Volume 25

Spring 2011

MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

Court of Appeals Holds that Conditions Involving Snow or Ice Need Not Be Immediately Created In Order to Hold a Municipality Liable Under the Affirmative Creation Exception to the Prior Written Notice Rule.

It is well established under the "prior written notice rule" that municipalities cannot be liable for injuries stemming from an allegedly dangerous and/or defective street or sidewalk condition, even where negligent, if it does not have prior written notice of the condition which allegedly caused plaintiff's injuries.[i] Equally well established are the two exceptions to this rule: (1) where the municipality receives a special use or confers or receives a special benefit from the area where the defect exists ("special use" exception), or, more commonly, (2) where the municipality created the defect or hazard through an affirmative act of negligence ("affirmative creation" exception). In the recent case of *San Marco v. Village of Mount Kisco*, the Court of Appeals chipped away at the latter exception.[ii]

In *San Marco*, the plaintiff slipped and fell on an accumulation of black ice in a parking lot owned by the Village/Town of Mount Kisco ("the Village") while on her way to work on Saturday morning. While the Village treated the parking lot for snow and icy conditions Monday through Friday, the lot was not maintained or monitored on the weekends. At an unspecified time before the plaintiff's accident, the Village plowed snow in the parking lot into a large pile, which was adjacent to the parking spaces where plaintiff fell. While it was undisputed that the very day before plaintiff's accident (a Friday), the Village had salted the lot and inspected it for icy conditions, it was also undisputed that the temperature had risen above and then fell below freezing between the Village's last inspection on Friday and plaintiff's fall early Saturday.

In response to plaintiff's claim that the Village was negligent in piling the snow so close to patron parking spaces and failing to remedy any icy conditions that developed as a result, the Village sought protection under its Local Law which required prior written notice of a dangerous and/or defective condition as a prerequisite to its liability. The trial Court rejected this argument and found a question of fact as to whether the Village's act of piling the snow near the parking lot put it within the "affirmative creation exception" to the prior written notice rule. The Appellate Division for the Second Department reversed and granted summary judgment for the Village. The Court of Appeals then reversed in a 5-4 decision delivered by Justice Lippman.

As discussed herein, while the Court of Appeals reaffirmed that the prior written notice rules function to shield municipalities from limitless liability for slip and falls where there is no

prior written notice of the injury-producing condition, it then proceeded to place a new limit on the affirmative creation exception to prior written notice rules.

The Appellate Division decisions of *Yarborough* and *Oboler* establish that where a plaintiff seeks to rely on the "affirmative creation" exception to negate the prior written notice rule and hold a municipality liable, the plaintiff must show both that the municipality *affirmatively* created the condition that caused plaintiff's injuries **and** that this defective and/or dangerous condition was *immediately* created and not the mere result of gradual wear and tear (commonly known as the "immediacy requirement").[iii] The First Department held in *Yarborough* that the "mere *eventual* emergence of a dangerous condition as a result of wear and tear and environmental factors . . . does not constitute an affirmative act of negligence that abrogates the need to comply with prior written notice requirements."

Typically, the "immediacy requirement" has been applied to claims involving potholes, loosened drain covers and various sidewalk conditions. In most of these cases, the immediacy requirement has shielded municipalities from liability because the condition that caused plaintiff's injury was the result of a gradual culmination of environmental factors and/or basic wear and tear from pedestrian and/or motor vehicle traffic. However, the Courts have not so often gauged whether the immediacy requirement applies where the injury producing condition is snow or ice. This was the very issue that the Court dealt with in *San Marco*.

The Second Department found in *San Marco* that while the Village had created the large pile of snow adjacent to the area where plaintiff fell, it did not "immediately" create the injury producing hazard; rather, it was the eventual interplay of environmental factors such as time and temperature which caused the black ice at issue. The Second Department thus held that because the black ice was not present immediately after the Village's plowing, the affirmative creation exception to the prior written notice rule did not apply.

However, the Court of Appeals opined that the typical requirement that an affirmatively created condition be "immediately" created, does *not* apply to conditions involving snow and/or ice. In limiting the creation exception to the prior written notice statutes in this way, the Court drew the following distinction between street and sidewalk conditions as compared to conditions involving snow and ice:

> [U]nlike a pothole, which is ordinarily a product of wear and tear of traffic or long-term melting and freezing on pavement that at one time was safe and served an important purpose, a pile of plowed snow in a parking lot is a cost-saving, pragmatic solution to the problem of an accumulation of snow that presents the foreseeable, indeed known, risk of melting and refreezing.
>
> The Court went on:
>
> [A] patch of pavement may gradually and unpredictably deteriorate, making the point at which the efficacy of the initial repair ceases, unknown to the municipality. It is therefore, understandable that the hazard may escape detection until the municipality receives prior written

> notice of the problem. However, in the case of black ice that forms from plowing snow . . . a municipality should require no additional notice of the possible danger arising from its method of snow clearance apart from widely available local temperature data.

In other words, the Court held that the purpose of the immediacy requirement is to shield municipalities from liability where a once safe condition becomes unsafe because of slow, gradual and/or uncontrollable factors which are either outside of the municipality's control or which could easily go undetected for a prolonged period of time. The Court indicated that a pothole, sidewalk defect or loose drain cover fits squarely within this scenario, but that snow and ice are *not* typically the types of conditions which go easily undetected or arise only after gradual passage of time. The Court seems to be classifying the dangers associated with snow and ice as open and obvious, not needing to be immediately created to raise a red flag for municipalities. Therefore, the Court held that while dangerous conditions involving potholes, man covers, sidewalks and the like must be *immediately* created in order to impose liability upon municipalities under the affirmative creation exception to the prior written notice rule, snow and ice conditions are an entirely different animal which need not be immediately created.

In support of this proposition, the Court referred to a 1949 case where the Court of Appeals held that a municipality could be liable for a slip and fall on ice in its parking lot without prior written notice. [iv] Further, the Court pointed to a 2008 decision from the Second Department where the Court found a triable issue of fact as to whether the County's snow removal methods created the ice on which plaintiff fell. [v]

Applying its freshly carved out exception to the exception to the *San Marco* facts, the Court found that because the Village had salted and inspected the lot on the eve of plaintiff's accident to eliminate black ice, the determinative factor of the Village's liability was whether its snow removal efforts created the icy condition on which plaintiff fell. The Court found that there was an issue of fact as to whether the Village exercised its duty in a reasonably safe manner by plowing high piles of snow adjacent to an active parking lot. In reversing the Second Department and denying the Village's motion for summary judgment, the Court emphasized that the Village neglected to employ snow and ice removal services on the weekend (when plaintiff's accident occurred), despite the fact that the parking lot remained open seven days a week.

In light of a strong dissent, the majority attempted to justify its decision by opining that it was *not* creating a new burden on municipalities with respect to snow and ice removal and that it was *not* deeming municipalities to be insurers of pedestrians.

The dissenting opinion by Justice Smith disagreed. Justice Smith noted that the majority's decision was tantamount to holding that "no written notice is required because the municipality was negligent." According to Justice Smith, the majority's decision is at odds with the very purpose of the prior written notice requirement, namely to protect municipalities, even when they *are* negligent, unless they have written notice of the defective and/or dangerous condition at issue.

In addressing the majority's contention that dangerous potholes and pavement conditions are more likely to go undetected and/or result from gradual or environmental changes, the dissent held that a municipality would not need to rely on the prior written notice rule if a danger was truly *unforeseeable* and *unknown*. Rather, as the dissent opined, it is where the risk *is* foreseeable, and the municipality is negligent in *failing to foresee* the danger, that the prior written notice rule takes effect and shield municipalities from perpetual slip and fall lawsuits.

The dissent found that neither the terms of the prior written notice rule nor the legislative intent behind it leave room for a distinction between snow and ice cases as compared to pavement and sidewalk cases. Further, the dissent forewarned that extending the affirmative creation exception to snow and ice cases such as the present one would serve to swallow up the protection afforded to municipalities by the prior written notice rule and effectively defeat the rule's purpose.

Second Circuit Court of Appeals Finds a Question of Fact as to Whether an Officer's Use of Pepper Spray was Reasonable and Found Lower Court's Blanket Removal of Pro Se Plaintiff's Special Solitude to be an Abuse of Discretion.

Tracy v. Freshwater, 623 F.3d 90 (2d Cir. 2010).

Graham v. Connor, 490 U.S. 386 (1989).

The Officer in this case effectuated a traffic stop on a dark and snowy night in Dansbury, New York where road visibility was generally poor. The defendant Officer pulled plaintiff over because his front windshield was covered in snow. After plaintiff denied having a license and registration, the Officer asked plaintiff to exit the car and clean his windows while the Officer ran a check on the vehicle's license plate.

The Officer's search revealed that the car was registered to a female. While seated in his vehicle, plaintiff then gave the Officer not one, but two fake names. The Officer asked plaintiff to exit the vehicle at this point, as he strongly suspected foul play. Intending to pat plaintiff down, the Officer asked plaintiff to put his hands over his head once he had exited the vehicle. Plaintiff and defendant's factual allegations surrounding their encounter sharply diverge after the plaintiff put his hands over his head. Plaintiff alleges that when the Officer asked him to face him, he attempted to do so but slipped on ice and grabbed his vehicle to break his fall. The Officer, rather, alleges that plaintiff attempted to escape by running towards the roadway. The Officer then struck the plaintiff on the head twice with a flashlight. Plaintiff alleges that he began to run at the Officer only after being struck. The Officer alleges that he struck plaintiff to prevent his escape and only after plaintiff attempted to punch him. Plaintiff alleges that he never tried to punch the Officer, yet was struck two more times with the flashlight. Plaintiff admitted that after being struck he did run towards the Officer and a struggle ensued.

Both parties agree that at some point in the struggle, plaintiff broke free, ran a short distance and slipped and fell on ice. The Officer then jumped on plaintiff and handcuffed him. Plaintiff claims that while being handcuffed he expressed to the Officer that he was in severe pain and that he was not resisting. Plaintiff contends that after he was handcuffed, the Officer

continued yelling at him, sprayed him with pepper spray from a few inches away and pushed plaintiff into the ground.

While still on top of and restraining the plaintiff, the Officer stated that he called for backup to no avail as his radio was malfunctioning. Plaintiff similarly recounted that the Officer was fiddling with some kind of device at this point during their encounter. The plaintiff complained that he was in pain and needed medical attention at this time. The Officer then forcefully hauled plaintiff to his feet at which point both parties heard a popping noise coming from the plaintiff's body. The Officer forced plaintiff to walk twenty feet to the patrol vehicle despite plaintiff's persistent complaints of pain. Plaintiff was placed in the patrol car while the Officer called for backup and medical assistance. At the hospital, plaintiff was found to have fractured and dislocated his hip, requiring surgical correction.

A post arrest investigation revealed plaintiff to be the subject of federal drug charges and was ultimately convicted of resisting arrest, criminal impersonation, criminal possession of a controlled substance and various other federal drug charges as a result of his encounter with the Officer.

Subsequently, plaintiff commenced a *pro se* suit pursuant to 42 U.S.C. 1983, alleging that the Officer used excessive force in violation of the Fourth Amendment when he hit plaintiff with a flashlight, jumped on plaintiff, forcibly moved plaintiff over to the patrol car and sprayed pepper spray in the plaintiff's face.

Despite plaintiff's status as a pro se litigant, he successfully filed thirty six motions, complete with exhibits and memorandums of law. Plaintiff's extensive motion practice coupled with his involvement in at least ten prior state and Federal actions led the United States District Court for the Northern District of New York to remove from plaintiff the special solitude ordinarily afforded to pro se litigants. The Court justified this denial of special protection to the plaintiff by noting that he had demonstrated substantial competence in self representing himself. The United States District Court for the Northern District of New York dismissed plaintiff's excessive force claims as against the defendant finding that the Officer was entitled to qualified immunity and that his actions were objectively reasonable under the Fourth Amendment. The Second Circuit Court of Appeals ultimately held that the lower Court abused its discretion in removing all special solicitude privileges from plaintiff and found an issue of fact as to whether the Officer's use of pepper spray was reasonable even after the plaintiff was handcuffed.

In addressing plaintiff's 1983 claim, the Second Circuit noted that qualified immunity protects the discretionary acts of Government officials absent a clear statutory or civil violation which a reasonable person would have known and that the Fourth Amendment requires objective reasonableness which must often be determined on a case by case basis. Citing ***Graham***, the Court noted that the Fourth amendment requires the Court to balance government against privacy interests while considering the following factors: (1) the nature and severity of the crime leading to the arrest; (2) whether the suspect poses an immediate threat to the arresting Officer's safety and (3) whether the suspect actively resisted or attempted to evade the arrest by flight. The Court opined that because Officers are often required to make split-second judgments, the Court must

analyze each of these factors bearing in mind the Officer's perceptions at the time of the encounter, and not with 20/20 hindsight vision.

In considering these factors, the Court found that the Officer acted reasonably in striking plaintiff with a flashlight because the Officer instinctively and correctly presumed that plaintiff was a fugitive and because plaintiff made quick and sudden movements while the Officer attempted to arrest him. The Court found plaintiff's contention that he merely slipped and fell on ice to be unconvincing and found that a reasonable Officer would have construed plaintiff's movements as requiring split second judgment and the use of force. The Court emphasized the fact that the Officer was without assistance during inclement weather at the time of the arrest and that the plaintiff only suffered a small laceration to his head as a result of being struck.

The Court found that the Officer acted reasonably in jumping on the plaintiff because plaintiff himself admitted that he attempted to escape. The Court emphasized that under the first *Graham* factor, the crime involved was now more serious than a mere traffic infraction as plaintiff was affirmatively resisting arrest at this point of the encounter. The Court also stated that the risk to the Officer persisted and that the Officer himself suffered injuries, thus indicating that the use of force was necessary.

The Court even found it reasonable that the Officer forcefully moved plaintiff to the patrol car despite his complaints of pain, reasoning that the Officer attempted to first call for backup but could not do so due to a radio malfunction. Again, the Court emphasized the fact that the Officer was unassisted and that the weather was both inclement and reduced visibility.
However, the Court found an issue of fact as to the Officer's reasonableness in spraying plaintiff with pepper spray from a few inches away even after plaintiff was already handcuffed and indicated that he was not resisting. Accordingly, the case was remanded on this issue.

As to the use of pepper spray, the Court rejected the defendant's argument that plaintiff's excessive force claims should be summarily dismissed because he was convicted of resisting arrest. The Court noted that a criminal conviction can preclude recovery in an excessive force claim under principles of collateral estoppel when the facts necessarily determined in the criminal proceedings are incompatible with a subsequent excessive force suit. However, the Court found that the issue of the Officer's reasonableness in using pepper spray during the plaintiff's arrest had not been actually and necessarily litigated in the criminal proceedings brought against him.

Further, the Court found that plaintiff should not have been entirely deprived of the special solitude normally afforded to pro se litigants. The Court noted that the issue of special solitude normally applies only in the civil context, but opined that it would address this issue as it could be potentially relevant in the context of criminal proceedings.

In finding the lower court's removal of special solitude to be an abuse of discretion, the Second Circuit opined that it had forewarned in dicta that the trend among Second Circuit Courts to withdraw this solitude could present additional burdens upon pro se litigants. The Court found that the appropriate degree and scope of special solitude afforded to pro se plaintiffs varies from

case to case and requires consideration of the procedural context of the case and experience of the litigant, although the Court opined that these considerations were not exhaustive.

While the Court found that a litigant's experience could justify an award of little to no special solitude, the Court opined that it would not be appropriate to substantially deny pro se plaintiffs this protection merely because they are experienced in certain aspects of litigation. Rather, the Court found it improper to infer that pro se litigants can be properly denied special solitude because of their experience with a particular stage or aspect of litigation, especially since pro se claims tend to be dismissed early on.

Accordingly, the Court found that plaintiff's extensive and competent motion practice and prior involvement in litigious proceedings did not in itself justify complete denial of special solitude. Interestingly, the Court opined that it was not foreclosing the appropriateness of limiting or even entirely removing solitude with respect to the plaintiff on remand, so long as plaintiff demonstrated substantial litigation experience.

Divided Court of Appeals Holds that Reckless Disregard Standard Afforded to Emergency Vehicles Under VTL 1104 Only Applies When the Emergency Vehicle is Engaged in a Privileged Act Enumerated in 1104 (b).

Kabir v. County of Monroe, 2011 Slip Op. 01609.

In a 4-3 decision by Justice Read, the Court of Appeals found that the higher, reckless disregard standard which typically shields emergency vehicles from suits arising out emergency operations now only applies when the emergency vehicle is engaged in the following acts enumerated in VTL 1104 (b): (1) Stopping, standing or parking; (2) proceeding past a red light, stop sign or flashing red signal; (3) exceeding the posted speed limit; or (4) disregarding regulations governing directions or movement or turning in specified directions. If an emergency responder's conduct does not fall into one of these four categories, a standard of ordinary negligence applies in ascertaining liability for the accident.

In this case the plaintiff was rear ended by a police vehicle responding to a classification one, high priority call but which did not have on its emergency sirens at the time of the accident. Because the Officer was unfamiliar with the area where the accident took place, he momentarily glanced down at his monitor while still driving in order to ascertain the cross streets of his destination. As a result, the Officer rear ended the plaintiff, who was stopped at a red light. The Officer glanced down for two to three seconds before the collision occurred and was traveling approximately 25-30 miles per hour in a 40 mile per hour zone.

The litigants disputed the applicability of VTL 1104 (b)'s reckless disregard standard, as the Officer was within the speed limit and not engaged in any of the four activities enumerated in this section of the statute. The Supreme Court found 1104 (b) applicable, the Appellate Division reversed with two Justices dissenting and granted plaintiff's summary judgment motion as to liability. The Court of Appeals affirmed the Appellate Division's decision, finding that the

Officer should be held to a standard of ordinary negligence and that summary judgment as to liability was appropriate.

The majority opinion opined that 1104 (b) requires plaintiff's to prove that the defendant acted with reckless disregard, as opposed to ordinary negligence, if the defendant was an emergency vehicle engaged in an emergency operation at the time of the accident. However, the Court noted VTL 1104 (e) establishes that emergency vehicles are not afforded blanket protection and must still drive with due regard for the safety of others. More importantly, the Court noted for the first time that 1104 (b) does not invoke a reckless disregard standard *unless* the emergency responder is engaged in one of the four enumerated activities in this section of the statute.

The Court did not find it surprising that it had to grapple with the applicability of VTL 1104 (b) to the case at bar, because accidents with emergency vehicles typically involve facts where the emergency responder is speeding, running a red light/stop sign, or engaging in one of the four enumerated activities in 1104 (b) at the time of the accident. However, in this case, where the Officer was well within the speed limit and slowing down for a red light, the Court found that ordinary negligence, and not reckless disregard, would be the proper standard in determining the Officer's liability.

Looking to the statute's legislative intent, the Court emphasized that the language and structure of 1104 (b) were the touchstone of its analysis. The Court noted that 1104 (b) is divided into four subsections, each enumerating a specific "*privileged*" activity that invokes the reckless disregard standard. The Court opined that the legislature could have easily created, but did not a safe harbor for emergency vehicles for all violations of the rules of the road. The Court found, based upon the structure and language of the statute, that the legislature intended that plaintiffs be made to prove an emergency responder's reckless disregard only when the emergency vehicle was engaged in the privileged activities listed in 1104 (b).

The Court found that if the legislature indeed wanted all injury producing activities engaged in by emergency responders to be privileged under 1104 (b), it could have worded the statute similarly to 1103 (b) of the VTL, which states that this section is applicable not only to "persons, teams, motor vehicles and other equipment while actually engaged in work on a highway. . . but to such vehicles and persons when traveling to or from work."

In light of the dissent's emphasis on the Court of Appeal's precedent in *Saarinen*, the majority indicated that the ordinary negligence v. reckless disregard standard was not an issue in that case, but rather what was the precise type of higher standard to be applied. To support its position, the majority noted that in *Saarinen*, the Court admitted that 1104's reference to both "due regard" and reckless" disregard made it difficult to ascertain the precise test to be used.

The majority further noted that in *Szczerbiak*, decided six weeks after *Saarinen* and also heavily relied upon by the dissent, the Officer struck the plaintiff arguably because he took his eyes off of the road. The majority asserted that it did not have to decide what standard to apply to the Officer's conduct in this case because the plaintiff could have, but did not argue, that ordinary negligence should apply. The majority noted that in *Szczerbiak* it merely held that if the

Officer *were* negligent in glancing down before the accident, his conduct would not amount to the recklessness required for the driver of an emergency vehicle to be held liable.

The majority attempted to ease the dissent's concern that its decision would cause "practical problems," by stating that it was simply interpreting VTL 1104 (b) and (e) to mean that a reckless disregard standard applies if the emergency vehicle was engaged in *privileged* conduct at the time of the accident, while ordinary negligence will apply if the vehicle was *not* engaged in privileged conduct.

A vehement dissent by Justice Graffeo opined that the majority's decision was "unworkable," "unwarranted," "incompatible" with the VTL's plain language and "inconsistent" with the public policy underlying VTL 1104.

The dissent found the majority's decision to be at odds with the very purpose of 1104 because VTL provides qualified immunity to emergency responders who violate the rules of the road, yet the majority now circumscribes this protection to only the categories of conduct enumerated in 1104 (b).

While the dissent acknowledged that VTL 1104 (b) and (e) are not models of clarity, it emphasized that 1104 (b) says nothing about the standard of liability that applies when an emergency responder is civilly sued for a motor vehicle accident arising out of emergency vehicle operation. The dissent noted that in *Saarinen*, the Court of Appeals made clear that 1140 (b) imposes a heightened, "reckless disregard" standard in these types of cases. The dissent asserted that its *Saarinen* decision was "unconditional," encompassed every aspect of an emergency responder's conduct and never suggested that only the conduct prescribed in 1104 (b) would trigger the applicability of a reckless disregard standard.

Applying *Saarinen*'s precedent to the present facts, the dissent found that the officer's momentary glance down at his monitor did not amount to a reckless disregard as a matter of law.

The dissent opined that *Saarinen* imposed a two part test to which the majority now wished to add a third step. The dissent stated that *Saarinen*'s two part test requires the Court to first ask whether the defendant's vehicle was an emergency vehicle and second, if the operator was performing emergency operations at the time of the accident. According to the dissent, the superfluous third step that the majority now adds to a VTL 1104 analysis gauges whether the emergency operator was engaged in the specific conduct enumerated in 1104 (b). Under this new step, if the emergency responder obeys traffic signals and does not speed, the defendant is "out of luck." The dissent deemed this third step to be incompatible with *Saarinen*, which affords latitude to emergency vehicle operators who must often make quick judgments under stressful conditions. According to the dissent, the majority's new precedent now only allows a lapse in judgment if it involves running a red light or speeding.

The dissent forewarned that the majority's decision would create "practical problems" because now emergency vehicle operators will be encouraged to run red lights, speed, and drive in the wrong direction in order to fall within 1104 (b) and be held to a higher standard of care. Further, plaintiffs will now seek to argue that the emergency vehicle scrupulously abided by the

rules of the road and did not engage in these types of conduct so that a standard of ordinary negligence will apply. The dissent asserted that the majority decision affords greater protection to emergency responders who violate the rules of the road than to those who obey these rules and accordingly, is adverse to the public policy of wanting emergency responders to exercise the utmost possible care during emergency operations.

The dissent was also "troubled" that the majority set this new precedent without explaining how to apply it. The dissent emphasized that Courts and juries must now apply different standards to each aspect of an emergency responder's conduct during an emergency route, applying a heightened standard of care to some actions but ordinary negligence to others. The dissent also asserted that the majority had not clarified if a plaintiff must prove an emergency responder's reckless disregard if the responder engages in "privileged conduct" under 1104 (b) at some point in the route but later engages in non privileged conduct. Even further, the dissent questioned which standard to apply when the accident is due to multiple causes, some involving privileged conduct and some not. The dissent opined that these unanswered questions demonstrate the unworkable nature and ambiguity stemming from the majority's decision.

District Court Finds that Where a Police Officer Stabbed his Wife to Death, Decedent Wife Stated a Sufficient Substantive Due Process Claim against the City Because NYPD Personnel Demonstrated Inaction Despite Plaintiff's Numerous Complaints About Her Husband's Behavior.

Pearce v. Longo, 2011 WL 691377 (2011).

After a Utica Police Officer stabbed his wife to death and then killed himself, the estate of the decedent wife commenced six causes of action pursuant to 42 U.S.C. 1983 against the City, the Utica Police Department, David Roefaro as Utica's Mayor and Daniel Labella as former Police Commissioner and Commissioner of Public Safety.

Plaintiff's causes of action allege violations of her substantive due process rights, violation of equal protection, conspiracy and the municipality's liability for failure to train its personnel. Plaintiff further brought forth state claims against all defendants and her husband's estate.

Plaintiff was married to a Utica police officer and complained to his supervisor that she feared for her life and for the lives of her children as her husband had been physically and verbally abusing her and had even made death threats to her while brandishing his gun. It was also claimed that plaintiff's husband had pointed a gun at a woman while working at as a high school security guard. After an episode where plaintiff's husband brandished his gun and threatened to "go postal," a Utica police department supervisor had tried to discourage her from reporting the incident, telling her that her husband could be suspended and that it would have a negative impact on the family's finances. Plaintiff still reported the incident and was assured by her husband's supervisor that the situation would be addressed with her husband. Plaintiff had also been discouraged from seeking a protective order in the past.

After meeting with his supervisors, plaintiff's husband went home and brandished his gun again, this time threatening to commit suicide in front of his wife and child. When plaintiff fled the home and reported this incident to her husband's supervisor, the supervisor opined that his guns would be confiscated. However, LaBella, then the Police Commissioner and Commissioner of Public Safety, refused to do so. An inferior officer ultimately overrode LaBella's affirmative order that plaintiff's husband be allowed to keep his weapons and did confiscate them.

Plaintiff subsequently commenced a divorce proceeding against her husband and was stabbed to death the same day as a divorce hearing where she was awarded the family home. That afternoon, plaintiff's husband stabbed both her and himself to death.

Defendant, the City, LaBella and Roefaro filed a 12 (b) (6) motion seeking dismissal of plaintiff's 1983 claims on the following grounds: (1) decedent's husband was not acting under the color of state law at the time he stabbed his wife; (2) plaintiff failed to show how defendant's had violated her civil rights; (3) LaBella and Roefaro were entitled to qualified immunity; (4) plaintiff failed to adequately state an equal protection or conspiracy claim and (5) defendant's did not have a duty to protect the decedent wife. The District Court for the Northern District addressed each argument in turn and ultimately dismissed plaintiff's equal protection, conspiracy and loss of consortium claims but found that she stated an adequate substantive due process violation under 1983.

With respect to defendant's argument that Longo was not acting under the color of state law when he stabbed his wife, the Court agreed and opined that to be acting under the color of state law, the Officer needed to invoke the real or apparent authority of the police department. The Court emphasized the merely being on duty is insufficient to bring an officer's actions under the color of state law. Applying this precedent, the Court found that while the officer was on duty at the time that he stabbed his wife, he was not invoking the police department's power. The Court further noted that the officer was home, off duty and therefore not under the color of state law when he had threatened his wife and child in the past. In reaching its conclusion, the Court relied heavily upon ***Bonsignore v. City of New York***, where the Second Circuit Court of Appeals found that an officer was not acting under the color of state law when he shot and killed both his wife and then himself.

The Court further dismissed plaintiff's equal protection claims, finding that even in her amended complaint only vaguely argued that her rights to equal protection had been violated. The Court noted that while plaintiff broadly alleged that other women had been discouraged from reporting abuse to the police supervisors and that the police department had a "dangerous lack of respect for women," the words "equal protection" appear nowhere in plaintiff's complaint.

The Court also struck down plaintiff's conspiracy claim, finding that plaintiff's allegations that Roefaro wrongfully appointed LaBella as commissioner despite his lack of qualifications fell short of a conspiracy, even though this could support a claim of municipal liability.

While defendants argued that the fact that the officer did not act under the color of state law necessitated dismissal of all of plaintiff's claims, the Court found that it only required dismissal of her 4th and 8th amendment claims and that her substantive due process claims could still stand.

The Court noted that while a mere failure to protect an individual from violence is not a due process violation, it then stated that liability can attach where defendants implicitly encourage dangerous and violent behavior. While the defendants claimed to not owe plaintiff a duty, the Court found that under the "state-created danger exception," defendants had enhanced the danger to the plaintiff by failing to properly act upon her repeated complaints. The Court also emphasized that the police department had even tried to discourage the plaintiff from reporting the ongoing abuse to her husband's supervisor and that LaBella refused to confiscate her husband's weapons.

In noting that the defendants' alleged conduct must be egregious and outrageous to support a due process violation, the Court found that the dangers of domestic violence are well known to law enforcement and that the officers' inaction therefore demonstrated a willful disregard for the serious implications of plaintiff's pervasive complaints.

With regard to municipal liability, the Court found that liability can be imposed upon a municipality under Section 1983 if the constitutional violation was caused by a municipal policy, custom or practice or a policy maker's decision. Applying this precedent, the Court found that plaintiff's amended complaint stated at least five encounters that plaintiff had with high ranking officers wherein she reported her husband's troublesome behavior and, accordingly, she could adequately show a pattern of the police department's failure to adequately respond to reported incidents of domestic violence. The Court further noted that a municipality's failure to train also can serve as a basis for a due process violation because there was an alleged history of mishandling complaints of domestic violence within the police department and that proper training could have prevented.

With respect to plaintiff's claims against LaBella and Roefaro, the Court emphasized that supervisors can be held personally liable under ***Colon v. Coughlin*** if one or more of the following are established: (1) the supervisor directly participated in the constitutional violation; (2) the supervisor failed to remedy the wrong after learning about it; (3) the supervisor created the policy that sanctioned the volatile conduct or allowed it to continue; (4) the supervisor was grossly negligent in supervising the personnel who committed the constitutional violation or (5) the supervisor failed to act after receiving information indicating that a constitutional violation was occurring. Even in light of ***Ashcroft v. Iqbal***, which indicates that only categories (1) and (3) can serve as a basis for supervisor liability, the Court struck down LaBella and Roefaro argument that they were not personally involved in the conduct that lead to plaintiff's death. The Court found that even under (1) or (3), LaBella and Roefaro could be liable for violating plaintiff's substantive due process rights because LaBella was not qualified for the position of Police Commissioner and Commissioner of Public Safety yet that Roefaro appointed him anyway. The Court found that LaBella's refusal to confiscate the weapons of plaintiff's husband and his general inaction in response to plaintiff's complaints had a direct causal link to the alleged constitutional violation. Further, Roefaro, as Mayor, was integral to shaping police policy and

also directly contributed to the constitutional violation by appointing an obviously unqualified candidate who then ignored the plaintiff's cries for help.

The Court also denied LaBella and Roefaro qualified immunity, opining that under the state-created danger theory, it could be found that they implicitly encouraged intentional violence against the plaintiff and that plaintiff's constitutional rights were clearly established.

Court of Appeals Grants Summary Judgment to a Public Bus Company Finding That It is Not Subject to the Same Obligations Regarding Student Safety That Normally Apply to Yellow School Buses.

Smith v. Sherwood, 16 N.Y.3d 130 (2011).

In this case, a private school contracted with a public bus company to transport its students. These public buses were allowed to pick up and discharge non student passengers while transporting students and were not designated with specially designed safety equipment normally found on yellow school buses.

Twelve year old plaintiff was a student who exited one of these public buses, began crossing in front of the bus and was hit by an oncoming motor vehicle while doing so. The bus normally dropped the plaintiff off at the western corner of the street, (where he would not have to cross in front of the bus) but instead dropped him off at the eastern side on the date of loss, either because plaintiff had forgotten to ring the bell indicating that he wished to exit the bus or because the bus driver ignored or failed to here the bell.

Notably, plaintiff had attended a presentation regarding bus safety within the year before the accident in which students were instructed never to cross the street in front of the bus and to instead wait until the bus was at least a block away. Similar instructions were disseminated to the students in the form of written materials and these same warnings were even posted on signs in the public buses that transported the students. Moreover, the public buses disseminated warnings prohibiting crossing the street in front of their buses twice a week over a public address system.

As a result of his accident, plaintiff sued the bus company, among others, alleging that it had breached its common law duty to the plaintiff and violated statutory provisions regulating school buses. While the Appellate Division denied the bus company's motion for summary judgment, the Court of Appeals reversed and granted the motion, finding that the bus company was not subject to the same requirements and/or obligations as yellow school buses and that the bus company had fulfilled its duty to the plaintiff in dropping him off safely.

The Court reiterated well established law that a common carrier has a duty to alighting passengers to stop in a location that would allow for these passengers to safely disembark. The Court noted that the common carrier has no further obligations once it fulfills this duty, even if the plaintiff is a school child who passes in front of a stopped bus.

While the Court found a question of fact as to why the bus operator dropped the plaintiff off on the east as opposed to the west side of the street, it declined to resolve this issue. Instead,

the Court found that regardless of which side of the street the plaintiff disembarked onto, the bus operator had pulled over in a safe location and accordingly had fulfilled his duty to the plaintiff.

The Court declined to hold the bus company to the obligations normally applicable to yellow school buses. The Court found that because the public bus here was not equipped with the safety equipment normally found on yellow school buses, such as an ejecting stop sign with red lights, the public bus could not be subject to VTL § 375 (20) (mandating the use of safety equipment) or VTL 1174(b) (requiring specially equipped school buses to stop with red signal lights flashing). The Court found that because the public bus was not specially equipped with this safety equipment, it did not have the legal authority or necessary equipment to make other vehicles stop and allow the plaintiff to cross the street, the way a yellow school buses would. Accordingly, the Court granted summary judgment for the defendant bus company.

---

[i] VILLAGE LAW §6-628; TOWN LAW §65(a); SECOND CLASS CITY LAW §244; NEW YORK CITY ADMIN. CODE §7-201(c)(2).

[ii] *San Marco v. Village of Mount Kisco*, 2010 N.Y. Slip Op. 09197.

[iii] *Yarborough v. City of N.Y.*, 813 N.Y.S.2d 511 (2d Dept. 2003); *Oboler v. City of N.Y.*, 8 N.Y.3d 888 (2d Dept. 2007).

[iv] *Zahn v. City of N.Y.*, 299 N.Y. 581 (1949).

[v] *Smith v. County of Orange*, 858 N.Y.S.2d 385 (2d Dept. 2008).