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IN THE SUPREME COURT OF THE STATE OF DELAWARE

MORGAN MCCAFFREY, Plaintiff-Below Appellant, v. CITY OF WILMINGTON, PATROLMAN MICHAEL SPENCER, individually and in his capacity as an officer, WILMINGTON SERGEANT DONALD BLUESTEIN, individually and in his capacity as an officer, SERGEANT GERALD MURRAY, individually and in his capacity as an officer, and CORPORAL RALPH SCHIFANO, individually and in his capacity as an officer, MASTER SERGEANT SHERRI TULL, individually and in her capacity as an officer, and CHIEF MICHAEL J. SZCZERBA, individually and in his capacity as an officer, Defendants-Below, Appellees.	:	No.: 26, 2015 On Appeal from Superior Court C.A. No. N12C-01-138 PLA

AMENDED **APPELLANT'S OPENING BRIEF**

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NATURE OF PROCEEDINGS

Plaintiff, Morgan McCaffrey ("McCaffrey"), filed this personal injury and civil rights lawsuit on January 19, 2012. Named Defendants included the driver of the automobile that caused the motor vehicle accident on June 5, 2010, Michael Spencer ("Spencer"), as well as The City of Wilmington ("City"), and investigating Wilmington Police officers Gerald Murray ("Murray"), Ralph Schifano ("Schifano"), and Donald Bluestein ("Bluestein"). Plaintiff amended the Complaint twice to add Wilmington officers Sherri Tull ("Tull") and Chief Michael Szczerba ("Szczerba").

The Second Amended Complaint contains the following Counts: Count I – common law negligence and recklessness claims against Spencer; Count II – civil rights violations against Spencer, Bluestein, Murray, Schifano and Tull; Count III – civil rights violations against City for improper custom and policy; Count IV – negligent and reckless hiring, retention and supervision against City and Szczerba; Count V – assault and battery against Spencer; and Count VI – intentional infliction of emotional distress against Spencer. (A-0001-0012).

The Superior Court dismissed all parties and all claims except for the claims against Defendant Michael Spencer. *See McCaffrey v. City of Wilmington*, C.A. No. N12C-01-138 PLA, 2012 WL 1593062 (Del. Super.

Ct. Apr. 25, 2012) (dismissing Counts I and II against City of Wilmington); *McCaffrey v. City of Wilmington,* C.A. No. N12C-01-138-PLA, 2012 WL 3518119 (Del. Super. Ct. Aug. 9, 2012) (dismissing Counts V and VI against City of Wilmington and all City Officers excluding Michael Spencer); *McCaffrey v. City of Wilmington*, C.A. No. N12C-01-138 EMD, 2013 WL 4852497 (Del. Super. Ct. June 26, 2013) (granting City of Wilmington and all City Defendants' motion for summary judgment); *McCaffrey v. City of Wilmington,* C.A. No. N12C-01-138 EMD, 2014 WL 6679176 (Del. Super. Ct. Nov. 3, 2014) (granting summary judgment to City of Wilmington and Chief Szczerba on Count IV).

On December 19, 2014, Plaintiff filed a Motion for Entry of Judgment with respect to all claims against all Defendants, except for Michael Spencer. The Court granted the Motion, and final judgment was entered in favor of Defendants on January 5, 2015. Plaintiff filed a notice of appeal to the Delaware Supreme Court on January 21, 2015. This is Plaintiff-Below, Appellant's Opening Brief.

SUMMARY OF ARGUMENT

1. **The Superior Court erred in determining that Spencer's actions on June 5, 2010 were outside the scope of his employment.**

2. **The Superior Court erred in granting summary judgment to City and Szczerba on Plaintiff's state law claims.**

STATEMENT OF FACTS

Michael Spencer submitted his application to the Wilmington Police Department ("WPD") on May 22, 2007. (A-0013-0034). In the course of his "Applicant Background Investigation," he disclosed that he was "discharged or fired" from a prior job as a store detective at Value City because he violated policy. (A-0021). He also revealed that he had used illegal drugs in the past and had "financial problems dealing with bad credit or bankruptcy" (A-0024).[1] Further, when asked whether he had any motor vehicle violations in the past three years, he listed disregarding a red light on July 10, 2004 and a speeding violation on March 9, 2007. (A-0026). His file shows that he also had a charge of operating a vehicle with after market window tinting on March 29, 2002, and following a motor vehicle too closely on January 22, 2001. (A-0070-0071). One of his prior employers, upon being interviewed during the application process, said that Spencer, "need[ed] to mature." (A-0055).

Michael Spencer began at WPD in January 2008 as a "Probationary Patrol Officer." (A-0033-0034). Like all officers, he had to complete an eighteen-month *probationary period* to demonstrate his "fitness for

[1] Plaintiff notes that in his application, he wrote that he used marijuana in June 2004, "less than the amount of nicotine in a cigarette." (A-0024). In his polygraph, however, he wrote that he used marijuana in June 2004, 1998 and 2001. (A-0104).

continued employment" before he was officially hired as a Patrol Officer. During this time, he violated many WPD policies as well as Delaware law.

Specifically, on September 13, 2008, when Spencer did not show up for work, police officers went to his house to find him; he later testified that he did not go to work because he had been out the night before, "drunk at Trolley Square." (A-0367). On October 21, 2008, on-duty Spencer responded to a call from off-duty officers who were involved in a fight with a civilian at a Wilmington bar called "Scratch McGoo's." Spencer violated protocol by not notifying dispatch, not interviewing the civilian, not notifying his supervisor, and failing to properly investigate the incident. (A-0137-0138).

On November 11, 2008, Spencer was involved in a domestic dispute with an ex-girlfriend at his home. (A-0691). A witness told the WPD that Spencer was drunk and "put his hands" on the victim. (A-0145). The victim was afraid to file a formal complaint but said Spencer, "needed some help." (A-0145). This information was set forth in the "Departmental Information" document that was addressed to Szczerba. (A-0145).

Spencer told the investigator that he physically tried to remove his phone from the victim, then she hit him with it. (A-0153). He also admitted to drinking and driving while in possession of a firearm on November 11,

2008, which is against Delaware law and WPD policy. He drove to his WPD field training officer's home in the middle of the night, and was crying, disheveled and not making sense. (A-0223, 0027). During the OPS domestic investigation, Spencer admitted he also had a domestic violence incident before entering WPD. (A-0200-0202).

During his probation, Spencer was evaluated and red flags were noted. For example, Sergeant W. Schmid documented that Spencer, "appeared too comfortable around senior officers," and, "sometimes comes across as too confident" and arrogant. (A-0942, A-0945-0946). In addition, it was noted that Spencer, "does appear at times to choose self-initiated activity over district integrity." (A-0947). Nevertheless, Spencer successfully passed through probation on August 3, 2009. (A-0940).

On the night of April 5, 2010, two months prior to the accident in this case, Spencer failed to contact his direct supervisor after being involved in a motor vehicle accident after drinking alcohol at the Delaware Association of Police.[2] (A-0684). A WPD supervisor went to Spencer's home to locate him, but Spencer did not answer his door. (A-0477-0478). Spencer was "counseled" for his failure to report the accident to a supervisor. (A-0685).

[2] WPD policy required an off-duty officer to contact his supervisor if he was in an accident so that the supervisor could determine if drinking or other violations occurred.

On the evening of June 4, 2010, Plaintiff Morgan McCaffrey, then aged 21, completed her double shift as a waitress at Iron Hill Brewery in Wilmington, Delaware. (A-0588). With two of her friends/co-workers, she met additional friends at approximately 11:00 p.m. at Timothy's Restaurant. (A-0589-0590). Over several hours, she had one beer and one "mixed" shot.[3] (A-0590). At approximately 1:30 a.m., she left to drive two friends home. (*Id*.).

On her way to her apartment, McCaffrey proceeded through a green light at the corner of Orange and Second Streets, traveling northbound on Orange Street in Wilmington. (A-0591). Suddenly and without warning, Michael Spencer disregarded a red light on westbound Second Street, collided with McCaffrey's vehicle, and pushed it across the intersection and into a fire hydrant. (*Id.)*.

That evening, Officer Spencer had attended a police-sponsored "Beef and Beer," then drove to a Wilmington bar where he met other Wilmington Police Officers. (A-0660). He admitted that he drove under the influence of alcohol and "blacked out." (A-0675). At 2:00 a.m., he was driving to see a woman who lived on Reed Street when he caused this accident. (A-0661).

[3] McCaffrey elaborated, " I'm not actually sure that I even finished the beer." (A-0590).

Following the collision, when Spencer asked if McCaffrey wanted an ambulance and police called, McCaffrey said yes. (A-0593). She heard Spencer place a phone call to report the accident, whereby he spoke partially in "cop terms." (A-0594). Spencer placed a call at 2:12 a.m. to the administrative line to the Wilmington Police Station. (A-0734, A-0741). "The general public would not know that number." (A-0741). WPD employee Christopher Partlow ("Partlow") answered the call and seemed to know who Spencer was. (A-0441). Spencer said it was a departmental accident, but Partlow did not classify it as a departmental. (A-0736-0737). Partlow could tell that "he might be drunk because the way he was acting on the phone and the way he was talking." (A-0737-0738). Neither Partlow nor his supervisor, Wendy Davis, dispatched an officer to the accident scene, which was approximately two blocks from the police station, until twenty minutes after the phone call ended. (A-0750-0751).

Meanwhile, Spencer showed McCaffrey his Wilmington Police Identification card, and asked her if she wanted to handle the matter "civilly." (A-0596). McCaffrey did not understand but agreed, "[b]ecause he was a police officer." (*Id*.). She explained, "I guess at that point I thought that maybe he knew better than I did how to handle the accident." (*Id*.). She thought that "still meant exchanging insurance information and

that everything would still be eventually taken care of through insurance and such." (A-0597). About ten minutes later, he cancelled the call for police. (*Id*.). He then placed his hands on McCaffrey's shoulders and kissed her without her consent. (A-0599). She was "really uncomfortable," and backed away, surprised. (*Id*.). She was crying. (A-0600).

Spencer then asked McCaffrey where she lived and she stated that she lived less than a block away. (*Id*.). Spencer said they should move the cars, which were totaled, off the roadway to her nearby apartment, and she complied. (*Id*.). She complied only because he "was a police officer." (A-0601). Once parked, she got her insurance and registration cards out and assumed he was doing the same when he went into his glove box. (*Id*.). Instead of handing her his insurance information, he handed her his handgun, magazine, and police badge. (A-0602). She was scared and felt that she had to do what he said. (*Id*.). She was in shock. (A-0605). She asked what they were doing, and he said, "let's go to your apartment and we will talk about it." (*Id*.). She believed they were going there to exchange insurance information.

Meanwhile, Corporal Schifano arrived at the accident scene at 2:39 a.m. to find that the vehicles were moved but debris was in the roadway.[4] Schifano reported this to WILCOM supervisor Wendy Davis, who called Spencer back. Spencer told her to "disregard." (A-0441). Spencer also told Davis that he was not involved in the accident. (*Id*.) Davis "realized he may be a police officer based on his jargon." (*Id.*). Davis then asked Partlow, "Who was Spencer?" Partlow replied, "Officer Spencer." (*Id*.).

Davis later testified that she "recognized his voice." (A-0874). Davis and Partlow listened back to the recorded phone call and appeared to believe something was wrong with him. (A-0876). Davis stated that "his speech may have been impaired," and "maybe some stuttering, stammering." (A-0876-0877). Davis asked why Partlow did not report this to a supervisor, which was required, and Partlow said that "he didn't want to get the officer in trouble." (A-0441-0442).

McCaffrey listened to Spencer "solely based on the fact that I think that he was a police officer." (A-0605). She was scared and did not want to upset him. (A-0606). They entered her studio apartment and she excused herself to the bathroom. (A-0607). After five minutes, she came out and he had taken his pants off. (*Id*.). She was scared and went back into the

[4] This twenty-seven minute delay by Schifano in going to an accident involving an off-duty officer is a "significant delay," according to Szczerba. (A-0842).

bathroom. (A-0608). When she came out again, he asked her to sit down on the futon bed, which was the only furniture she had. (A-0609). She sat as far as she could away from him, about three feet. (*Id*.). He then asked her if she wanted to have sex, and she said no. (*Id*.). He then stood up, straddled her and sat on top of her, while placing his hands on her shoulders. (*Id*.). He again asked her to have sex, and she said no. (*Id*.). He then laid down and passed out. (A-0610). She returned to the bathroom and changed into sweatpants and a sweatshirt, got her cell phone, and left her apartment. (*Id*.).

After making fifteen phone calls from 3:07 a.m. to 3:36 a.m**.** to various friends, she reached her neighbor Kevin Molholm and asked for help. (A-0892-0893). In Kevin's apartment, she was crying and showed him the gun, magazine, and police badge. (A-0907). McCaffrey was afraid to call 911 because she had an officer in her apartment who had just caused a serious motor vehicle accident. (A-0909). Also, she was concerned because she had outstanding parking tickets. (A-0912-0914). Kevin encouraged her to place a call to 911, which she did at 3:52 a.m. (A-0909, 0924).

McCaffrey did not return to her apartment. She met Officers Bluestein, Murray, Schifano and Tull outside on the sidewalk. Spencer had passed out drunk in her bed, unclothed, and he had urinated in her bed. (A-0608-0610). McCaffrey was taken to the WPD station, where she had to

wait until 8:00 a.m. to be interviewed by Master Sergeant Reutter. (A-0279).

Despite Spencer's obvious intoxication, the four WPD officers who responded to McCaffrey's apartment failed to perform any field sobriety tests until several hours had passed. At 7:15 a.m., back at the police station, Schifano attempted to interview Spencer. (A-0287). Spencer became agitated and refused. (*Id*.). He later consented and passed, despite having no memory of taking the test. (A-0665). Spencer was only criminally charged with the failure to stop at a red light. (A-0649).

Spencer was later charged, internally, with multiple violations and went before a WPD Complaint Hearing Board.[5] He was found guilty of unauthorized display of firearm,[6] failure to obey the law, and failure to follow the correct procedure for an off-duty accident.[7] He entered a twenty-eight day alcohol rehab program but left before the program was over. (A-0677). Spencer testified that he had a drinking problem and stopped "right

[5] Plaintiff's police liability expert Greg Warren provided a report detailing Spencer's pattern of illegal and unprofessional behavior. (A-0929).

[6] It is not clear how "display" of firearm applied, when in fact he handed Plaintiff a loaded weapon.

[7] The Uniform Collision Report from the June 5, 2012 accident was written by Schifano. (A-0648). Schifano described Spencer "Operator of Unit 1" as having bloodshot eyes and an odor of alcohol. (A-0651). The report makes no mention of the gun, bullets, or badge, the assault or battery, the intentional delay in DUI testing or the visit to the emergency room.

around" the time of this accident. (A-0675).[8] He had blacked out in the past from drinking. (*Id*.). At his deposition, he testified that he was drinking again. In fact, in a completely unrelated incident, after his deposition, he was charged with a DUI when he was found to be almost four times the legal limit on November 12, 2013.

Plaintiff suffered from assault, battery, and intentional infliction of emotional distress. She had sprains to her neck, back and right ring finger and sought medical treatment for those injuries. (A-0614). Further, she was upset and fearful that Spencer would retaliate and come back to her apartment. She moved out of her apartment, threw away her bedding and mattress, and has had nightmares and has been fearful of police as a result of this incident. (A-0616).

[8] Spencer has said this in the past. During an OPS interview on 12/12/08, he testified that he probably had a drinking problem before he became an officer in the past but believed that he no longer had a drinking problem in 2008. (A-0192, A-0194-0195).

ARGUMENT

I. The Superior Court erred in determining that Spencer's actions on June 5, 2010 were outside the scope of his employment.

A. QUESTION PRESENTED

Did the Court err in determining that Spencer's actions were outside the scope of employment? *See McCaffrey v City of Wilmington*, C. A. No. N12C-01-138 PLA at pp. 5-7, 2012 WL 1593062 (Del. Super. Ct. April 25, 2012) (Attached).

B. STANDARD OF REVIEW

A trial court's grant of a motion to dismiss is reviewed *de novo*. *RBC Capital Markets, LLC v. Education Loan Trust IV, 87 A.3d 632, 639* (Del. 2014).

C. MERITS OF ARGUMENT

A motion to dismiss should only be granted under DEL. SUPER. CT. CIV. R. 12(b)(6) if the plaintiff is not entitled to recover under any reasonably conceivable set of circumstances susceptible to proof. *Battista v. Chrysler Corp*., 454 A.2d 286, 287 (Del. Super. Ct. 1982). Plaintiff alleges that a reasonable person could have conceived that Spencer was acting as a police officer when he interacted with Plaintiff. Therefore, the motion to dismiss should have been denied.

Plaintiff set forth the facts of her case in the section entitled "Background" in the Second Amended Complaint. (A-0002-0005). Plaintiff asserted state law claims against Spencer in Count I (Negligence and Recklessness), Count V (Assault and Battery), and Count VI (Intentional Infliction of Emotional Distress). While Plaintiff did not allege agency in Count I, Plaintiff reasserted all foregoing paragraphs throughout the Second Amended Complaint, wherein she stated: "At all times, Defendant [Spencer] was an agent, servant, and employee of the Wilmington Police Department and City of Wilmington and operated within the scope of his employment. Defendant's negligence and recklessness is imputed to the City of Wilmington." (A-0011-0012).

Defendant City filed a partial motion to dismiss Count I based on the argument that Spencer's actions were outside the scope of employment. The Superior Court agreed, unfairly limiting the analysis to what took place *prior* to the motor vehicle accident. Specifically, the Court ruled:

> First, Spencer's alleged conduct does not fall within the scope of employment. In Delaware, responsibility for an employee's tortious conduct, committed in the scope of employment, will be imputed to the employer by the doctrine of respondeat superior. Liability for the torts of the servants will only be imposed upon the master when those torts are committed by the servant within the scope of employment which, at least in theory, means that they were committed in furtherance of the master's business.

McCaffrey v. City of Wilmington, C.A. No. C.A. No. N12C-01-138 PLA, 2012 WL 1593062, at *3 (Del. Super. Ct. Apr. 25, 2012) (internal footnotes omitted).

The Court considered four factors to determine whether the conduct was in the scope of employment: whether it was of the kind he was employed to perform; whether it occurred within authorized time and space; whether it was activated, in part, by a purpose to serve the master; and if any force used was not unexpectable by the master. *Id.* (quoting *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 570 (Del. 1962)). The Court determined that Spencer's conduct was outside the scope of his employment, as he was not authorized to drive under the influence of alcohol or cause an accident. *Id.* The Court also dismissed the apparent authority argument under Count I, because Spencer was off duty. *Id*. at *4.

The Court stated that Count I only addressed Spencer's negligence in causing the accident. *Id*. However, Plaintiff also alleged in Count I that Spencer was negligent and reckless in cancelling his call to the police after the accident, and directing Plaintiff to move the cars from the scene of the accident. (A-0006). Notably, throughout the Complaint, Plaintiff also alleged agency for the accompanying assault, battery, and intentional

infliction of emotional distress. The delay by the WPD relating to their drunk employee allowed the assault and other torts to occur.

Plaintiff reiterates her arguments made to the Superior Court, and also relies on a subsequent Supreme Court case to support her position that Spencer was acting within the scope of his employment when he caused harm to Plaintiff. *See Doe v. State*, 76 A.3d 774 (Del. 2013). In *Doe*, an on-duty Delaware State Police Officer committed sexual assault on a woman while transporting her to court. The Supreme Court reversed the Superior Court's grant of summary judgment to Defendant. *Id.* at 777. The Court explained, "The question of whether a tortfeasor is acting within the scope of employment is fact-specific, and, ordinarily, is for the jury to decide. 'The phrase, "scope of employment," is, at best, indefinite.'" *Id*. at 776 (quoting *Draper v. Olivere Paving & Constr. Co.*, 181 A.2d 565, 569 (Del. 1962)). Further,

> Wrongful conduct, by definition, is not within the scope of employment in the sense that it is not conduct the employee was hired to perform. The relevant test, however, is not whether Giddings' sexual assault was "within the ordinary course of business of the [employer], ... but whether the service itself in which the tortious act was done was within the ordinary course of such business" ... during the time frame within which the tort was committed.

Id. at 777 (quoting *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995)). Those are two of the three factors to be analyzed; the third is

whether the act was, in part, to serve the employer. *Id.* This factor, "has been construed broadly as a matter for the jury to decide." *Id.*

Doe reasons that the force was "not unexpectable" or unforeseeable. *Id.* "Several other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks." *Id.*

Doe cites another case, *Draper v. Olivere Paving & Construction Co*., 181 A.2d 565 (Del. 1962), which held that it was for the jury to decide whether the Defendant's employee was acting in the scope of employment when the employee became angry at a driver who was about to drive on an impassable section of the road, and slashed the driver's throat. *Draper*, 181 A.2d at 572-73.

Plaintiff acknowledges that the big difference between *Doe* and this case is that the officer in *Doe* was in uniform, in a police car, and officially "on duty." However, Plaintiff maintains that while Spencer was not in uniform and not driving a police car, he took on the role as an officer when he identified himself as an officer, showed his police badge and identification, and took control of the accident scene in his capacity as an officer. He called in the accident to a phone line reserved for police only, and he directed her to move her car from the accident scene. Plaintiff only abided by his instructions because he was a police officer. (A-0596). A jury

could fairly conclude that at those times he was acting within the scope of employment.

Courts have recognized that agency exists for off-duty police officers in certain circumstances. *See Civil Liability for Acts of Off-Duty Officers*, 2007 (9) AELE MO. L. J. 101 (Sept. 2007) *and* 2007 (10) AELE MO. L. J. 101 (Oct. 2007). An example is in *Anderson v. Warner*, 451 F.3d 1063 (9th Cir. 2006), where an off-duty jail commander acted under color of law when he asserted that he was a "cop" to prevent bystanders from interfering with his assault on a motorist who rear-ended him). This is contrasted with *Phelan v. City of Mount Rainier*, 805 A.2d 930 (D.C. 2002), where agency did not exist when an off-duty officer, in plain clothes, did not identify himself as an officer and did not have authority in that jurisdiction, when he killed someone during a fight.

Plaintiff submits that the facts in her case are similar to those in *Anderson*, because both officers were off-duty yet they asserted that they were officers. *Phelan* contrasts with our facts in that Spencer did identify himself as an officer right away and throughout the encounter, and he had authority in the Wilmington jurisdiction. In fact, the incident took place just blocks from the Wilmington Police Station. Spencer was doing the work

that he was employed to perform, i.e., controlling and reporting traffic accidents, in a public intersection, activated in part to serve his employer.

In sum, a strong factual record supports Plaintiff's arguments that Spencer acted in the scope of employment on June 5, 2010. The Court erred by dismissing the claims instead of allowing the case to proceed to a jury trial.

II. The Superior Court erred in granting summary judgment to City and Szczerba on Plaintiff's state law claims.

A. QUESTION PRESENTED

Did the Court err in determining that there was no dispute of material fact and that Defendants City and Szczerba were entitled to summary judgment on the State tort claims as a matter of law? *See McCafferty v. City of Wilmington*, C.A. No. N12C-01-138 EMD at p.7, WL 6679196 (Del. Super. Ct. Nov. 3, 2014) (Attached).

B. STANDARD OF REVIEW

A trial court's decision granting summary judgment will be reviewed de novo as to the facts and the law. *DeBaldo v. URS Energy & Const*., 85 A.3d 73, 77 (Del. 2014).

C. MERITS OF ARGUMENT

Summary judgment is only appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. DEL. SUPER. CT. CIV. R. 56(c). Issues of negligence are not generally susceptible to summary judgment adjudication. *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962).

The Court inappropriately granted summary judgment, determining that City was immune from liability and Szcerba did not act with gross or wanton negligence in employing, retaining, and supervising Spencer.

1. The City's Liability

a. The City was Negligent and Grossly Negligent in Hiring, Retaining and Supervising Spencer.

An employer may be vicariously liable for an employee that is acting within the scope of his employment. RESTATEMENT (SECOND) OF AGENCY ch. 7 (1958). An employer can also be liable for an employee that is acting outside the scope of employment under certain circumstances. RESTATEMENT (SECOND) OF TORTS § 317 (1965) provides:

> A master is under a duty to exercise reasonable care so to control his servant while acting *outside the scope of his employment* as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> the servant
>
> is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> is using a *chattel* of the master, and
>
> the master
>
> knows or has reason to know that he has the ability to control his servant, and
>
> knows or should know of the necessity and opportunity for exercising such control.

RESTATEMENT (SECOND) OF TORTS § 317 (1965) (emphasis added).

An example of a master being responsible under these circumstances is where there is negligent hiring, retention and supervision. A claim of negligent hiring, retention and supervision exists against an employer where

he or she fails to exercise due care to protect third parties from the foreseeable tortious acts of an employee. *Matthews v. Booth*, C.A. No. 04C-09-219MJB, 2008 WL 2154391, at *3 (Del. Super. Ct. May 22, 2008). The negligent hiring or supervision can occur when the employer is negligent in "giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity." *Simms v. The Christina Sch. Dist.,* No. C.A. 02C-07-043 JTV, 2004 WL 344015, at *8 (Del. Super. Ct. Jan. 30, 2004).

A master must exercise authority to prevent employees from misusing chattels which he entrusts to them for use as servants. RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (1965). This is the case even when the chattel is used outside the scope of employment. *Id.*

Comment (c) of Restatement (Second) of Torts Section 317 explains with respect to negligent retention: "There may be circumstances in which the only effective control which the master can exercise over the conduct of his servant is to discharge the servant. Therefore the master may subject himself to liability under the rule stated in this Section by retaining in his employment servants, who, to his knowledge, are in the habit of

misconducting themselves in a manner dangerous to others." RESTATEMENT (SECOND) OF TORTS § 317 cmt. c (1965).

The City was negligent and grossly negligent in hiring, retaining and supervising Spencer. Before he was hired, the WPD knew that Spencer had a poor driving record, was discharged from a recent previous job for "violating policy," had used illegal drugs in the past, and had made poor decisions regarding his finances. Spencer's disregard of "policy," the law and good judgment should have been serious warning signs and he should not have been hired by the WPD.

Once Spencer was hired as a probationary officer, he demonstrated more seriously troubling behavior. As discussed, on November 11, 2008, Spencer was involved in a domestic violence incident with two women, one of which was also employed by the WPD and who reported it to a WPD superior. Spencer drove with his gun, under the influence of alcohol, to his superior's home, "crying, disheveled and not making sense." (A-0223, A-0027).

In addition, on October 21, 2008, Spencer knowingly violated WPD procedure when he failed to notify his supervisor and properly investigate a bar fight between fellow WPD officers and a civilian. This misconduct took place while Spencer was in his *probationary period*, which was clearly a

time where new hires were supposed to be under *increased* scrutiny as they had to prove that they were "fit" for the permanent position.

Plaintiff's police expert, Dr. Greg Warren stated that WPD and Szceerba breached its duties by taking no intervening or preventive action, disciplinary action, counseling, training, or professional treatment. (A-0936-A-0938). By not initiating the actions needed, the City allowed Spencer to remain on the streets with full police power, placing citizens in general and Plaintiff in particular, in danger. (A-0938).

b. Immunity is Waived.

Immunity is waived because the City failed to ensure the proper use of its equipment by Officer Spencer. 10 *Del. C*. § 4012 provides the exceptions to immunity under the County and Municipal Tort Claims Act:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
>
> 1. In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary. . . .

10 DEL. CODE ANN. tit. 10, § 4012 (2015).

This Court has found that an improperly equipped automobile can be considered "equipment" under section 4012. *Sussex Cnty. v. Morris*, 610

A.2d 1354, 1359-60 (Del. 1992) (affirming decision that constable's own automobile was improperly equipped so that he was not afforded immunity). Further, the Court has held that electric utility poles and transmission lines are considered "equipment," under Section 4012. *Porter v. Delmarva Power & Light Co.,* 488 A.2d 899, 906 (Del. Super. Ct. 1984). Equipment is limited to items of unusual design that in their normal use pose a particular hazard to members of the public. *Sadler v. New Castle Cnty.*, 565 A.2d 917, 923 (Del. 1989). A nightstick used by a police officer during an arrest was not considered "equipment" under the circumstances of that case, but the Court noted that, "The Court's ruling here should not be read to find that a nightstick could never be 'equipment' under s 4012(1)." *Hedrick v. Blake*, 531 F.Supp. 156, 158 n.4 (D. Del. 1982).

It is undisputed that Spencer used his WPD equipment including his police identification, badge, gun, and magazine during this incident. The City knew about Spencer's repeated misuse of his gun; he previously drove with it while drinking and the City did not discharge him. The City allowed him to hold himself out as an officer, both on duty and off, and allowed him to carry his police identification, badge, gun, and magazine which he used as instrumentalities to invoke fear in Plaintiff wherein he repeatedly inappropriately touched her and intimidated her.

c. Demanding Compliance with WPD Polices and the Law is Ministerial, not Discretionary.

10 *Del. C*. § 4011(b)(3) provides that notwithstanding Section 4012, a government entitly shall not be liable for damage from the failure to exercise or perform a discretionary function. *See* 10 DEL. CODE ANN. tit. 10, § 4011 (2015). The entity will not be protected by immunity if the function is ministerial. *See Sussex County v. Morris*, 610 A.2d 1354, 1358-59 (Del. 1992). The Delaware Supreme Court has adopted the general definition of "ministerial" from the Restatement (Second) of Torts. *Id.* at 1359. "An act is ministerial if the 'act of the official involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act." *Id*. (quoting RESTATEMENT (SECOND) OF TORTS § 895D cmt. h (1979)).

In *Sussex County*, a mental patient escaped from the constable's personal moving vehicle when being transported. The constable's selection of his personal vehicle and equipment were ministerial and therefore not afforded immunity. *Id*. at 1357. The Court found that *what* was used (an ill-equipped car) was distinguishable from cases where there was criticism of *how* something was used. *See Sadler v. New Castle Cnty.*, 565 A.2d 917

(Del. 1989) (holding that how rescue personnel rescued plaintiff was protected as discretionary).

Courts have also looked to whether there was a policy that regulates behavior at issue. For example, in *Morales v. Family Founds. Acad., Inc. School*, C.A. No. N12C-03-176 JRJ, 2013 WL 3337798 (Del. Super. Ct. June 11, 2013), the Court explained that, "Ministerial acts occur '[w]hen a policy is implemented by a school, [and] the school is required to follow that policy.'" *Id*. at *3 (quoting *O'Connell v. LeBloch*, No. C.A. 97C-05-031, 2000 WL 703712, *6 (Del. Super. Ct. Apr. 19, 2000). Instances where summary judgment was denied because there was a policy in place and there was a factual dispute as to whether that policy was violated and caused injury, include a school policy requiring maintenance of wooded bleachers, and where a policy existed for an "excused" student who was injured going to outdoor gym class. *See Scarborough v. Alexis I. DuPont High School*, 1986 WL 10507 (Del. Super. Ct. Sept. 17, 1986); *Whitsett v. Capital School District*, No. C.A. 97C-04-032 JTV, 1999 WL 167836 (Del. Super. Ct. Jan. 28, 1999).

In the instant case, the City chose not to enforce WPD rules, regulations and policies on Spencer. Requiring compliance with same is ministerial, and not discretionary. The enforcement does not involve

personal decision or judgment in that the rules and regulations apply to all officers without discretion. As explained, there are WPD rules and regulations that Spencer was charged with by WPD Internal Affairs: Unauthorized Display of Firearm, Leaving the Scene of an Accident, and Failure to Comply with Off Duty Accidents. (A-0253-0255). He had previously violated the same or similar provisions, and others. The enforcement of these policies should be viewed as ministerial; in that they are legally mandated functions which do not leave room for judgment. The failure to perform this ministerial function removes immunity for the City.

2. Szczerba's Liability

The Court erred in determining that since, "WPD took steps to reprimand and otherwise discipline Officer Spencer," Szczerba did not demonstrate an "I-don't-care-attitude." *McCaffrey v. City of Wilmington,* C.A. No. N12C-01-138 EMD, 2014 WL 6679176, at *8 (Del. Super. Ct. Nov. 3, 2014)

A government employee may be personally liable for gross or wanton negligence and recklessness that results in property damage or bodily injury. *See* 10 DEL. CODE ANN. tit. 10, § 4011(c) (2015). Willful and wanton conduct is defined as conduct where there is a conscious decision to ignore consequences when it is reasonably apparent that someone will be harmed.

Koutoufaris v. Dick, 604 A.2d 390, 398-99 (Del. 1992). Wanton conduct occurs when a person, although not intending to harm, does something that is so unreasonable that the person either knows or should know that harm will probably result. *Hedrick v. Webb*, No. Civ.A.01C-06-031-RFS, 2004 WL 2735517, at *6 (Del. Super. Ct. Nov. 22, 2004). It reflects an "I don't care" attitude. *Id*. Whether there is wanton conduct is usually reserved for the trier of fact. *Id.* (quoting *Washington v. Wilmington Police Dept.*, Civ.A. No. 92C-05-159, 1995 WL 654158, at *4 (Del. Super. Ct. Sept. 18, 1995)).

As stated, a claim of negligent hiring, retention and supervision exists against an employer where he fails to exercise due care to protect third parties from the foreseeable tortious acts of an employee. *Matthews v. Booth*, C.A. No. 04C-09-219MJB, 2008 WL 2154391, at *3 (Del. Super. Ct. May 22, 2008). The negligent hiring or supervision can occur when the employer is negligent in "giving improper or ambiguous orders or in failing to make proper regulations, or in the employment of improper persons involving risk of harm to others, or in the supervision of the employee's activity." *Simms v. The Christina Sch. Dist.,* No. C.A. 02C-07-043 JTV, 2004 WL 344015, at *8 (Del. Super. Ct. Jan. 30, 2004). Grossly negligent hiring, retention and supervision occurs when an employer is so unreasonable that he consciously ignores an employee's misconduct when it

is reasonably apparent that someone will be harmed. It also occurs when the employer fails to enforce regulations and policies.

As the Chief of Police of the Wilmington Police Department, Szczerba was in charge of the day to day operations of the department. It is undisputable that he was responsible to act reasonably in hiring, retaining and supervising his employees. Further, Chief Szczerba was directly involved in the WPD becoming CALEA[9] certified which included the requirement for an effective Early Warning System in place for troubled employees such as Spencer.

When asked whether he normally reads the Departmental Information memos, addressed to him, regarding his officers, Szczerba testified: "Normally no. Sometimes I do. Sometimes I don't." (A-0820). At his deposition, when asked if he knew whether Spencer had any infractions while he was on probation, he replied, "No, I do not." (A-0843). When each of the infractions were pointed out at his deposition, Szcerba then agreed that they were "red flags," "unacceptable," and a "concern." (*Id.*).

Further, Szczerba had the authority to appeal a Complaint Hearing Board's decision on disciplining an officer for misconduct; but he never

[9] CALEA stands for Commission of Accreditation for Law Enforcement Agencies.

once exercised that right. (A-0826). "I stand by the decisions of the Complaint Hearing Board." (*Id.*). "They handle it." (*Id.*)

There is evidence that Szczerba acted with willful and wanton misconduct by consciously deciding to ignore consequences when it was reasonably apparent that someone would be harmed by Spencer. *See Koutoufaris v. Dick*, 604 A.2d 390, 398-99 (Del. 1992). Szczerba chose to ignore the fact that Spencer drove under the influence of alcohol in the past. Szczerba chose to ignore Spencer's domestic violence incidents and propensity to violate WPD policies and the law. Szczerba was grossly negligent and willful and wanton in hiring, retaining, and supervising Spencer.

Szczerba failed to enforce WPD's own policies and the law. Although he may not have intended to cause harm, he knew or should have known that harm would probably result. He had an "I don't care" attitude and he should be accountable for the consequence thereof.

Szczerba should never have agreed to hire Spencer in the first place. His application itself revealed multiple problems including a poor driving record, a discharge from a prior job for violating "policy," and other examples of bad judgment and behavior. Next, had Szczerba appropriately responded to Spencer's poor probationary period record, Spencer would not

have survived probation. As an officer on probation, one would expect no infractions; however, Spencer engaged in many. Even fellow officers noted his arrogance and questioned his integrity. (A-0941-0948). Up to the time of this collision, Spencer consistently demonstrated poor compliance with rules, policies, and the law.

But for Szczerba's grossly negligent hiring, retaining, and supervising Spencer, Plaintiff's assault, battery, intentional infliction of emotional distress, and property damage to her bedding and mattress would not have occurred.

Szczerba made a conscious decision to tolerate Spencer's dangerous behavior; the minor slap-on-the-wrist consequences from WPD were meaningless. The level of Szcerba's failure to read Departmental Informations addressed to him, and failure to oversee what he later admitted were red flags, constitutes wanton negligence. This is especially true since Spencer was on probationary status as a new hire.

In sum, it was error for the trial court to grant summary judgment to Szczerba because it cannot be deemed as a matter of law that Szczerba did not act with wanton negligence. Plaintiff has produced more than sufficient evidence in support of her position; that evidence could easily and fairly lead a jury to find the requisite level of negligence.

CONCLUSION

For the reasons stated above, the judgment of the Superior Court should be reversed and the case should be remanded.

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CERTIFICATION OF SERVICE

I, Laura J. Simon, hereby certify on this 19th day of March, 2015, I served a true and correct copy of the *AMENDED* APPELLANT'S OPENING BRIEF upon the following by File & Serve Xpress:

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