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First Department Finds Question of Fact as to Whether New York City Police Department Negligently Supervised Officer Who Fatally Shot Girlfriend While Off Duty

Gonzalez v. City of New York, 2015 WL 5552724, 2015 N.Y. App. Div. LEXIS 6781 (1st Dept. 2015)

A 16-year old woman was shot and killed by her 38-year old boyfriend, a New York City police officer, while he was off duty. After the shooting, the officer killed himself. The First Department found that there were questions of fact “as to whether the City negligently supervised and retained an officer with violent propensities, and whether the intervening intentional tort of the off-duty officer was itself a foreseeable harm that shaped the duty imposed upon the City when it failed to guard against a police officer with violent propensities.”

The court explained that the duty owed by the police department to the plaintiff (the administrator of the estate) arises from the tort of negligent hiring and retention. Under this theory, “an employer may be liable for the acts of an employee acting outside the scope of his or her employment.” In this case, the City would have breached this duty if the City learned of the officer’s violent propensities and failed to investigate, discharge, or reassign the officer and the plaintiff’s damages were a consequence of the City’s negligent retention or supervision of the officer. Specifically, the court stated that “[t]he duty not to entrust a gun to a dangerous or incompetent police officer thus extends to any person injured as a result of the negligent entrustment.”

The court cited to New York case law holding “governmental employers liable for placing employees, like police officers who are known to be violent, in positions in which they can harm others.” The court further explained that this liability can attach even if the employee’s misconduct occurs outside the scope of employment, so long as the plaintiff demonstrates a connection between the plaintiff’s injuries and the defendant’s misconduct. In this case, the City trained and armed the officer, thus creating a danger, and allowed him to retain his weapon after allegedly learning of the officer’s dangerous propensities, increasing the risk to the public. Thus, the officer’s actions were made possible through the use of his weapon, which the City authorized him to carry.

The court held that the City “could reasonably have anticipated that its negligence in failing to discipline an officer who had violent propensities would result in the officer injuring someone with his gun.” Therefore, the court denied the City’s motion for summary judgment,

since a jury could find that the officer misused his weapon, which was proximately caused by the City's negligence in supervising and retaining the officer with violent propensities.

Court of Appeals Clarifies the Trivial Defect Doctrine

Hutchinson v. Sheridan Hill House Corp., 26 N.Y.3d 66 (2015)

In this decision, the Court of Appeals reviewed three similar cases and clarified the trivial defect doctrine.

Initially, the Court of Appeals outlined its holding in *Trincere v. County of Suffolk*, 90 N.Y.2d 976 (1997), in which it held that "there is no 'minimal dimension test' or per se rule that a defect must be of a certain minimum height or depth in order to be actionable." Rather, a court is to consider all of the facts and circumstances presented, including, but not limited to, width, depth, elevation, irregularity, appearance of the defect, and the time, place and circumstance of the injury. The Court explained that under *Trincere*, a defect may be physically insignificant, but still actionable if "its intrinsic characteristics or the surrounding circumstances magnify the dangers it poses, so that it 'unreasonably imperils the safety of' a pedestrian."

The Court of Appeals explained that the case law in New York establishes that courts should not focus on whether the defect is a trap or snare, but instead, "the relevant questions are whether the defect was difficult for a pedestrian to see or to identify as a hazard or difficult to pass over safely on foot in light of the surrounding circumstances." To establish triviality, the defendant has the initial burden of showing that the "defect is, under the circumstances, physically insignificant and the characteristics of the defect or the surrounding circumstances do not increase the risks it poses." The burden then shifts to the plaintiff to establish an issue of fact.

In the first case discussed by the Court, plaintiff Hutchinson tripped over a metal object in the middle of the sidewalk, which was protruding approximately one quarter of an inch above the ground, in an area that was well-illuminated and where a pedestrian was not necessarily required to look ahead at the crowds or physical surroundings. Moreover, the "object stood alone and was not hidden or covered in any way so as to make it difficult to see or to identify as a hazard. Its edge was not jagged and the surrounding surface was not uneven." The Supreme Court granted the defendant's motion for summary judgment and the Appellate Division affirmed. The Court of Appeals affirmed finding that based on the circumstances presented, the defect was trivial and, thus, not actionable.

In the second case, plaintiff Zelichenko fell while walking down a staircase in a residential building. The "step tread had a missing piece, of irregular shape, 3 ¼ inches in width and at least ½ inch in depth, on the nosing of the step, where a person might step." The Supreme Court denied the defendant's motion for summary judgment. The Appellate Division reversed based on the fact that the "chip" was located almost entirely on the edge of the step, and not on the walking surface and, thus, constituted a trivial defect. The Court of Appeals reversed, explaining that although a person could walk in such a way so as to avoid the nosing on the step and, thus, avoid the chip, it does not imply that every person will walk that way. The relevant inquiry is

“whether a person would invariably avoid the defect while walking in a manner typical of human beings descending stairs.” Therefore, a question of fact existed as to whether the defect was trivial.

In the third case, plaintiff Adler fell while walking down the interior staircase of her apartment building. Plaintiff testified that her right foot “got caught” on a protrusion of some sort in a step tread that had been painted over. Plaintiff also testified that the stairway was illuminated by a light bulb, she was looking down while descending the stairs, she did not recall any dirt or debris on the stairs, and the stairs were not slippery or cracked. She further testified that she had in fact seen “the clump” on previous occasions. The Supreme Court denied the defendants’ motion for summary judgment and the Appellate Division reversed. The Court of Appeals reversed on the ground that defendants did not meet their initial burden. Specifically, the record included deposition testimony and indistinct photographs, but no measurements of the protrusion and, thus, it was not possible to determine if it was physically small enough to constitute a trivial defect. Although the photographs in this case did not justify the finding of a trivial defect, the Court emphasized that its holding should not preclude future fact-finders from finding a trivial defect based on photographs.

In sum, the Court explained that courts are to consider all of the facts and circumstances of a trip and fall in determining whether a defect is trivial, not just the size of the defect. Moreover, when the size of the defect is unknown, the court should deny summary judgment where the photographs and descriptions of the defect are inconclusive. Finally, except in cases that present unusual circumstances, courts should “avoid interjecting the question whether the plaintiff might have avoided the accident simply by placing his feet elsewhere.”

Third Department Finds that Occasional Uncivil and Crude Behavior Does Not Create Hostile Workplace

Minckler v. United Parcel Service, Inc., 132 A.D.3d 1186, 19 N.Y.S.3d 602 (3d Dept. 2015)

The female plaintiff began working for the United Parcel Service, Inc. (UPS) in 1992 as an administrative clerk. She shared an office with a number of people including defendant Jackson. In October 2010, plaintiff filed a formal complaint alleging workplace harassment. In November 2010 she resigned. Then, in January 2011, she filed this lawsuit alleging, among other things, sexual harassment in the workplace, gender discrimination, and retaliation against UPS, and assault and battery against defendant Jackson. Defendants moved for summary judgment, which the Supreme Court granted. Plaintiff appealed.

Plaintiff claimed that beginning in 2005 defendant Jackson, among other things, used sexually explicit language, called plaintiff sexually derogatory terms, pulled her bra strap, and pulled her hair. The Third Department found that the record clearly established that “the workplace was one in which the banter was occasionally uncivil and crude. Under the totality of the circumstances, however, [the court is] unable to conclude that the conduct, while offensive, either permeated the workplace or was so ‘severe and pervasive’ as to constitute a hostile work environment under the Human Rights Law.”

The Court held that defendants were entitled to summary judgment on plaintiff's intentional discrimination claim since plaintiff did not establish every element of the claim. The Court explained that to succeed on a sexually hostile work environment claim, a party must demonstrate that his or her employment conditions were altered as a result of the perceived abusive conduct and that a reasonable person would find that such conduct created a hostile or abusive environment. Here, the plaintiff conceded in her deposition that while defendant Jackson's comments were crude, they "did not objectify or disparage women in general" but rather "resulted from their mutual animosity." Therefore, the Court concluded that Jackson's conduct was not so severe or pervasive as to establish a hostile work environment claim.

The Court also held that defendant UPS was entitled to summary judgment on plaintiff's retaliation claim. Plaintiff claimed that following the investigation of her October 2010 complaint, her hours were reduced, her request to move offices was denied, and her co-workers were not happy with her. On November 12, 2010 plaintiff's counsel wrote to UPS advising that plaintiff was resigning due to the intolerable working conditions. Plaintiff failed to establish that she suffered any adverse employment action following her complaint or that the work conditions were so intolerable that a reasonable person would have been compelled to resign two weeks later.

As to plaintiff's claim for assault and battery, the Court denied defendant Jackson's motion for summary judgment. While the 2009 pulling of the bra strap incident was time barred, there was a triable issue of fact as to the alleged 2010 hair pulling incident. Defendant submitted testimony that he was assisting plaintiff in getting something out of her hair. Plaintiff, however, testified that defendant pulled her hair for 10-15 seconds without provocation. The Court viewed the evidence in a light most favorable to plaintiff and denied the motion.