86-1088

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF CANTON, OHIO,
Petitioner,

v.

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether inadequate training can be found to be a "policy or custom" of a City within the meaning of *Monell* v. *New York City Department of Social Services*, 436 U.S. 658 (1978), without independent evidence that the City knew or should have known that the training was inadequate and therefore that violations of constitutional rights might forseeably result from any inadequate training.

2. Whether a City's grant of discretionary authority to a municipal employee, which is exercised by an employee in a way that deprives a person of a constitutional right, shifts the burden to the City to prove that the training of its employee was adequate.

3. Whether the City of Canton was properly held subject to liability under 42 U.S.C. § 1983, for the actions of the admitting officer of the City's jail who had discretionary authority to arrange for medical care for an arrestee but who did not receive specialized medical training to detect potential emotional illness.

LIST OF PARTIES

Other parties, in addition to those listed in the caption are:

Stanley A. Cmich
David Maser
James Schnabel
Matthew Norcia
Richard Kuehner
John Daianu
Raymond Samolia

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The City of Canton, Ohio ("Canton"), hereby petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit (App., *infra*, 1a-11a) is not reported. The opinion of the United States District Court for the Northern District of Ohio, denying Petitioner's Motions for Judgment Notwithstanding the Verdict or for a New Trial, (App., *infra*, 12a-18a) is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 2, 1986, and a petition for rehearing was denied on August 22, 1986. On November 4, 1986, Justice Scalia extended the time for filing a petition to and including January 4, 1987 (a Sunday). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution (U.S. Const. amend XIV, § 1) provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

42 U.S.C. § 1983 provides, in pertinent part:

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

STATEMENT

1. Respondent Geraldine Harris was lawfully arrested on April 26, 1978, by officers of the Canton Police Department who transported her to the City's Police Station in a patrol wagon. App., *infra*, 2a. When she arrived at the station, Mrs. Harris was found sitting on the floor of the wagon. The shift commander, who was present when the patrol wagon arrived, asked Mrs. Harris if she was in need of medical assistance or medication. Instead of responding to the question, Mrs. Harris asked to see "Ronnie," who is her son. *Id.* at 2a.

During the course of routine booking procedures, Mrs. Harris, who was leaning against the wall, slumped to a seated position on the floor. Officers assisted Mrs. Harris to her feet and placed her in a chair, but twice she slumped back to the floor. The City presented evidence at trial that Mrs. Harris was fully conscious and aware of her actions while she was in custody. The shift commander also testified that he did not believe that Mrs. Harris' behavior was caused by any illness or injury. Instead, Mrs. Harris' actions appeared to him to be merely an emotional reaction to her arrest. He testified that such reactions are not at all uncommon among arrestees. App., *infra*, 2a.

During the course of the booking procedures, Mrs. Harris was again asked if she required any medical attention or medication, and she again responded by asking to see "Ronnie." Following booking, Mrs. Harris was placed in a holding cell for a short period of time until bail was arranged and she was released to her family. Mrs. Harris was in police custody at the city jail for a total of no more than 30 to 40 minutes. App., *infra*, 2a-3a.

2. Mrs. Harris, together with her husband and daughter, subsequently brought this lawsuit under 42 U.S.C. § 1983, against various individual police officers involved in her arrest and detention, city officials, including the mayor and police chief and the City of Canton. Respondents did not, however, name the shift commander as a defendant. Respondents alleged, *inter alia*, that the City had violated Mrs. Harris' due process rights by depriving her of medical treatment during the course of her post-arrest detention.[1]

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[1] Respondents' complaint included a number of constitutional claims that were rejected by the district court or the jury, including claims under the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments. The court granted the motions for directed verdict by defendants Mayor Stanley A. Cmich and Police Chief David

The case was tried to a jury, which rejected all of respondents' extant claims except the claim that *the City* unreasonably denied Mrs. Harris medical attention. On that claim, the jury awarded Mrs. Harris $200,000 against the City. The City's motions for remittitur, new trial or judgment notwithstanding the verdict were denied. App., *infra*, 4a.

The court of appeals unanimously reversed the judgment of the district court, but the majority voted to remand the case for a new trial. App., *infra*, 9a. The majority separately analyzed the two theories of municipal liability upon which the jury was instructed. The first instruction predicated the City's liability on the mere participation of "supervisory personnel" in the alleged constitutional violation. The court unanimously held that that instruction was erroneous. Because the instruction presented an alternative theory of liability, the jury's award was reversed on that ground. *Id.* at 9a.

The majority remanded the case to the district court for a new trial on the adequacy of the City's training of police officers. The court held that the City could be liable, based on the evidence presented at trial, on the ground that the City had "an established policy of allowing shift commanders unfettered discretion . . . to make the decision to refer a prisoner to the hospital . . . coupled with the fact that these commanders were given no training or guidelines for making this decision." App., *infra*, 6a.[2]

Maser. The jury found in favor of all the other remaining defendants, police officers Schnabel, Norcia, Kuehner, Daianu and Samolia, on all of the counts against them. Respondents did not cross-appeal from these adverse judgments.

[2] Although the "inadequate training" theory was argued in the respondents' brief filed in the court of appeals, the district court did not instruct the jury on this theory. Instead, the district court held that the evidence concerning "the denial of medical attention

In particular, the evidence at trial established that the shift commander or "jailer" is responsible for determining whether prisoners require immediate medical attention. The regulations of the Canton Police Department specifically provide:

> [The shift commander] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail.

App., *infra*, 4a. The evidence showed that shift commanders did not receive any specialized medical training beyond basic first aid. The City assumed that the shift commander would make the decision whether hospitalization of a prisoner is necessary based on common sense and experience.

The court of appeals reasoned that inadequate training of officers which can be linked causally to a constitutional deprivation is a sufficient basis for imposing liability on a municipality. As applied, the court held that the grant of discretion to the shift commander to evaluate Mrs. Harris' medical condition coupled with *the City's failure* to "show any evidence of adequate training" raised "a

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. . . does not raise a jury issue concerning police training deficiencies." Tr. 4-168.

The jury was instructed that the City could be held liable on a related, but distinct, theory of "inadequate supervision." Specifically, the jury was instructed that:

> the burden of proof is upon Geraldine Harris to prove, by a preponderance of the evidence, that for the City of Canton and its police department to be held liable under Section 1983 [the City] *failed to supervise* its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result.

Tr. at 4-388-389, App., *infra*, 8a (emphasis added).

valid jury issue of municipal liability . . . ." App., *infra*, 6a (emphasis added). Accordingly, the court remanded the case back for a second trial on that issue alone.

Judge Merritt dissented. App., *infra*, 10a-11a. First, he noted that the City's policy regarding medical treatment of arrestees was clearly not unconstitutional. Second, he argued there was no basis for finding that it was the "custom" of the City to apply its regulation so as to deprive arrestees of their constitutional rights. App., *infra*, 10a. In the absence of a showing of custom or policy, he rejected the conclusion that "a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury . . . ." App., *infra*, 10a. He pointed out that the majority's "inadequate training" theory, as applied to the City of Canton, would, in effect, "erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail." App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit has held that a city can be liable under Section 1983 for a deprivation of an arrestee's constitutional rights by a municipal employee even though the city had a policy which was clearly intended to protect the arrestee's rights and there was no evidence that the policy was a sham. Furthermore, the court below has held that liability may be appropriate even though there was no evidence that the City had any reason to foresee that its discretionary policy of providing medical care might not protect the arrestee's right to medical treatment. Indeed, the court of appeals has shifted the burden to the City to prove the adequacy of training once a plaintiff proves that an employee violated the plaintiff's constitutional rights. Accordingly, the decision below conflicts with this Court's decisions in *Monell* v. *New York*

City Department of Social Services, 436 U.S. 658 (1978), and *City of Oklahoma City* v. *Tuttle*, 105 S. Ct. 2427 (1985), and expands the liability of cities under Section 1983 beyond anything Congress ever intended. Moreover, some of the issues presented in this case are also presented in *City of Springfield, Mass.* v. *Kibbe*, 777 F.2d 801 (1985), *cert. granted*, 106 S. Ct. 1374 (1986) (No. 85-1217), in which certiorari already has been granted. For these reasons, the Court, at a minimum, should hold this petition pending the final disposition of *Kibbe*, and alternatively, should grant the petition to decide the important issues that are presented in this case that may not be resolved in *Kibbe*.

1. In *Monell*, this Court held that municipalities are "persons" subject to liability under 42 U.S.C. § 1983. In so doing, however, the Court made it clear that only those violations of constitutional rights that occur pursuant to municipal custom or policy are attributable to the municipality. This requirement was intended to "distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible." *Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292, 1298 (1986) (emphasis in original).

It is helpful, in considering the elements of municipal liability under Section 1983, to analogize to the familiar elements of tort liability.[3] Generally, liability in tort requires proof of: 1) an act; 2) state of mind (intent, negligence, or strict liability); 3) causation; and 4) injury. *Monell* teaches that municipal liability for constitutional injury will only be imposed on the basis of a municipality's own *acts*, *i.e.*, on the basis of municipal

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[3] "Section [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe* v. *Pape*, 365 U.S. 167, 187 (1961). *See also Tuttle*, 105 S. Ct. at 2439 (Brennan, J., concurring).

"custom or policy." *Respondeat superior* is an inappropriate basis for liability under the Act.

The instant case raises unresolved issues regarding the intent and causation elements of a Section 1983 claim. With respect to intent, the issue raised is whether a claimant must present independent proof of a deliberate "course of action consciously chosen from among various alternatives" by the municipality.[4] In particular, in the context of claim based not on a municipal act but rather on a municipality's failure to act (*i.e.*, inadequate training), the question is what showing of deliberate decisionmaking on the part of municipal policymakers is required to support a finding that the City adopted a "custom or policy" of inadequate training.

With respect to causation, the issue presented is what proof must plaintiff present of an "affirmative link" between the municipal custom or policy and the constitutional injury suffered by plaintiff. Specifically, the issue is what, if any, proof is required that the municipal "custom or policy" at issue—rather than the acts of an individual employee—was the moving force behind a constitutional violation.

2. The decision of the court of appeals, exposing the City of Canton to substantial liability under Section 1983 for "inadequate training," constitutes a serious misapplication of the principles set forth in this Court's decisions in *Monell* and *Tuttle* for determining what constitutes a custom or policy sufficient to establish municipal liability. Under the Sixth Circuit's interpretation of the "custom or policy" requirement, municipal governments may be held liable any time a plaintiff can prove that he suffered a constitutional injury at the hands of a municipal employee and that additional training of that employee

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[4] *See Tuttle*, 105 S. Ct. at 2436.

could have prevented the injury.[5] Such a holding, in effect, imposes municipal liability on a theory of *respondeat superior* because a plaintiff will almost always be able to adduce evidence that *some* level of additional training or supervision might have prevented the injury in question. Allowing Section 1983 claims to proceed under such a theory is, for several reasons, fundamentally inconsistent with the prior holdings of this Court.

First, with respect to the "intent" element of the custom or policy requirement of *Monell*, "the word 'policy' implies a course of action consciously chosen from among various alternatives." As the plurality opinion in *Tuttle* further noted: "it is therefore difficult in one sense even to accept the submission that someone pursues a 'policy' of 'inadequate training,' unless evidence be adduced which proves that the inadequacies resulted from conscious choice —that is, proof that the policymakers deliberately chose a training program which would prove inadequate." *Tuttle*, 105 S. Ct. at 2436. Here, no such proof of a deliberate policy of inadequate training was presented.[6]

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[5] The evidence below did not even meet this minimal showing. Although Mrs. Harris presented evidence that subsequent to her arrest she was diagnosed as suffering from "gross stress reaction, anxiety and depression," there was no evidence presented that her injuries proximately resulted from the City's actions in failing adequately to train or supervise the shift commander who made the decision not to seek immediate medical attention for Mrs. Harris. In fact, there was not even any evidence as to whether Mrs. Harris' injuries resulted from the 30-40 minute delay in receiving medical attention rather than from other factors, such as the arrest itself.

[6] Indeed the only proof of a deliberate policymaking decision relevant to the situation at issue was the evidence presented that the City had adopted a policy of taking prisoners to the hospital when medical attention was requested by the prisoner or when the shift commander determined that medical attention was necessary. *See* page 5, *supra*.

The liability in this case is predicated not on any direct and compelling proof concerning the City's policy of providing neces-

The present case starkly illustrates the difficulty of divining municipal policy from the nonfeasance of municipal decisionmakers. There was no evidence presented that City officials had any knowledge that the shift commander was incapable of making a decision whether immediate medical attention was required. There was no evidence that any other prisoner ever suffered any injury or inconvenience due to a denial of medical treatment. Nor was there any showing that the alleged "inadequacies" of the shift commander's decisionmaking had ever been brought to the attention of the relevant City policymakers. In such a situation, it is unreasonable to hold that the City deliberately—or even "recklessly"—adopted a "policy" of inadequate training. See *Tuttle*, 105 S. Ct. at 2436.

Second, the "inadequate training" theory as applied by the Sixth Circuit ignores the causation requirement of a Section 1983 cause of action. As this Court recently reaffirmed, Section 1983 requires that "the particular policy be the 'moving force' behind a *constitutional* violation. There must at least be an affirmative link between the training inadequacies alleged, and the particular constitutional violation at issue." *Tuttle*, 105 S. Ct. at 2436-2437 n.8 (emphasis in original); *see id.*, at 2439 (Brennan, J., concurring) ("plaintiff must prove, in the broad causal language of the statute, that [this] policy or custom of the city 'subjected' him or 'caused him to be subjected' to the deprivation of constitutional rights"); *Rizzo* v. *Goode*, 423 U.S. 362, 370-371 (1976). It cannot be that a City is liable for actions of its employees which are

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sary medical care, but on the Sixth Circuit's finding that "the city could not show any evidence of adequate training." App., 6a. Not only does the court of appeals' holding erroneously reverse the applicable burden of proof, it ignores the only real evidence of municipal policy and premises liability on the jury's standardless and unreviewable discretion to determine whether the City's training of shift commanders was "adequate."

undertaken in spite of official policy instead of because of it. Compare *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U.S. 256, 279 (1979).[7]

Respondents in the instant case presented no evidence to support their theory that an unconstitutional denial of medical attention was *caused* by the City's "policy" of inadequate training. At best, respondents were able to prove two discrete facts: that Mrs. Harris did not receive medical attention while detained at the jail and that the City failed to adduce evidence that the officer who was responsible for and who made the decision had received specialized medical training. But there was no indication of what, if any, additional training could have, or would have, prevented the claimed deprivation of Mrs. Harris' rights. In short, respondents did not establish that the City's training "policy" caused Mrs. Harris' injuries in a " 'but for' sense," and they certainly did not establish that the alleged constitutional violations occurred "*pursuant to*" City policy. See *Pembaur*, 106 S. Ct. at 1299-1300 n.11 (emphasis in original).

This case thus presents an opportunity for the Court to clarify the requirement that there must be an "affirmative link" between City policy and the constitutional violation alleged. *Tuttle*, 105 S. Ct. at 2436. Particularly in cases such as this, where the custom or policy alleged is a city's failure to train (or failure to do any other act), it is important that the lower courts and litigants have clear guidance with respect to the requirement that the violation must be proven to have occurred "pursuant to" the City's custom or policy.

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[7] In *Pembaur* v. *City of Cincinnati*, the plurality opinion noted that both the majority and concurrence in *Tuttle* "found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant* to a municipal policy rather than simply resulting from such a policy in a 'but for' sense." 105 S. Ct. 1292, 1299-1300 n.11 (emphasis in original).

Finally, this case demonstrates the substantial impact on municipalities that an unduly generous application of the *Monell* standards permits. The court of appeals has sanctioned a theory of Section 1983 liability that is so broad that virtually any conduct of a municipal employee can be attributed to his governmental employer under an "inadequate training or supervision" theory. By so doing, the court of appeals has "*sub silentio*" imposed the novel requirement upon cities that their police forces must provide "paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail." App., *infra*, 10a (Merritt, J., dissenting). It cannot lightly be assumed that Congress would impose such an onerous burden upon municipalities. Review by this Court of the decision below is therefore imperative to protect cities and counties from having to divert scarce resources from essential services and apply them to training programs designed to prevent constitutional violations which are not properly the *responsibility* of local governments. See *Monell*, 436 U.S. at 690-691.

3. On March 10, 1986, this Court granted the petition of the City of Springfield, Massachusetts in *City of Springfield* v. *Kibbe*, No. 85-1217 ("*Kibbe*"). In *Kibbe*, the First Circuit affirmed a jury verdict against the City of Springfield under Section 1983 based on the theory that the constitutional injury in question was the result of inadequate police training. *Kibbe* involved the conduct of police officers during the course of a high speed chase and subsequent shooting of a fleeing felon. Although the facts underlying the alleged constitutional injury are greatly dissimilar, the jury in *Kibbe* was instructed under a theory that required it to impose liability on the City if the jury could infer that a municipal custom or policy of "grossly negligent training" caused the injury in question.

Like the present case, *Kibbe* presents issues regarding the fundamental elements of a Section 1983 claim against

a municipality. Specifically, *Kibbe* raises the issue of whether a viable theory of Section 1983 liability based on inadequate training requires proof of either a deliberate decision by municipal policymakers or widespread practices that would put the relevant policymakers on notice. *Kibbe* also presents the separate, but related, issue of whether such a claim requires independent proof that the training in question was so grossly negligent as to amount to deliberate indifference. The fundamental issue in that case is identical to the issue presented here, *viz.*, whether the allegedly inadequate training of police officers constitutes a viable theory of municipal liability under 42 U.S.C. § 1983.[8] Accordingly, the Court, at a minimum, should hold this petition pending its decision in *Kibbe*.

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[8] There are currently at least five petitions for certiorari pending before the Court that raise the same, or similar, issues of municipal liability under Section 1983 based on inadequate training or supervision. *City of Rensselaer, New York* v. *Fiacco*, No. 85-1813 (filed May 2, 1986); *Vippolis* v. *Village of Haverstraw*, No. 85-1048 (filed Dec. 16, 1985); *City of Shepherdsville* v. *Rymer*, No. 85-1192 (filed January 16, 1986); *City of Borger* v. *Gronstaff*, No. 85-1585 (filed March 27, 1986); and *County of Wayne* v. *Marchese*, No. 85-359 (filed Aug. 29, 1985). The Sixth Circuit's decision in *Rymer* v. *Davis*, 754 F.2d 198 (6th Cir.), *vacated*, 105 S. Ct. 3518, *reinstated on remand*, 775 F.2d 756 (6th Cir. 1985), *petition for cert. filed sub nom. City of Shepherdsville* v. *Rymer*, No. 86-1192, was the primary authority relied upon by the majority opinion below. App., *infra* 5a.

Even if the Court were to uphold the "inadequate training" theory as a potential basis for municipal liability under Section 1983 in *Kibbe*, review should nevertheless be granted in the present case. Although the City believes the *Kibbe* case was wrongly decided by the First Circuit, the evidentiary basis for liability under the inadequate training theory in the present case is even less than that in *Kibbe*. Moreover, the present case squarely presents issues of municipal liability not raised in *Kibbe*, such as the issue of which party bears the burden of proof regarding the adequacy of the training at issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be held pending the outcome of *City of Springfield, Mass.* v. *Kibbe*, No. 85-1217 and then disposed of as appropriate in light of the disposition of that case, or alternatively, the petition should be granted.

Respectfully submitted,

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January 2, 1987

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3314

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Plaintiffs-Appellees,

v.

STANLEY CMICH, *et al.*,
Defendants,

CITY OF CANTON, OHIO,
Defendant-Appellant.

[Filed July 2, 1986]

On Appeal from the United States District Court
for the Northern District of Ohio

BEFORE: LIVELY, MERRITT and JONES, Circuit Judges.

PER CURIAM. The City of Canton appeals from a judgment on a jury verdict finding the City liable under 42 U.S.C. § 1983 for causing Geraldine Harris to be denied medical care while incarcerated.

Mrs. Harris, a fifty two-year-old black woman, was driving her teenage daughter to school when she was stopped by a Canton police officer for speeding. The police officer ultimately arrested her because, as he claimed, she became uncontrollably upset and uncooperative. Mrs. Harris was put into a patrol wagon by two officers who arrived to transport her to the police station. She testified that she was pushed and thrown about violently, and jabbed in her ribs. The officers said a minimal amount of force was used and that Mrs. Harris was lifted and placed in the vehicle because she could not or would not walk on her own.

When the vehicle's door was opened at the station, the shift commander, Captain Maxson, was present. He had been notified by the officers of a possible need for his presence. He testified that Mrs. Harris "was just lying there," which was unusual because "I don't know of anybody that rides in a wagon on the floor." Captain Maxson thought Mrs. Harris might need medical attention, and asked her if she needed a doctor or medication. She did not respond to the question, but asked incoherently about a person named "Ronnie." No medical care was ordered.

During booking, Mrs. Harris was standing against a wall when she suddenly slumped to the floor. Officers helped her into a chair, but Harris slumped to the floor again. She was put back in the chair, but again fell. Captain Maxson testified that Mrs. Harris was left on the floor for a short time, up to ten minutes, to avoid further falls. He explained that emotional behavior is common upon incarceration, and that he and officer John Daianu believed that Mrs. Harris was merely excited and would calm down if left alone and permitted to see her family, as most arrestees do. The City argued at trial that she chose to slump each time and was fully conscious and aware of her actions.

Captain Maxson testified that after a few minutes in Booking, Mrs. Harris was taken to a cell. She testified

that while she was incarcerated, she was twice taken from her cell for searches of her person. After bond procedures were completed, Mrs. Harris was released at about 9:00 a.m., having been at the city jail for about 30 to 40 minutes. A little more than an hour had elapsed since she was stopped while driving.

Mrs. Harris's family had her taken to Timken Mercy Hospital by ambulance from the jail. Mrs. Harris was hospitalized for one week. She was diagnosed as suffering from gross stress reaction, anxiety and depression, with symptoms including immobility and respiratory difficulty. Psychiatric therapy was necessary periodically for more than a year.

Mrs. Harris, together with her husband and daughter, brought a civil action against the police officers, city officials and the City of Canton under 28 U.S.C. §§ 1981, 1983, 1985-86, and the Fourth, Fifth, Eighth, Thirteenth and Fourteenth Amendments. She claimed the following constitutional violations: unlawful seizure, cruel and unusual punishment, deprivation of liberty and physical well-being without due process, failure to provide equal protection of the law due to race, and unlawful search. In addition to these federal constitutional violations, Mrs. Harris claimed false imprisonment, assault and battery under state law. The complaint also charged the police with assaulting and battering the teenage daughter who was a passenger in the car with her.

Damages were based on physical and emotional injuries, pain and suffering, treatment expenses, loss of services to Mr. Harris, exemplary damages, and legal costs and fees. Compensatory damages of one million dollars and exemplary damages of two million were sought. In addition, plaintiffs requested injunctive and declaratory relief in regard to the police policies and practices. The suit was dismissed due to untimely filing under the applicable Ohio statute of limitations, but on appeal the Harrises

prevailed and the case was remanded for further proceedings. *Harris v. City of Canton*, 725 F.2d 371 (6th Cir. 1984).

A jury trial was held. In addition to the testimony described above, there was evidence presented as to the policies of the Canton police department in regard to medical treatment for prisoners. Section 334.7 of the Canton Police Regulations provides as follows:

> He [the jailer] shall, when a prisoner is found unconscious or semi-conscious, or when he or she is unable to explain his or her condition, or who complains of being ill, have such person taken to a hospital for medical treatment, with permission of his supervisor before admitting the person to the City Jail.

Former police Chief Wyatt testified to the department's usual practice for implementing section 334.7 He stated that shift commanders are authorized to make medical decisions under section 334.7 in their sole discretion based on personal observation. In the face of this grant of discretion, there was no evidence offered that the City provided any training or instructions to shift commanders, other than minimal first aid instruction, to prepare them for making such determinations.

At the close of the evidence, the court denied the defendants' motion for directed verdict. The jury rejected all the Harrises' claims except one: the jury found that Mrs. Harris was unreasonably denied medical attention while incarcerated at the city jail, and it awarded her $200,000 against the City of Canton. The court denied the city's motion for remittitur, new trial, or judgment n.o.v., and this appeal followed. The City raises numerous issues, including the insufficiency of plaintiffs' evidence to raise a jury question on her claim of deprivation of medical attention, and improper instructions to the jury on Harris's theories of municipal liability.

In regard to her claim of an unconstitutional deprivation of medical care, *see Estellee v. Gamble*, 429 U.S. 97, 104-05 (1976); *Westlake v. Lucas*, 537 F.2d 857 (6th Cir. 1976), Mrs. Harris contended that given her obvious signs of anxiety, hyperventilation and loss of ambulatory function, the officers should have referred her for medical care. She said that Maxson never even took her pulse in order to determine whether she needed care. Furthermore, she testified that the officers laughed at her and ridiculed her. Harris based municipal liability for the deprivation of medical care on two theories: (1) inadequate training by the City of its police officers, which proximately caused the deprivation; and (2) the participation of supervisory personnel in the deprivation.

I. Inadequate Training

Where a municipality has wholly failed to train or has been grossly negligent in training its police force, it may be concluded that there was a municipal custom that allowed or condoned certain violations of constitutional rights by police. *E.g.*, *Rymer v. Davis*, 754 F.2d 198, 201 (6th Cir. 1985), *vacated*, 105 S.Ct. 3518 (1985), *reinstated on remand*, 775 F.2d 756 (6th Cir. 1985); *Hays v. Jefferson County*, 668 F.2d 869, 874 (6th Cir. 1982). To succeed in a claim that a municipality is liable for failure to train its police force, the plaintiff must prove that the municipality acted recklessly, intentionally, or with gross negligence. *See Hays*, 668 F.2d at 872 (6th Cir. 1982) (holding that "simple negligence is insufficient" to support liability of municipalities for inadequate training and supervision of individual officers). In addition, the plaintiff must demonstrate that the municipality's inadequate training of its officers was causally connected to the deprivation, which means proving that the lack of training was so reckless or grossly negligent that deprivations of persons' constitutional rights were substantially certain to result. *Rymer*, 754 F.2d at 201.

Harris's theory of grossly inadequate training was based on the fact that the police had an established policy of allowing shift commanders unfettered discretion under rule 334.7 to make the decision to refer a prisoner to the hospital based on their personal judgment and perceptions, coupled with the fact that these commanders were given no training or guidelines for making this decision. The former police chief testified to the discretion in decision-making, and the city could not show any evidence of adequate training. Mrs. Harris's evidence on these two facts thus raised a valid jury issue of municipal liability under *Rymer* and *Hays* for grossly negligent failure to train. The district court did not err in finding that there was sufficient evidence to submit that theory to the jury and in denying a directed verdict. We have reviewed the court's instructions on this theory of liability, and we find them adequate.

II. Participation of Supervisory Personnel

Harris's suit was alternatively based on her claim that, when a supervisory officer actually participates in the deprivation, the City is liable for his acts because he is a supervisor. That position is incorrect. Mrs. Harris relies on the case of *Smith v. Heath*, 691 F.2d 220 (6th Cir. 1982), in which this court stated as follows:

> The district judge specifically found that [the supervisory officer] was directly responsible for *and personally participated in the deprivation* of the Smiths' constitutional rights. He both subjected and caused the appellees to be subjected to the deprivation of their civil rights and is thus liable under section 1983.

Id. at 225. This passage provides for liability under section 1983 when the supervisory officer participated in the wrongdoing. In *Smith*, however, the officer was appealing a judgment finding him personally liable. Municipal liability was not at issue. *Id.* at 221.

It is clear that for the City to be liable, there must be a City policy or custom that causes the deprivation. *See, e.g., Hays*, 668 F.2d at 872-73. In *Hays*, both the municipality and the individual supervisors were sued. The court first discussed the personal liability of the supervisory officers at length, explaining that their liability cannot be based merely on the fact that they had the right and duty to supervise the officers who allegedly committed the violation of the Constitution. Their individual liability must be based on their own grossly negligent conduct. *Id.* In other words, the supervisory officers could not be found personally liable on the basis of the doctrine of respondeat superior. Immediately following this discussion of the liability of the supervisory officers, the court stated that the liability of the municipality must also be based on its own conduct, that is, on a municipal policy or custom rather than on the acts of its employees:

> The *Rizzo* case requires that there must be a direct causal link between the acts of individual officers and the supervisory defendants. *Rizzo v. Goode*, 423 U.S. at 370-71, 96 S.Ct. at 603-04. It is essentially this same concept that requires that the implementation or execution of a governmental policy or custom be shown before liability can be imposed on a municipality. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 96 L.Ed. 2d 611 (1978).

Hays, 668 F.2d at 872. While it is clear that a city "can act only through its principal officials," *id.* at 875, a supervisor does not automatically render the city liable under section 1983 merely by engaging in misconduct. If he is a policy-maker and his act may be construed as setting or implementing a policy, then the act of a supervisor may render the city liable under certain circumstances, *see Pembauer v. City of Cincinnati*, 106 S.Ct. 1292, 1300 (1986), but we have no allegations or proofs of such a theory before us.

We find that Harris's alternate theory of municipal liability was legally defective. It should not have gone to the jury, and thus the question of the sufficiency of the evidence on this theory of liability is irrelevant. The pertinent part of the jury instructions is as follows:

> Accordingly, the burden of proof is upon Geraldine Harris to prove, by a preponderance of the evidence, that for the City of Canton and its police department to be held liable under Section 1983, *its police department and/or its supervisory personnel either in some way participated in the actual misconduct, if any,* or failed to supervise its police force and that such supervision was so reckless, grossly negligent, inadequate, and the result of deliberate indifference that police misconduct and violations of citizen's rights were probably certain to result. Under such conditions, and only under such conditions, the City of Canton may fairly be determined as acquiescing in and implicitly authorizing such violations.
>
> * * * *
>
> Thus, if you find from the preponderance of the evidence that the city, acting through its police department and its supervisory personnel, actually participated in the alleged misconduct, you may conclude that the city and its supervisory personnel acquiesced in that misconduct and your finding will be for Geraldine Harris. Otherwise, you shall find in favor of the City of Canton.
>
> * * * *
>
> You are further instructed that you may not return a verdict against the City of Canton if you believe, from a preponderance of the evidence, that Mrs. Harris was denied medical treatment by a Canton police officer merely because of the fact that said police officer was an employee of the City of Canton. In other words, if you believe that the Canton Police

> Department adequately supervised, trained and controlled the police officers, then you shall return a verdict for the City of Canton even though you may believe, from a preponderance of the evidence, that an individual police officer in the employment of the city knowingly denied medical treatment to Geraldine Harris.

Tr. at 4-388 -90 (emphasis added). The City argues that this instruction impermissibly allowed the jury to find the City liable for the misconduct of its employees under the doctrine of respondeat superior. *See Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

In the first sentence of the passage quoted above, the part of the sentence following the word "or" provides a correct basis for municipal liability under Mrs. Harris's first theory of liability, discussed above; however, the part preceding the "or" provides an alternate basis for municipal liability that is incorrect. This instruction allows a finding of municipal liability merely because its supervisory personnel did a bad act, with no need to find that the city was a bad actor through a city policy or custom. This was error. We cannot know on which basis of liability the jury found the City liable, and accordingly, we must reverse.

We recognize that the trial court gave a correct statement of *Monell* when it stated, in the final quoted paragraph, that the City was not liable merely for employing officers who acted wrongfully. We conclude, however, that the instructions, read as a whole, could have misled and confused the jury as to the applicable principles of law.

The City has raised several other issues. We have considered them, and find no other error. The judgment of the district court is REVERSED and this case is REMANDED for a new trial.

MERRITT, Circuit Judge, concurring in part and dissenting in part. I concur in Part II of Judge Jones' proposed opinion for the Court. On Part I respecting the claimed unconstitutionality of the City's policy of handling the medical needs of the prisoners, I do not find the policy contained in § 334.7 of the Canton Police Regulations to be unconstitutional, nor do I find a custom of unconstitutional application of the policy. I read Judge Jones' opinion for the Court to conclude that a delegation of unregulated or undirected authority to the jailor to make decisions on the need for medical care raises a colorable substantive due process claim suitable for submission to the jury on remand. I cannot think of any way that the City could more specifically regulate or direct the exercise of this authority without providing paramedical officers or medical specialists of some type at the jail.

The exercise of such authority respecting medical care must be delegated to jailors or other intake officials if it is to be effectively exercised at all by the City. We should not erect a due process requirement that cities must have paramedical officers or other trained medical specialists who exercise some type of professional judgment at the jail. It seems to me that ordinary common sense review and handling of cases on an individual basis by intake officers should pass constitutional muster. Intake officers must meet the "deliberate indifferent standard" of *Estelle v. Gamble*, 429 U.S. 97 (1976), but I see no need to embed within this standard a subsidiary special training requirement. Nor do I believe that the case should be submitted to a jury under a general charge so that the jury is

allowed to create such a requirement *sub silentio* as a part of its general verdict.

A TRUE COPY

Attest:

JOHN P. HEHMAN,
Clerk

By /s/
Deputy Clerk

ISSUED AS MANDATE: September 5, 1986

COSTS: None

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C80-18-A

JUDGE SAM H. BELL

GERALDINE HARRIS, *et al.*,
Plaintiff

—v—

CITY OF CANTON, *et al.*,
Defendant

[Filed Mar. 14, 1986]

ORDER

The above-entitled civil rights action is currently before the court on a motion filed by the City of Canton for judgment notwithstanding the verdict and alternative motion for new trial. This motion is less than two pages long and contains no citation to either case law or to specific evidence presented at trial. For the reasons which follow the motion is hereby denied.

On August 28, 1984 a trial by jury was commenced for nine days involving numerous federal and state causes of action by Geraldine Harris, her husband Willie and daughter Bernadette against the City of Canton and several individual police officers and supervisory personnel of the City. On September 12, 1984, the jury returned a

verdict against the City of Canton on the claim of denial of medical treatment and awarded Mrs. Harris damages of two hundred thousand dollars. The jury factually found that the City of Canton had violated Mrs. Harris' constitutional rights by denying her necessary medical treatment while she was incarcerated at the City Jail. In addition, the jury found in favor of the defendants on all of the remaining claims.

The grounds stated by the City for granting a motion for judgment notwithstanding the verdict are as follows:

1. There can be no liability against the City of Canton on an employer/employee theory.

2. There was no evidence of a custom, policy, or practice on the part of the City of Canton that it denies medical treatment to prisoners of its jail.

3. The "medical treatment" part of the charge was erroneous and confused the jury.

4. On April 26, 1978, the City of Canton was not a person amendable to suit pursuant to Section 1983.

The first issue raised by the City is presumably the argument that their liability was based upon a respondeat superior basis. The law is clear that in a civil rights action brought under 42 U.S.C. § 1983 a municipality may not be held liable for the negligent acts of an employee. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In *Monell* the Supreme Court expressly rejected respondeat superior as a basis for municipal liability in Section 1983 actions. The Court stated as follows:

> By our decision in *Rizzi v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976), we would appear to have decided that the mere right to control without any control or direction having been exercised and

> without failure to supervise is not enough to support § 1983 liability.

436 U.S. at 694 n.58, 98 S.Ct. at 2037, 56 L.Ed.2d at 637.

In this action, the court ruled at trial that the City of Canton may not be held liable on the basis of respondeat superior. Consistent with that ruling, the court has reviewed the instructions given to the jury and does not find that any such instruction was given. In fact the court specifically instructed the jury that the City of Canton was not responsible for oversights or simple negligence in the supervision of personnel under the mandates of section 1983. Thus, the court finds that this ground for judgment notwithstanding the verdict is not applicable to the present action and is without merit.

The second and third grounds raised by the City of Canton are related and shall be dealt with herein together. In the second ground it is asserted that the evidence presented at trial was not sufficient to create a jury issue that the City of Canton through a policy or practice denied medical treatment to Mrs. Harris. In the third ground it is asserted that the court erroneously construed and applied the law as it concerns the medical treatment to be afforded by a municipality.

When a trial court is ruling on a motion for directed verdict or a motion for judgment notwithstanding the verdict, the evidence must be viewed in a manner most favorable to the non-moving party. *Coffy v. Multi-County Narcotics Bureau*, 600 F.2d 570, 579 (6th Cir. 1979); *Krotkoff v. Gloucher College*, 585 F.2d 675, 677 (4th Cir. 1978); *Hull v. Holiday Inns of America*, 478 F.2d 224 (6th Cir. 1973); *Smitty Baker Coal v. United Mine Workers*, 457 F.Supp. 1123, 1130 (D.C. Va. 1978), *aff'd.* 620 F.2d 416 (4th Cir. 1980), *cert. denied* 449 U.S. 870, 101 S.Ct. 207, 66 L.Ed.2d 89 (1980). The evidence viewed in this manner showed that Mrs. Harris, while incarcerated at the Canton Jail, became incoherent and

lost the ability to stand or control her body movements which ultimately resulted in her slumping to the floor. While Mrs. Harris was in this condition, a supervisor of the police department was, pursuant to police policy, contacted by the jailers and he was able to examine the plaintiff. At that time, the supervisor was unable to communicate with the plaintiff due to her condition or get her to answer simple questions or move her body. Thereafter, the supervisor, using his common sense and best judgment, determined that Mrs. Harris did not need medical treatment and she was left lying on the floor. The supervisor had no special training in recognizing when medical treatment was necessary. Shortly thereafter, family members of the plaintiff called an ambulance and Mrs. Harris was removed to the hospital where she was admitted for approximately one week. At trial the plaintiff's physicians testified that when Mrs. Harris arrived at the hospital she required medical assistance.

Before a municipality can be held responsible for violation of an individual's constitutional rights, it must be demonstrated that the constitutional violation was caused by a custom, policy or practice of the City. *Monell v. Department of Social Services, supra.* A "custom, policy or practice" of a municipality does not only include the "policy statement, ordinance, regulation or decision adopted and promulgated by the City's governing body" but also includes the deprivations of constitutional rights caused by a governmental custom. *Williams v. Butler,* 746 F.2d 431, 435 (8th Cir. 1984). A governmental custom does not require the formal approval of the City's officials or formal ratification by some official decision-making body. *Rymer v. Trooper H.A. Davis,* —— F.2d ——(6th Cir. February 11, 1985); *Williams v. Butler, supra.*

The Sixth Circuit has ruled that a municipality may be liable for the actions of its police force when there is a complete failure to train the police or when such train-

ing is so reckless or grossly negligent that future police misconduct is almost certain to result. *Hays v. Jefferson County*, 668 F.2d 869 (6th Cir. 1982); *cert. denied*, 103 S.Ct. 75 (1983). The vesting of complete *carte blanche* authority within a supervisory person in the police department without any special training may be determined by the fact finder to be reckless or grossly negligent. A municipality may be found liable by a jury when it permits decisions concerning the medical treatment of prisoners to be rendered by supervisors exercising only their common sense. *Rymer v. Trooper Davis, supra.*

Applying these legal standards to this action, the court held that a jury issue was present and instructed the jury accordingly. The evidence construed in a manner most favorable to Mrs. Harris could be found by a jury to demonstrate that the City of Canton had a custom or policy of vesting complete authority with the police supervisor of when medical treatment would be administered to prisoners. Further, the jury could find from the evidence that the vesting of such *carte blanche* authority with the police supervisor without adequate training to recognize when medical treatment is needed was grossly negligent or so reckless that future police misconduct was almost inevitable or substantially certain to result. Thus, the court finds that the second and third grounds for a judgment notwithstanding the verdict are not well founded.

The final argument raised by the City of Canton is that a municipality is not a person amenable to suit under Section 1983. Presumably this argument is based upon the holding in *Monroe v. Pape*, 365 U.S. 167 (1960), wherein the Supreme Court found that Congress did not intend to bring a municipality under the ambit of Section 1983. *Id.* at 187-192. However, since the ruling in *Monroe* the Supreme Court has expressly overruled that holding and has found that a municipality is a person within the meaning of the statute and may be sued for con-

stitutional deprivations. *Monell v. Department of Social Services, supra* at 664-689. *Also see*: *Brandon v. Holt*, 469 U.S. ——, 105 S.Ct. ——, 83 L.Ed.2d 878 (1985); *Williams v. Valdosta*, 689 F.2d 964 (11th Cir. 1982); *Hays v. Jefferson County, supra*, *Powe v. Chicago*, 664 F.2d 639 (7th Cir. 1981); *Black v. Stephens*, 662 F.2d 181 (3d Cir. 1981), *cert. denied* 456 U.S. 950, 102 S.Ct. 1646, 71 L.Ed.2d 876 (1981). Since the City of Canton has cited no case law nor has the court discovered any law that would demonstrate that the cases cited above are no longer the law, the final ground for judgment notwithstanding the verdict is dismissed.

In the alternate motion for new trial, the City of Canton raises two grounds. The first ground is that the evidence was insufficient to render a verdict against the City. The court has already discussed the evidence construed pursuant to *Coffy v. Multi-County Narcotics Bureau, supra* at 579, and finds that the evidence was sufficient to submit to the jury the issue of the City of Canton's liability. Further, the court finds that this evidence is sufficient to support the jury's verdict.

The final ground raised by the City of Canton is that a new trial is proper because the judgment is excessive. In this circuit, the standard to be applied if the fact finders award of damages is "so large as to shock the judicial conscience." *Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 827 (6th Cir. 1980); *Also see Stengel v. Belcher*, 522 F.2d 438, 444 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118, 97 S.Ct. 514, 50 L.Ed.2d 269 (1976); *Kroger Co. v. Rawlings*, 251 F.2d 943, 945 (6th Cir. 1958). Although the court concedes that the amount of $200,000 is a large award for the injuries sustained by Mrs. Harris, the court does not find that the award rises to a level that shocks the judicial conscience. Thus, the court does not find that the verdict was excessive. In making this finding it should be noted that the City of Canton has failed to offer any evidence of bias,

passion or prejudice on the part of the fact finders. In addition, the City has not shown where the award is significantly larger than cases involving similar injuries. Hence, this court shall permit the jury's verdict to stand.

Accordingly, the City of Canton's motion for judgment notwithstanding the verdict and alternative motion for new trial are hereby denied.

IT IS SO ORDERED.

/s/
SAM H. BELL
U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3314

GERALDINE HARRIS, WILLIE G. HARRIS,
BERNADETTE HARRIS,
Plaintiffs-Appellees,

v.

STANLEY CMICH, *et al.*,
Defendants,

CITY OF CANTON,
Defendant-Appellant

[Filed Aug.22, 1986]

ORDER

BEFORE: LIVELY, Chief Judge; MERRITT and JONES, Circuit Judges

The city of Canton has petitioned the Court to rehear its decision of July 2, 1986, affirming in part the judgment of the district court.

The Court has considered the petition for rehearing offered in support thereof. A majority of the panel finds that the issue of adequate training was properly before

this court on appeal, and so the petition is found not to be well taken.

It is therefore, ORDERED that the petition for rehearing is denied.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman,
Clerk