IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

C.A. NO.: 10-3921

DOE,

v.

LUZERNE COUNTY

APPELLANT'S BRIEF AND APPENDIX (VOLUME ONE)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA AT
CIVIL ACTION NO.: 08-1155
THE HONORABLE A. RICHARD CAPUTO
ORDER/JUDGMENT DATED AUGUST 31, 2010

Cynthia L. Pollick, Esquire
363 Laurel Street
Pittston, PA 18640
(570) 654-9675

Attorney for Appellant
Jane Doe

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

This matter is before the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1291. On August 31, 2010, the district court granted Luzerne County and its officials' summary judgment. Doe timely filed a Notice of Appeal.

ISSUES FOR REVIEW[1]

1. Whether this Circuit will follow the 2nd, 6th, 7th, and 9th Circuits' holding that a person has a constitutional right to privacy in one's body?

2. Whether the video recording of Plaintiff naked with a sheer see-through sheet of paper wrapped around only her genital area and breasts in a shower room and subsequent dissemination of those images constituted an unconstitutional search and seizure under the Fourth Amendment and violation of privacy right under the Fourteenth Amendment?

3. Whether the district court erred when it *sua sponte* adopted a position not asserted by Defendants that there was a 'special needs exception' covering the filming of two deputies who were nude and partially nude in a medical facility's shower room?

4. Whether the district court erred by not allowing a failure to train claim to move forward since Doe showed her right to bodily privacy was violated?

[1] All issues were reserved in Plaintiff's Brief in Opposition to Summary Judgment. (DDE # 50).

STATEMENT OF THE CASE AND FACTS

Plaintiff is a Deputy Sheriff for the Luzerne County Sheriff's Department. (A620, DDE # 50-4). On September 27, 2007, Doe and her partner, Brian Szumski, were serving a body warrant at the apartment residence of David and Louis Cruz. (A623, DDE # 50-4).

Upon exiting the apartment, both deputies became aware of the fact that hundreds of fleas had infested their clothing and bodies. (A625-626, DDE # 50-4) They radioed the problem to the base and were told to proceed immediately to the Luzerne County Correctional Facility for decontamination. (A626-627, DDE # 50-4).

By the time the deputies arrived at the Correctional Facility, the fleas already were underneath their clothing, biting them. (A627, DDE # 50-4). Deputy Chief Bobbouine was on the phone with someone at the prison and told them to remain in the car for now. (A628, DDE # 50-4).

Deputy Chief Bobbouine later informed the deputies that the jail would not take them, so they were instructed to go to the Emergency Management Building ("EMA Building"). (A628, DDE # 50-4).

Deputy Chief Bobbouine later arrived at the EMA building with Chief Ryan Foy, Deputy Erin Joyce, and Deputy Michael Patterson. (A628, DDE # 50-4). Chief Foy and Deputy Chief Bobbouine exited the car and began

laughing at the Plaintiff and Szumski, while Chief Foy filmed them in the car. (A628, DDE # 50-4).

Plaintiff and Szumski continued to be bitten while in the car and asked if they could roll the windows down because of the heat. (A629, DDE # 50-4). They were laughed at and told no because the other officers did not want fleas. (A629, DDE # 50-4).

During this time at the EMA Building, Chief Foy held a video camera that was on and had a red light flashing. He circled the car, tapping on the window, laughing. Plaintiff asked him to stop videotaping and he told her to shut up because it was for "training purposes". (A630, DDE # 50-4).

Two male EMA workers finally came out and attempted to set up a decontamination shower outside. (A630, DDE # 50-4). They were unsuccessful with the setup because they were missing parts did not know how to hook it up. (A630, DDE # 50-4).

Chief Foy again proceeded to videotape and Plaintiff told him to get out of her face. (A631, DDE # 50-4). Chief Foy laughed again. (A631, DDE # 50-4). The entire stay outside of the EMA building lasted over an hour. (A631, DDE # 50-4). Numerous times throughout this period Plaintiff and Szumski were ordered to remain in the car. (A633, DDE # 50-4).

A call finally came in to Chief Foy and he told Plaintiff and Szumski to follow him. (A634, DDE # 50-4). They followed Deputy Chief Bobbouine and Chief Foy to Mercy Hospital, while Chief Foy filmed the entire ride. (A635, DDE # 50-4).

Upon arrival at the hospital, Szumski was taken first to be decontaminated. (A635, DDE # 50-4). Plaintiff finally was instructed to take off all unnecessary clothing, including socks and boots, and put them in the trunk. (A636-637, DDE # 50-4).

As she walked toward the hospital, Chief Foy started taping her again, which she again objected to. (A639, DDE # 50-4). Once again, Plaintiff told him to stop and he laughed. (A639, DDE # 50-4).

Upon entering the hospital, Plaintiff was led to the shower area, was instructed on how to use the shampoo, and showered. (A643, DDE # 50-4). Following the shower, Deputy Joyce entered the shower room to assist Plaintiff in combing her hair, while the Plaintiff kept her eyes closed to avoid burning them with the shampoo and her back was facing the door. (A643, DDE # 50-4).

During this time, Plaintiff heard Deputy Chief Bobbouine yell "'what's that shit on your back'", which she later learned was in reference to the tattoo on her shoulder. (A645, DDE # 50-4). Chief Foy chimed in, saying that they

were tattoos and Deputy Chief Bobbouine said that they were tan lines, while the Plaintiff angrily told them to get out of there. (A645, DDE # 50-4). Also, an on-looker stated that you could see her "boobies". (A665, DDE # 50-4).

Once Plaintiff was dry, Deputy Joyce told Deputy Chief Bobbouine and Chief Foy to get her some medium sized scrubs, but Plaintiff overheard them saying that she should get a 3x because she is heavy in the ass. (A646, DDE # 50-4). She was given 3x pants. (A648, DDE # 50-4).

All parties finally left the hospital, but Chief Foy informed Plaintiff and Szumski that they could not ride up front in the car because the other officers did not want fleas. (A649, DDE # 50-4).

When they arrived back at the Sheriff's office, they had to wait to be let out of the cargo area of the car. Chief Foy grabbed the video camera and started to film, saying something to the effect of "here come the fleabags." (A653, DDE # 50-4).

Following the incident, Chief Foy placed the images and video from the video camera onto his county computer, in a folder labeled "Brian's ass." (A593, DDE # 50-3). Since this was a county computer, everyone on the network could access the file. (A651, DDE # 50-4). Chief Foy later had a showing of the film he so proudly captured to numerous people employed by

Luzerne County in his office. (A695, DDE # 50-5; A651, DDE # 50-4; A734, DDE # 50-7).

Deputy Mandy Leandri initially saw some of the images of naked Szumski in Chief Foy's office and later saw the images of Plaintiff's tattoo while using Chief Foy's computer. (A734-735, DDE # 50-7). She informed Plaintiff and the then Sheriff about the video and images on her new computer that was once Chief Foy's. (A651-652, DDE # 50-4).

Plaintiff was called to Sheriff Savokinas' office where she identified five to six still pictures and a video of her bare back. (A652, DDE # 50-4). One picture was of Szumski completely naked from the back while using the shower, one frontal view of him wrapped in see-through paper, one of the two officers in the cargo area of the Expedition, one of Doe's naked back, and one of her wrapped in the paper sheer. (A652, DDE # 50-4). The only part of her covered in those photos was her buttocks. (A652, DDE # 50-4).

According to Chief Foy, Deputy Chief Bobbouine told him to film the incident for "training purposes". (A588, DDE # 50-3). Deputy Chief Bobbouine denies giving this instruction. (A695, DDE # 50-3). Nevertheless, a training video never was created from the footage. (A706, DDE # 50-5). In fact, Deputy Michael Vesek ("Vesek") witnessed the jovial nature of the filming and

stated that it did not seem like serious filming for the purpose of creating a training video. (A754, DDE # 50-8).

Chief Foy never received any type of consent from Plaintiff to film her. (A589, DDE # 50-3, A698, DDE # 50-5; A658, DDE # 50-4).

The plaintiff was subjected to numerous embarrassing comments about the video and images. (A655, DDE # 50-4). As a result of the stress and humiliation from the incident she gained a lot of weight, missed work, and had trouble sleeping. (A656, DDE # 50-4).

STATEMENT OF RELATED CASES AND PROCEEDINGS

Pursuant to LAR 28, we represent that this case has not previously been before this court.

SUMMARY OF THE ARGUMENT

A person has a privacy interest in not having their naked or semi-nude body videotaped by the government for no legitimate purpose. When supervisor, Chief Ryan Foy videotaped Plaintiff while she was being decontamined for fleas after serving a body warrant in a medical facility's shower stall with only a see-through sheet of paper covering her private parts, with an onlooker stating you can see her "boobies", Plaintiff's right to bodily privacy was violated.

When Chief Ryan Foy transferred the video of two deputies, one naked from the back while actually using the shower and Plaintiff semi-nude, to his governmental computer under "Brian's Ass" and called subordinates in his office for a personal viewing of the film he captured that day, Plaintiff's right to unreasonable search and seizure was violated.

ARGUMENT

Standard of Review

All determinations of law made by a district court are reviewed by appellate courts *de novo*. *Nutrasweet Co. v. Vit-Mar Enters.*, 176 F.3d 151, 153 (3d Cir. 1999). Summary judgment only should be granted when a reasonable jury could not find in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

In deciding the motion, the court must view all relevant facts in a light most favorable to the non-moving party. *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 278 (3d Cir. 2000). The moving party is faced with the burden of proving that there is an absence of material facts to prove the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

I. While the 2nd, 6th, 7th, and 9th Circuits have held that a person has a privacy interest in their unclothed body, this Circuit has yet to rule on this exact issue

In this case, Luzerne County through Chief Ryan Foy videotaped employees completely and partially nude while in a private medical facility being decontaminated for fleas that occurred while serving a warrant on-the-job. While the district court did not find this egregious conduct to rise to a constitutional violation, several Circuits have found otherwise holding that a person has a constitutional privacy interest in one's body.

The Second, Sixth, Seventh, and Ninth Circuits have all held that an individual has a right to bodily privacy. *Poe v. Leonard*, 282 F.3d 123 (2nd Cir. 2002); *Knisley v. Pike County Joint Vocational School District*, 604 F.3d 977 (6th Cir. 2010); *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008); *Byrd v. Maricopa County Sheriff's Dep't*, 2011 U.S. App. LEXIS 86 (9th Cir. 2011).

In *Poe*, the Second Circuit held that "… we conclude that the right to privacy in one's unclothed body extends beyond a Fourth Amendment context to the case at hand". *Poe v. Leonard*, 282 F.3d 123, 136 (2nd Cir. 2002).

In that case, a Connecticut State Trooper, Douglas Pearl, was assigned to create testing videos. *Poe*, 282 F.3d at 126. Trooper Pearl had his finance's friend play the role of a robber in one of the videos he was creating. *Poe*, 282 F.3d at 128-129. Pearl asked Poe to dress provocatively and invited her to the police academy for filming. *Poe*, 282 F.3d at 128-129. Upon arrival at the police academy,

> … wearing a skimpy low-cut blouse, Pearl suggested that she change clothing, specifically requesting that she 'lose the bra.' Pearl suggested that she change clothes in his office, told her where to stand, and left the room. Once Poe removed her shirt and bra, she noticed a video camera sitting on a shelf was videotaping her. Poe brought the tape to the CSP, which investigated the incident and terminated Pearl. *Id.*

In finding that Trooper Pearl had violated Poe's constitutional right to privacy, the 2nd Circuit reasoned:

> [w]e cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and person dignity … We do not see how it can be argued that the search of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers does not. Nor can we imagine a more arbitrary intrusion upon the security of that privacy than for a male police officer to unnecessarily photograph the nude body of a female citizen who has made complaint of an assault on her … We find that these cases, read together, are sufficiently clear in establishing that there is a right to privacy in one's unclothed or partially unclothed body …" *Poe*, 282 F.3d at 138.

Likewise, in *Knisley*, the Sixth Circuit held that "… the Supreme Court has held that '[a] search of a child's person … is undoubtedly a severe violation of subjective expectations of privacy …. [s]tudents have a significant privacy interest in their unclothed bodies." *Knisley v. Pike County Joint Vocational School District*, 604 F.3d 977 (6th Cir. 2010).

In that case, the plaintiffs were 11 high school students. *Knisley*, 604 F.3d at 978. During plaintiffs' high school nursing class, two students reported that they were missing cash, credit and gift cards to their instructor. *Knisley*, 604 F.3d at 980. Defendant had an instructor "… take the students into the restroom one at a time and have them unhook and shake their bras

underneath their tops and take their pants halfway down their thighs." *Knisley*, 604 F.3d at 980. The *Knisley* court concluded that the searches were unreasonable finding a constitutional violation. *Knisley*, 604 F.3d at 981.

Similarly, in *Michael C.,* the Seventh Circuit found a violation of the Fourth Amendment right to be free from unreasonable search when a caseworker examined minor students. *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008). In that case, a caseworker with family services was notified of an allegation of child abuse and went to the alleged victims's (minor plaintiffs who were 8 and 9 respectively) school to interview them.

During that interview, the caseworker "… asked the child to pull up his shirt, and Ian complied. … Gresbach asked Alexis to pull down her tights and lift up her dress, and Alexis did so." *Michael C.*, 526 F.3d at 1012.

The Seventh Circuit held that "… physical examinations conducted by child welfare caseworkers, that include visual examinations of portions of a child's body which are normally covered by clothing, implicate Fourth Amendment concerns, and are within the scope of searches under the amendment." *Michael C.*, 526 F.3d at 1014. The court went on to reason that "… visual observations of Ian's stomach and Alexis's legs by Gresbach to look for signs of abuse must be searches under the scope of the Fourth Amendment." *Michael C.*, 526 F.3d at 1014.

As the Seventh Circuit realized "[e]ven a limited search of a person is a substantial invasion of privacy. A search of a child's person or of a closed purse or other bad carried on her person … is undoubtedly a severe violation of subjective expectation of privacy." *Michael C.*, 526 F.3d at 1015.

Comparably, in *Byrd*, the Ninth Circuit sitting *en banc* also found a violation of constitutional right to privacy in one's body. *Byrd v. Maricopa County Sheriff's Dept.*, 2011 U.S. App. LEXIS 86 (9th Cir. 2011). In that case, Maricopa jail officials searched inmates when no emergency existed. *Byrd v. Maricopa County Sheriff's Dept.*, 2011 U.S. App. LEXIS 86 (9th Cir. 2011).

Inmate Byrd was ordered to remove all clothing except his boxers and was searched by a female cadet. *Byrd v. Maricopa County Sheriff's Dept.*, 2011 U.S. App. LEXIS 86 (9th Cir. 2011). The female cadet ordered Byrd:

> … to turn away from her, spread his feet and raise his arms above his head. Wearing latex rubber gloves, she pulled Byrd's waistband a few inches and felt the waistband to make sure nothing was hidden in it. O'Connell did not look inside Byrd's boxer shorts. … She then moved her hand from his outer thigh to the bottom of the shorts on his inner thigh and applied slight pressure to feel his inner thigh for contraband. Using the back of her hand, O'Connell moved Byrd's penis and scrotum out of the way applying slight pressure to search the area. O'Connell then searched the other side using the same technique. Finally, O'Connell placed her hand at the bottom of Byrd's buttocks and ran her hand up to separate the cheeks while applying slight pressure, to search for contraband inside his anus. O'Connell estimated that the search lasted ten to twenty seconds, and Byrd

> estimated that the search took sixty seconds. *Byrd v. Maricopa County Sheriff's Dept.*, 2011 U.S. App. LEXIS 86 (9th Cir. 2011).

The Ninth Circuit noted that " … our undisputed recognition of the 'feelings of humiliation and degradation associated with forcibly exposing one's nude body to strangers.'" *Byrd v. Maricopa County Sheriff's Dept.*, 2011 U.S. App. LEXIS 86 (9th Cir. 2011). The Ninth Circuit stated that "[w]e approach this issue by reiterating our longstanding recognition that 'the desire to shield one's unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Byrd v. Maricopa County Sheriff's Dept.*, 2011 U.S. App. LEXIS 86 (9th Cir. 2011).

Another case from the Ninth Circuit provides guidance on this issue. In *Bernhard*, the Ninth Circuit found that video surveillance of the men's locker room violated the Fourth Amendment. *Bernhard v. City of Ontario,* 270 Fed. Appx. 518 (9th Cir. 2008)(*Trujillo v. City of Ontario*, 428 F. Supp.2d 1094, 1099 (C.D. Cal. 2006)(same case just different case name on appeal).

In *Bernhard*, Detective Schneider had a personal friend install a surveillance camera in the men's locker room of the Ontario Police Department due to an alleged theft. *Trujillo*, 428 F. Supp.2d 1094, 1099 (C.D. Cal. 2006). Plaintiffs, 13 police officers, were recorded in various states of

undress at various times without their knowledge. *Trujillo*, 428 F. Supp.2d at 1000. There were no signs that the locker room was subject to videotaping. *Trujillo*, 428 F. Supp.2d at 1099.

The Ninth Circuit held that Schneider had violated the plaintiffs' Fourth Amendment rights in performing an unreasonable search. *Bernhard v. City of Ontario*, 270 Fed. Appx. 518, 519 (9th Cir. 2008). The Ninth Circuit noted that "[t]hey [plaintiffs] engaged in private activities in the locker room, such as changing clothes, using the bathroom, and showering." *Bernhard v. City of Ontario*, 270 Fed. Appx. 518, 519 (9th Cir. 2008).

As the court found, "… installing a covert video surveillance camera in the locker room, was severe." *Bernhard v. City of Ontario*, 270 Fed. Appx. 518, 519 (9th Cir. 2008). The Ninth Circuit so pointedly reasoned "… common sense dictates that reasonable persons, including police officers, do not expect to be secretly videotaped by other police officers while changing clothes in their workplace locker rooms". *Bernhard v. City of Ontario*, 270 Fed. Appx. 518, 519 (9th Cir. 2008).

The District of Columbia Court of Appeals noted "[a]nd the Court has made it clear that the "inestimable right of personal security" embodied in the Fourth Amendment "belongs as much to the citizen on the streets . . . as to the homeowner closet in his study . . . . For, as [the Supreme] Court has always

recognized, 'No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.'" *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008)(emphasis added).

As the DC Circuit emphasized:

> …. The undoing of clothing to reveal whatever is underneath to whomever happens to be on the street necessarily involves an even more serious intrusion upon the sanctity of the person. The involuntary opening of someone's clothing reveals to the world at large (not just to the searching police officer) what an individual obviously intends to keep private. *United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008)(emphasis added).

Just like the 2nd, 6th, 7th, and 9th Circuits, this Circuit should find that one has a constitutional right in one's body, and the government cannot invade that right by observing, filming, or otherwise capturing images of a person who is nude with only a see-through sheet covering her genitals and breasts. On the videotape an on-looker is heard saying you can see her "boobies". (A665, DDE # 50-4).

Common sense tells us that a person has a reasonable expectation when in a shower, and especially a private medical facility's shower room when trying to escape hundreds of fleas after being contaminated while serving a search warrant. Just as many of this Circuit's sister courts have decided this

issue in favor of bodily integrity, we request that this Circuit hold the same since the government cannot have any interest in filming nude or semi-nude workers in this situation. There is no rational reason that the government can argue against such a right since what possible training purposes does the government have in videotaping naked and partial naked employees.

II. Being videotaped in a medical decontamination shower while nude with only a sheer sheet covering one's genital and breast area by the government is humiliating and invades one's right to privacy

Plaintiff and Deputy Szumski were forced to remain in their patrol car with the windows up, while being bitten by fleas. (A629, DDE # 50-4). Despite this miserable and embarrassing situation, they were told to remain in the car while being laughed at and filmed by their Supervisors. (A629, DDE # 50-4).

Despite requests for a cessation of the filming, Chief Foy refused, citing the need to make a "training video," all the while continuing to laugh at and degrade Plaintiff and Szumski. (A631, DDE # 50-4).

Upon entering the hospital, Plaintiff was instructed to put on a blanket to ensure that no fleas jumped off her into the hospital. (A639, DDE # 50-4). She then was led to the shower area, was instructed on how to use the shampoo, and showered for fifteen to twenty minutes. (A643, DDE # 50-4).

Following her actual shower, Deputy Joyce entered the shower room to assist Plaintiff in combing her hair, while Plaintiff kept her eyes closed to avoid burning them with the shampoo. (A645, DDE #50-4).

During this time, the Plaintiff heard Bobbouine yell "'what's that shit on your back'" in reference to the tattoo on her shoulder. (A645, DDE # 50-4). Chief Foy chimed in, saying that they were tattoos and Bobbouine said that they were tan lines, while the Plaintiff told them to get out of there. (A645, DDE # 50-4). At one point, an on-looker is heard saying you can see her "boobies". (A665, DDE # 50-4).

Once the Plaintiff was dry, Deputy Joyce told Deputy Chief Bobbouine and Chief Foy to get her some medium sized scrubs, but the Plaintiff overheard them saying that she should get a 3x because she is heavy in the ass. (A646, DDE # 50-4). She was given 3x pants. (A648, DDE # 50-4).

The district court concluded that Doe's privacy was not violated at that time because "Plaintiff had her back to the door and any body part in which Plaintiff might have had a 'deeply rooted' notion of privacy was covered." (A14, DDE # 76). This reasoning ignores the fact that Plaintiff was wrapped in see-through sheet paper during this time, with an on-looker commenting that you can see her "boobies". (A665, DDE # 50-4).

In other words, although her genitals and breasts were covered by a sheet of see-through paper, she was exposed by its transparency. It is difficult to say that no reasonable jury could find that Doe had a right to keep her wet body wrapped in see-through paper away from the prying eyes of a camera owned by Luzerne County and operated by Doe's Supervisor Chief Foy.

Furthermore, this exchange led to the discovery of an extremely personal and intimate detail that Plaintiff wished to remain private. While she was in the shower, Chief Foy videotaped her in which her tattoo on her shoulder of her girlfriend's initials was clearly visible and showed these pictures to other deputies at the Sheriff's Office. (A735, DDE # 50-7).

The district court discounted this fact, concluding that "there is no evidence in the record from which a reasonable jury could imply that Plaintiff's sexual orientation was disclosed to anybody who was not already aware of her orientation." (A15, DDE # 76). This simply is not true.

Deputy Leandri specifically testified that she was shocked to see the tattoo and to learn that it bore the initials of Doe's girlfriend. (A735, A737, DDE # 50-7). Whether Leandri was aware of Plaintiff's sexuality was not in the record; however, the testimony in the record was that Leandri was shocked that Doe had a tattoo with her partner's initials. Since sexuality is an intimate detail that is entitled to privacy protection, a reasonable jury could

find this revelation to be an invasion of Plaintiff's privacy. *Sterling v. Borough of Minersville*, 232 F.3d 190, 196 (3d Cir. 2000).

Finally, the district court erred in comparing the instant situation to the privacy concerns addressed in a situation involving a prisoner. (A13, DDE # 76) (citing *Davis v. Bucher*, 853 F.2d 718, 719 (9th Cir. 1988). On its face, it seems highly counter-intuitive to compare the privacy rights of a citizen police officer to an incarcerated criminal.

In fact, the *Davis* court addressed this issue, stating that "Davis imported the photos into the prison environment, a habitat presenting an inherent risk of disclosure and a cognizable diminution in Davis' reasonable expectations of privacy." *Davis*, 853 F.2d at 720. Essentially, the *Davis* court recognized that the prisoner actively participated in the disclosure of his intimate details by bringing the pictures into what amounts to a public environment.

In contrast, Plaintiff did nothing to participate in the disclosure of her naked body with only a sheer sheet of paper wrapped around her. She merely went to work and found herself in a horribly embarrassing situation. She did not consent to any of the filming, let alone encourage it. (A630-631, A639, 658, DDE # 50-4). In the end, confiscating and disseminating pictures of a prisoner's wife does not come anywhere near the level of filming and

disseminating images of a subordinate police officer in a miserable, sweaty, flea-bitten, and unclothed state.

Ultimately, the district court significantly distorted the facts of the case and ignored other testimony that could be relied upon by the jury in favor of Plaintiff. In essence, rather than correctly viewing the facts in a light most favorable to Plaintiff, the facts actually were viewed in a light most favorable to the Defendants.

As such, Plaintiff respectfully requests that this Court apply the correct standard that should have been applied by the district court, permitting a conclusion that a reasonable jury could easily find in favor of Plaintiff.

III. Shocking degradation or egregious humiliation is not necessary for Plaintiff to state a claim, and even if it was, there was, at minimum, an issue of fact as to whether Plaintiff being videotaped while nude with only a sheer sheet covering her genitals and breasts was substantially humiliating

The district court erred by requiring, as a matter of law, Plaintiff to show "shocking degradation or egregious humiliation" to state a claim for invasion of privacy. No such rule exists, and even if it did exist, certainly a reasonable jury could conclude that having the government videotape you while in the shower stall being decontamined with only a sheer piece of paper wrapped around your genitals and breast area is humiliating.

The district court relied on this Circuit's decision in *Nunez* to find support for such a rule. However, a cursory review of this Circuit decision in *Nunez* shows that no such rule was announced. *Nunez v. Pachman*, 578 F.3d 228 (3d Cir. 2009). The only mention of "shocking degradation or egregious humiliation" was in a footnote wherein this Circuit was describing language used by the Eighth Circuit. *Nunez,* 578 F.3d at 232.

Moreover, in the *Nunez* case, the court was dealing with the right of an ex-criminal concerning the privacy of his expungment papers, which he alleged was confidential, not what is at issue in this case, which is the right to keep private one's unclothed body from governments' inspection. *Nunez,* 578 F.3d at 232-233. Consequently, the *Nunez* decision does not provide any authority for the rule used by the district court.

Nonetheless, even if this Court adopts such a severe rule being told your "fat in the ass", given 3x hospital scrubs after being inappropriately videotaped unclothed with an on-looker stating you can see her "boobies" and having an office showing of two deputies one completely nude another semi-nude is humiliating to the egregious degree, and certainly the district court should not have concluded that no one would be degraded and humiliated to a level necessary to invoke the constitution, which is impermissibly answering the question that only a jury could factually decide.

Although the district judge may not be shockingly degraded if he was videotaped by the Chief Judge with only a sheer see-through piece of paper covering his genitals, but certainly, another judge, perhaps a female, may be so degraded and feel completely violated since no one has right to videotape you without your permission in such a state and to find otherwise is to constitutionalize Defendants' egregious, illegitimate, warrantless acts.

IV. Special needs exception was not argued by Luzerne County nor is it the relevant standard for this situation

Interestingly, the district court took a position not argued by the Defendants. The district court held that Luzerne County's actions were covered by a "special needs" exception, which was not even asserted by Luzerne County as a reason to toss this lawsuit.

Nonetheless, the special needs exception cannot apply to this situation since Chief Foy had no reason "… to believe that life or limb was in jeopardy." Michael C., 526 F.3d 1008, 1016 (7th Cir. 2008). Chief Foy is heard on the videotape laughing during his filming. (A754, DDE # 50-8).

Nor was any special government need served by videotaping deputies nude and partially nude. As this Court has stated "… there are instances when a search furthers a "special governmental need" beyond that of normal law enforcement such that the search, although not supported by the typical

quantum of individualized suspicion, can nonetheless still be found constitutionally "reasonable."". *Neumeyer v. Beard*, 421 F.3d 210 (3d Cir. 2005).

However, one wonders what special government need requires the filming of two deputies in a decontamination shower room, one completely nude and another with a see-through sheet wrapped about her genitals and breasts. What was the government going to learn from that but private, intimate, personal details about the actual body's of the deputies, which ended up being replayed by Chief Foy for the whole office to view.

V. Because a constitutional injury can be found, the district court's reasoning regarding the failure to train claim must be reversed

In line with its earlier decision to dismiss all claims of constitutional violations against the Defendants, the district court concluded that "there was no ultimate constitutional injury, so there cannot be any claim for failure to train." (A18, DDE # 76). Given the above analysis, Plaintiff respectfully requests that this Court reverse this decision.

If this issue is remanded, the district court must weigh the remaining factors regarding a failure to train claim. Although an appellant court has the power to examine an issue that was not addressed by a district court, it should not do so "[w]hen the resolution of an issue requires the exercise of discretion

or fact finding." *Hudson United Bank v. Litenda Mortg. Corp.*, 142 F.3d 151, 160 (3d Cir. 1998).

The remaining analysis regarding the failure to train claim requires fact-based inquiries into the question of whether or not the County's policy of not training employees about constitutional violations involving videotaping was in deliberate indifference to the rights of many citizens who potentially could be the victim of such violations. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). Because of this need for factual analysis, the issue is best decided by the district court. *Hudson United Bank*, 142 F.3d at 160.

CONCLUSION

For the preceding reasons, Jane Doe respectfully requests that this Court reverse the District Court's grant of summary judgment and remand for further consideration.

s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire

CERTIFICATE OF BAR MEMBERSHIP

Cynthia L. Pollick, Esquire, hereby certifies that she was admitted to practice before the United States Court of Appeals for the Third Circuit on October 12, 2000.

s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire

CERTIFICATE OF WORD COUNT

Cynthia L Pollick, Esquire, hereby certifies that the foregoing Brief contains 5,567 words in compliance with 14,000 word restriction.

s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire

VIRUS CHECK CERTIFICATION

Cynthia L. Pollick, Esquire, hereby certifies that the PDF file does not contain any viruses, and it was checked by the Norton System.

s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire

IDENTICAL COMPLIANCE CERTIFICATION

Cynthia L. Pollick, Esquire, hereby certifies that the E-Brief and Hard Copies of the Brief are identical.

s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire

TABLE OF CONTENTS FOR APPENDIX

Volume One

Volume Two

Volume Three

The Employment Law Firm
Cynthia L. Pollick, LLM
I.D. No.: 83826
363 Laurel Street
Pittston, PA 18640
(570) 654-9675

Attorney for Plaintiff

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

JANE DOE	:	CIVIL ACTION – LAW
	:	
Plaintiff	:	JURY TRIAL DEMANDED
	:	
v.	:	
	:	
LUZERNE COUNTY and RYAN FOY, in his Individual Capacity, and BARRY STANKUS, in his Individual Capacity	:	
Defendants	:	NO. 3:08-CV-1155

AMENDED NOTICE OF APPEAL

Notice is hereby given that Plaintiff, Jane Doe, in the above named case, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order, Decision, and Judgment of August 31, 2010 issued by Judge A. Richard Caputo granting Defendants' summary judgment motion on Plaintiff's claim for invasion of privacy, violation of search and seizure under Federal and State laws and failure to train when Defendants videotaped and distributed electronic images of Plaintiff, who was a county sheriff's deputy and became contaminated with fleas after serving a warrant, while she was being decontaminated for fleas in the shower area of a medical facility and other times that day.

By: s/ Cynthia L. Pollick
Cynthia L. Pollick, Esquire
Pa. I.D. No.: 83826
363 Laurel Street
Pittston, PA 18640
(570) 654-9675

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

JANE DOE,

Plaintiff,

v.

LUZERNE COUNTY, RYAN FOY, in his Individual Capacity, and BARRY STANKUS, in his Individual Capacity,

Defendants.

CIVIL ACTION NO. 3:08-CV-1155

(JUDGE CAPUTO)

MEMORANDUM

Presently before the Court is Defendants' Motions for Summary Judgment. (Doc. 45.) For the reasons discussed more fully below, Defendants' motions will be granted.

BACKGROUND

1. FACTUAL BACKGROUND

A. September 27, 2007

Plaintiff, Jane Doe, was hired by Defendant Barry Stankus as a Luzerne County Deputy Sheriff in 2002.[1] (Doe Dep. 13:7-16, July 8, 2009). On September 27, 2007, Plaintiff was attempting to execute a bench warrant from a county judge. (Doe Dep. 24:19-25:25.) On that day, Plaintiff and Deputy Brian Szumski entered a residence that "was in total disarray" and discovered upon exiting the residence that they had been infested with fleas. (Doe Dep. 34:15-37:2.) Plaintiff and Szumski later contacted the sheriff's base and alerted the base that they had become contaminated with fleas. (Doe Dep. 38:25-39:1.)

[1] Defendant Stankus was the Luzerne County Sheriff on September 27, 2007; he is no longer in office. (Stankus Dep. 48:22, July 9, 2009).

Plaintiff and Szumski were told to go to the Luzerne County Correctional Facility. (Doe Dep. 42:13-15.) When they arrived at the Correctional Facility, Plaintiff and Szumski exited their police cruiser and took off their uniform shirts, bulletproof vests, and duty belts because it was a very hot day. (Doe Dep. 43:11-16.) Plaintiff and Szumski were contacted by Chief Deputy Arthur Bobbouine who told them to stay in the car until he could contact the jail to arrange decontamination; Bobbouine called them back shortly thereafter and informed them that the jail would not take Plaintiff and Szumski. (Doe Dep. 44:12-45:17.)

Plaintiff and Szumski were then directed to go to the emergency management building ("the EMA building") by Bobbouine. (Doe Dep. 46:5-13.) Bobbouine told them to stay in the car and the he would be arriving shortly; Bobbouine arrived approximately twenty minutes later with Defendant Deputy Chief Ryan Foy, Deputy Erin Joyce and Deputy Michael Patterson. (Doe Dep. 47:14-48:18.) When Foy and Bobbouine got out of the car they were laughing at Plaintiff, and Foy began videotaping Plaintiff and Szumski. (Doe Dep. 48-22-25.) Defendant Stankus testified that he ordered Foy to videotape the decontamination for training purposes. (Stankus Dep. 16:17-19, July 9, 2009.) Several people deposed, including Stankus and the Plaintiff, testified that this was the second time in recent memory that a deputy had become infested with fleas in the course of their duty. Bobbouine stated that he was not ordered by Stankus to videotape and was not aware if Stankus had ordered Foy to videotape; he further testified that he did not direct Foy to videotape. (Bobbouine Dep. 16:1-17:2, July 9, 2009.) Foy claims that Bobbouine told him to tape for training purposes. (Foy Dep. 9:12-15, July 9, 2009.) Plaintiff testified that she had no knowledge whether or not Foy had, in fact, been ordered to videotape for training purposes. (Doe Dep. 90:10-12.) Ultimately, no training video was ever made from this footage. (Stankus Dep. 16:13-16.)

Plaintiff and Szumski asked to exit the vehicle, but were told to stay in the car lest they infest the others with fleas as well. (Doe Dep. 50:3-5.) According to Plaintiff, it was Bobbouine and Foy who told her to stay in the vehicle, and Foy issued a direct order to her to stay in the car. (Doe Dep. 50:22-24.) As Plaintiff and Szumski sat in the police cruiser, EMA employees attempted to construct a decontamination shower out of PVC pipes outside the EMA building. (Doe Dep. 53:19-54:8.) The EMA employees' attempts to construct the shower were unsuccessful; Plaintiff and Szumski were waiting in the vehicle for between one and two hours while the decontamination shower was being unsuccessfully erected. (Doe Dep. 60:22-62:2.) Plaintiff testified that she became angry with the length of time she was in the car and asked to go home so that she could decontaminate herself, but was given a direct order by Foy and Bobbouine to stay in the car. (Doe Dep. 68:11-21.) While Plaintiff and Szumski were waiting for the shower to be put together at the EMA building, Bobbouine sent another deputy to purchase products to remove the fleas from the bodies and hair of Plaintiff and Szumski. (Doe Dep. 65:20-66:17.) During this time, Defendant Foy was intermittently taping the situation. (Doe Dep. 71:13-25.)

After it became clear that the attempts to construct a decontamination shower at the EMA building were unsuccessful, Plaintiff and Szumski followed Patterson, Bobbouine, Foy, and Joyce to Mercy Hospital while Foy videotaped the ride.[2] (Doe Dep. 73:16-74:18.) Upon arriving at the hospital, Plaintiff and Szumski parked and Plaintiff was told to stay in the vehicle, which she did for forty-five minutes while Szumski was decontaminated. (Doe Dep.

---

[2] Mercy Hospital's name was changed to Geisinger South by the time depositions were taken in this case, and is referred to as Geisinger South in much of the deposition testimony. (Doe Dep. 73:16-25.)

75:22-76:10.) When Szumski finished showering, Plaintiff was directed to take off her boots, socks, and any items of clothing or jewelry that she did not need to bring into the hospital. (Doe Dep. 80:19-81:2.) As Plaintiff began walking toward the hospital entrance, she noticed Defendant Foy taping her and yelled for him to turn off the camera. (Doe Dep. 87:22-88:8.) Foy gestured at Plaintiff to be quiet, laughed at Plaintiff and told her that the video was for training purposes; this was the third time during the day that Foy told Plaintiff that he was videotaping for training purposes. (Doe Dep. 89:12-24.) Before Plaintiff entered the door to the hospital she was met by Deputy Joyce,[3] who gave Plaintiff a blanket and told her to wrap the blanket around her head so that no fleas would jump off her body and into the hospital. (Doe Dep. 92:12-18.)

Plaintiff then entered the hospital vestibule wearing the blanket, work pants, and a tee shirt. (Doe Dep. 98:4-12.) Plaintiff entered the decontamination shower wearing this clothing. (Doe Dep. 102:23-25.) Deputy Joyce stood with her foot in the doorjamb with the door open approximately two inches and read Plaintiff instructions from the products that had been procured to accomplish the decontamination. (Doe Dep. 103:2-104:25.) Plaintiff was still fully clothed while Joyce read the instructions and did not disrobe until she was alone in the shower room; the door to the decontamination shower was a “heavy wooden door.” (Doe Dep. 102:15-16,109:13-19.)

After she had finished showering, Plaintiff asked, through the wooden shower door, if there were any towels and was informed that she would have to use the drying materials provided in the decontamination shower, which Plaintiff testified were “paper sheets, almost

[3] Deputy Joyce is female. (Doe Dep. 94:12.)

like when you're at a doctor's office and you sit on their bed, the paper that is down." (Doe Dep. 112:12-113:5.) Joyce then asked if Plaintiff had wrapped herself in the materials provided and was "decent" before telling her that she would have to come in to make sure that all of the fleas were out of Plaintiff's hair. (Doe Dep. 113:11-18.) Plaintiff then stepped away from the door and Joyce stepped completely into the shower room, closing the door behind her. (Doe Dep. 113:18-23.) While Joyce checked Plaintiff's hair to make sure that the fleas had been killed by the shampoo, Plaintiff stood with her back towards the door. (Doe Dep. 115:12-18.)

As she stood with her back towards the door in the shower area, she heard a male voice ask "what's that s - - t all over your back?" (Doe Dep. 115:18-20.) Plaintiff identified the voice as Bobbouine and, thinking that he was referring to fleas, brushed at her back, without turning around at any time. (Doe Dep. 116:4-9.) Foy then commented that the matter that caught Bobbouine's eye were tattoos on Plaintiff's back, and then Foy and Bobbouine commented on the tan lines on Plaintiff's back. (Doe Dep. 116:13-16.) Plaintiff yelled for Foy and Bobbouine to leave the shower area; Joyce also yelled at them, Plaintiff heard the door close, and Joyce assured Plaintiff that Foy and Bobbouine were gone. (Doe Dep. 116-18-117:21.) Plaintiff testified that during this time she never turned around, had her back facing Foy and Bobbouine the entire time, and she only saw them out of the corner of her eye as she tried to brush fleas off her back after Bobbouine commented on her tattoo. (Doe Dep. 116:19-22.) During the time Joyce was in the shower area with Plaintiff, Plaintiff was wrapped in the paper described above; the paper covered Plaintiff from the middle of her chest, past her genitals, to her thigh; a large portion of her back, legs and shoulders were left exposed. (Doe Dep. 122:22-124:7.) Plaintiff stated that, to the best of her knowledge, her

"private areas" were covered by the paper wrap, but that she could not tell if it was see-through because her eyes were being affected by the flea shampoo. (Doe Dep. 123:1-124:23.)

Deputy Joyce then left the shower and tried to find Plaintiff some clothes to wear. (Doe Dep. 119:1-3.) When Joyce came back, she asked Plaintiff what size she would take in hospital scrubs, and Plaintiff answered that she would need a medium; after Joyce exited the shower, Plaintiff overheard Foy and Bobbouine comment that "[Joyce] better ger [Plaintiff] a 3X because [Plaintiff] is a little heavy in the rear." (Doe Dep. 119:5-25.) When Joyce came back with the scrubs, Plaintiff stepped off to the side of the door, opened it slightly, stuck her wrist out, and was handed the scrubs by Joyce. (Doe Dep. 120:6-121:9.) Plaintiff then got dressed in the scrubs and exited the shower when she was fully clothed. (Doe Dep. 126:5-6; 135:14.)

Plaintiff and Szumski then rode back to sheriff's office; because their cruiser had to be fumigated to kill any fleas, they were forced to ride in the tailgate of the SUV with Joyce, Patterson, Foy and Bobbouine. (Doe Dep. 147:11-23.) Foy videotaped Plaintiff and Szumski getting out of the vehicle and said something to the effect of "here come the fleabags." (Doe Dep. 147:19-25.) As Plaintiff was in the parking lot to the sheriff's office, she encountered Stankus, who had been laughing with Bobbouine and Foy and, according to Plaintiff, walked by Plaintiff and Szumski without acknowledging them. (Doe Dep. 148:12-17.) Plaintiff was met in the parking lot by Mary Jean Farrell, who had brought clothes for Plaintiff to wear. (Doe Dep. 149:8-10.) Foy and Bobbouine told Plaintiff that she should just go home; Plaintiff went into the sheriff's office bathroom, changed clothes and went home for the day. (Doe Dep. 149:19-150:1.)

B. The Video/Photographs

At some point after these events, Defendant Foy played the videotape he made for other employees of the Luzerne County Sheriff's Office. (Doe Dep. 138:16-18.) In April 2008, Plaintiff learned from Deputy Mandy Leandri that there was a videotape and screen-shot photographs of Plaintiff on Foy's old computer. (Doe Dep. 140:7-10.) After Foy left office, Leandri was given Foy's old computer; as Leandri was exploring the files on the computer to delete any files she might not need, she came across the video and screen captures of the September 27, 2007 incident. (Doe Dep. 140:14-141:1.) Leandri contacted the new sheriff, Michael Savokinas, who then contacted Plaintiff so that she could see what was on the computer. (Doe Dep. 141:1-24.) Plaintiff testified that there were five or six still photographs and a video clip on the computer. (Doe Dep. 142:4-7.) The video clip showed Plaintiff's bare back; the photos were of Szumski naked from the back, Szumski wrapped in a light cloth that was see-through, Plaintiff and Szumski in the tailgate of the SUV, Plaintiff's bare back, and one of Deputy Joyce combing Plaintiff's hair with Plaintiff's back turned to the camera. (Doe Dep. 142-4-143:24.) None of these photographs or video showed images of Plaintiff with her buttocks, breasts, or vaginal region exposed. (Doe Dep. 144:1-13.) Plaintiff states that the video and images were place on a county-wide server, thereby making them available to any county employee,[4] but she is not sure to whom the files were actually distributed. (Doe Dep. 136:24-137:11.)

---

[4] This testimony is called into doubt by the deposition of Stephen Englot, the county's IT director, who testified that the files were not on a county-wide folder and that files could only be shared on servers within county departments, not between county departments. (Englot Dep. 39:12-15, 49:9-15, Nov. 18, 2009.) However, because this Court must examine the facts in the light most favorable to Plaintiff on summary judgment, we will assume that the images described were, in fact, on a county-wide server.

Leandri testified that shortly after the September 27, 2007 incident, Foy invited several employees into his office to view the tape. (Leandri Dep. 16:8-11, Sept. 7, 2009.) Leandri claims that she went into Foy's office, saw a video clip containing Szumski's naked buttocks, and then walked out, but never saw a video of the Plaintiff. (Leandri Dep. 17:14-16, 19:17.) When Leandri later saw the still photographs on Foy's old computer, the picture she saw of Plaintiff showed Plaintiff's shoulders with a tattoo containing Plaintiff's girlfriend's initials. (Leandri Dep. 20:8-16.)

2. PROCEDURAL HISTORY

Plaintiff filed her first Complaint on June 17, 2008. (Doc. 1.) On November 25, 2009, Plaintiff filed a Second Amended Complaint. (Doc. 29.) Plaintiff's Second Amended Complaint brought a claim for relief pursuant to 42 U.S.C. §1983 against all Defendants for violation of the Fourth Amendment and violation of privacy rights pursuant to the Fourteenth Amendment (Count I), and a claim against Luzerne County for failure to train in violation of 42 U.S.C. § 1983 (Count II). In Count I, Plaintiff alleges that "Defendants unlawfully searched and seized video images of Plaintiff" and that Defendants' "actions constitute seizure in violation of the Forth (sic) Amendment to the United States Constitutions (sic) and deprived [Plaintiff] of her right to privacy found in the Fourteenth Amendment."

On December 18, 2009, Defendant Stankus filed a Motion to Dismiss, arguing that Plaintiff's claims against him were time-barred. Both parties submitted deposition evidence with their briefs. As a result, this Court issued an order converting the 12(b)(6) motion into a motion for summary judgment.[5] (Doc. 43.) On March 29, 2010, Defendants filed a second

[5] Because this Court reaches its conclusion based on arguments presented in the second Motion for Summary Judgment, it need not reach the issues raised in the previous motion.

Motion for Summary Judgment. (Doc. 45.) The second Motion for Summary Judgment has been fully briefed and is ripe for disposition.[6]

LEGAL STANDARD

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is material if proof of its existence or nonexistence might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Where there is no material fact in dispute, the moving party need only establish that it is entitled to judgment as a matter of law. Where, however, there is a disputed issue of material fact, summary judgment is appropriate only if the factual dispute is not a genuine one. *Id.* An issue of material fact is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id*.

Where there is a material fact in dispute, the moving party has the initial burden of proving that: (1) there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. *See* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2727 (2d ed. 1983). The moving party may present its own evidence or, where the nonmoving party has the burden of proof, simply point out to the Court that "the nonmoving party has failed to make a sufficient showing of an essential

---

[6] Recently, Plaintiff was given the opportunity to provide the deposition testimony of Defendants' expert, Hunter Jones, regarding the computer images. Plaintiff presented this Court with an excerpt of that transcript in order to prove "that the material in question had been widely disseminated." (Doc. 75.) As will be discussed below, the amount of dissemination is not material to the claims asserted in this case.

element of her case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to the nonmoving party. *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988). Once the moving party has satisfied its initial burden, the burden shifts to the nonmoving party to either present affirmative evidence supporting its version of the material facts or to refute the moving party's contention that the facts entitle it to judgment as a matter of law. *Anderson*, 477 U.S. at 256-57.

The Court need not accept mere conclusory allegations, whether they are made in the complaint or a sworn statement. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990). In deciding a motion for summary judgment, "the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249.

DISCUSSION

1. COUNT I

Count I of Plaintiff's Second Amended Complaint brings a claim pursuant to 42 U.S.C. § 1983. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects, or causes to be subjected, any citizen of the United States or other persons 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. . . .

42 U.S.C. § 1983.

Plaintiff brings a claim under § 1983 for violation of her right to privacy pursuant to the substantive Due Process clause of the Fourteenth Amendment and for illegal search and seizure pursuant to the Fourth Amendment.

A. Fourteenth Amendment Privacy

The boundaries of the right to privacy have not been clearly delineated, but have definitely been extended to marriage, procreation, contraception, family relationships, and child rearing. *Sterling v. Borough of Minersville*, 232 F.3d 190, 193 (3d Cir. 2000) (citations omitted). The Supreme Court has held that the constitutional right to privacy encompasses an individual's autonomy in making choices about intimate matters and an individual's interest in avoiding the disclosure of highly personal information. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

In drawing the line about what type of information is protected from divulgence by the Constitution, the Third Circuit Court of Appeals has held that the federal constitutional right to privacy is much narrower than the right to privacy usually protected by state tort law and "shields from public scrutiny only that information which involves 'deeply rooted notions of fundamental personal interests derived from the Constitution.'" *Nunez v. Pachman*, 578 F.3d 228, 231-32 (3d Cir. 2009) (citations omitted). In order to violate a person's constitutional right to privacy, "the information disclosed must be either *a shocking degradation* or *an egregious humiliation* of [plaintiff] to further some specific state interest." *Id.* at 232 n.8 (emphasis in original).

Although there have been no cases in the Third Circuit that are directly analogous to the case at bar, two opinions from the Ninth Circuit Court of Appeals are instructive. In *York v. Story*, 324 F.2d 450, 452 (9th Cir. 1963), the plaintiff went to the police to file charges for assault, at which point one of the police officers took the plaintiff to a room at the police station, directed her to undress and then "directed [plaintiff] to assume various indecent positions, and photographed her in those positions." The police officer took the photographs despite the plaintiff's protestations that there was no need for her to be nude or assume the

positions demanded by the officer because the bruises caused by the assault she was reporting would not show. *Id.* The officer later told the plaintiff that he had destroyed the pictures because they did not come out; the photographs had, in fact, come out and the officer had circulated the pictures among the personnel of the police department. *Id.* The Ninth Circuit Court of Appeals held that the officer's actions constituted a violation of plaintiff's right to privacy, reasoning that "[t]he desire to shield one's unclothed figured from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity." *Id.* at 455.

In *Davis v. Bucher*, 853 F.2d 718, 719 (9th Cir. 1988), the plaintiff, an inmate at a Washington prison, was being scheduled for transfer and had his possessions boxed, including an envelope containing four nude photographs of his wife. The defendant, a corrections officer, removed the photos from the envelope, examined them, and then showed them to two inmates. *Id.* Months later, plaintiff became agitated when defendant attempted to serve a meal to plaintiff's cell; when asked to explain the inmate's reaction, defendant "recounted the photo incident, adding gratuitous derogatory comments about [plaintiff's wife's] anatomy" in the presence of another guard and an inmate. *Id.* The court held that injury suffered by the plaintiff was "not one of constitutional magnitude" and presented "a controversy squarely within the ambit of state tort law protections." *Id.* at 720. The court reasoned that the defendant's "conduct was tasteless, unwise, and unwarranted, but this is not the despicable and outrageous abuse of official power and invasion of carefully guarded personal modesty presented in [*York*]." *Id.* at 721.

The instant case does not fall within the zone of privacy protected by the Fourteenth Amendment. Although the supposed training video was likely ill-conceived and definitely poorly executed, Defendants actions do not rise to the level of a shocking degradation or

egregious humiliation. Like *Davis*, this is the type of "tasteless, unwise, and unwarranted" behavior that is better suited to state tort law, and does not rise to the level of a constitutional violation. For the majority of the time at issue here, Plaintiff was fully clothed; she was fully clothed as she was waiting in her police cruiser and was dressed in hospital scrubs after exiting the shower area.

While in the shower, there is no evidence that creates a genuine issue of material fact from which a reasonable jury could find that Plaintiff's right to privacy was violated. After she had finished showering, Joyce, a female, was sent in to the shower to ensure that all of the fleas had been cleaned from Plaintiff's hair and checked to make sure Plaintiff was "decent" before entering. When the door was opened for a brief period, Plaintiff had her back to the door and any body part in which Plaintiff might have had a "deeply rooted" notion of privacy was covered. Likewise there is no evidence on the record that suggests that any of the video or photographs captured by Defendant Foy exposed any body part that, as a matter of law, is covered by the rubric of privacy rights in the Fourteenth Amendment. The evidence shows that the only body part divulged by Defendants were Plaintiff's back, shoulders, and limbs. These are not body parts whose protection is deeply rooted in fundamental personal interests.

To the extent that Plaintiff is arguing that her right to avoid having her sexual orientation divulged was violated by exposing a tattoo with her girlfriend's initials, that claim also fails. *See Sterling*, 232 F.3d at 196 (holding that one's sexual orientation is an intimate aspect of one's personality entitled to privacy protection). Plaintiff's sexual orientation was not divulged by her tattoo. This case is factually distinguishable from *Sterling*, where police officers threatened to disclose plaintiff's homosexuality to his grandfather, prompting plaintiff to commit suicide. First, the disclosure at issue here involved several letters on Plaintiff's

back, not her sexual orientation. Secondly, there is no evidence in the record from which a reasonable jury could imply that Plaintiff's sexual orientation was disclosed to anybody who was not already aware of her orientation. Thus, from the record in this case, there is no genuine issue of material fact from which a reasonable jury could find that Plaintiff's right to privacy was violated. Summary judgment will be granted in favor of Defendants on this count.

B. Fourth Amendment Search/Seizure

The Fourth Amendment of the United States Constitution guarantees the "right of the people to be secure in their persons . . . against unreasonable searches and seizures." Normally, the Fourth Amendment requires the government to obtain a search warrant supported by probable cause to search a person. *Wilcher v. City of Wilmington*, 139 F.3d 366, 373 (3d Cir. 1998). However, there are a number of well-established exceptions to the warrant and probable cause requirements, including the so-called "special needs" exception. *Id.* This exception recognizes that there are certain "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (internal quotations and citations omitted). In such circumstances, the government need not show probable cause or individualized suspicion, but must only prove that the search or seizure was "reasonable." *Wilcher*, 139 F.3d at 373-74. To determine if a search or seizure is reasonable, the court must balance the "'intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *Id.* at 374 (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989)).

In *Wilcher*, the city of Wilmington, Delaware entered into a collective bargaining agreement with the firefighters' union that included provisions for urinalysis to combat drug

use among firefighters. 139 F.3d at 371. The city solicited bids from companies who specialized in drug testing and ultimately accepted the bid of a company called SODAT. *Id.* The process of urine collection employed by SODAT required the SODAT employees to look in the general direction of the firefighters as they commenced urinating, but not to focus on their genitals. *Id.* The district court's finding of facts stated that the urine collection process might have included some observation of the genital area generally, but any such observation was the byproduct of general observation of the donor. *Id.*

In holding that the method employed by the city and SODAT passed constitutional muster, the court stated:

> Because we find that SODAT's direct observation method, as described in the district court's findings of fact, meets the three elements of the Fourth Amendment reasonableness test, we hold that the plaintiffs' Fourth Amendment rights have not been violated. The City's significant interest in preserving the integrity of its firefighters' drug tests outweighs their expectations of privacy. . . . As for the female firefighters, we note the district court's finding that SODAT has taken several steps to minimize the potentially intrusive effects of having a person present in the same room during the collection of a female firefighter's urine. So long as SODAT's monitors refrain from looking at the firefighters' genitalia, its direct observation procedure remains within the boundaries of a constitutional search. Accordingly, the district court did not err when it ruled in the defendants' favor on the issue of constitutionality under the Fourth Amendment.

Id. at 378.

This Court begins its analysis by noting that the reasonableness of a search is a matter of law. *Id.* at 373. The instant case falls within the purview of the special needs exception to the warrant and probable cause requirements; although Defendants are involved in law enforcement, they were not acting in their capacity as law enforcement officials when they were trying to decontaminate one the employees of the sheriff's department who had become infested with fleas. Furthermore, this is an exceptional situation where the warrant requirement is functionally impracticable. It would be senseless to require

a governmental entity to procure a warrant from a magistrate judge before requiring their vermin-infested employees to be decontaminated. Thus, it is for this Court to determine whether, as a matter of law, the search of Plaintiff was reasonable.

Although the government's interests in this case, namely preventing the present and future spread of flea infestation, was less important than the one at issue in *Wilcher*, so too was the intrusion on Plaintiff's Fourth Amendment interests. In this case, the record shows that both the method of the intrusion and the nature of the intrusion were not as invasive as the method and nature of the direct observation urine collection at issue in *Wilcher*. There is no genuine issue of material fact on the record that a reasonable juror could rely on to find that Defendants saw Plaintiff's genitalia. When Joyce entered the shower area to check Plaintiff's hair, she did so while Plaintiff had covered up her genitalia. When Defendant Foy videotaped Plaintiff she was either fully clothed or had her genitals covered with her back toward Foy. Moreover, to the extent that Plaintiff is challenging the distribution of the photographs or video here, those challenges are not appropriately made in the context of the Fourth Amendment, but rather must be dealt with under the privacy context discussed above. *See York*, 324 F.2d at 454 (noting that distribution of nude photographs of plaintiff must be addressed through right to privacy and "could hardly be characterized as unreasonable searches").

On balance, then, the search at issue here was a reasonable one, as the Defendants' need to maintain a workplace free of flea infestation both at the time of this circumstance and in the future outweighed the intrusion of Plaintiff's Fourth Amendment rights by being videotaped and checked by a fellow female deputy in a manner that did not expose her genitals. Therefore, the Plaintiff's Fourth Amendment rights were not violated and summary judgment will be granted in favor of Defendants.

2. Count II

In Count II, Plaintiff brings a cause of action against Luzerne County based on a failure to train theory. Municipal liability can be predicated on a failure to train. In order to impose municipal liability, a plaintiff must identify a municipal "policy" or "custom" that caused the plaintiff's injury. *Monell*, 436 U.S. at 694. "Where, as here, the policy in question concerns a failure to train or supervise municipal employees, liability under section 1983 requires a showing that the failure amounts to 'deliberate indifference' to the rights of persons with whom those employees will come into contact." *Carter v. City of Philadelphia*, 181 F.3d 339, 357 (3d Cir. 1999). As the U.S. Supreme Court has explained, only in circumstances exhibiting deliberate indifference "can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989).

For a failure to train to amount to deliberate indifference, "it must be shown that (1) municipal policymakers know that employees will confront a particular situation; (2) the situation involves a difficult choice or a history of employees mishandling; and (3) the wrong choice by an employee will frequently cause deprivation of constitutional rights." *Id*. This third prong, stated another way, requires a causal nexus, in that the "identified deficiency in [the] training program must be closely related to the ultimate [constitutional] injury." *Woloszyn v. County of Lawrence*, 396 F.3d 314, 325 (3d Cir. 2005) (citations omitted).

In the instant case, there was no ultimate constitutional injury, so there cannot be any claim for failure to train. As such, summary judgment will be granted in favor of Defendant Luzerne County on this count.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted. An

appropriate Order follows.

August 31, 2010
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

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

JANE DOE,

Plaintiff,

v.

LUZERNE COUNTY, RYAN FOY, in his Individual Capacity, and BARRY STANKUS, in his Individual Capacity,

Defendants.

CIVIL ACTION NO. 3:08-CV-1155

(JUDGE CAPUTO)

ORDER

NOW, this 31st day of August 2010, **IT IS HEREBY ORDERED** that:

(1) Defendants' Motion for Summary Judgment (Doc. 45) is **GRANTED**.

(2) **JUDGMENT IS ENTERED** in favor of Defendants.

(3) The Clerk of Court shall mark this case as **CLOSED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

APPEAL, CLOSED, SCR, STANDARD

United States District Court
Middle District of Pennsylvania (Scranton)
CIVIL DOCKET FOR CASE #: 3:08-cv-01155-ARC

Doe v. Luzerne County et al
Assigned to: Honorable A. Richard Caputo
Case in other court: Third Circuit Court of Appeals, 10-03921
Cause: 42:1983 Civil Rights Act

Date Filed: 06/17/2008
Date Terminated: 08/31/2010
Jury Demand: Both
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Jane Doe represented by **Cynthia L. Pollick**
The Employment Law Firm
363 Laurel Street
Pittston, PA 18640
570-654-9675
Fax: 6545021
Email: pollick@lawyer.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

V.

Defendant

Luzerne County represented by **John G. Dean**
Elliott Greenleaf & Dean
39 Public Square
Wilkes-Barre, PA 18702
570-371-5290
Email: jgd@elliottgreenleaf.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Mark W. Bufalino
Elliott Greenleaf & Dean
39 Public Square
Suite 1000
Wilkes Barre, PA 18702
570.346.7569
Email: mbuflaw@netzero.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul A. Galante
225 Wyoming Avenue
West Pittston, PA 18643

570-655-1441
Email: pag@elliottgreenleaf.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Ryan Foy represented by **John G. Dean**
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Mark W. Bufalino
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Paul A. Galante
(See above for address)
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Defendant

Barry Stankus represented by **Mark W. Bufalino**
(See above for address)
ATTORNEY TO BE NOTICED

Paul A. Galante
(See above for address)
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
06/17/2008	1	COMPLAINT against Luzerne County, Ryan Foy (Filing fee $350, Receipt Number 1316544), filed by Jane Doe. (Attachments: # 1 Civil Cover Sheet) (kn,) (Entered: 06/17/2008)
06/17/2008		Summons Issued as to Luzerne County, Ryan Foy and provided to Attorney Pollick for service on Defendant(s). (kn,) (Entered: 06/17/2008)
06/20/2008		Case assigned to Judge Caputo. (kn,) (Entered: 06/20/2008)
06/25/2008	2	ORDER Re: Case Assignment and Procedures to Counsel of Record. Signed by Honorable A. Richard Caputo on 6/25/08. (jam,) (Entered: 06/25/2008)
06/30/2008	3	AMENDED COMPLAINT against Luzerne County, et al, filed by Jane Doe. (Pollick, Cynthia) Modified on 7/8/2008 (ep,). (Entered: 06/30/2008)
07/03/2008	4	NOTICE of Appearance by John G. Dean on behalf of Luzerne County, Ryan Foy. (Dean, John) (Entered: 07/03/2008)
07/03/2008	5	NOTICE of Appearance by Mark W. Bufalino on behalf of Luzerne County,

		Ryan Foy. (Bufalino, Mark) (Entered: 07/03/2008)
07/08/2008	6	Summons Issued as to Luzerne County, Ryan Foy (Amended Complaint) and provided to Atty. Pollick for service on Defendant(s). (ep,) (ep,). (Entered: 07/08/2008)
07/10/2008	7	WAIVER OF SERVICE Returned by Jane Doe. Luzerne County waiver sent on 7/3/2008, answer due 9/2/2008; Ryan Foy waiver sent on 7/3/2008, answer due 9/2/2008. (Pollick, Cynthia) (Entered: 07/10/2008)
09/02/2008	8	*Defendants'* ANSWER to 1 Complaint *and Affirmative Defenses* by Luzerne County, Ryan Foy.(Dean, John) (Entered: 09/02/2008)
09/16/2008	9	NOTICE of Rescheduled Case Management Conference. Case Management Conference currently scheduled for Monday, September 22, 2008 has been rescheduled to Monday, October 20, 2008 at 9:30 a.m. in Chambers, Wilkes Barre.(jam,) (Entered: 09/16/2008)
09/17/2008	10	SCHEDULING ORDER: Case Management Conference set for 10/29/2008 09:00 AM in Chambers, Wilkes-Barre before Honorable A. Richard Caputo.Signed by Honorable A. Richard Caputo on 9/17/08. (jam,) (Entered: 09/17/2008)
10/20/2008	11	CASE MANAGEMENT PLAN by Jane Doe. (Pollick, Cynthia) (Entered: 10/20/2008)
10/30/2008	13	CASE MANAGEMENT ORDER - STANDARD CASE MANAGEMENT TRACK. This case shall be placed on the November 2009 trial list of this court. Discovery due 6/1/09. Motions for joinder of parties due 5/1/09. Motions to amend pleadings due 5/1/09 as to Plaintiff. Expert witness requirements due 6/1/09 as to Plaintiff, 7/1/09 as to Defendants, Supplements due 8/3/09. Dispositive motions due 6/30/09. Disclosures due 6/30/09. A pretrial conference will be held in October 2009. Signed by Honorable A. Richard Caputo on 10/30/08. (jam,) (Entered: 10/30/2008)
04/03/2009	14	MOTION for Extension of Time to Complete Discovery by Jane Doe. (Attachments: # 1 Proposed Order)(Pollick, Cynthia) (Entered: 04/03/2009)
04/09/2009	15	CERTIFICATE of Concurrence by Jane Doe re 14 MOTION for Extension of Time to Complete Discovery. (Pollick, Cynthia) (Entered: 04/09/2009)
05/05/2009	17	AMENDED CASE MANAGEMENT ORDER - STANDARD CASE MANAGEMENT TRACK, Motions terminated: 14 MOTION for Extension of Time to Complete Discovery filed by Jane Doe. IT IS HEREBY ORDERED that the motion is granted, and the following shall constitute the Amended Case Management deadlines in this case. This case shall be placed on the February 2010 trial list of this court. All discovery to be completed by 9/1/09. Motions for joinder of parties and/or to amend pleadings shall be filed by 8/1/09. Expert witness requirements due 8/1/09 for plaintiff, 9/1/09 for defendant, supplements due 10/2/09. All dispostive motions together with supporting briefs shall be filed by 9/30/09. Disclosures shall be made by 9/30/09. A pretrial conference will be held in January 2010. Signed by Honorable A. Richard Caputo on 5/5/09. (jam,) (Entered: 05/05/2009)

06/15/2009	18	Letter from Cynthia L Pollick *RE: Telephone Conference on Discovery Dispute*. (Pollick, Cynthia) (Entered: 06/15/2009)
07/07/2009	20	Letter from Cynthia L Pollick *RE: Request for Telephone Conference*. (Attachments: # 1 Letter to OP on discovery)(Pollick, Cynthia) (Entered: 07/07/2009)
07/07/2009	21	Letter from MARK W. BUFALINO, ESQUIRE. (Attachments: # 1 Letter to Attorney Pollick-3/26/09, # 2 Letter from Attorney Pollick-4/9/09, # 3 Letter to Attorney Polick-4/13/09, # 4 Letter to Attorney Pollick-5/7/09, # 5 Letter from Attorney Pollick-6/29/09, # 6 Letter to Attorney Pollick-7/6/09)(Bufalino, Mark) (Entered: 07/07/2009)
07/10/2009	22	Unopposed MOTION for Extension of Time to Complete Discovery by Jane Doe. (Attachments: # 1 Proposed Order)(Pollick, Cynthia) (Entered: 07/10/2009)
07/17/2009	23	SECOND AMENDED CASE MANAGEMENT ORDER - STANDARD CASE MANAGEMENT TRACK, Motions terminated: 22 Unopposed MOTION for Extension of Time to Complete Discovery filed by Jane Doe. IT IS HEREBY ORDERED that Plaintiff's Motion for Extension (Doc. 22) is granted and the following shall constitute the amended deadlines in this case. This case shall be placed on the May 2010 trial list of this court. All discovery to be completed by 12/1/09. Motions for joinder of parties and/or to amend pleadings due 11/1/09. Expert witness requirements due 11/1/09 as to Plaintiff, 12/1/09 as to Defendant, and supplements due 1/2/10. Dispositive motions together with supporting briefs shall be filed by 12/30/09. Disclosures shall be made by 12/30/09. A pretrial conference will be held in April 2010. Signed by Honorable A. Richard Caputo on 7/17/09. (jam,) (Entered: 07/17/2009)
08/17/2009	24	MOTION to Compel *Electronic Material* by Jane Doe.(Pollick, Cynthia) (Entered: 08/17/2009)
11/02/2009	26	Unopposed MOTION to Amend/Correct - *File 2nd Amended Complaint* by Jane Doe. (Attachments: # 1 2nd Amended Complaint, # 2 2nd Amended Comp;aint - No underlining, # 3 Proposed Order)(Pollick, Cynthia) (Entered: 11/02/2009)
11/03/2009	27	ORDER granting 26 Plaintiff's Motion for Leave to File Amended Complaint. IT IS HEREBY ORDERED that the Motion is granted, and Plaintiff shall file and effect service of the Second Amended Complaint within thirty (30) days of the date of this Order in accordance with L.R. 15.1(a). Signed by Honorable A. Richard Caputo on 11/3/09 (jam,) (Entered: 11/03/2009)
11/25/2009	28	MOTION to Compel Discovery - *Electronic Material* by Jane Doe. (Attachments: # 1 Supplement)(Pollick, Cynthia) (Entered: 11/25/2009)
11/25/2009	29	AMENDED COMPLAINT against all defendants, filed by Jane Doe.(Pollick, Cynthia) (Entered: 11/25/2009)
11/30/2009	30	Consent MOTION for Extension of Time to Complete Discovery *File Dispositive Motions and Related Deadlines* by Luzerne County, Ryan Foy. (Attachments: # 1 Certificate of Concurrence, # 2 Proposed Order)(Bufalino,

		Mark) (Entered: 11/30/2009)
11/30/2009	31	NOTICE of Appearance by Paul A. Galante on behalf of Luzerne County, Ryan Foy. (Galante, Paul) (Entered: 11/30/2009)
12/17/2009	33	ORAL ORDER re 28 MOTION to Compel Discovery - *Electronic Material* filed by Jane Doe. Plaintiff's Motion is granted. Defendant will do search of files with qualified person (concern over deleted files). By Honorable A. Richard Caputo on 12/17/09. (jam,) (Entered: 12/18/2009)
12/17/2009	35	THIRD AMENDED CASE MANAGEMENT ORDER. Defendants' Motion for Enlargement of Time to Complete Discovery, File Dispositive Motions and Related Deadlines [Doc. 30] is granted. The Amended Case Management Plan is amended and enlarged as follows: Discovery due 2/3/10. Motions for joinder of parties due 3/2/10. Motions to amend pleadings due 3/2/10. Expert witness requirements due 3/4/10 for plaintiff, 3/29/10 for Defendants. Disclosures shall be made by 3/29/10. Dispositive motions due 3/29/10. The matter will be placed on the August 2010 trial list. A pretrial conference will be held in July 2010 at a date and time to be announced. Signed by Honorable A. Richard Caputo on 12/17/09 (jam,) (Entered: 12/18/2009)
12/18/2009	34	MOTION to Dismiss *Plaintiff's Complaint* by Luzerne County, Ryan Foy, Barry Stankus. (Attachments: # 1 Proposed Order, # 2 Certificate of Nonconcurrence)(Bufalino, Mark) (Entered: 12/18/2009)
12/18/2009	36	ANSWER to 29 Amended Complaint by Luzerne County, Ryan Foy.(Bufalino, Mark) (Entered: 12/18/2009)
12/31/2009	37	BRIEF IN SUPPORT re 34 MOTION to Dismiss *Plaintiff's Complaint* filed by Luzerne County, Ryan Foy, Barry Stankus.(Bufalino, Mark) (Entered: 12/31/2009)
01/12/2010	38	Unopposed MOTION for Extension of Time to File Brief to 37 Brief in Support filed by Jane Doe. (Attachments: # 1 Proposed Order)(Pollick, Cynthia) (Entered: 01/12/2010)
01/13/2010	39	ORDER granting 38 Motion for Extension of Time to File Response/Reply re 34 MOTION to Dismiss *Plaintiff's Complaint*. Brief in Opposition due by 1/30/2010. Signed by Honorable A. Richard Caputo on 1/13/10 (jam,) (Entered: 01/13/2010)
01/27/2010	40	BRIEF IN OPPOSITION re 34 MOTION to Dismiss *Plaintiff's Complaint* filed by Jane Doe. (Attachments: # 1 Excerpt of Deposition of Jane Doe) (Pollick, Cynthia) (Entered: 01/27/2010)
02/10/2010	41	REPLY BRIEF re 34 MOTION to Dismiss *Plaintiff's Complaint*, 38 Unopposed MOTION for Extension of Time to File Brief to 37 Brief in Support filed *Brief in Support of Stakus' Motion to Dismiss Plaintiff's Complaint* filed by Barry Stankus.(Galante, Paul) (Entered: 02/10/2010)
02/10/2010	42	APPENDIX by Barry Stankus. to 41 Reply Brief, *Defendant Stankus' Appendix of Exhibits of Reply Brief in Support of Motion to Dismiss*. (Galante, Paul) (Entered: 02/10/2010)

02/11/2010		DOCKET ANNOTATION: Document 42 resent to Attorneys John Dean and Paul Galante on this date. (cw,) (Entered: 02/11/2010)
02/25/2010	43	MEMORANDUM AND ORDER: IT IS HEREBY ORDERED that: 1) Defendant Stankus' Motion to Dismiss is CONVERTED to a Rule 56 Motion for Summary Judgment. 2) The parties shall submit further evidence and/or supplemental briefs of no more than seven (7) pages within thirty (30) days of the date of this order. Signed by Honorable A. Richard Caputo on 2/25/10. (jam,) (Entered: 02/25/2010)
03/29/2010	44	EXHIBIT 13 by Luzerne County, Ryan Foy, Barry Stankus re 34 MOTION to Dismiss *Plaintiff's Complaint* (Videodisc). (ep,) (Entered: 03/29/2010)
03/29/2010	45	MOTION for Summary Judgment by Luzerne County, Ryan Foy, Barry Stankus. (Attachments: # 1 Proposed Order, # 2 Certificate of Nonconcurrence)(Bufalino, Mark) (Entered: 03/29/2010)
03/29/2010	46	STATEMENT OF FACTS *As To Which No Genuine Issue Remains To Be Tried* by Luzerne County, Ryan Foy, Barry Stankus. (Bufalino, Mark) (Entered: 03/29/2010)
03/29/2010	47	BRIEF IN SUPPORT re 45 MOTION for Summary Judgment filed by Luzerne County, Ryan Foy, Barry Stankus.(Bufalino, Mark) (Entered: 03/29/2010)
03/29/2010	48	Exhibit List *in support of motion for summary judgment* by Luzerne County, Ryan Foy, Barry Stankus.. (Attachments: # 1 Exhibit(s) deposition transcript of Plaintiff Jane Doe, # 2 Exhibit(s) deposition transcript of Deputy Vesek, # 3 Exhibit(s) deposition transcript of Lamoreaux, # 4 Exhibit(s) deposition transcript of Leandri, # 5 Exhibit(s) deposition transcript of Bobbouine, # 6 Exhibit(s) deposition transcript of Stankus, # 7 Exhibit(s) deposition transcript of Volciak, # 8 Exhibit(s) deposition transcript of Aigeldinger, # 9 Exhibit(s) deposition transcript of Joyce, # 10 Exhibit(s) deposition transcript of Benfante, # 11 Exhibit(s) deposition transcript of patterson, # 12 Exhibit(s) deposition transcript of Jugus, # 13 Affidavit affidavit of Hunter Jones) (Bufalino, Mark) (Entered: 03/29/2010)
03/29/2010	49	DISCLOSURE REPORT by Luzerne County, Ryan Foy, Barry Stankus by Luzerne County, Ryan Foy, Barry Stankus.(Bufalino, Mark) (Entered: 03/29/2010)
04/12/2010	50	BRIEF IN OPPOSITION re 45 MOTION for Summary Judgment filed by Jane Doe. (Attachments: # 1 Deposition of 30(b)6 Transcript - Stankus, # 2 Deposition Transcript of 30(b)6 - Foy, # 3 Deposition Transcript of Jane Doe, # 4 Deposition Transcript of Bobbouine, # 5 Deposition Transcript of Lamoreux, # 6 Deposition Transcript of Leandri, # 7 Deposition Transcript of Vesek, # 8 Berhard Case - 9th Circuit)(Pollick, Cynthia) (Entered: 04/12/2010)
04/12/2010	51	ANSWER TO STATEMENT OF FACTS re 46 Statement of Facts, 50 Brief in Opposition, filed by Jane Doe.(Pollick, Cynthia) (Entered: 04/12/2010)
04/15/2010	52	MOTION to Strike 48 Exhibit List,,, *Affidavits since witnesses were not disclosed during discovery and permission to depose those witnesses before*

		trial by Jane Doe. (Attachments: # 1 Proposed Order, # 2 Guang Dong case) (Pollick, Cynthia) (Entered: 04/15/2010)
04/15/2010	53	BRIEF IN SUPPORT re 52 MOTION to Strike 48 Exhibit List,,, *Affidavits since witnesses were not disclosed during discovery and permission to depose those witnesses before trial* MOTION to Strike 48 Exhibit List,,, *Affidavits since witnesses were not disclosed during discovery and permission to depose those witnesses before trial* filed by Jane Doe. (Attachments: # 1 Defendants' Answer to Plaintiff's Interrogatories)(Pollick, Cynthia) (Entered: 04/15/2010)
04/29/2010	54	REPLY BRIEF re 45 MOTION for Summary Judgment filed by Luzerne County, Ryan Foy, Barry Stankus. (Attachments: # 1 Appendix Supplemental Appendix of Exhibits, # 2 Exhibit(s) Deposition transcript of Stephen Englot) (Bufalino, Mark) (Entered: 04/29/2010)
04/30/2010	55	MOTION to Strike 48 Exhibit List,,, *Untimely Indentified Expert* by Jane Doe. (Attachments: # 1 Proposed Order, # 2 Defendants' Answers to Interrogatories) (Pollick, Cynthia) (Entered: 04/30/2010)
04/30/2010	56	BRIEF IN SUPPORT re 55 MOTION to Strike 48 Exhibit List,,, *Untimely Indentified Expert* filed by Jane Doe.(Pollick, Cynthia) (Entered: 04/30/2010)
05/03/2010	57	BRIEF IN OPPOSITION re 52 MOTION to Strike 48 Exhibit List,,, *Affidavits since witnesses were not disclosed during discovery and permission to depose those witnesses before trial* MOTION to Strike 48 Exhibit List,,, *Affidavits since witnesses were not disclosed during discovery and permission to depose those witnesses before trial* filed by Luzerne County, Ryan Foy, Barry Stankus. (Attachments: # 1 Unpublished Opinion(s) Ghulam v. Strauss Veal Feeds, Inc., 2002 U.S. Dist. Lexis 28253)(Bufalino, Mark) (Entered: 05/03/2010)
05/07/2010	58	REPLY BRIEF re 52 MOTION to Strike 48 Exhibit List,,, *Affidavits since witnesses were not disclosed during discovery and permission to depose those witnesses before trial* MOTION to Strike 48 Exhibit List,,, *Affidavits since witnesses were not disclosed during discovery and permission to depose those witnesses before trial* filed by Jane Doe.(Pollick, Cynthia) (Entered: 05/07/2010)
05/17/2010	59	APPENDIX by Luzerne County, Ryan Foy, Barry Stankus. *of Exhibits in Opposition to Plaintiff's Motion to Strike Defendants' Expert Witness*. (Bufalino, Mark) (Entered: 05/17/2010)
05/17/2010	60	BRIEF IN OPPOSITION re 55 MOTION to Strike 48 Exhibit List,,, *Untimely Indentified Expert* filed by Luzerne County, Ryan Foy, Barry Stankus. (Bufalino, Mark) (Entered: 05/17/2010)
05/26/2010	61	REPLY BRIEF re 55 MOTION to Strike 48 Exhibit List,,, *Untimely Indentified Expert* filed by Jane Doe. (Attachments: # 1 Exhibit(s) "A", Defendants Answers to Plaintiff' Interrogatories, # 2 Exhibit(s) "B", 5/5/09 Case Management Order, # 3 Exhibit(s) "C" 7/17/09 Case Management Order, # 4 Exhibit(s) "D", 12/17/09 Case Management Order)(Pollick, Cynthia) (Entered: 05/26/2010)
06/01/2010	62	MEMORANDUM AND ORDER granting in part and denying in part 52

		Motion to Strike ; granting in part and denying in part 55 Motion to Strike. IT IS HEREBY ORDERED that:1)Plaintiffs Motion to Strike Affidavits Since the Witnesses Were Not Disclosed During Discovery and Permission to Depose Those Individuals Before Trial (Doc. 52) is GRANTED in part and DENIED in part as follows:a) Plaintiffs motion is GRANTED regarding the affidavits of Jason Volciak, Eric Aigeldinger, and John Jugus. These affidavits are STRICKEN from the record for failure to comply with Fed. R. Civ. P. 26(a)(1)(A)(i), and these individuals are EXCLUDED from testifying at any hearing or trial pursuant to Fed. R. Civ. P. 37(c)(1). b) Plaintiffs motion to depose Jason Volciak, Eric Aigeldinger, and John Jugus is DENIED.2) Plaintiffs Motion to Strike Untimely Identified Expert, or in the Alternative, Motion to Permit Plaintiff Time to Hire and Examine Defendants Computers/Servers as Well as Take Defendants Experts Deposition (Doc. 55) is GRANTED in part and DENIED in part as follows:a)Plaintiffs motion to strike Defendants expert disclosure is DENIED.b)Plaintiffs motion to hire an expert is DENIED.c) Plaintiffs motion to depose Defendants expert witness is GRANTED. Signed by Honorable A. Richard Caputo on 6/1/10 (jam,) (Entered: 06/01/2010)
06/29/2010	63	MOTION to Compel *DEFENDANTS TO PRODUCE ELECTRONIC MATERIAL THAT WAS COPIED AND BEING USED BY DEFENDANTS' EXPERT* by Jane Doe. (Attachments: # 1 Proposed Order)(Pollick, Cynthia) (Entered: 06/29/2010)
06/29/2010	64	BRIEF IN SUPPORT re 63 MOTION to Compel *DEFENDANTS TO PRODUCE ELECTRONIC MATERIAL THAT WAS COPIED AND BEING USED BY DEFENDANTS' EXPERT* filed by Jane Doe.(Pollick, Cynthia) (Entered: 06/29/2010)
06/29/2010	65	SCHEDULING ORDER: This case is removed from the August 2010 trial list and shall be placed on the November, 2010 trila list of this Court. Signed by Honorable A. Richard Caputo on 6/29/10. (jam,) (Entered: 06/29/2010)
07/08/2010	66	Letter from Cynthia L Pollick *RE: TC on 7/22/2010*. (Pollick, Cynthia) (Entered: 07/08/2010)
07/09/2010	67	Letter from Mark W. Bufalino regarding telephone conference on 7/22/10. (Bufalino, Mark) (Entered: 07/09/2010)
07/09/2010	68	MOTION to Exclude *Witnesses From Testifying At Trial* by Luzerne County, Ryan Foy, Barry Stankus. (Attachments: # 1 Proposed Order, # 2 Certificate of Nonconcurrence, # 3 Exhibit(s) March 30, 2010 letter, # 4 Exhibit(s) June 22, 2010 letter)(Bufalino, Mark) (Entered: 07/09/2010)
07/16/2010	69	BRIEF IN OPPOSITION re 63 MOTION to Compel *DEFENDANTS TO PRODUCE ELECTRONIC MATERIAL THAT WAS COPIED AND BEING USED BY DEFENDANTS' EXPERT* filed by Luzerne County, Ryan Foy, Barry Stankus.(Bufalino, Mark) (Entered: 07/16/2010)
07/16/2010	70	APPENDIX by Luzerne County, Ryan Foy, Barry Stankus. to 68 MOTION to Exclude *Witnesses From Testifying At Trial of Exhibits*. (Attachments: # 1 Exhibit(s) Plaintiff's Answer to Defendants' Interrogatories)(Bufalino, Mark) (Entered: 07/16/2010)

07/16/2010	71	BRIEF IN SUPPORT *OF MOTION TO EXCLUDE WITNESSES FROM TESTIFYING AT TRIAL* re 68 MOTION to Exclude *Witnesses From Testifying At Trial* filed by Luzerne County, Ryan Foy, Barry Stankus.(Bufalino, Mark) (Entered: 07/16/2010)
07/22/2010		ORAL ORDER denying as moot 63 Motion to Compel Defendants to Produce Electronic Material That Was Copied And Being Used By Defendants' Expert, since material has been supplied.Signed by Honorable A. Richard Caputo on 7/22/10 (jam,) (Entered: 07/22/2010)
07/30/2010	73	BRIEF IN OPPOSITION re 68 MOTION to Exclude *Witnesses From Testifying At Trial* filed by Jane Doe. (Attachments: # 1 Chambers v. Pa (Chief Judge Kane))(Pollick, Cynthia) (Entered: 07/30/2010)
08/24/2010	74	MEMORANDUM ORDER: IT IS HEREBY ORDERED THAT Plaintiff has 7 days to submit the deposition of Defendants' expert witness before the motions for summary judgment are decided on the current record. Signed by Honorable A. Richard Caputo on 8/24/10. (jam,) (Entered: 08/24/2010)
08/30/2010	75	Supplemental Exhibit and Response by Jane Doe. 50 Brief in Opposition,. (Attachments: # 1 Excerpt of Hunter Jones deposition transcript)(Pollick, Cynthia) (Entered: 08/30/2010)
08/31/2010	76	ORDER granting 45 Motion for Summary Judgment. IT IS HEREBY ORDERED that:(1)Defendants Motion for Summary Judgment (Doc. 45) is GRANTED.(2)JUDGMENT IS ENTERED in favor of Defendants.(3)The Clerk of Court shall mark this case as CLOSED Signed by Honorable A. Richard Caputo on 8/31/10 (jam,) (Entered: 08/31/2010)
09/28/2010	77	NOTICE OF APPEAL in NON-PRISONER Case as to 76 Order on Motion for Summary Judgment, by Jane Doe. Filing Fee and Docket Fee Paid. Filing fee $ 455, receipt number 03140000000001993098. The Clerk's Office hereby certifies the record and the docket sheet available through ECF to be the certified list in lieu of the record and/or the certified copy of the docket entries. (Pollick, Cynthia) (Entered: 09/28/2010)
09/29/2010	78	AMENDED DOCUMENT by Jane Doe. Amendment to 77 Notice of Appeal,. (Pollick, Cynthia) (Entered: 09/29/2010)
09/30/2010	79	USCA Case Number 10-3921 for 77 Notice of Appeal, filed by Jane Doe. USCA Case Manager Phyllis Ruffin (DOCUMENT IS RESTRICTED AND CAN ONLY BE VIEWED BY COURT STAFF). (Ruffin, Phyllis) (Entered: 09/30/2010)

PACER Service Center

Transaction Receipt

03/12/2011 09:27:34

PACER Login:	cp0713	**Client Code:**	roberts
Description:	Docket Report	**Search Criteria:**	3:08-cv-01155-ARC
Billable Pages:	7	**Cost:**	0.56

CERTIFICATE OF SERVICE

Cynthia L. Pollick, Esquire, hereby certifies that on April 7, 2011, she served two copies of Appellant's Brief and Appendix on Defendants' counsel, Mr. Mark Bufalino, Esquire, Elliott Greenleaf & Dean, 39 Public Square, Suite 1000, Wilkes-Barre, PA 18702.

s/Cynthia L. Pollick
Cynthia L. Pollick, Esquire