983. We are convinced, after reviewing the pertinent caselaw, that no such duty exists in Pennsylvania.²³ Even so, the failure to arrest Samantha would not give rise to a constitutional claim, as liability under section 1983 can be predicated only on violations of "federal statutory or constitutional rights under color of state law." *D.R.*, 972 F.2d at 1375 (citations omitted). The illegal conduct under the state law cannot add to or subtract from the "constitutional validity '[of a state's actions].'" *Id.* (citations omitted).

Under the particular circumstances of this case, we hold that the state-created danger theory is a viable mechanism for establishing a constitutional claim under 42 U.S.C. § 1983. When viewed in the light most favorable to the legal guardians, the evidence submitted was sufficient to raise a triable issue of fact as to whether the police officers affirmatively placed Samantha in a position of danger. The district court erred, therefore, in granting summary judgment for the defendant police officers based on its finding that a constitutional violation had not occurred.

IV.

The plaintiffs also argue that liability should be imposed under section 1983 against the City of Philadelphia for constitutional violations as a result of the City's acquiescence in the longstanding policy, custom or practice of not granting "activity credits" 24 for taking intoxicated individuals into custody, and its failure to adequately train its police officers in the proper care of intoxicated persons. By so doing, the plaintiffs contend, the City acted with "deliberate or reckless indifference, callous disregard, or in an arbitrary and abusive manner so as to shock the conscience." Consequently, Samantha's right to substantive due process and her liberty interest in personal security guaranteed by the Fourteenth Amendment were allegedly violated.

We do not believe the district court adequately considered the appropriate legal standard in granting the City's motion for summary judgment. Although we feel compelled to set forth the appropriate legal standard, we decline to rule on whether it was met here, leaving that determination to the district court in the first instance.²⁵

The Supreme Court enunciated the rule for imposing liability against a municipality under section 1983 in *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). The Court held in *Monell* that:

. a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694, 98 S.Ct. at 2037-38. Accordingly, the Supreme Court expressly rejected the imposition of section 1983 liability against a municipality on a respondeat superior theory. *Id.* at 691, 98 S.Ct. at 2036.

In *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989), the Supreme Court was asked to decide whether liability can ever be imposed against a municipality under section 1983 for constitutional violations as a result of failing to train its police officers. Mrs. Harris had been arrested and taken to the police station for processing where she "slumped to the floor" twice and spoke incoherently. Medical assistance was never sought for her. Following her release from custody, Mrs. Harris was taken to a hospital by her family, where she was diagnosed as suffering from several emotional injuries. In concluding that section 1983 liability may attach to a municipality if it had a policy or custom of failing to train its employees and that failure caused the underlying constitutional violation,²⁶ the Court rejected the City of Canton's argument that only unconstitutional policies are actionable under the civil rights statute. *Id.* at 387, 109 S.Ct. at 1203-04. As to the degree of fault required to impose liability for the municipality's inaction, the Court articulated the following rule: "the inadequacy of police training may serve as the basis for section 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came into contact."²⁷ *Id.* at 388, 109 S.Ct. at 1204 (footnote omitted). The Court further explained:

Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under § 1983. Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality—a "policy" as defined by our prior cases—can a city be liable for such a failure under § 1983.

Id. at 389, 109 S.Ct. at 1205. In addition to proving deliberate indifference, the Court held that the plaintiffs must show that the "deficiency in training actually caused the police officers' indifference to [the individual's] medical needs." Id. at 391, 109 S.Ct. at 1206.

Recently, we had the opportunity to examine the holdings of *Monell* and its progeny in *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir.1996). In *Beck*, we were asked to decide whether sufficient evidence had been presented for a jury to infer that a municipality had adopted a custom of permitting its police officers to use excessive force in the performance of their duties. Citing *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), we noted that the Supreme Court recognized a "two-path track to municipal liability under § 1983," either through government policy or custom. *Beck*, 89 F.3d at 971. We had previously set forth the parameters of a government policy or custom for section 1983 liability:

Policy is made when a "decisionmaker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well settled" as to virtually constitute law.

Beck, id. (quoting *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir.1990) (citations omitted)). Moreover, a prerequisite to establishing liability in either situation is a showing that a policymaker was responsible either for the policy or, through acquiescence, for the custom. Id. See also *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989); *Bielevicz v. Dubinon*, 915 F.2d 845, 850 (3d Cir.1990).

In order to ascertain who is a policymaker, "a court must determine which official has final, unreviewable discretion to make a decision or take action." *Andrews*, 895 F.2d at 1481. We further held in *Bielevicz* that:

Under § 1983, only the conduct of those officials whose decisions constrain the discretion of subordinates constitutes the acts of the municipality. This does not mean, however, that the responsible decisionmaker must be specifically identified by the plaintiff's evidence. Practices "'so permanent and well settled' as to have 'the force of law' [are] ascribable to municipal decisionmakers."

915 F.2d at 850 (citations omitted).

Proof only of the existence of an unlawful policy or custom is not sufficient, however, to impose municipal liability under section 1983. Id. A plaintiff must also establish that the government policy or

custom was the proximate cause of the injuries sustained. *Id.* (citation omitted). “To establish the necessary causation, a plaintiff must demonstrate a ‘plausible nexus’ or ‘affirmative link’ between the municipality’s custom and the specific deprivation of constitutional rights at issue.” *Id.* (citation omitted). To the extent that the “causal link” is not too attenuated, the jury must decide whether the government policy or custom proximately caused the constitutional violation. *Id.*

Here, the district court dismissed the municipal liability claims against the City of Philadelphia on the basis that the plaintiffs failed to establish an underlying constitutional violation pursuant to section 1983. It does not appear that, in so ruling, the district court considered the substantive elements of the municipal liability claims-whether (1) the City of Philadelphia’s training program for handling intoxicated persons was adequate; (2) if the training program was inadequate, the City was deliberately indifferent to the deficiency; and, (3) the deficiency in the training actually caused the police officers’ indifference to Samantha’s intoxication and need for assistance. The precedent in our circuit requires the district court to review the plaintiffs’ municipal liability claims independently of the section 1983 claims against the individual police officers, as the City’s liability for a substantive due process violation does not depend upon the liability of any police officer. *Fagan v. City of Vineland*, 22 F.3d 1283, 1293-94 (3d Cir.1994) (*Fagan I*) (citing *Simmons v. City of Philadelphia*, 947 F.2d 1042, 1063 (3d Cir.1991), cert. denied, 503 U.S. 985, 112 S.Ct. 1671, 118 L.Ed.2d 391 (1992)). Accordingly, on remand, the district court must evaluate the municipal liability claims in light of the standards set forth above, notwithstanding the outcome as to the claims against the individual police officers.²⁸

V.

In conclusion, we find that the evidence presented, when viewed in the light most favorable to the legal guardians, together with all reasonable inferences on their behalf, could support a jury’s verdict in their favor as to the constitutional violations alleged against the individual police officers. We will, therefore, reverse the order of the district court granting summary judgment for the defendants and remand for trial on this issue, and for further consideration of the municipal liability claims against the City of Philadelphia in light of our opinion.

FOOTNOTES

1. The relevant facts are controverted. A genuine dispute about material facts exists where the “evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). In a review of a grant of summary judgment, we are required to view the evidence presented in the light most favorable to the nonmovants, the parents and legal guardians of Samantha Kneipp, together with all reasonable inferences on their behalf. *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 743 (3d Cir.1996).

2. Joseph testified at his deposition that when he left for work at 9:00 a.m. that morning, there had been two quarts of beer in the refrigerator; however, when he got home from work, they were gone. He assumed that Samantha had consumed the beer that afternoon, thus necessitating their excursion to the tavern in the evening. Samantha is an alcoholic and had recently spent a week in a detoxification facility. The distance between the tavern and the Kneipp’s home was approximately one mile.

3. The Kneipps were quarreling over Samantha's desire to continue drinking-she wanted Joseph to buy her a six pack of beer and take it home, but he refused. Because of this, Samantha was refusing to go home.

4. Dr. Richard Saferstein, a forensic scientist, projected that Samantha's blood alcohol level at the time she was detained by Officer Tedder would have been approximately .25%, assuming she had not consumed any alcohol after she left the tavern. At this level, according to Dr. Saferstein, Samantha would have "serious incapacitation of muscular coordination, critical judgment, normal perception, and cognitive functions."

5. Officer Tedder stated in his deposition that he told them to "either knock it off or go in the house or [he] was going to take him in for intoxication."

6. One officer, Francis Healy, arrived sometime between 12:10 a.m. and 12:13 a.m. In his deposition, Officer Healy testified that when he arrived at the scene, he observed Samantha and Officer Tedder engaged in a discussion, and Tedder was telling her what to do; he did not see Joseph anywhere. Officer Healy heard Tedder tell Samantha to go home, and she turned around and started walking to what he believed to be her house. At about the same time, Officer Healy was "waived off" by Tedder and he departed at approximately 12:20 a.m.

7. A reasonable jury could believe that Joseph was correct in assuming that the police would take care of Samantha given his need to get home and care for their son. For example, when the police told Mr. Kneipp that he could go home (in response to his question), it was implicit that the police were going to take care of Mrs. Kneipp. The police were aware that Mrs. Kneipp was sufficiently intoxicated to need assistance. Given the circumstances, what could "Can I leave?" mean other than "Will you take care of my wife so I can leave?" Mr. Kneipp was not under arrest and the only thing preventing him from leaving was the need to take care of his wife. Why would he ask for permission to leave other than to indicate that he expected the police to take care of his wife? And when the police said "you can leave," that reasonably implied that they would take care of his wife. This affirmative action on the part of the police led Mr. Kneipp to leave his wife unattended, something he alleges he otherwise would not have done.

8. The fact that Joseph went home by himself is corroborated by the deposition testimony of Officer Francis Healy, and of Tina Leone, an upstairs neighbor.

9. The Police Department Incident Report completed by Officer Tedder regarding his encounter with the Kneipps on January 24, 1993 at 12:01 a.m. indicated: "Above intoxicated and causing disturbance on Hwy. Adjusted. Sent Home." Based on this statement and the testimony of other witnesses, we believe reasonable jurors could infer that Officer Tedder sent Samantha home alone. Nonetheless, whether or not Officer Tedder actually sent Samantha home is not critical to our decision since the danger was created when Samantha was separated from her private source of rescue and subsequently abandoned by the police.

10. The City and the police officers contend that Samantha may have consumed more alcohol between the time they left her on Lorry Place (which was sometime after 12:20 a.m.) and the time she was discovered at the bottom of the embankment (at 1:51 a.m.). Other than Samantha's wish to continue drinking, the municipal defendants, however, failed to present any evidence substantiating that Samantha went drinking after 12:20 a.m. on January 24, 1993. In his report as well as his deposition testimony, Dr. Saferstein stated that he had not seen any evidence in the documents he reviewed which suggested that Samantha had consumed additional alcohol after her encounter with Officer Tedder and, thus, he assumed Samantha had nothing further to drink. The district court rejected this assumption as "wildly improbable" based solely on Samantha's statement to Joseph that she wanted to continue drinking. From this the district court inferred that Samantha must have drunk some alcohol between the time of her encounter with Officer Tedder and when she was later found unconscious. In ruling on a motion for summary judgment, the district court should have viewed the evidence presented in the light most favorable to the legal guardians, together with all reasonable inferences on their behalf. The district court, however, did not apply this standard in reviewing this evidence. It was not reasonable to infer from Samantha's statement alone that she did indeed continue to drink after she encountered Officer Tedder, where there was no other evidence presented to substantiate that she, in fact, continued to drink.

11. At approximately 12:30 a.m., Tina Leone entered the front door to the duplex. Thinking it was Samantha returning home, Joseph opened the door to his apartment, only to find Tina Leone in the hallway. When Joseph discovered that she was not Samantha, he became concerned for her safety.

12. Approximately six months earlier, Joseph had a negative experience with the police which resulted in his incarceration for an eight hour period. Samantha was caught shoplifting and he had been waiting for her outside the store. The police officer told him, that if he did not pay for what she stole, he would arrest both of them. Joseph paid for the merchandise, but expressed to the police captain that he felt it was wrong that he had to pay, and he was being blackmailed and forced to pay for something that Samantha was stealing. Upon hearing this, the captain ordered the officer to take Joseph and lock him up.

13. The Kneipps' son was home alone when Joseph went out to search for Samantha.

14. The temperature reading at 11:50 p.m. on January 23, 1993 in the vicinity where Samantha was found unconscious was 34 degrees Fahrenheit.

15. Anoxia refers to a decrease in the amount of oxygen delivered to the brain.

16. The brain damage sustained by Samantha reduced her level of functioning to an extremely low level, in that she is now unable to swallow and must be fed by a feeding tube inserted into her stomach; she is virtually blind; she cannot walk or sit upright; her oral communication is dysarthric; and she suffers from bowel and bladder incontinence. Despite these physical problems, Samantha is projected to live an average life expectancy. In addition to the brain damage, Samantha also sustained a subdural hematoma, the effect of which, on her condition, was minimal.

17. In their motion for summary judgment, the City of Philadelphia and defendant police officers argued that a “special relationship,” which is required in order to invoke the protections of the due process clause, did not exist between Samantha and Officer Tedder, and thus, Samantha failed to establish a constitutional claim actionable under § 1983. The municipal defendants further argued that because the state-created danger theory had yet to be adopted by this court, the law in this area was not clearly established at the time of Samantha's accident, and therefore, Officer Tedder was entitled to qualified immunity on this claim. Even if Officer Tedder is not entitled to qualified immunity, the municipal defendants argued that Officer Tedder's actions did not shock the conscience and thus all claims under section 1983 should be dismissed. The City finally argued that the claims against it must also fail because the legal guardians did not succeed on their constitutional claims against the individual police officers.

18. The district court considered the videotape deposition of Dr. Saferstein in ruling on the plaintiffs' motion for reconsideration. Dr. Saferstein's deposition was made part of the district court record and we properly consider it on appeal.

19. The defendants have not challenged the factual basis for application of the “under color of state law” requirement here. Based on the facts before us, we believe that this has been met.

20. The conduct upon which the D.R. plaintiffs predicated the state-created danger consisted of:(1) failing to report to the parents or other authorities the misconduct resulting in abuse to plaintiffs; (2) placing the class under the control of an inadequately trained and supervised student teacher; (3) failing to demand proper conduct of the student defendants; and (4) failing to investigate and put a stop to the physical and sexual misconduct.972 F.2d at 1373.

21. In the past, we have declined to distinguish terms such as “deliberate indifference,” “reckless indifference,” “gross negligence,” or “reckless disregard” in the context of a violation of substantive due process under the Fourteenth Amendment. *Williams v. Borough of West Chester*, 891 F.2d 458, 464 n. 10 (3d Cir.1989) (citation omitted).In attempting to reconcile the shocks the conscience standard with the reckless disregard test, we noted in *Fagan II* that the reckless disregard standard appeared to apply only in those cases where the victim was in custody. 22 F.3d at 1306 (citation omitted). We further commented that the reckless disregard threshold was “appropriate in custody cases because the government has restricted an individual's liberty and thereby increased his or her vulnerability to abusive governmental action or to private harm.” *Id.* By way of analogy, the alleged constitutional violation here should also be judged by the reckless disregard standard, as the rationale for employing such a threshold in custody cases is equally pertinent to the facts before us.

22. We view the “state-created danger” relationship to be different than the “special relationship” required by *DeShaney* to impose liability under section 1983. The relationship requirement under the state-created danger theory contemplates some contact such that the plaintiff was a foreseeable victim of a defendant's acts in a tort sense. The special relationship in *DeShaney*, on the other hand, has a custodial element to it-the state must affirmatively act to restrain an individual's freedom to act on his

or her own behalf either through incarceration, institutionalization, or some other comparable limit of personal liberty. 489 U.S. at 200, 109 S.Ct. at 1005-06.

23. The parties do not disagree with our conclusion.

24. Corporal Farr explained the use of activity credits in her deposition. According to Corporal Farr, the officers are evaluated based on activity credits. Their supervisors use the credits to determine whether the officers are “doing something constructive or productive out there. They're just not riding around 8 hours doing absolutely nothing, but that's how you are evaluated based on your activity that you bring in.” She further explained that “[t]he officers get credit for making arrests but not for just bringing someone in who's intoxicated.”

25. We are cognizant of the rule that generally a court of appeals will not consider an issue which was not reviewed by the district court. *Singleton v. Wulff*, 428 U.S. 106, 120-21, 96 S.Ct. 2868, 2877-78, 49 L.Ed.2d 826 (1976); *Nelson v. County of Allegheny*, 60 F.3d 1010, 1013 n. 3 (3d Cir.1995), cert. denied, 516 U.S. 1173, 116 S.Ct. 1266, 134 L.Ed.2d 213 (1996). This rule is one of discretion as opposed to jurisdiction. *Nelson*, id. (citing *Selected Risks Ins. Co. v. Bruno*, 718 F.2d 67, 69 (3d Cir.1983)). The circumstances here simply do not compel us to pass on these questions. Rather, we leave these municipal liability issues for the district court and/or the jury to pass upon in the first instance.

26. The Supreme Court in *City of Canton* assumed that a constitutional violation had occurred under section 1983. *Id.* at 388-89 n. 8, 109 S.Ct. at 1204 n. 8. Of course, had there not been an underlying constitutional violation in the first instance, plaintiff's “failure to train” claim against the City would not stand. *Id.* See also *Collins v. City of Harker Heights*, 503 U.S. 115, 123-24, 112 S.Ct. 1061, 1067-68, 117 L.Ed.2d 261 (1992).

27. As we noted in *Mark*, some inconsistency exists in this circuit as to the standard of care to be applied to the underlying constitutional violation in policy, custom or practice cases. 51 F.3d at 1153 n. 13. In *Fagan II*, we interpreted *Collins* to hold that the appropriate test in all substantive due process cases is whether the defendant's actions shock the conscience. *Id.* (citing *Fagan II*, *supra*). In articulating the standard of care for municipal liability, however, we explained that the shocks the conscience standard applied to determine the liability of the pursuing police officers under section 1983, while a deliberate indifference standard applied to determine the municipality's liability. *Id.* (quoting *Fagan v. City of Vineland*, 22 F.3d 1283, 1292 (3d Cir.1994) (*Fagan I*)). Although *City of Canton* predated our opinions in *Fagan I & II* and the Supreme Court's decision in *Collins*, we continue to recognize the application of the deliberate indifference standard to ascertain municipality liability as the constitutional standard in failure to train police officers cases. See, e.g., *Beck v. City of Pittsburgh*, 89 F.3d 966, 972 (3d Cir.1996).

28. Judge Becker would affirm the grant of summary judgment on the municipal liability claims. In his view, under the standards announced in this opinion (which he views as correct), and on this fully developed record, there is simply no possibility that plaintiffs can prevail on their claims against the City. More specifically, Judge Becker believes there to be no evidence in the record that would justify any of the following conclusions: (1) that the City's training for handling intoxicated persons was inadequate;

(2) that the City was deliberately indifferent to any putative deficiency in the program; or (3) that any deficiency in training actually caused the police officers' indifference to Samantha's intoxication and need for assistance. More specifically, Judge Becker believes that plaintiffs' central contention, that the City committed a constitutional violation by reason of its acquiescence on the policy of not granting "activity credits" for taking intoxicated persons into custody, is fatally flawed. Since the City does not have to take intoxicated people into custody at all, there appears to Judge Becker to be no reason why it should reward its officers for doing so. Moreover, even assuming that the officers knew that Samantha was drunk and that she needed care, there appears to be scant role for training because the City has no duty to take drunk people into custody. In short, Judge Becker believes that imposing liability on the City on this record would require an unjustifiable extension of § 1983 municipal liability.

MANSMANN, Circuit Judge