2020 Municipal Update

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Section 1104 NYS Vehicle Traffic Law

Fuchs v. City of New York, 186 A.D.3d 459, 126 N.Y.S.3d 652 (2d Dept. 2020)

On September 26, 2010, Sara Fuchs' (Plaintiff) car was hit by a vehicle that was evading police officers. The car the police officers pursued ultimately turned the wrong way down a one-way street which led to the accident with the Plaintiff. The officers in pursuit exceeded the speed limit and disregarded regulations governing the direction of movement and turning in specified directions. The Plaintiff brought this action to recover damages for personal injuries against the City of New York and the New York City Police Department (Defendants). Following discovery, the Defendants moved for summary judgment dismissing the complaint, the Supreme Court granted the motion, and the Plaintiff appealed.

Vehicle and Traffic Law § 1104 provides a qualified exemption to drivers of authorized emergency vehicles from certain traffic laws when they are involved in an emergency operation. Those traffic laws include exceeding the speed limit, disregarding regulations governing the direction of movement, and turning in specified directions. However, this provision does not protect the driver from the consequences of his reckless disregard for the safety of others.

The Second Department found that the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the police officers did not act with reckless disregard for the safety of others. Further, the court found that the proximate cause

of the accident was the independent recklessness of the driver of the vehicle that was being pursued, not the police officers' conduct in initiating the pursuit. Therefore, the Court granted the Defendant's motion for summary judgment dismissing the complaint asserted against them.

Durham v. Vill. of Philadelphia, 185 A.D.3d 1497, 127 N.Y.S.3d 672 (4th Dept. 2020)

On the day of the accident, a pregnant woman called 911 asking for emergency assistance after experiencing hemorrhaging. Philadelphia Volunteer Fire Department firefighters (Defendant) responded in an ambulance wherein they requested assistance of a paramedic who was in an Army ambulance. The Defendant picked up the woman and drove with her to rendezvous with the paramedic's Army ambulance. When they met, Defendant pulled the ambulance to the shoulder of the southbound lane with its emergency lights on. The paramedic pulled the Army ambulance to the shoulder of the northbound lane to execute a U-turn and park. While executing the maneuver, the Army ambulance was broadsided by a truck driven by Plaintiff.

The Plaintiff commenced this action seeking damages for injuries that she sustained concerning the accident with the Army ambulance. Plaintiff alleged that the Defendant was liable because the accident was caused by Defendant's failure to select a reasonably safe area to rendezvous with the Army ambulance. She appealed from an order granting Defendants' motion for summary judgment dismissing the complaint.

The Appellate Court found the specific conduct Defendant was engaged in was exempted from the rules of the road as he was parked on the shoulder of the road pursuant to Section 1104 of the New York State Vehicle and Traffic Law. As such, the Appellate Court concluded that the Defendant's conduct of parking the ambulance on the shoulder of the road to rendezvous with

another ambulance was entitled to immunity, unless they acted with reckless disregard for the safety of others. Further, Plaintiff had abandoned any claim that Defendant acted with reckless disregard for the safety of others, and on appeal Plaintiff did not dispute the court's conclusion in that regard. Therefore, the Fourth Department concluded that the lower court properly granted Defendants' motion and dismissed the complaint.

Proce v. Town of Stony Point, 185 A.D.3d 975, 127 N.Y.S.3d 541 (2d Dept. 2020)

On October 11, 2016, police officer Hurley received a call from a woman who believed that a person was on her back porch, had tried to enter her home, and had run into the woods. Shortly thereafter, Hurley departed the police station in a marked police vehicle with its lights and siren activated. While en route to the scene, Hurley learned that another officer was responding to the woman's residence, so Hurley turned off the lights and siren on his vehicle and canvassed a nearby street, looking for the suspect. Afterwards, Hurley received a radio call from a sergeant stating that he had located a person on Hastings Lane fitting the description of the suspect.

Hurley proceeded to the sergeant's location, driving north toward Hastings Lane. When he reached Hastings Lane, Hurley made a sharp left turn. As he turned left, the front driver's side of his vehicle struck the Plaintiff's vehicle, injuring him. Hurley testified that he did not see the injured Plaintiff's vehicle until he was making the turn and was not able to stop in time to avoid the impact. Hurley further testified that, in his own mind, the call was no longer a "high" priority, but he believed the situation called for caution until the suspect's story could be confirmed.

The Second Department held that Hurley's conduct may have constituted a momentary lapse in judgment, but it did not rise to the level of reckless disregard for the safety of others.

The reckless disregard standard demands more than a showing of a lack of due care under the circumstances — it requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and has done so with conscious indifference to the outcome.

Further, the Second Department held that Hurley was engaged in an emergency operation based on his deposition testimony, pursuant to Section 1104 of the New York State Vehicle and Traffic Law. The fact that Hurley believed the call was no longer a "high" priority and had deactivated the lights and siren on his vehicle did not mean that Hurley was no longer engaged in an emergency operation. Hurley did not act with reckless disregard for the safety of others and still believed that caution should be taken until a suspect was found. As such, Hurley was engaged in privileged conduct governed by the statutory reckless disregard standard of care, and Hurley and the Town were not liable for the Plaintiff's injuries.

Section 1103 NYS Vehicle Traffic Law

Rascelles v. State, 187 A.D.3d 953, 130 N.Y.S.3d 739 (2d Dept. 2020)

The Plaintiff commenced this action to recover damages for injuries he allegedly sustained when a New York State Department of Transportation (DOT) dump truck, locating a deer carcass, collided with his moped while the Claimant was traveling in the bike lane on the county highway. An interlocutory judgment of the Court of Claims on March 2, 2017 found the Defendant to be at fault. The Defendant appealed.

The Plaintiff argued that the DOT vehicle was traveling partly over the line into the bike lane because the driver was distracted looking for the deer, watching the GPS map on the

passenger's cell phone, and did not see the Plaintiff's moped in the bike lane. The DOT truck was traveling 30 to 35 miles per hour when it turned further into the bike lane where they sideswiped the claimant on his moped.

The Second Department held that the evidence was insufficient to establish that the DOT workers exhibited a "reckless disregard for the safety of others" pursuant to Vehicle & Traffic Law § 1103(b). Further, the Plaintiff failed to establish that the DOT workers acted in conscious disregard of a known or obvious risk that was so great as to make it highly probably that harm would follow. Ultimately, the DOT workers were actually engaged in work on a highway at the time of the accident, and therefore the court properly determined that the Defendant could only be held liable if the actions of the DOT employees constituted a reckless disregard for the safety of others.

Prior Written Notice Statutes Concerning Trip and Falls

Creutzberger v. Cty. of Suffolk, 180 A.D.3d 991, 121 N.Y.S.3d 72 (2d Dept. 2020)

On September 2, 2007, the Plaintiff attended a festival on property owned by the Defendant, County of Suffolk, and occupied by the Defendant, Long Island Maritime Museum (hereinafter the Museum, and together with the County, the Defendants). The Plaintiff alleged that he was injured when the bicycle he was riding on a grass path struck the edge of an elevated boardwalk, throwing him to the ground. The boardwalk was elevated approximately five inches above the ground.

The Plaintiff sought to recover damages for personal injuries he sustained in the accident, and the matter proceeded to a jury trial on the issue of liability. The Supreme Court, Suffolk County, denied the Defendant's motion for judgment as a matter of law, and entered

interlocutory judgment upon the jury verdict finding the County 45% at fault, the Museum 40% at fault, and Plaintiff 15% at fault. Thereafter, the County and Museum appealed.

The Plaintiff asserted that the requirement for prior written notice was obviated because the Defendants created a dangerous or defective condition through an affirmative act of negligence by cutting the grass to the same level as the boardwalk, thereby concealing the height differential between the boardwalk and the path. However, the Appellate Division found that, at trial, the Plaintiff failed to proffer any evidence that the Defendants mowed the grass abutting the boardwalk to the same level of the boardwalk. Further, the Plaintiff presented testimony of a park supervisor employed by the County, who testified that the grass was not cut to make it even with the boardwalk, but rather, the grass was cut "down to the ground."

Based on the evidence presented at trial, the Second Department held there was no rational process by which the jury could base a finding in favor of the Plaintiff on the theory that the Defendants created a dangerous or defective condition through an affirmative act of negligence. As such, the interlocutory judgment was reversed, and the matter remitted to the Supreme Court, Suffolk County, for a new trial on the issue of liability.

Roadway Design

Heins v. Vanbourgondien, 180 A.D.3d 1019, 119 N.Y.S.3d 158 (2d Dept. 2020)

On August 7, 2010, the Plaintiff was driving with three passengers. The plaintiff and all the passengers consumed alcohol. While driving, an argument between the two passengers in the rear passenger seats ensued which distracted Plaintiff, causing her to swerve into the median. The median sloped downwards toward its center; the vehicle eventually hit the opposite slope, rolled at least once and came to rest in the median.

The Plaintiffs' claim asserted against the County was based upon the theory that the median had been constructed with a “non-recoverable slope” and that the County therefore had a duty to provide safety equipment to assist the driver of an “errant vehicle” in regaining control. The Plaintiff did not specify the safety equipment required. The Second Department held that the County failed to meet its prima facie burden of demonstrating that it constructed or maintained County Road 48 in a reasonably safe condition since its witness was unable to state whether the median at the accident location had a “recoverable” or “non-recoverable” slope or whether the grade of the slope complied with industry standards.

The Second Department found that the County was not entitled to summary judgment based on the defense of qualified immunity. The County failed to demonstrate that the design of County Road 48 and any subsequent alterations to it were the result of deliberate governmental decision-making which considered the risks relevant to this action. Therefore, the Second Department upheld with Supreme Court's determination that the County was not entitled to summary judgment based upon a defense of qualified immunity.

Further, the Second Department found triable issues of fact as to whether the median’s slope of the County road may have contributed to the motor vehicle accident which precluded summary judgment for the County. There were also triable issues of fact as to whether the passenger's actions may have contributed to the motor vehicle accident which precluded summary judgment for passenger.

Governmental Immunity – Negligence

Stevens & Thompson Paper Co. Inc. v. Middle Falls Fire Dep't, Inc., 188 A.D.3d 1504, 137 N.Y.S.3d 529 (3rd Dept. 2020)

On April 6, 2014, a large fire broke out at a vacant paper mill in the Town of Greenwich, Washington County. Plaintiff Stevens & Thompson Paper Company, Inc. owned and operated the Dahowa Hydroelectric Facility (facility) which was next door to a former paper mill where the fire broke out. The Middle Falls Fire Department (Fire Department) responded to the fire and mutual aid was summoned from defendant Village of Greenwich. As there were no fire hydrants to supply the firefighters with water, Village firefighters stationed a fire engine near the facility to pump water from the intake canal. A deck gun on the engine shot the water into a ravine where it would flow back into the Battenkill River. The Fire Department used the deck gun to attain the water and the stream of water from the deck gun passed over the facility and caused water to fall over the powerhouse. The facility's power supply shut down when water seeped into the powerhouse, and the facility sustained significant mechanical damage that forced it offline for a prolonged period.

The Plaintiff claims that the Fire Department was negligent in extinguishing the fire. The plaintiff commenced this action to recover for its damages, alleging negligence, and nuisance on the part of the Fire Department, the Village, and defendant Town of Greenwich (collectively referred to as Defendants) related to the water discharge on its property. It was alleged that the Fire Department Defendants' discharge of water resulted in several million dollars in property damages. Following joinder of issue and discovery, the Defendants separately moved for summary judgment dismissing the amended complaint while Plaintiff moved for partial summary judgment on the issue of liability. The Supreme Court granted those Defendants'

motions insofar as they sought summary judgment dismissing the amended complaint and denied Plaintiff's motion. The Plaintiff appealed and the Third Department affirmed the decision.

The Fire Department and Defendants argued that their actions were discretionary in nature and cannot be the basis for liability; that even assuming that their actions were ministerial in nature, no special relationship existed between the Plaintiffs and these Defendants; that they are not liable in nuisance, and that the Hartford Fire Insurance Company paid Stevens & Thompson claim despite a clear exclusion in the policy, rendering the subrogation claim unenforceable. Further, the Fire Department contended that they were entitled to governmental immunity and cannot be held liable to Plaintiff even if they were negligent.

The Third Department granted summary judgment to the Fire Department as it found that the Defendant's actions were protected by the governmental immunity doctrine, which shields public entities from liability for discretionary actions taken during the performance of governmental functions. This doctrine states that government action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general. Here, the decisions relating to the deck gun resulted from the exercise of reasoned judgment that, as a result, rendered the Fire Department Defendants immune from liability for ordinary negligence. Further, the Court found that the Fire Department's purportedly negligent acts reflected their training as they considered the safety of themselves and the public, as well as the potential for property damage, in using the deck gun. Moreover, the firefighters had no reason to anticipate that this would affect the interior of the powerhouse.

Second Circuit Qualified Immunity

Lennox v. Miller, 968 F.3d 150 (2d Cir. 2020)

On July 22, 2016 the Plaintiff (Lennox) left her child in her car in order to confront her boyfriend and a female he was with. Lennox allegedly punched the female in the face after which the police were called. When Officer Clarke and Miller arrived on the scene, Lennox was holding her child. Officer Clarke and Lennox engaged in a verbal argument which ended in Clarke coming up behind Lennox, grabbing her arms behind her head, causing her child to fall and hit the ground. Lennox was then handcuffed and there was an alleged attempt flee, but Lennox stated she couldn't move. Clarke then threw Lennox face down on the grass. Lennox said "help me" to Miller, but he did not intervene. Lennox claims Clarke put his full weight onto Lennox with both of his knees and made her urinate herself. Lennox also claims Clarke "bashed her head on the ground and swung her up on her feet and pulled and pushed her over to his police car." Lennox was in the car for twenty minutes with the windows up and engine off, during which Lennox had asthma and anxiety attacks.

The District Court denied the motion for summary judgment on Lennox's assault, battery and excessive force claims against Officer Clarke, her failure to intervene claim against Officer Miller, and her punitive damages claims against Officers Miller and Clarke. The District Court explained that "issues of fact exist as to whether Officer Miller had actual knowledge of Officer Clarke's use of force against Lennox and disregarded a reasonable opportunity to intervene on her behalf." Officer Miller was similarly not entitled to qualified immunity.

The Second Circuit stated that "There was no evidence compelling a conclusion that Lennox physically resisted Officer Clarke once she was handcuffed and on the ground. As such, a jury could find that Officer Clarke used unreasonable force on an individual who was not

resisting arrest and who was secured in such a manner that she posed no threat to public safety." Thus, the Second Circuit found that viewing the facts in the light most favorable to Lennox, Officer Clarke could have violated law that was clearly established on July 22, 2016, and the court could not say he was entitled to qualified immunity. Officer Miller, on the other hand, was entitled to qualified immunity because there was no evidence that he had a reasonable opportunity to intervene or that his failure to do so contravened clearly established law.

Jones v. Treubig, 963 F.3d 214 (2d Cir. 2020)

On April 7, 2015, Plaintiff (Jones) was stopped by two officers at his apartment building in East Harlem. Jones consented to being searched and the officers found a bottle of medication Jones intended to give to his uncle. At that point, Jones's uncle ran and the officer's handcuffed Jones's right arm. Jones swung at the officers who then took him to the ground. More officers arrived on scene and hit Jones with a baton and pepper sprayed his face after he said, "I'm not going to jail". Officer Treubig subsequently arrived on scene because Jones was still resisting and used the taser once on Jones which caused him to fall back on the ground with his arms out in the air. According to Lt. Treubig, the initial tasing "didn't stabilize Jones enough to the point where the officers were able to grab his hands." Treubig "reassessed the situation" and applied the taser a second time to the plaintiff. Jones was charged with a controlled substance offense and resisting arrest. He was released without bond, and all charges were ultimately dismissed.

Thereafter, Jones brought a § 1983 action alleging that the police officers used excessive force. The jury found officer Treubig liable and awarded plaintiff nominal compensatory damages in addition to punitive damages. The Southern District granted officer's renewed motion for judgment as a matter of law based on qualified immunity.

The Court found there was no clearly established law that using a taser two times in rapid succession constituted excessive force under the particular circumstances of the case. The Court further concluded that Treubig's mistaken view of resistance at the point when he re-cycled the taser was "reasonably believed," and did not preclude his entitlement to qualified immunity. As such, the District Court concluded that Treubig did not act unreasonably.

Upon review, the Second Circuit concluded that it was clearly established at the time of the incident that an officer could not use significant force against an individual who was no longer resisting arrest and posing no threat to the safety of other people. At the time of the second taser use, Jones was no longer resisting arrest and was not a danger. Therefore, the Second Circuit reversed the judgment of the District Court.

Additionally, the Second Circuit concluded that given the absence of any finding by the jury as to the reasonableness of the mistaken factual belief by Treubig regarding resistance by Jones after the first tasing, and given that a jury could find such a mistaken belief unreasonable when the facts are construed most favorably to Jones, any such mistake cannot be a proper basis for affording Treubig qualified immunity. Further, evidence from Treubig himself revealed he had time to re-assess whether Jones was still resisting arrest before using the taser a second time. As such, the rapidly evolving nature of the situation as a whole did not "cloak" Treubig with qualified immunity for the unreasonable use of force following that re-assessment. Finally, the fact that he was not yet handcuffed at the time of the second tasing provided no grounds for the doctrine of qualified immunity to disturb the jury's finding of excessive force relating to Lt. Treubig's conduct in this case.

Chamberlain Est. of Chamberlain v. City of White Plains, 960 F.3d 100 (2d Cir. 2020)

On November 19, 2011 Kenneth Chamberlain, a 68-year old African American U.S. veteran who had a mental illness and lived alone accidentally activated an emergency medical-alert system to which he subscribed. The operator reported the call to the White Plains Department of Public Safety who sent an ambulance and squad car to Chamberlain's apartment. Despite the dispatcher's warning that Chamberlain had a mental illness, the officers began banging loudly on his door and shouting demands that they be allowed to enter. The noise alarmed Chamberlain, who then activated his Life Aid button to report "an emergency" that "the White Plains Police Department is banging on my door and I did not call them, and I am not sick." The operator called White Plains Police to cancel the police dispatch. In response, the police dispatcher informed her that "they're gonna make entry anyway .... They're gonna open it anyway."

Chamberlain also repeatedly told the Life Aid operator and the officers at his door that he had not called the police. Further, from the beginning of his encounter with the police, Chamberlain stated lucidly, repeatedly, and emphatically to the Life Aid operator and the officers at his door that he was not in need of assistance. Because Chamberlain continued to refuse to open his door, the officers radioed for tactical reinforcements. There were approximately twelve officers in the augmented police force when they attempted to gain entry. They were armed with heavy tactical gear, including handguns, a beanbag shotgun, tasers, a riot shield, and pepper spray. The twelve officers forced their way into his apartment and Chamberlain was shot by a beanbag shotgun used by Sergeant Martin.

The District Court granted Sergeant Martin's motion to dismiss the excessive force claim against him, but the Court permitted Chamberlain to reassert that claim at the summary judgment

stage. Chamberlain then challenged the District Court's grant of summary judgment in favor of defendants on the excessive force claim asserted against Sergeant Martin. The Second Circuit remanded the excessive force claim against Sergeant Martin in order for the District Court to determine, in the first instance at the appropriate stage of the proceedings, whether Sergeant Martin was entitled to qualified immunity for his use of the beanbag shotgun in light of the totality of circumstances, including the officers' warrantless entry and the justifications thereof.

The Second Circuit stipulated that the officers' unlawful entry into Chamberlain's apartment, if borne out by proven facts, may affect the balancing of factors bearing on whether the officers' use of force was objectively unreasonable under the circumstances. This reasoning was based on City. of Los Angeles, Calif. v. Mendez (2017) where the court declined to address the question of whether "unreasonable police conduct prior to the use of force that foreseeably created the need to use it" is a relevant factor in an excessive force analysis because that question was raised after certiorari was granted.

Qualified Immunity – Supreme Court

Baxter v. Bracey, 140 S. Ct. 1862, 207 L. Ed. 2d 1069 (2020)

On January 8, 2014 a neighbor called the police after seeing Baxter breaking into a house. While caught in the act of burglarizing the house, Baxter heard sirens and ran to another house to hide in the basement. After giving several warnings, the police released a dog to apprehend him and the dog bit him. Baxter alleged that he had already surrendered when the dog was released. Baxter alleged excessive force and failure to intervene, in violation of the Fourth Amendment.

Applying qualified immunity precedents, the Sixth Circuit held that even if the officers' conduct violated the Constitution, they were not liable because their conduct did not violate a clearly established right. Baxter then petitioned the Supreme Court of the United States to reconsider the precedents that the Sixth Circuit applied. The Supreme Court denied this petition.

Justice Thomas dissented from the decision stating that § 1983 of the qualified immunity doctrine appears to stray from the statutory text and would therefore grant the petition. Justice Thomas asserts that the analysis the court uses is no longer grounded in the common-law backdrop against which Congress enacted the 1871 Act. Justice Thomas asserts that the court should return to the approach of asking whether immunity "was 'historically accorded the relevant official' in an analogous situation at common law.'"

Second Department Excessive Force

Owens v. City of New York, 183 A.D.3d 903, 124 N.Y.S.3d 695 (2d Dept. 2020)

On November 12, 2007, the Plaintiff called 911 after having a verbal dispute with her son. During the ensuing encounter with New York City Police Officers, the son was shot 14 times by the police, killing him. The Plaintiff brought suit alleging excessive force. The Supreme Court granted the Defendant's summary judgment motion, and the Plaintiff appealed.

The Second Department found a genuine issue of material fact as to whether the officers' use of deadly physical force was objectively reasonable under the Fourth Amendment, which precluded summary judgment on the § 1983 excessive force claim. The Court found that the Defendants failed to demonstrate, prima facie, the absence of triable issues of fact as to whether the defendant officers' use of deadly physical force against the decedent was objectively reasonable under the circumstances. The Defendants further failed to establish, prima facie, the

absence of triable issues of fact as to whether a reasonable officer, facing the same situation, could have believed that deadly physical force was necessary to protect himself or herself or others from death or serious physical injury, and that the defendant officers were thus entitled to qualified immunity.

However, the Second Department found that the Defendants' motion for summary judgment based on the number of shots fired, regarding excessive force, should be granted. The Second Department stated that the deposition testimony of each officer demonstrated, prima facie, that each fired until each perceived that the decedent no longer posed a threat of death or serious physical injury. The Second Department held that if officers are justified in firing at a suspect in order to end a severe threat to public safety, they need not stop shooting until the threat has ended.

Supreme Court Title VII – Sexual Orientation

Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)

Gerald Bostock was fired when he started playing in a gay softball league after working as a child-welfare advocate for Clayton County, Georgia for ten years. The County fired him for conduct "unbecoming" a county employee. Bostock sued in federal court for gender discrimination under Title VII of the Civil Rights Act of 1964. The trial court dismissed his claim, reasoning that Title VII does not prohibit discrimination based on homosexuality, and the Eleventh Circuit affirmed that ruling. Meanwhile, two other circuit courts reached the opposite result in similar cases. First, skydiving instructor Donald Zarda was fired a few days after he mentioned he was gay. Second, the funeral home where Aimee Stephens worked for years,

presenting as a man, fired her after Stephens said she intended to live and work as a transgender woman.

Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Zarda and Stephens, respectively, to proceed.

The Supreme Court of the United States held that an employer who fires an individual employee merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964. Here, the employers each violated Title VII of the Civil Rights Act of 1964 when they fired a long-time employee shortly after the employee revealed that he or she was homosexual or transgender because it was impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

Further, just as sex was necessarily a but-for cause when an employer discriminated against homosexual or transgender employees, an employer who discriminated on these grounds inescapably intended to rely on sex in its decision making; achieving the employer’s ultimate goal of discriminating against homosexual or transgender employees. Finally, as enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.

Special Duty Defense – Discretionary Immunity

Ferreira v. City of Binghamton, 975 F.3d 255 (2d Cir.), certified question accepted, 35 N.Y.3d 1105, 157 N.E.3d 673 (2020)

On August 19, 2011, an informant notified police officer James Hawley that Michael Pride had recently robbed local drug dealers, was armed, and was staying at his girlfriend's apartment. Based on this, the police obtained a no-knock search warrant for the residence. The night before, Binghamton police officers conducted an hour of surveillance of the residence where officers observed Pride and another man in front of the residence engaged in "activity consistent with a drug transaction," but did not see weapons or drugs. No additional surveillance was conducted before the raid the next morning and no attempt was made by Hawley, members of the SWAT unit, or others to obtain a blueprint or layout of the residence. During the raid, Ferreira (Plaintiff), while unarmed, was shot in the stomach by Officer Miller in the course of Miller executing the no-knock search warrant.

The District Court instructed the jury that it could find the City liable for negligence either on the basis of negligence on the part of Miller in shooting Plaintiff or on the basis of negligence of the other police officers in their preparation for the entry. The jury found negligence on the part of the City (partially offset by a finding of 10% comparative fault on Plaintiff's part). It rendered an award of $3 million against the City, but it found no negligence on the part of Officer Miller and rendered a verdict in his favor. In granting judgment as a matter of law in favor of the City, the District Court concluded that New York state law requires a plaintiff to demonstrate the existence of a "special relationship" in order to sustain the duty element of a negligence claim against a municipality, and that Plaintiff had failed to adduce evidence supporting such a relationship. As to the discretionary immunity issue, the District Court granted judgment as a matter of law on Plaintiff's negligence claim against the city.

Plaintiff challenged the District Court's ruling that the City was entitled to judgment as a matter of law because discretionary immunity protects its actions in planning and executing the raid.

The Second Circuit could not discern from precedent which view was favored by New York's highest court, and because the issue is essentially one of state policy, the question was certified to the New York Court of Appeals. The question certified is as follows; "Does the 'special duty' requirement—that, to sustain liability in negligence against a municipality, the plaintiff must show that the duty breached is greater than that owed to the public generally—apply to claims of injury inflicted through municipal negligence, or does it apply only when the municipality's negligence lies in its failure to protect the plaintiff from an injury inflicted other than by a municipal employee?" As such, this question has yet to be decided.

The Second Circuit held that discretionary immunity did not apply because according to the testimony of the City's own police officers, certain actions of the City's employees in the planning of the raid violated acceptable police practice. The Plaintiff elicited sufficient evidence to support a jury finding that the City, through the actions of its employees in the police department and SWAT unit, violated established police procedures and acceptable police practice. The evidence included failing to conduct adequate pre-raid surveillance of the residence or gather other intelligence and failing to attempt to obtain a floor plan or layout of the residence. The sole intended purpose of the raid was to catch Pride unaware. The Second Circuit pointed out that if surveillance had been conducted and revealed that Pride had not returned to the apartment, the no-knock pre-dawn raid, with all of its attendant dangers, would have been pointless. This was sufficient to support a jury finding that certain failures on the part of the City in planning the raid violated acceptable police practice and that these failures caused Plaintiff's injury.

Additionally, the Court declined the City's invitation to fashion for New York a heightened requirement that plaintiffs demonstrate the violation of a formal written policy in order to defeat discretionary immunity — particularly given that under this doctrine plaintiffs are already required to demonstrate more than is otherwise required to establish liability.

APPENDIX

McKinney's Vehicle and Traffic Law § 1103

§ 1103. Public officers and employees to obey title; exceptions:

(a) The provisions of this title applicable to the drivers of vehicles upon the highways shall apply to drivers of all vehicles owned or operated by the United States, this state, or any county, city, town, district, or any other political subdivision of the state, except as provided in this section and subject to such specific exceptions as are set forth in this title with reference to authorized emergency vehicles.

(b) Unless specifically made applicable, the provisions of this title, except the provisions of sections eleven hundred ninety- two through eleven hundred ninety-six of this chapter, shall not apply to persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway nor shall the provisions of subsection (a) of section twelve hundred two apply to hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation. The foregoing provisions of this subdivision shall not relieve any person, or team or any operator of a motor vehicle or other equipment while actually engaged in work on a highway from the duty to proceed at all times during all phases of such work with due regard for the safety of all persons nor shall the foregoing provisions protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others

McKinney's Vehicle and Traffic Law § 1104

§ 1104. Authorized emergency vehicles:

(a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.

(b) The driver of an authorized emergency vehicle may:

1. Stop, stand or park irrespective of the provisions of this title;
2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as he does not endanger life or property;
4. Disregard regulations governing directions of movement or turning in specified directions.

(c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible

signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.

(d) An authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits
for the purpose of calibrating such vehicles'1 speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as an authorized emergency vehicle shall not be prohibited from using any sidewalk, highway, street or roadway during an emergency operation.

(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

(f) Notwithstanding any other law, rule or regulation to the contrary, an ambulance operated in the course of an emergency shall not be prohibited from using any highway, street or roadway; provided, however, that an authority having jurisdiction over any such highway, street or roadway may specifically prohibit travel thereon by ambulances if such authority shall deem such travel to be extremely hazardous and would endanger patients being transported thereby.