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After an Emotionally Disturbed Son Shot and Killed His Mother, Lower Court Denies the City's Summary Judgment Motion and Finds Questions of Fact as to Whether a Special Relationship Was Created When Mother Summoned Police Officers to Her Home Several Times for Domestic Disputes Involving Her Son.

Bawa v. City of New York, 2011 Slip Op. 50553.

In this case, an emotionally disturbed twenty year old son shot and killed his mother, her wheelchair ridden boyfriend, the boyfriend's aide and shortly thereafter, himself. Plaintiffs in this matter are the mother's seven year old son and his father, who assumed custody of the child after the shooting.

It is undisputed that the Police were summoned to and did in fact go to the mother's home several times before the day of the shooting. While the shooting occurred in April of 2007, plaintiff had called the police asking for assistance as far back as May 30, 2006, at which time the police went to her home and prepared a Domestic Incident Report (DIR). The report was bereft of many details, stating only that the mother refused to make a statement and that the incident was not a "verbal dispute only." No order or protection was obtained.

The mother again summoned the police in October of 2006 and again the police went and filled out a DIR report, which this time indicated that the complainant's son was an "emotionally disturbed person" and that the dispute was again not a "verbal dispute only." In fact, EMS was called and removed the son from his mother's home and transported him to a hospital. The mother filed a complaint later that day with the Internal Affairs Bureau (IAB), stating that the police did not escort her son to the hospital and that she was worried that her son would ultimately escape and harm her and her younger son.

On November 5, 2006, the police again responded to the mother's 911 phone call regarding a dispute with her son. This time, the DIR indicated that no arrest was made because no offense had been committed.

Two days before the shooting, the police were at the mother's home twice in one day. The DIR from the first visit indicated that the son committed a violation because he threatened to

kill and/or injure his mother. No arrest was made and the DIR from the second visit then noted that the visit was unnecessary. After the two police visits, the mother again filed a complaint with the IAB regarding the supposed inadequacy of the police's actions.

The final police visit to the mother's house was on the very day of the shooting, shortly after it occurred. Plaintiff had called 911 requesting police assistance, but had already been shot and killed by the time the police arrived. There was a sharp factual dispute as to how long it took the police to respond, with plaintiff stating that she called and was waiting on and off for as long as five hours and the City/Police stating that the responding officers arrived at the home within 15 minutes of the 911 call.

The City and plaintiff both moved for summary judgment. The City motion argued that it had no special relationship to the mother such that it could be liable for its actions or lack thereof. The Court opined that such a special relationship can be created when a municipality violates a statutory duty in place for the plaintiff's benefit; voluntarily assumes a duty that induces the plaintiff's justified reliance; or voluntarily assumes positive direction and control in the face of a known, blatant and dangerous safety violation. Further, the Court emphasized that the elements of a special relationship include: (1) the municipality's assumption through promise or action of an affirmative duty to act on the plaintiff's behalf; (2) the municipality's knowledge that its inaction could harm the plaintiff; (3) some form of direct contact between the plaintiff and municipality and (4) the plaintiff's justifiable reliance on the municipality's affirmative undertaking.

As to the existence of a special relationship, the Court denied both motions and found issues of fact as to whether the City had voluntarily assumed a duty of care to the complainant mother by responding to her 911 calls on several occasions, some of which were a mere two days before the shooting. The Court also found issues of fact as to whether the mother justifiably and detrimentally relied on the officers' actions. Under the Dead Man Statute, generally prohibiting interested witnesses from testifying about the statements of a now deceased person, the Court deemed inadmissible the responding officers' testimony that they never made any affirmative promises to the mother when responding to her 911 calls. Under the Dead Man Statute, the Court also deemed inadmissible any testimony regarding the mother's statement during one police visit that she knew that there was nothing the officers could do for her and that they were not needed. Further, the Court found that even if the mother had made a statement indicating that police assistance was unnecessary, an issue of fact arises because she twice complained to the IAB about the inadequacy of the police's assistance.

The Court also found issues of fact as to whether the responding officers violated NYPD directives by not arresting the son and possibly failing to swiftly respond to the mother's 911 call on the day of the shooting.

The Court additionally discussed but did not draw a conclusion on the issue of whether the City's actions violated the Family Protection and Domestic Violence Intervention Act, which mandates that an arrest be made if an officer has reasonable cause to believe a felony had been committed or that a misdemeanor constituting a family offense has been committed, unless the victim requests that no arrest be made. The Court emphasized that while no weapons were noted as being involved in any of the domestic disputes between the mother and son in this case, there was reasonable cause for the responding officers to believe a misdemeanor family offense had been committed.

The Court rejected the City's argument that the officers' acts were discretionary and therefore privileged. The Court, rather, found that the protection afforded to police discretionary acts under *McClellan v. City of New York* does not extend to cases where a special relationship exists between plaintiff and the defendant, particularly where plaintiff alleges a failure of police protection.

The Court did, however, dismiss the seven year old son's cause of action for emotional distress, finding that he was in school at the time of the shooting and thus not within the zone of danger. The Court also dismissed plaintiff's cause of action for constitutional violations, finding that plaintiff failed to plead and establish any official police policy which violated a constitutional right.

Court Grants Summary Judgment to the City Where Plaintiff Did Not Plead or Prove the Existence of a Special Relationship Between Himself and a City Traffic Agent.

Ajjarupu v. City of N.Y., 2011 Slip Op. 30778 (U).

After a motorcyclist was struck by an oncoming vehicle directed by a City traffic agent to proceed against the red light, the Court granted summary judgment for the City, finding that the plaintiff had failed to plead and prove that any special relationship existed between the plaintiff and the traffic agent.

On February 19, 2009, plaintiff was on his motorcycle at or near the intersection of 10th Avenue and West 42nd Street in Manhattan stopped at a red light in the far left lane. Plaintiff looked for oncoming traffic and ultimately proceeded straight through the intersection once the light controlling his lane of travel had turned green. In doing so, a vehicle traveling west through the same intersection struck the plaintiff after the traffic control agent in the intersection directed the defendant driver to proceed against the red light.

In deciding the City's summary judgment motion seeking dismissal of the plaintiff's negligence suit, the New York Supreme Court reiterated long standing precedent that a Municipality cannot be liable for negligence in the performance of governmental duties unless a special relationship exists between the plaintiff and the City. The Court further opined that

Municipalities cannot be liable in the performance of discretionary duties even if negligence can be proven.

The Court ultimately deemed traffic control to be a governmental but discretionary act, requiring plaintiff to plead and prove the existence of a special relationship. The Court stated that traffic control is performed for the protection and safety of the public and distinguished traffic control from the Officer's actions in *Ohdan v. City of New York*, namely, forcing plaintiff to move and ultimately crash into an illegally parked car despite the fact that plaintiff could not speak English or drive. The Court found the Officer's actions in *Ohdan* so unprofessional as to not constitute the type of discretionary acts normally immunized by public policy. Conversely, the Court asserted that the traffic agent's act of directing defendant to proceed against a red light was "clearly" an immunized, discretionary one.

The Court granted the City's motion because plaintiff failed to plead and prove the existence of a special relationship in the notice of claim, summons and complaint and bill of particulars. Interestingly, the Court found that summary judgment would have been appropriate even if plaintiff had properly plead the existence of a special relationship, because the plaintiff never even saw or communicated with the traffic agent before the accident, and thus, could not be said to have reasonably or detrimentally relied on the agent's actions. Further, the Court noted that based on the total lack of contact between plaintiff and the traffic agent before the accident, the agent could not have been said to have made any affirmative undertakings for the plaintiff's benefit.

The Court also found that co defendant driver and his employer could not oppose the City's motion for summary judgment on the grounds of a special relationship between plaintiff and the City, as neither party raised this point until oral argument.

Second Department Affirms Summary Judgment Against a School District, Finding that its Teacher Had a Duty to Exercise a Higher Standard of Care When Supervising Students in an Academic, After School Program on School Grounds.

Nash v. Port Washington Union Free Sch. Dist. 2011 Slip Op. 03040.

Plaintiff was a sophomore enrolled in a science program at the defendant's school and was keeping a fellow member company after school hours while he worked on a project for the program. The program contained only nine students, was only open to academically qualified candidates and required students to remain enrolled from their sophomore through senior year. The program was taught by a single teacher, Ms. Serfaty.

On the date of loss, the third party defendant-student asked plaintiff to keep him company after school while he worked on an ongoing cell culture project in the school laboratory. Plaintiff agreed to do so and Ms. Saferty also stayed after school to supervise the project. At this time, Ms. Saferty asked plaintiff to make himself useful and clean up the lab, which plaintiff began to

do. Ms. Saferty then sat in the office adjacent to the laboratory while the third party defendant was at work on his project. The laboratory contained standard classroom facilities, lab tables, incubators, flow hoods and various other types of scientific equipment.

A short while later, Ms. Saferty left the school grounds to buy food at the corner deli, located within walking distance. She informed the students that she would return in about twenty minutes. During her absence, the third party defendant washed his hands with ethanol alcohol, obtained a spark lighter off of a laboratory table and struck it several times while he paced back and forth and spoke to the plaintiff (who was sitting on a nearby stool). An eventual explosion ensued, causing plaintiff to suffer severe burn injuries. Third party defendant testified that just before the accident, he was sterilizing the surface of his work area with ethyl alcohol and that he may have held the spark lighter over a beaker which contained same.

The Fire Marshal's investigation revealed that the fire was likely caused by the accidental ignition of an ignitable fluid.

Plaintiff testified that the third party defendant had been previously diagnosed with hyper active disorder, was generally fidgety and carried a wire around with him to manipulate because he needed to constantly occupy his hands. Ms. Saferty was aware that third party defendant carried a wire around for this purpose.

Third party defendant claimed that he questioned Ms. Saferty several times prior to the accident about using ethyl alcohol to sterilize glassware. Ms. Saferty claimed she adamantly instructed third party plaintiff never to use ethyl alcohol to clean glassware and would not allow such a practice in her presence. Third party defendant testified that she had in the past instructed him to sterilize glassware with alcohol and that she even refilled the alcohol for him when he needed more.

Ms. Saferty acknowledged at her deposition that she knew third party defendant was working with ethyl alcohol on the date of loss and that there may have been spark lighters "lying around" in the laboratory. In fact, she acknowledged that the very morning of the accident, third party defendant again asked her about the use of ethyl alcohol for sterilization purposes.

Ms. Saferty testified that while school policy prohibited teachers from leaving students unattended in classrooms, she testified that it was custom that this policy only applied during school hours. The school principal sharply disputed her testimony, stating that this policy applied at all times in both classrooms and class room related settings and that it would have been inadequate supervision under the policy for Ms. Saferty to be sitting in her office adjacent to the lab where the students were working.

After the defendant appealed the lower Court's decision granting summary judgment to the plaintiff on the issue of liability, the Second Department had to decide the duty of care

applicable to an after school activity performed in an academic setting, for academic credit and on school grounds. The Court further had to decide if plaintiff's accident was foreseeable and if the accident was not preventable regardless of the level of Ms. Saferty's supervision.

In addressing the applicable standard of care, the Court noted that during school hours, teachers such as Ms. Saferty are held to a higher standard of care, that is, the "reasonably prudent parent" standard. This standard requires schools to exercise such care as would a parent of ordinary prudence and in comparable circumstance, effectively taking the place of the child's parent or guardian. However, the Court noted that it has applied a lesser standard of care, requiring mere reasonable and ordinary prudence, to after school activities such as intramural or extramural athletics.

The Court rejected the school's argument that the lesser standard of care should apply to Ms. Saferty's actions because the injury producing activity took place after school hours. Rather, the Court found that the higher standard of care applied because unlike athletics, third party defendant's project was part of an academic program which was allotted into his class schedule and for which he would receive an academic grade. The Court found "no legal significance" that the project was performed after school hours because the program was allotted time period in his schedule, just like any other regular class. The Court further noted that in some cases where the lesser standard of care applied, the activities performed by the students were held off of school grounds.

The Court also deemed it of no significance that plaintiff himself was not working on the project at the time of the accident, as he himself was enrolled in the science program and had even been instructed by Ms. Saferty to clean the laboratory.

Applying the higher, prudent parent standard of care, the Court found that Ms. Saferty exercised no supervision over the students' activities, thus deeming the conclusion of liability against the school "inescapable." The Court noted that schools are not liable for every thoughtless or careless injury producing acts of its students, but are liable for foreseeable injuries proximately related to the absence of adequate supervision. The Court concluded that injury to the plaintiff was foreseeable to Ms. Saferty, as third party defendant, a fidgety individual, asked Ms. Saferty several times about sterilizing glassware with ethyl alcohol and Ms. Saferty knew he was working with this very substance on the date of the accident. Further, the Court emphasized that she was aware that spark lighters were laying around in the laboratory. The Court rejected defendant's argument that the activation of a spark lighter occurred so quickly as to have been unpreventable despite any level of supervision. The Court found that it was the dangerous act of using alcohol for sterilization which could have been prevented by adequate supervision.

Accordingly, the Second Department affirmed the lower Court's decision granting summary judgment to the plaintiff on the issue of liability.

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