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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1418-06T2
A-2356-06T2

LINDA REIS, General Administratrix
and Administratrix ad Prosequendum
OF THE ESTATE OF CHRISTINE EBERLE,
deceased,

Plaintiff-Appellant,

v.

DELAWARE RIVER PORT AUTHORITY and
CHIEF ROBERT E. ALLENBACH, COUNTY
OF CAMDEN, CAMDEN CITY POLICE
DEPARTMENT, CAMDEN COUNTY FIRE AND
AMBULANCE COMMUNICATIONS CENTER,

Defendants,

and

CITY OF CAMDEN and MARIE CUPPARO,

Defendants-Respondents.

CITY OF CAMDEN and CHIEF
ROBERT E. ALLENBACH,

Third-Party Plaintiffs,

v.

RYSHAONE H. THOMAS and
MARCUS TOLIVER,

Third-Party Defendants.

Argued January 9, 2008 - Decided February 19, 2008

Before Judges Axelrad, Sapp-Peterson and Messano.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-4988-03.

Andrew J. Rossetti and Michael A. Ferrara, Jr. argued the cause for appellant (Ferrara Law Firm, L.L.C. and Rossetti & Devoto, P.C., attorneys; Mr. Rossetti and Mr. Ferrara, on the brief).

John Eastlack argued the cause for respondent City of Camden (Holston, MacDonald, Uzdavinis, Eastlack, Ziegler & Lodge, attorneys; Cheryl L. Cooper, on the brief).

Gary M. Marek argued the cause for respondent Marie Cupparo (Timothy D. Scaffidi, attorney; Mr. Marek, on the brief).

PER CURIAM

These consolidated appeals arise from the tragic abduction and murder of Christine Eberle (Eberle) on November 12, 2001, in Camden. Her mother, adminstratrix ad prosequendum Linda Reis (plaintiff), appeals from the motion judge's order of October 6, 2006, that granted defendants City of Camden (Camden) and its civilian police 9-1-1 dispatcher, Marie Cupparo, summary judgment and dismissed plaintiff's complaint.[1] We have

[1] All other defendants in the litigation have either settled with plaintiff or otherwise been dismissed; therefore, we address (continued)

considered the arguments raised on appeal in light of the motion record and applicable legal standards. We reverse.

I.

The facts gleaned from the motion record when viewed in a light most favorable to plaintiff reveal that on the night in question, at approximately 8:00 p.m., Eberle was returning home from her place of employment in Philadelphia. She took the "Hi-Speedline" transit train, owned and operated by the Delaware River Port Authority through its Port Authority Transit Corporation, to the Ferry Avenue Station in Camden. As she exited the train and proceeded to her car in the parking lot of the station, she was abducted by two men later identified as Marcus Toliver and Rayshone Thomas.

Michael Marato, another commuter present in the parking lot some thirty to forty yards away, heard Eberle's screams. He saw a man run between Eberle's vehicle and another car, grab her, push her into a "four-door Escort type [] vehicle," and speed off. Marato observed the vehicle drive over the sidewalk and curb and out of the parking lot onto a side street. Marato suspected something was amiss, so he drove his car after the vehicle and called 9-1-1 from his cell phone.

(continued)
only the issues as they relate to the remaining defendants on appeal.

Cupparo answered the call. Marato described the abduction, gave a description of the assailant's vehicle, relayed the general direction of travel, and continued to follow the other car until he lost sight of it. Marato returned to the station parking lot and awaited the police, but they never came.

Cupparo inadvertently failed to enter the call into the 9-1-1 dispatch system. She attributed this failure to having lost the piece of scratch paper she used to copy down the information. As a result, no police units were ever dispatched to the call.

Toliver and Thomas drove Eberle to a field and viciously beat her for some time. Toliver claimed that during the course of the assault, he acted as a look-out to make sure no police or other individuals were nearby. Eberle was ultimately killed with a machete.

Plaintiff introduced expert evidence that there were Camden police units on duty that could have responded to the 9-1-1 dispatch had it been made. Depositions of various law enforcement personnel indicated that in all likelihood other law enforcement agencies from surrounding towns would have also responded to the call, some with lights and sirens activated, and that there were a number of police vehicles in the vicinity of both the scene of the abduction and Eberle's murder.

Cupparo's supervisor, Sgt. Scott Leusner, testified in depositions that Marato's 9-1-1 call was "Level One" and required immediate dispatch of police units for a response. In an internal affairs investigation that followed, Cupparo was found to have violated departmental policy and procedure without explanation, and she was disciplined for negligent conduct. Camden's police chief, Robert E. Allenbach, testified in depositions that Marato's call was of the highest priority and necessitated the dispatch of "at least one car." Allenbach also indicated that a police unit should also have been dispatched to take a statement from Marato.

Plaintiff's expert James A. Williams furnished a report in which he opined that Cupparo's actions were negligent, that Camden had not properly trained its personnel, and that an appropriate dispatch would have led to a police response that would have likely prevented Eberle's murder. Plaintiff also introduced a 1996 report from the New Jersey Attorney General's Office that was severely critical of the performance of and lack of training in the Camden Police Department. This report was followed by another report in 1998 that noted a failure to implement recommendations from the 1996 report, and shortcomings in the police department's handling of 9-1-1 calls. In her testimony, Cupparo claimed that she had no formal training

between 1982 and 2001, that she was unfamiliar with national standards and training regimens, that her performance was inadequately monitored, and that there was no formal review process in place in the police department.

Defendants moved for summary judgment and argued that the failure to dispatch any police in response to the 9-1-1 call was immunized under the Tort Claims Act, N.J.S.A. 59:1-1 through 12-3 (the TCA). In particular, defendants claimed that N.J.S.A. 59:5-4, which provides immunity to public entities and their employees "for [the] failure to provide police protection service, or, if police protection service is provided, for failure to provide sufficient police protection service," controlled under the facts presented.

After two days of oral argument, the motion judge granted summary judgment and dismissed plaintiff's complaint. Relying in large part upon our decision in Sczyrek v. County of Essex, 324 N.J. Super. 235 (App. Div. 1999), certif. denied, 163 N.J. 75 (2000), the judge concluded that defendants' conduct was immunized from liability. This appeal ensued.[2]

[2] The second day of oral argument took place on the day scheduled for trial, October 10, 2006. The judge's decision was placed on the record that day, though the order entered is dated October 6. There is not a separate order dismissing the litigation as to Cupparo; however, all parties have acknowledged the grant of summary judgment included plaintiff's claims against her.

II.

When reviewing a grant of summary judgment, we employ the same standards used by the motion judge. Atlantic Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 230 (App. Div.), certif. denied, 189 N.J. 104 (2006). We first determine whether the moving party has demonstrated there were no genuine disputes as to material facts; we then decide whether the motion judge's application of the law was correct. Id. at 230-31. We owe no deference to the motion judge's conclusions on issues of law. Id. at 231 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). In this matter, the judge's decision rested solely upon his interpretation of the TCA.

While this appeal was pending, we issued our decision in Massachi v. AHL Services, Inc., 396 N.J. Super. 486 (App. Div. 2007). The facts in that case are strikingly similar to the events at the core of this litigation. There, the plaintiff's decedent's abduction was witnessed by two young women who immediately ran to the Seton Hall University guard station to report the crime. Id. at 491. When they were rebuffed by the security guard, they telephoned the South Orange Police Department from one of their homes, reporting the abduction,

providing a description of the perpetrator, the victim, and the assailant's car and providing its license plate number. Ibid.

At approximately the same time, two off-duty Essex County Sheriff's Officers who witnessed the abduction also saw the assailant's car, and immediately called 9-1-1 to report the incident. Ibid. The City of Newark's 9-1-1 operator was unsure how to handle the call; however, after consulting a co-worker, she did enter the information into the dispatch system. Ibid. Unfortunately, the operator entered an incorrect description of the vehicle and failed to indicate its location or that it was moving. Id. at 491-92. The police dispatcher, relying upon the incorrect information, directed police officers to the wrong location and when they arrived, the victim and her assailant were gone. Id. at 492.

Some twenty minutes later, in nearby Westfield, the police were independently summoned to the assailant's home by his roommate. Ibid. After hearing two gunshots and waiting for additional response team members, the police eventually entered the assailant's room, only to find him dead and the victim mortally wounded. Ibid.

In reversing the motion judge's grant of summary judgment to Newark based upon the immunity provided by N.J.S.A. 59:5-4, we concluded that "where police officers negligently perform

ministerial duties, . . . 'N.J.S.A. 59:5-4 does not insulate [them] from [the] unfortunate results of their negligently executed ministerial duties.'" Id. at 496 (quoting Suarez v. Dosky, 171 N.J. Super. 1, 10 (App. Div. 1979), certif. denied, 82 N.J. 300 (1980)). "[O]nce [Newark] made a decision to hire 9-1-1 operators and provide them with specific procedural regulations governing the manner in which they must respond to calls, then the negligent performance of those 9-1-1 operator duties is not entitled to any immunity under N.J.S.A. 59:5-4." Massachi, supra, 396 N.J. Super. at 498.

We concur with the analysis of our colleagues in Massachi. Here, Cupparo was responsible under Camden's police department's procedural guidelines to at least enter Marato's 9-1-1 call into the system and to do so in a non-negligent fashion. It cannot be fairly disputed that in this regard she was required to carry out a ministerial function devoid of any discretionary decision-making on her part.[3]

Defendants' arguments against the application of Massachi to the facts presented here are two-fold. First, they contend that these facts are significantly distinguishable and compel a different result. For example, they argue that Marato's

[3] At oral argument on the motion, Camden's counsel acknowledged that Cupparo's "duty . . . to enter the call" was "ministerial."

description of the assailant's car was vague, lacking detail such as the license plate number; thus, even if entered into Camden's 9-1-1 system, the information would not have effectively thwarted Eberle's assault and murder.

Perhaps that argument may prevail at trial when the issues of proximate cause are judged against the full panorama of evidence in the case.[4] The contention, however, is unavailing for purposes of summary judgment, particularly in light of plaintiff's contrary evidence and expert testimony that concluded if the dispatch was entered, even based upon Marato's imprecise or erroneous information, police units would have been dispatched. Since the assault on Eberle took some time, plaintiff's evidence leads to the inference that the assailants, who acknowledged concern for the presence of the police and others before killing Eberle, would have fled rather than risk being caught.

Defendants' second argument is purely a legal one. They contend that Massachi erroneously interpreted the immunity provisions of N.J.S.A. 59:5-4, and that our earlier holding in Sczyrek, supra, should control. In particular, defendants rely upon the following passage from Sczyrek for support:

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[4] Defendants' other arguments regarding the lack of proximate cause between Cupparo's omission and Eberle's death are likewise issues more appropriately addressed at trial.

> There is no reason, therefore, why the statutory immunity should not apply whenever there is a claim based on a "failure to provide police protection service." This is so whether that failure is attributable to a policy decision at the highest level, a tactical decision by some lesser ranking official (perhaps a desk sergeant who determines what, if any, response is appropriate to a particular call), and even the alleged actions of telephone operators or other non-ranking employees which may lead to a "failure to provide police protection."
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> [Sczyrek, supra, 324 N.J. Super. at 242-43 (quoting N.J.S.A. 59:5-4)(emphasis added).]

We think the facts at hand, however, are significantly dissimilar from those in Sczyrek and require a different result.

In Sczyrek, plaintiff's decedent brought suit against Essex County alleging negligence that resulted in the murder of her husband, a Newark Police officer, in the courthouse as he was about to testify in a criminal trial. Id. at 237. In part, plaintiff's claim rested upon the failure of the Essex County Prosecutor's Office to respond to letters and phone calls regarding the impending shooting provided by an inmate at the county jail. Id. at 238-39.

We distinguished the issue from that presented in Suarez, supra, and Shore v. Housing Auth. of Harrison, 208 N.J. Super. 348 (App. Div. 1986), "where police who were on the scene behaved negligently." Instead, we characterized "[t]he issue

posed [] [as] whether the immunity provision of N.J.S.A. 59:5-4 applies when the liability claim is based on alleged 'failure to provide police protection,' but that failure allegedly stems from carelessness or negligence of rank and file employees, and not from a governmental policy determination." Sczyrek, supra, 324 N.J. Super. at 242 (quoting N.J.S.A. 59:5-4).

We are not persuaded by defendants' argument that we should apply Sczyrek's holding to the facts at hand. The decision whether to respond to the letters and phone calls of an inmate who wishes to provide information clearly rests within the discretionary authority of the public law enforcement entity as exercised through its employees. It is quintessentially a decision that might "materially affect the efficient distribution of a scarce police personnel resource." Morey v. Palmer, 232 N.J. Super. 144, 152 (App. Div. 1989). Whether the employee making such a decision is of a particular rank is immaterial.

In this case, however, Cupparo answered Marato's 9-1-1 call as she was required to do. In a sense, from that moment she was "on the scene," and her obligation to enter the information was not subject to any discretion whatsoever. Rather, she was obligated by her department's policies and procedures to perform her task in a clearly-defined and non-negligent fashion. We

think the distinction is significant because "the performance of low-level ministerial tasks" is not within the immunity provided by N.J.S.A. 59:5-4. Massachi, supra, 396 N.J. Super. at 498; Suarez, supra, 171 N.J. Super. at 10. Thus, we reject this aspect of defendants' argument.

III.

We find it necessary to address two issues that the motion judge specifically failed to address when he granted defendants' motion for summary judgment. First, Camden argues that it cannot be vicariously liable for Cupparo's failure to perform her duties because if she failed to follow a "standing order," her omission was a willful act for which the city is immune. We find this contention to be without merit.

Pursuant to N.J.S.A. 59:2-10, "[a] public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct." Camden argues that since Cupparo knew it was her obligation to enter the call into the dispatch system pursuant to a standing order, her failure to do so was equivalent to willful misconduct on her part.

This ignores the essential nexus between knowledge of the order and the intention on the part of the public employee to

violate it. In construing the statutory phrase in the context of a police vehicle chase, our Supreme Court noted that "willful misconduct" required proof of "two elements: 1) disobeying either a specific lawful command of a superior or a specific lawful standing order and 2) knowing of the command or standing order, knowing that it is being violated, and intending to violate it." Fielder v. Stonack, 141 N.J. 101, 126 (1995) (emphasis added).

The record fails to reveal any evidence that supports the conclusion that Cupparo intended to violate a standing order requiring her to enter the 9-1-1 call into the dispatch system. In her deposition, Cupparo explained that she wrote Marato's information down on scratch paper but could not explain why she failed to enter it into the system. Clearly, that testimony does not establish as a matter of law that Cupparo intended to violate the police department's orders.

Lastly, at oral argument, defendants advanced the argument that they were immune from liability under the provisions of the "9-1-1 Statute," N.J.S.A. 52:17C-1 through -20. However, it does not appear that the argument was ever raised by these defendants before the motion judge and he certainly never addressed the contention if it was. Defendants did not cross-appeal from the judge's ruling nor have they briefed the issue.

Under all these circumstances, we decline to address the argument. Defendants are free to move for summary judgment on this ground before the trial judge. Massachi, 396 N.J. Super. at 508.

Reversed.