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MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

First Department Reverses Termination of Disgruntled School Teacher Who Posted About her Students on Facebook.

Rubino v. City of N.Y., 2013 N.Y. Slip OP. 3272.

After a school teacher was fired for posting angrily about her students on Facebook (including alluding to letting one of them drown), she appealed her termination. Notably, plaintiff initially denied the charges when confronted with them and acted in cahoots with her friend in an attempt to lead her employer to believe that it was her friend who posted the comments. Eventually, however, plaintiff confessed that she did post the comments and generally expressed remorse for what she admitted was inappropriate behavior. Plaintiff deleted the posts in question three days after posting them and was not Facebook “friends” with any of her students or their families.

The First Department concluded that the penalty of termination was “shocking” to one’s sense of fairness and reversed plaintiff’s termination, mainly because she was a fifteen year veteran in the Department of Education with no prior disciplinary history.

The Court found that the posts, while inappropriate, were made to vent her frustrations and that it was not posted to the public at large because it was only visible to those in her Facebook network. As far as plaintiff’s initial denial of the allegations, the Court found that plaintiff acted out of fear of losing her livelihood and not as part of a premeditated plan.

Court Dismisses Claims of Negligent Police Training Against County After Officers Shot and Killed a Mentally Disturbed Man.

Miller v. County of Monroe, 2013 U.S. Dist. Lexis 70467.

Plaintiff widow sued on her and her husband’s behalf after the Police shot him in his own home. The police escorted plaintiff decedent home in handcuffs after he was arrested for driving while intoxicated. Once released from the handcuffs and in the presence of the police and his wife, plaintiff decedent took possession of and aimed his legally registered handgun at them. Plaintiff’s widow alleges that the gun was only aimed at the ceiling and that she was attempting to talk to her husband and calm him down during this encounter. However, per plaintiff’s

complaint, the police handcuffed her and placed her in a police car outside of the home, from where she observed her husband still armed and the police officers shot him to death.

Plaintiff sued the County itself, alleging that it was negligent for failing to properly train and/or supervise the officers involved in the incident and essentially alleging its negligence under a *respondeat superior* theory. The Court dismissed these claims, but did allow plaintiff's *respondeat superior* claims to survive against the County Police Department, as the direct employers of the officers.

The Court held that the County could not be held liable for the officers' conduct, under either Federal or State law. Under Federal law, the Court held that plaintiff failed to sufficiently plead a "*Monell*" claim, so coined by the United States Supreme Court in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658. The latter case involved a police shooting also and sets forth that a municipality may be liable under 42 U.S.C. 1983 for failure to train and/or inadequate supervision, but only when such a failure or lack of supervision amounts to deliberate indifference of the plaintiff's rights. The Court in *Monell* further opined that "deliberate indifference" is a stringent standard of fault, requiring proof of a municipality's disregard of known or obvious consequences of the misconduct at issue. In the context of police cases, the *Monell* Court held that a municipality may be deemed deliberately indifferent if its police policymakers choose to retain a program while having actual or constructive notice that its implementation causes employees to violate citizens' rights. Furthermore, there must be some pattern or similar constitutional violations stemming from the lack of proper employee training and/or supervision. Subsequent case law, both Federal and State however, have made clear that a municipality's §1983 failure to train/supervise liability cannot be predicated upon a mere theory of *respondeat superior*. In this case, plaintiff alleged exactly that.

The Court therefore, held that even taking the plaintiff's allegations as true and awarding her every fair and reasonable inference, her complaint could not survive a motion to dismiss because her allegations were speculative and asked the Court to impute liability to the County solely under a *respondeat superior* theory and make the leap that this single incident infers a lack of proper training or a lack of or inadequate police policies.

Second Department Grants Summary Judgment to Village, Finding that it Adequately Illuminated Accident Roadway Where Plaintiff Was Struck by a Motor Vehicle.

Silvestri v. Village of Bronxville, 2012-05074.

Plaintiff claimed personal injury after she was hit by a car at a Bronxville intersection owned by the Village of Bronxville. Plaintiff's Notice of Claim set forth that the accident occurred as a result of improper and insufficient lighting at the intersection and the Complaint similarly set forth that the low level of illumination at the intersection rendered it unsafe for public travel. The Village, by our office, *Morris Duffy Alonso & Faley*, moved for summary judgment post 50-H. The trial Court denied the motion, with the Second Department reversing and finding no questions of fact as to the Village's liability.

Plaintiff summarily testified at her 50-H hearing that a traffic light governs the intersection in question and that she waited for the light to turn red before proceeding to cross. She was struck in or around the middle of the intersection by a vehicle attempting a left turn. The plaintiff testified that there are streetlights at all four corners of the intersection and that all were illuminated at the time of the accident. Plaintiff did not testify as to any specific defect in the accident location, beyond testifying that the lighting conditions there were “not too well” or “dull.” Neither the plaintiff nor anyone else ever complained to the Village about the supposedly inadequate lighting in the area.

While the lower Court found that the Village failed to submit admissible proof that the intersection was reasonably safe with the lighting it had installed, the Second Department found that the Village *did* maintain the area in a reasonably safe condition and had no actual or constructive notice of any lighting defect. The Court was unpersuaded by plaintiff’s reliance on a newspaper article that the Village planned to renovate its lighting system and general contention that the subject intersection was extremely busy and heavily traveled by pedestrian and vehicular thoroughfare. The Court opined that a municipality’s obligation to install and/or maintain street lighting arises only in those situations where illumination is needed to avoid dangerous and potentially hazardous conditions.

Kings County Supreme Court Finds that the City did Not Have a Special Duty to a Teenage Boy Who Was Assaulted and Shot by a Fellow Student Moments After Police Intervention.

Moore v. City of New York, 2013 N.Y. Slip Op. 51214 (U) (July 25, 2013).

Plaintiff, a fifteen year old boy, was “jumped” and ultimately shot by a fellow student in a heavily policed, high crime area of Brooklyn. On the day in question, plaintiff’s assailants beat him for about two minutes and dispersed at the sound of police sirens. The responding officers checked plaintiff’s consciousness and inquired about his condition. Plaintiff did not verbally respond to the officers, but instead ran after an assailant who was walking away from the scene. Another scuffle ensued as a result and after plaintiff took off running and was then chased for two blocks by various assailants, the group was boxed-in by a second police car and were told by the officers to “break it up.” After admonishing the group, the police car drove away and plaintiff was shot moments later by one of his assailants.

Plaintiff commenced suit against the City of New York and various individual police officers for his injuries. The Court granted summary judgment for the City, finding that there was no requisite special duty between plaintiff and defendants.

The Court noted that a municipality may not be liable for failure to provide adequate police protection absent a *special duty*. A municipality can create a special duty in three ways: (1) by violating a statutory duty enacted for the benefit of a particular class of people; (2) when the municipality voluntarily assumed a duty that generates justifiable reliance by the plaintiff or (3) when the municipality assumes positive direction and control in the face of a known, blatant and dangerous safety violation.

Plaintiff argued that the City, through its police officers, created a special duty under method (2). In this vein, the Court noted that four elements establish the *justifiable reliance* type of special duty: (1) when the municipality assumes an affirmative duty to act either through promises or actions; (2) the municipality knows that inaction could lead to harm; (3) some form of direct contact was made between plaintiff and the municipality's agents and (4) that the plaintiff justifiably relied on the municipality's affirmative undertaking.

The Court opined that to establish justifiable reliance, generally a plaintiff must show that a defendant's conduct actually lulled plaintiff into a false sense of security, induced relaxation of plaintiff's own vigilance and/or caused plaintiff to forego other available avenues of protection, and thereby placing plaintiff in a worse position than if the municipality never assumed the duty.

The Court declined to find that the officers induced justifiable reliance by their conduct in responding to the incident two separate times. As to the officers' first intervention, where they inquired as to the plaintiff's physical condition, the Court found that plaintiff did not justifiably rely on them and hardly relied at all, as plaintiff he had no exchange with the officers and, indeed, proceeded to run after one of his assailants. There was also evidence that plaintiff ignored the officers' warning to go home at this point.

The Court found that any arguable reliance on this first contact with the police was too vague and indefinite to create a special duty. The Court found the second intervention, where the officer's boxed in plaintiff and his assailants, to be even more tenuous and that this similarly failed to establish justifiable reliance.

The Court was not persuaded by plaintiff's argument that the City assumed a special duty by heightening police protection in the subject neighborhood and specifically, in or around the plaintiff's school area during dismissal. Rather, the Court opined that finding a special duty based on these facts would be to enlarge the ambit of a special duty to include routine police procedures, such as ascertaining the status of an injured individual stabilizing a tense situation.

Second Circuit Affirms Dismissal of Plaintiff's Claims Against the City following an Allegedly Wrongful Arrest and Body Cavity Search.

Gonzalez v. City of Schenectady, 2013 U.S. App. Lexis 17943 (August 28, 2013).

Plaintiff was arrested for drug possession and subject to a post-arrest body cavity search, both of which he claims violated his constitutional rights under 42 U.S.C. 1983. Plaintiff was arrested after he approached an undercover informant in an area known as a "drug mart," asked what he needed and told the informant that he could "get whatever he[sic] needed." Following this encounter, two uniformed officers approached plaintiff, arrested him and found nothing during a regular search. It was a subsequent, full body cavity search at the police precinct that unveiled contraband in the plaintiff's rectum.

At trial, the criminal court Judge refused to suppress the contraband found during the cavity search, finding that the search was "lawfully" conducted pursuant to an arrest based upon

probable cause. The plaintiff was convicted and the Third Department reversed his conviction, finding that the officers did *not* have a reasonable suspicion for the cavity search. Plaintiff then filed a civil lawsuit against the City and individually named officers for (1) false arrest and (2) unlawful search.

The Second Circuit affirmed dismissal of the plaintiff's claims, finding that the officers were entitled to qualified immunity under each claim because (1) they had "arguable" probable cause to arrest the plaintiff and (2) because the law on cavity searches is not clearly established.

Qualified immunity shields government officials from suit only if their conduct does not violate a *clearly* established constitutional right of which a reasonable person would have known. Qualified immunity depends upon whether (1) plaintiff can prove a violation of his or her constitutional right; (2) whether that constitutional right was "clearly" established and (3) even if it was, whether an objectively reasonable government official would believe the conduct at issue was lawful. A constitutional right is clearly established under prong (2) if the contours of the right are sufficiently clear, such that a reasonable officer would understand that the complained-of conduct violated that right.

Addressing the applicability of qualified immunity as to plaintiff's false arrest claim, the Court noted that plaintiff satisfied prong (1) and (2) because he *does* have a clearly established constitutional right to be free from false arrest and that this right was violated when the officers arrested him without the requisite probable cause. Looking at the facts known to the officers at the time of the arrest, the Court noted that there was no probable cause for it because plaintiff only represented that he could "get" the drugs that the informant needed and that plaintiff thus, did not possess any when he approached him. The Court also opined that the plaintiff's representation to the informant was not a bona fide offer to sell contraband.

Even without probable cause for the arrest, the Court noted that qualified immunity could shield defendants from plaintiff's false arrest claim if the officers acted with objective reasonableness, under prong (3). Objective reasonableness is present if the officers had an "arguable" probable cause for the arrest, i.e., if officers of reasonable competence could disagree on whether there was probable cause. Because the criminal court found that there was probable cause for the arrest at the time of trial and considering the high drug area and context in which plaintiff approached the informant, the Second Circuit found that there was "arguable" probable cause for the arrest that entitled defendants to qualified immunity in plaintiff's civil suit.

Turning to plaintiff's claims of an unlawful cavity search, defendants did not dispute that they violated plaintiff's right to be free of unreasonable searches, but argued that plaintiff's right was not *clearly* established. The Court agreed and noted that the case law on cavity searches offers no bright line rule on their constitutionality and that officers cannot be expected to piece together unclear and often conflicting legal precedents. Further, the Court noted that the officers acted with objective reasonableness in conducting the cavity search even without full blown probable cause, as a reasonable officer would not have understood a cavity search during an arrest for a drug offense to be unlawful.

First Department Upholds Termination of School Teacher Who Allegedly Made Death Threats During a Disciplinary Proceeding.

Smith v. New York City Dept. of Educ., 2013 N.Y. Slip Op. 5765.

An arbitrator terminated plaintiff, a tenured school teacher, after a disciplinary proceeding where it was alleged, among other things, that plaintiff had excessive absences and failed to properly supervise his students. Plaintiff allegedly made death threats to his own attorney while the proceeding was ongoing, which the attorney relayed to the first arbitrator who presided over the proceeding. The first arbitrator recused himself based on this information and was then replaced by a second, whose decision terminated the plaintiff. Plaintiff subsequently found out that the attorney relayed his death threats to the first arbitrator and appealed the second arbitrator's findings in a CPLR, Article 75 petition. The First Department affirmed the lower Court's dismissal of the petition.

The Court refused to disturb the arbitrator's award because it was made with due process, was based upon adequate evidence and was not arbitrary and capricious. The Court found that the death threats did not disrupt the disciplinary proceeding and noted that the hearsay evidence of plaintiff's alleged death threats was admissible. The Court held that the basis for the arbitrator's overall findings were also supported by witnesses having personal knowledge of the material facts and/or hearsay beneath the charges brought against him in his employment.

The Court rejected plaintiff's argument that his threats was protected speech because they constituted true threats, an exception to the First Amendment and did not concern matters of public concern. The Court also noted that plaintiff's prior attorney only leaked the threats to the arbitrator because plaintiff's behavior became increasingly erratic and the attorney thought him to be genuinely dangerous.

First Department Finds that the City Committed Spoliation of Evidence By Failing to Prevent Automatic Destruction of 911 Call Recordings.

Strong v. City of New York, 2013 Slip Op. 665 (October 15, 2013).

Plaintiffs were injured after a police officer, allegedly during an emergency response, struck another motor vehicle and various pedestrians. In answering the plaintiffs' complaint, the City raised the "emergency operation" affirmative defense, claiming that because the accident occurred during the officer's emergency operation of a police vehicle, the City had to be held to VTL 1104's heightened, "reckless disregard" standard in order to be found liable. Plaintiff's requested production of the N.Y.P.D.'s 911 audio recordings relative to the purported emergency that the officer was responding to, but they were routinely destroyed 180 days after the incident, per the N.Y.P.D.'s policy. Plaintiffs then moved against the City for spoliation sanctions, claiming that it had been deprived of essential evidence needed to negate the City's emergency operation defense.

The First Department found that the City had committed spoliation of evidence because it should have taken steps to prevent the automatic destruction of the tapes. However, the Court

found that the only sanction warranted was precluding the City from offering any evidence from the destroyed recordings because plaintiff was not entirely deprived of means to negate the City's emergency operation defense.

The Court opined that while the City had not destroyed the tapes willfully or in bad faith, it was negligent in doing so. The Court found that the City was on notice that the plaintiffs could need the tapes in the course of the litigation, given plaintiffs' Notice of Claim,' 50-H testimony, Order to Show Cause, which was withdrawn before decision, but still served on the City, requesting these items and by the City's very assertion of the emergency operation defense in its answer.

First Department Restores a Bicyclist's Claim of Negligence Against Dog Owner for Central Park Accident.

Doerr v. Goldsmith, 2013 N.Y. Slip Op. 6442 (October 3, 2013).

Hastings v. Sauve, 967 N.Y.S.2d 658 (2013).

Plaintiff bicyclist was injured when defendant's dog, in response to defendant's "come here" motions, collided with plaintiff and propelled him off of his bike in Central Park. While the lower Court initially threw out plaintiff's suit, a divided First Department found issues of fact precluding summary judgment, based upon a Court of Appeals decision that was rendered during the plaintiffs' appeal.

The lower Court dismissed plaintiff's suit on the settled principle that animal owners cannot be liable for negligence relative to the actions of their animals, but only for strict liability in cases where the owner has notice of the animal's vicious propensities and plaintiff here did not claim that the accident occurred due to the animal's vicious propensities. However, the Court found that the Court of Appeals' decision in *Hastings v. Sauve* crafted a new precedent allowing negligence suits against animal owners. In *Hastings*, the Court of Appeals permitted a claim of negligence against a cow owner whose cow wandered onto a roadway and injured the plaintiff motorist.

The First Department found that the *Hastings* decision opened the door for negligence claims against animal owners who do not take care to keep their animals out of the roadway or off the property of others and that plaintiff's suit could survive because plaintiff was injured because of defendant's actions in summoning his dog while the plaintiff was in the dog's path, and not the dog's own instinctive or volitional behavior.

The dissent found that the *Hastings* decision was inapplicable because the decision was circumscribed to farm animals and did not apply to typical household pets, particularly in Central Park, where animals are customarily unleashed and allowed to wander.

**Court Finds Issues of Fact as to Infant Plaintiff's Claim of Negligent School Supervision
Stemming from a Wrestling Injury.**

Carter v. Uniondale Union Free Sch. Dist., 2013 Slip Op. 51576 (U) (September 13, 2013)

Plaintiff, a sixth grader, broke his left humerus after his opponent picked him up and threw him down during a gym class wrestling match. Plaintiff's opponent chose plaintiff to wrestle with him. Plaintiff sued his School District, claiming that the gym teacher was negligent in allowing the two to wrestle given evidence of prior verbal and physical altercations between the two.

The Supreme Court of Nassau County denied the School's motion for summary judgment, finding factual issues as to whether it had sufficient notice of the prior issues between the boys such that the incident at issue was reasonably foreseeable. In rendering its decision, the Court noted that while the gym teacher denied knowing of any problem between the boys, the school guidance counselor and math teacher conceded being aware of prior physical contact between them in the school hallways and in class and even calling the boys' parents in for a meeting.

The Court rejected the School's argument that plaintiff assumed the risk of his injuries by reaching his arm out to brace his contact with the floor, even though he was specifically instructed not to do so by the teacher. In this regard, the Court held that given the plaintiff's age and the nature of wrestling as a violent sport, the teacher's expectation that plaintiff would precisely follow instructions was hard to accept and that plaintiff did not assume the risk that an improper technique could lead to an injury because his injury occurred in context of a gym class during which students were required to participate. The Court further noted that the School had failed to submit "compelling proof" that the plaintiff's act of reaching his arm out was so unusual that no instructor could have anticipated that he would do so.

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