EFiled: Mar 31 2015 12:35PM EDT
Filing ID 57000345
Case Number 26,2015

IN THE SUPREME COURT

OF THE STATE OF DELAWARE

MORGAN MCCAFFREY,	)	
	)	
Plaintiff-below,	)	
Appellant,	)	
	)	
v.	)	C.A. No. 26, 2015
	)	
CITY OF WILMINGTON and	)	
CHIEF MICHAEL SZCZERBA,	)	Court Below:
Individually and in his capacity	)	Superior Court of the
As an officer,	)	State of Delaware
	)	New Castle County
	)	C.A. No. N12C-38-138 EMD
Defendant-below	)	
Appellees.	)	

DEFENDANTS-BELOW APPELLEES, CITY OF WILMINGTON AND CHIEF MICHAEL SZCZERBA'S ANSWERING BRIEF

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Date: March 31, 2015

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NATURE OF THE PROCEEDINGS

On January 19, 2012, Appellant Morgan McCaffrey ("Plaintiff"), the Plaintiff below, filed a Complaint in this matter. Count I of Plaintiff's Complaint alleged state tort claims for negligence and recklessness against Defendant below Wilmington Police Officer Michael Spencer ("Spencer") as a result of an off-duty auto accident. Count I also asserted Appellee the City of Wilmington was liable for Spencer's action on the theory of *respondeat superior*. Count II of Plaintiff's Complaint asserted constitutional due process and equal protection claims pursuant to 42 *U.S.C.* §1983 ("§ 1983") against Spencer. Plaintiff alleged that while acting under color of law, Spencer returned to Plaintiff's apartment and made sexual advances. Count II also asserted constitutional due process and equal protection claims against Wilmington Police Officers Gerald Murray ("Murray"), Ralph Schifano ("Schifano") and Donald Bluestein ("Bluestein"), alleging that they failed to enforce the law against Spencer by not arresting him for DUI. Count III of Plaintiff's Complaint asserted the City of Wilmington was liable for the actions of Spencer and the other Officers. Count IV asserted the City was liable for negligent hiring, retention and supervision pursuant to §1983. Finally, Plaintiff brought a common law assault and battery claim against Spencer (Count V) and a tort claim for intentional infliction of emotional distress against all of the Defendants (Count VI).

On April 25, 2012, the Superior Court granted the City's partial motion to dismiss, dismissing Count I of the Complaint (the common law negligence and recklessness claims arising from the auto accident) against the City of Wilmington, ruling that Spencer was off-duty at the time of the auto accident, and therefore the City could not be held liable for Spencer's actions.

On June 5, 2012, Plaintiff filed a Second Amended Complaint adding Lt. Sherri Tull ("Tull") as a Defendant in Counts II, III and VI, and Appellee Chief of Police Michael Szczerba ("Sczcerba" or "Defendants" collectively with Appellee City of Wilmington) as a Defendant in Count IV. On August 9, 2012, the Superior Court granted below-Defendants' partial motion to dismiss Counts V and VI of the Complaint (assault and battery and intentional infliction of emotional distress) against the City of Wilmington and Bluestein, Schifano, Murray and Tull, holding those below-Defendants were immune from suit under the Municipal Tort Claims Act.

On January 31, 2013, the City of Wilmington and below-Defendants Bluestein, Murray, Schifano, Tull, and Szczerba filed a motion for summary judgment on all remaining Counts. On June 26, 2013, the Superior Court granted in part and denied in part the motion for summary judgment, with the result that all remaining claims against the City of Wilmington, Bluestein, Murray, Schifano, Tull, and Szczerba were dismissed. On July 3, 2013, Plaintiff filed a motion for reargument based in part on

Plaintiff's contention that Defendants did not address, and the Superior Court did not consider, what Plaintiff asserted was a common law state tort claim against the City of Wilmington and Szczerba in Count IV of the Second Amendment Complaint for grossly negligent hiring, retention, and supervision. On this basis alone, the Superior Court granted in part Plaintiff's motion to reargue on January 31, 2014.

For clarity, the Superior Court designated the common law gross negligence and recklessness claim as Count IV(b). On November 3, 2014, following briefing and oral argument, the Superior Court dismissed Plaintiff's claims against Appellees City of Wilmington and Chief Szczerba in Count IV(b) pursuant to Delaware Rules of Civil Procedure 12(b)(6) and 56.

On January 21, 2015, Plaintiff filed a Notice of Appeal to this Court which listed Defendants Murray, Schifano, Bluestein, Tull, Szczerba, and the City of Wilmington as the parties against whom the appeal was being taken. Plaintiff attached to the Notice of Appeal copies of the four Superior Court decisions which, *in toto*, dismissed all claims against Murray, Schifano, Bluestein, Tull, Szczerba, and the City of Wilmington.

On March 9, 2015, Plaintiff filed an Opening Brief in this matter which restricted the scope of this Court's review to the April 24, 2012 Superior Court decision dismissing Count I as to Appellee City of Wilmington and the November 3,

2014 Superior Court decision dismissing Count IV(b) as to Appellees City of Wilmington and Szczerba.

This is Appellees City of Wilmington and Szczerba's Answering Brief in Opposition to Plaintiff's Appeal.

SUMMARY OF ARGUMENT

I. DENIED. THE SUPERIOR COURT CORRECTLY RULED THAT DEFENDANT MICHAEL SPENCER WAS NOT ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT DURING THE EVENTS ALLEGED IN COUNT I OF THE COMPLAINT.

II. DENIED. THE SUPERIOR COURT PROPERLY HELD THAT THE COUNTY AND MUNICIPAL TORT CLAIMS ACT PROVIDES THE CITY AND SZCZERBA IMMUNITY FROM PLAINTIFF'S CLAIMS IN COUNT IV(B).

STATEMENT OF FACTS

On June 5, 2010, Plaintiff was involved in a motor vehicle accident with Spencer at the intersection of 2nd and Orange Streets in the City of Wilmington. (*See* Second Amended Complaint at ¶ 10, A-0003). Shortly after the accident, at approximately 2:12 a.m., Spencer called Wilmington Police dispatch to report the accident. (*See* Detail Call for Service Report, A-0927-8; Deposition of Morgan McCaffrey at p. 40, A-0593). Plaintiff alleges Spencer identified himself as an off-duty police officer and suggested they handle the accident between themselves. (*Id.* at pp. 49-50, A-0596.) Plaintiff agreed. (*Id.*) Plaintiff alleges Spencer then contacted the 911 operator again and advised the operator that the parties would handle the accident between themselves. (*Id.* at p. 54, A-0597.)

Shortly after Spencer and Plaintiff reached their agreement, Plaintiff alleges Spencer kissed her on the lips. (*Id.* at pp. 60-61, A-0598-9.) Plaintiff backed away and did not say anything. (*Id.* at p. 64, A-0599.) Plaintiff later admitted she found Spencer attractive. (*Id.* at pp. 69-70, A-0601.) According to Plaintiff, Spencer then asked her where she lived. (Deposition of Morgan McCaffrey at p. 65, A-0600.) Despite Plaintiff's deposition testimony indicating she was suspicious of Spencer, Plaintiff told him she lived around the corner. (*Id.*) At that point, Plaintiff and Spencer moved their cars the short distance from the accident scene to Plaintiff's

apartment. (*Id.* at p. 68, A-0600.) When the two arrived at Plaintiff's apartment, Plaintiff alleges Spencer handed her his badge and service weapon. (*Id.* at pp. 71-73, A-0601-2.) Plaintiff took them, saying nothing. (*Id.* at p. 75, A-0602.) Spencer and Plaintiff walked side by side to her apartment. (*Id.* at p. 71-73, A-0601-2.)

Plaintiff allowed Spencer into her studio apartment. (*Id.* at p. 91, A-0606.) Spencer entered and sat on the bed, the only piece of furniture in the apartment. (*Id.* at 93-94, A-0607.) Plaintiff went into the bathroom for approximately five minutes and when she emerged, Spencer was allegedly wearing basketball shorts. (*Id.* at p. 96, A-0607.) Plaintiff went back into the bathroom and when she again emerged, she claims Spencer asked if she wanted to have sex. (*Id.* at p. 101, A-0609.) Plaintiff alleges Spencer then tried to sit on her, asking again if she wanted to have sex. (*Id.* at pp. 103-4, A-0609.) Plaintiff said no, at which point Spencer got off of her and lay down in the bed. (*Id.*) Plaintiff returned to the bathroom, emerging several minutes later and found Spencer asleep. (*Id.* at p. 105, A-0610.)

Throughout this exchange, Plaintiff knew there was an outstanding warrant for her arrest relating to an unpaid ticket. (*Id.* at p. 45, A-0509.) Rather than call the police once Spencer had fallen asleep, Plaintiff called all her friends to discuss what she should do at this point. (*Id.* at pp. 107-8, A-0610.) When she could not reach any of her friends by telephone, she contacted her neighbor Kevin Mulholm. (*Id.* at pp.

107-8, A-0610.) Mulholm advised her to call the police. (*Id.).* Plaintiff did contact the police, at 3:52 a.m.—almost two hours after the accident occurred. (*See* Deposition of Morgan McCaffrey at p. 110, A-0611; Detailed Call for Service, A-0924-5.) According to Mulholm, Plaintiff wanted to avoid involving the police because she was afraid she would be arrested on the outstanding warrant. (*See* Deposition of Kevin Mulholm at pp. 19-20, A-0913-4.)

Defendants Bluestein, Murray, Tull and Schifano arrived shortly after Plaintiff's call to the Police Department and removed Spencer from the apartment. (Deposition of Morgan McCaffrey at p. 117, A-0613.) Meanwhile, Officer Schifano proceeded to investigate the accident. When he concluded his investigation, Officer Schifano charged Spencer with Failure to Stop at a Red Light and charged Plaintiff with Failure to Have Insurance; Fictitious or Cancelled Registration; and Failure to Reinstate License. (*See* Police Report at pp. 2-3, A-0648-50.) Plaintiff pled to or was found guilty of Failure to Reinstate License. (*See* Delaware Justice of the Peace Court 20 Disposition Record, B-1.)

After leaving Plaintiff's apartment, Sgt. Bluestein transported Spencer to the hospital because Spencer had visible injuries and blood on his shirt. (*See* June 5, 2010 Departmental Information Report of Donald Bluestein, A-0280-1.) While the officers were at the apartment, Lt. Sherri Tull notified the captain on duty, Capt. Marlyn Dietz

of the Wilmington Police Department ("WPD"), that Spencer had been involved in an accident while he was off-duty. (*See* June 21, 2010 Departmental Information Report of Sherri Tull, A-0278-9.) Tull believed Dietz instructed her not to conduct any DUI test on Spencer until Dietz and members of the WPD Office of Professional Standards ("OPS") arrived. (*Id.*) Schifano required Spencer to perform a field sobriety test shortly after 7:15 a.m., which Spencer passed. (*See* June 21, 2010 Departmental Information Report of Ralph Schifano, A-0286-8; State of Delaware Uniform Collision Report, A-0648-52.)

OPS undertook an investigation of the incident involving Plaintiff and Spencer. (*See* OPS File 10-193, A-0263-0408). The investigation commenced immediately, with OPS officers interviewing Plaintiff and Mulholm on the date of the incident. (*Id.*, A-0306-0337) As a result of OPS's investigation, Spencer was subsequently charged with and disciplined for violating WPD directives 7.3(c)(2) (Unauthorized Display of Firearm); 7.1 (a)(3) (Leaving the Scene of an Accident); and 7.1(I) (Failure to Comply with a Lawful Directive [Off-duty Accidents]). (*See* OPS File 10-193, A-0253-55). Spencer received thirty-one days' suspension as a result. (*Id.*) Additionally, Inspector Sean Finerty and Capt. Victor Ayala of the WPD investigated the actions of the responding officers, Tull, Bluestein, Murray, Schifano, and Dietz. (*See* OPS file 10-482, A-0409-0466.)

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY RULED THAT DEFENDANT MICHAEL SPENCER WAS NOT ACTING IN THE COURSE AND SCOPE OF HIS EMPLOYMENT DURING THE EVENTS ALLEGED IN COUNT I OF THE COMPLAINT.

A. QUESTION PRESENTED

Whether the Superior Court correctly ruled that Defendant Michael Spencer was not acting in the course and scope of his employment by Plaintiff City of Wilmington during the events alleged in Count I of the Complaint, and therefore correctly dismissed Count I as to the City? (B-2-7.)

B. STANDARD OF REVIEW

This is an appeal from a motion to dismiss Count I of Plaintiff's Complaint against Appellee City of Wilmington. The Delaware Supreme Court reviews lower court rulings granting motions to dismiss employing a *de novo* standard. *RBC Capital Markets, LLC v. Education Loan Trust IV,* 87 A.3d 632, 639 (Del. 2014).

C. MERITS OF THE ARGUMENT

l. Plaintiff conflates the dismissal of Count I of the original Complaint with the dismissal of Counts V and VI of the Second Amended Complaint.

Plaintiff asserts that the Superior Court erred in ruling that all of Spencer's actions on the night of June 5, 2010 were outside the course and scope of his

employment. (Opening Brief at p. 14.) Plaintiff obfuscates that the trial court's determination was only with respect to Spencer's alleged negligent acts asserted in Count I of Plaintiff's original complaint. (*See* April 25, 2012 Order Granting Defendants City of Wilmington and Wilmington Police Department's Motion to Dismiss.) Defendant City of Wilmington only moved to dismiss Count I of the Complaint on the basis that Spencer was not acting in the course and scope of his work duties. (B-2-4.) The Superior Court dismissed Counts V and VI (assault and battery and intentional infliction of emotional distress against Spencer--and against the City by way of *respondeat superior*--as a result of his actions after the accident) as to the City of Wilmington on different bases, in later orders from the Superior Court, which Plaintiff does not now appeal. Therefore, the scope of this Court's review must be limited to the events alleged in Count I of the original Complaint, which seeks damages only for Spencer's alleged negligence in causing the auto accident on June 5, 2010.

2. The Superior Court correctly ruled that Defendant Michael Spencer was not acting in the course and scope of his duties at the time he allegedly caused the automobile accident (Count I).

The Superior Court correctly dismissed Plaintiff's original Count I against the City of Wilmington because that claim failed as a matter of law. Plaintiff alleged Defendant Spencer was off-duty at the time of the events alleged in the Complaint and

alleged nothing to suggest he was acting in the course and scope of his duties as an employee of the City of Wilmington during the alleged events giving rise to liability in Count I.

In Delaware, "[t]wo general rules establish the framework for determining vicarious liability. The first general rule is that if the principal is the master of an agent who is a servant, the fault of the agent, **if acting within the scope of employment**, will be imputed to the principal by the doctrine of *respondeat superior." Fisher v. Townsends*, 695 A. 2d 53, 58 (Del. 1998), citing *Fields v. Synthetic Ropes, Inc.*, 215 A.2d 427, 432 (Del. 1965) (emphasis supplied). "[L]iability for the torts of the servant is imposed upon the master **only** when those torts are committed by the servant within the scope of his employment which, theoretically at least, means that they were committed in furtherance of the master's business." *Draper v. Olivere Paving & Constr. Co*., 181 A.2d 565, 570 (Del. 1967) (emphasis supplied).

"[T]he conduct of a servant is within the scope of his employment if (1) it is of the kind he is employed to perform; (2) it occurs within the authorized time and space limits; (3) it is activated, in part at least, by a purpose to serve the master; and (4) if force is used, the use of force is not unexpectable by the master." *Id.* at 570 (Del. 1967), citing *Restatement of Agency* (2d), § 228. While the question of whether an alleged tortfeasor was acting in the course and scope of his employment (and therefore

whether his tortious conduct may be imputed to his employer) is ordinarily a question of fact to be decided by a jury, if "the contrary is so clearly indicated by the facts…the court should decide it as a matter of law." *Id.* at 569, citing *Restatement of Agency* (2d), § 228, comment *d.*

Nothing alleged by Plaintiff in her Complaint met any of the criteria set forth by Delaware courts as necessary to show Defendant Spencer was acting in the course and scope of his employment as a Wilmington police officer at the time of the events alleged in Count I of the Complaint. To the contrary, the facts alleged in Count I, when read most favorably to Plaintiff, required dismissal as a matter of law. Therefore, the Superior Court correctly dismissed it. In fact, the facts Plaintiff alleges directly contradict her allegation that Spencer was acting in the course and scope of his work duties at the time of the auto accident. Plaintiff asserted in the Complaint that Spencer was off-duty at the time of the events giving rise to the Complaint. (January 19, 2012 Complaint at ¶ 8, B-24.) The acts giving rise to the auto accident were self evidently not of the kind Spencer is employed to perform and were not activated in any way to serve the interests of Appellee City of Wilmington. Additionally, to the extent force was alleged, it was clearly not of a type expected by Spencer's employer, the City of Wilmington.

As alluded to *supra*, Plaintiff now attempts to rely on Spencer's actions as

alleged in subsequent counts to argue that the Superior Court incorrectly dismissed Count I against the City of Wilmington. However these subsequent actions have no bearing on the City's liability for Spencer's negligent acts alleged in Count I to the City because all of the acts of negligence alleged in Paragraph 39(a)-(e) of the Complaint occurred *before* Spencer and the Plaintiff interacted. Accordingly, Plaintiff could not show that she believed Spencer was acting in the course and scope of his duties or with apparent authority at the time of his alleged negligence in Count I (related entirely to the operation of his private automobile while off-duty) because each act of negligence alleged in that Count is related to the motor vehicle collision itself. Spencer was not driving a marked or unmarked Wilmington police vehicle, nor was he in uniform, nor was he on duty. Plaintiff did not allege that Spencer's negligence, and/or any resulting damages, in Count I of the Complaint were in any way related to her reliance on Spencer's alleged apparent authority or his assertion of police authority. Accordingly, none of the alleged negligent acts of Defendant Spencer as set forth in Count I fall within any of the exceptions to the general rule of the Second Restatement of Agency § 219 that a master is not liable for the torts of an employee who is off-duty. Therefore, the Superior Court correctly dismissed Count I of the Complaint against the City of Wilmington, and its decision should be upheld.

Plaintiff asserts in her Opening Brief that she also alleged in Count I that

Spencer was negligent and reckless in cancelling his call to police after the automobile accident and directing Plaintiff to move her car from the accident scene. Plaintiff attempts, through these allegations, to relate Spencer's involvement in the auto accident to his job duties. (*See* Appellant's Opening Brief at p. 16.) However, Plaintiff's assertion is not correct. While Plaintiff made these factual allegations in Count I, she did not allege that Spencer was negligent in doing these things and did not, in Count I, allege any damages as a result of these actions. (A-0006 at ¶ 43.) Additionally, when the City of Wilmington moved to dismiss Count I in 2013, Plaintiff did not bring to the Court's attention that Count I included allegations of negligence resulting in damages other than the automobile accident itself. (*See* Opposition to Defendant City of Wilmington's Partial Motion to Dismiss, B-22-27.) Under Delaware's "notice pleading" requirements, the City is entitled to clarity with respect to the nature of the claims it is defending. *Nieves v. All Star Title, Inc*., 2010 Del. Super. LEXIS 451 at *7 (Del. Super. Ct. Oct. 22, 2010). Plaintiff had a duty to correct any alleged misunderstanding about the nature of the claims she asserted against Appellee in Count I well before this stage in the proceeding, but she did not. She cannot now be permitted to expand Count I of the Complaint to include new allegations of damages as a result of new allegations of negligence for actions that occurred after the auto accident. Delaware Supreme Court Rule 8; *Jenkins v. State*,

305 A.2d 610, 613 (Del. 1973). ("It is elementary that this Court will decline generally to review contentions not raised below and not fairly presented to the court below for decision.")

3. This case is not *Doe v. State* and that case merely underscored the case law already in existence and relied upon by the Superior Court.

Plaintiff next turns the Court's attention to *Doe v. State*, 76 A. 3d 774 (Del. 2013) in the apparent hope that *Doe,* a recent case, may change the result below. However, Plaintiff's acknowledgment of the "big difference" between this case and *Doe* (Opening Brief at p. 18) underscores that this case is not *Doe*. If Spencer had been on duty, in uniform, in a marked police vehicle, *Doe* could provide some guidance here. But he was not. *Doe* itself further underscores the differences between the facts at issue in *Doe* and the facts herein when the *Doe* court acknowledges that the first two factors under the Restatement of Agency were met in that case by virtue of the fact that the defendant was on duty, in uniform, and carrying out police duties during a time that he was supposed to be doing so. *Id.* at 777. None of those facts are similar to this case. The *Doe* court further held:

> The relevant test, however, is not whether [alleged tortious acts occur] 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. Stated differently, the test is whether the employee was acting in the ordinary course of business during the time frame within which the tort was committed. *Id.* at 778.

Applying the test set forth in *Doe* to Plaintiff's Count I, the Superior Court's ruling must still be upheld. The auto accident occurred while Defendant Spencer was off-duty in his own vehicle and was not in any way in the ordinary course of his employer's business. What is more, *Doe* merely piggybacks on *Draper* and did not substantively change Delaware case law with respect to the question now on appeal.

Plaintiff is correct that *Doe* acknowledged "[t]he phrase, 'scope of employment' is, at best, indefinite." *See* Opening Brief at p. 17, citing *Doe*, 76 A. 3d at 776. However, Plaintiff urges a reading of *Doe* that would have an absurd result. If employers could be held vicariously liable for off-duty auto accidents involving their employees while in their own personal vehicles and which occurr on their personal time, any employer in Delaware could be named as a co-defendant any time an employee is involved in an accident. In fact, the *Draper* court alluded to the potential for this problem when it acknowledged that the appellant in that case "would have us expand [the definition of "scope of employment"] so as to make [defendant] Olivere a practical insurer against the torts of its employees." *Draper,* 181 A. 2d at 569.

That Spencer's alleged later actions could be argued to fall within one of the criteria set forth in *Restatment of Agency* (2d), § 228 (which is not something that the Appellees admit or that any court has been asked to rule on) does not change the absurdity of this result. If the question of whether Spencer was acting in the course

and scope of his employment at the time of the auto accident were permitted to go to a jury merely because Spencer called to report the accident and then cancelled the call or directed the Plaintiff to move her car to the side of the road (actions that any person could be expected to take following an accident), then any time a person interacts with the other party to an accident subsequent to the accident in a way that evoked his or her job duties (the mechanic who attempts to fix a flat, the doctor who renders basic first aid, the psychologist who calms the other party's anxiety, the baker who offers a conciliatory cookie) could incur liability for his or her employer for the prior-occurring auto accident. The primary difference between this case and *Doe*, *Draper*, and all of the cases cited by *Doe* and *Draper* in support of their conclusions, is that in each of those cases the alleged tort occurred in the ordinary course of the tortfeasor's employment while the tortfeasor was employed and on duty. As *Draper* noted:

> In the case at bar, the facts taken most favorably to the plaintiffs show a continuous course of action which commenced initially at least with the carrying out by [the defendant] of the duties for which he had been hired. *Draper*, 181 A. 2d at 572.

By way of significant contrast, the accident itself in this case was not in any way *within* the ordinary course and scope of Spencer's employment, and there is no question here the auto accident did not constitute a part of a continuous course of action that commenced with Spencer carrying out duties for which he had been hired. Therefore, the Superior Court correctly dismissed Count I against the City of

Wilmington.

4. The test for whether an employee is acting in the course and scope of his or her employment for purposes of Delaware common law tort liability is different from that used to determine whether a state actor was acting "under color of state law" for purposes of determining liability under 42 U.S.C. § 1983.

Finally, Plaintiff relies on a federal case, *Anderson v. Warner*, 451 F.3d 1063 (9th Cir. 2006) to support her assertion that Spencer was acting in the course and scope of his duties during the events in alleged in Count I of the Complaint. However, the court in that case was addressing the issue of municipal liability under 42 *U.S.C.* § 1983, and as such, the question the court faced was whether the defendant was acting "under color of law" for purposes of liability under that statute *Id.* at 1068. This question, and the resulting analysis, are entirely different from that used by Delaware state courts for determining whether an employee was acting in the course and scope of his or her duties such that employer liability could be found under common law tort principles. *See, e.g., Barna v. City of Perth Amboy*, 42 F. 3d 809, 816 (3d Cir. 1994). Furthermore, the *Anderson* court did not address the issue of vicarious liability, nor would it have, because the United States Supreme Court has recognized that municipalities cannot be found liable under 42 *U.S.C.* § 1983 under a *respondeat superior* theory. *Monell v. Dept of Soc. Servcs.*, 436 U.S. 658, 691 (1978) Therefore, *Anderson* provides no guidance on the question of whether Spencer was acting in

course and scope of his duties during the events alleged in Count I (a state tort claim) of the complaint.

II. THE SUPERIOR COURT PROPERLY HELD THAT THE COUNTY AND MUNICIPAL TORT CLAIMS ACT PROVIDES THE CITY AND SZCZERBA IMMUNITY FROM PLAINTIFF'S CLAIMS IN COUNT IV(B).

A. QUESTION PRESENTED

Whether the Superior Court properly held that the City of Wilmington is immune from Plaintiff's claim of negligent and reckless hiring and supervision; and that record evidence does not support that Szczerba's actions in hiring, retaining, or supervising Spencer rose above ordinary negligence, such that Szczerba would not enjoy immunity from these claims? (B-28-55)

B. STANDARD OF REVIEW

This is an appeal from a grant of summary judgment in favor of Appellee Szczerba, and dismissal pursuant to Delaware Rule of Civil Procedure 12(b)(6) in favor of Appellee the City of Wilmington as to Count IV(b) of Plaintiff's Second Amended Complaint. This Court reviews the Superior Court's denial or grant of summary judgment *de novo* to determine whether, viewing the facts in the light most favorable to the nonmoving party, the moving party has demonstrated that there are no material issues of fact in dispute, and that the moving party is entitled to judgment as a matter of law. *Shuba v. United Servs. Auto. Ass'n*, 77 A.3d 945, 947 (Del. 2013). This Court reviews lower court rulings granting motions to dismiss employing a *de novo* standard. *RBC Capital Markets*, 87 A. 3d at 639.

C. MERITS OF THE ARGUMENT

l. The Superior Court correctly ruled that the City of Wilmington enjoys immunity from Plaintiff's claims in Count IV(b) because hiring, supervising, and retaining Spencer were discretionary acts.

The Superior Court correctly ruled that the City of Wilmington is immune from Plaintiff's claims set forth in Count IV(b) pursuant to 10 *Del. C.* § 4011(a) of the County and Municipal Tort Claims Act because the decision to hire and retain Spencer was discretionary, not ministerial.

"The determination of whether a particular act is discretionary or ministerial is a question of law, which may sometimes require a factual determination." *Hughes v. Christiana School District*, 2008 Del. LEXIS 232, at *8 (Del. May 19, 2008). This Court has "adopted the general definition of 'ministerial' from the Restatement (Second) of Torts: '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.* at *9 (citing *Sussex County v. Morris*, 610 A.2d 1354, 1359 (Del. 1992)); *see also, Stevenson v. Brandywine School District,* 1999 Del. Super. LEXIS 401, at *7-8 (Del. Super. Ct. July 9, 1999) (holding that the decision of how to secure a wheelchair-bound student in a school bus is a ministerial action for which there is no immunity under the State Tort Claims Act); *Sussex County,* 610 A.2d at 1359 (holding that a constable's decision to

transport a mentally ill patient in his own private vehicle rather than a police car was a ministerial decision that was not protected by the County and Municipal Tort Claims Act); *Scarborough v. Alexis I. duPont High School*, 1986 Del. Super. LEXIS 1343 at *7 (Del. Super. Ct. Sept. 17, 1986) (holding that the act of inspecting bleachers was ministerial in nature and thus the high school and school district were not protected by the State Tort Claims Act). In *Scarborough*, the Court stated:

> The defendants' maintenance personnel were performing functions in obedience to the mandate of legal authority. The defendants have a duty to provide reasonably safe premises for their invitees and to give warning of latent or concealed dangers. School property must be maintained. That is routinely or mandatorily required. Therefore, the act of inspecting the bleachers was ministerial, not discretionary. The defendants are not protected by the Delaware Tort Claims Act . . . . *Id.*

In contrast to the ministerial actions described above (where the actors were carrying out legally mandated functions in a context which did not leave room for judgment), a discretionary function is one where the public official must exercise judgment. *See* Restatement (Second) of Torts, § 895D, comment b. "[T]he most common application of immunity to discretionary governmental functions involves policy decisions under the police power, [however] errors committed in the exercise or enforcement of activities undertaken under the police power also enjoy protection." *Sadler v. New Castle County*, 565 A.2d 917, 921 (Del. 1989) (citing McQuillan, *The*

Law of Municipal Corporations, § 53.22a (3d ed. 1984)). "The use of the term 'performance' in section 4011(b)(3) is a clear indication that the legislature intended to include within the scope of the Act's immunity not only the policy decision to undertake a function but **also the manner in which that undertaking is discharged**." *Id.* at 922 (emphasis supplied). The decision to hire or retain a police officer clearly falls within the definition of "discretionary act" as used by the County and Municipal Tort Claims Act, the Second Restatement of Torts, and Delaware case law. Delaware courts have recognized that the hiring, retention, and supervision of employees are acts of judgment requiring discretion. *See Smith v. Williams*, 2007 Del. Super. LEXIS 266 at *7-8 (Del. Super. Ct. Sept. 11, 2007). Deciding whether to hire a specific officer is a decision in which there is a great deal of latitude. (*Order Granting Defendants City of Wilmington and Chief Michael Szczerba's Motion to Dismiss, or in the Alternative, for Summary Judgment of Plaintiff's Count IV(b)* at p. 13; *Wilm. C.* § 2-232.) Furthermore, training, hiring, and retaining police officers are personnel decisions which involve judgment in the manner of undertaking the discharge of the police power and are clearly discretionary acts as contemplated by *Sadler*. Therefore, even if Plaintiff were able to allege or show some exception to the general grant of immunity afforded the City by the Tort Claims Act, the City is clearly immune from Plaintiff's claim in Count IV(b) because the claim alleges liability as a result of a discretionary

act, which is privileged under 10 *Del. C.* § 4011(b)(3). *Heaney v. New Castle County*, 672 A.2d 11, 14 (Del. 1995).

Plaintiff would have this Court believe that hiring, retention, and supervision of an employee are ministerial acts simply because there are regulations and policies governing employee behavior. In doing so, Plaintiff conflates the policies governing the conduct of employees themselves with the broader, more discretionary functions of hiring, retaining, and supervising employees, functions which are not constrained by specific policies.[1] For example, the decision to hire Spencer was not undertaken in accordance with any policy. While certain minimum qualifications may be required to join the WPD, no rules or policies require the hiring of a specific officer. Nor do policies or regulations dictate when new officers are hired, or how many are hired, save for the broad requirement that minimum staffing numbers be met (and that number itself is not fixed, but set by the City, in its discretion). *See Wilm. C.* § 2-232. In short, the WPD, like any other police department, has tremendous discretion with respect to this function. As such it is a discretionary act privileged from liability

[1] Additionally, Appellant's assertion that the City "chose not to enforce WPD rules, regulations and policies on Spencer" (Opening Brief at p. 28) is wholly unsupported by the record. In each instance in which members of the WPD believed that Spencer may have violated Department directives, he was investigated, and in most cases received punishment. (A-0118-A-0245.) For his involvement in the events giving rise to the instant litigation, Spencer received 31 days of unpaid suspension (A-0253-0257.) Only in cases where the WPD, in its *discretion*, determined that not enough evidence supported the charges was Spencer not disciplined, but even these cases were investigated. (*See, e.g.*, A-0145-0235.)

pursuant to 10 *Del. C.* § 4011(b)(3). *See Simms v. Christina Sch. Dist*., 2004 Del. Super. LEXIS 43 at *24-5 (Del. Super. Ct. Jan. 30, 2004).

2. Whether Spencer was using "equipment" as defined by the exceptions to immunity portion of the Tort Claims Act is moot because the City enjoys immunity from liability for discretionary acts.

Plaintiff devotes a substantial portion of her Opening Brief to arguing that immunity is waived under the Tort Claims Act because Spencer was using "equipment" as defined in the exceptions to immunity set forth in the Act. *See* Opening Brief at § II(C)(b), discussing 10 *Del. C.* § 4012(1). However, this is a red herring. The question of whether or not Spencer used "equipment" such that his actions would fall within the exception to immunity as set forth in 10 *Del. C.* § 4012(a) was never addressed by the Superior Court. The Superior Court did not need to address the question because it was mooted by the Court's correct ruling that the acts of hiring, retaining and supervising Spencer are discretionary and not ministerial. The County and Municipal Tort Claims Act sets forth specific instances in which governmental entities are immune from suit. 10 *Del. C.* § 4011(b)(3) states:

> **Notwithstanding § 4012** of this title, a governmental entity shall not be liable for any damage claim which results from:
>
> * * *
>
> (3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order resolution, regulation, or resolve under which the discretionary function or duty is performed is valid or

invalid.

10 *Del. C.* §4011(b)(3) (emphasis supplied).

Black's Law Dictionary defines "notwithstanding" as meaning "despite; in spite of." BLACK'S LAW DICTIONARY 1091 (7th ed. 1999). In other words, *in spite of* the exceptions to immunity set forth in 10 *Del. C.* § 4012, governmental entities additionally may not be held liable for discretionary acts pursuant to 10 *Del. C.* § 4011(b)(3). Both hurdles must be cleared. *Heaney*, 672 A.2d at 14 (Del. 1995). Acts which are not discretionary are deemed to be ministerial, and therefore do not fall within the protection of 10 *Del. C.* § 4011(b)(3). *Sussex County*, 610 A.2d at 1359. Therefore, it is of no moment that Spencer may or may not have used "equipment" as contemplated by 10 *Del. C.* § 4012(1) because the City has immunity from Plaintiff's claims in Count IV(b) for entirely different reasons. Therefore, the Superior Court's ruling dismissing the City of Wilmington from Plaintiff's Count IV(b) must be upheld.

3. Even if the City's acts of hiring, retaining and supervising Spencer were not discretionary, none of the other exceptions to immunity, including the equipment exception, are supported by the record.

Even if this Court were to now take up the question of whether the City enjoys immunity from Plaintiff's claim in Count IV(b) in light of the exception to immunity set forth in 10 *Del. C.* § 4012(1), Plaintiff's claim would still fail as a matter of law. This Court has adopted a narrow view of the definition of "equipment" as it is used in

§ 4012(1), defining "equipment" as being limited "to those items of unusual design or size, such as motor vehicles, aircraft or electronic transmission lines, which in their normal use or application pose a particular hazard to members of the public." *Sadler v. New Castle County*, 565 A.2d 917, 923 (Del. 1989). This Court reemphasized the need to "strictly construe" the exceptions in § 4012 in *Walls v. Rees*, 569 A. 2d 1161, 1167 (Del. 1990). Not surprisingly, the accoutrements of policing have consistently been ruled by the lower courts not to constitute "equipment" as used in § 4012(1). *See Hedrick v. Blake*, 531 F. Supp. 156, 158 (D. Del. 1982) (a police officer's nightstick is not "equipment" within the meaning of § 4012(1)); *White v. Crowley*, 1986 Del. Super. LEXIS 1202, at *11 (Del. Super. Ct. May 8, 1986) (handcuffs not considered "equipment" for the purposes of § 4012(1)); *Thomas v. Wilmington Police Dep't*, 1994 Del. Super. LEXIS 266, at *9 (Del. Super. Ct. June 3, 1994) (affirming handcuffs not "equipment"); *Collins v. Figueira*, 2006 Del. Super. LEXIS 266, at *5 (Del. Super. Ct. June 23, 2006) (a municipality and its police department entitled to immunity from a state law tort claim for negligent supervision even though officers employed pepper spray). Because Spencer's ID card, badge and gun are not "equipment" as that term is used in § 4012(1), the City is immune from Plaintiff's claims of supervisory negligence.

However, even if the Court were to take up Plaintiff's position that a gun is

"equipment" under § 4012(1) because a gun poses a hazard to the public in its ordinary use, Plaintiff would still fail to clear the bar to immunity for two reasons. First, according to Spencer's own unrebutted testimony, the gun that he gave to Plaintiff (thereby causing her emotional distress) belonged to him. It was his own personal gun, not his departmentally-issued gun. (*See* October 19, 2012 Deposition of Michael Spencer at p. 38, ll. 14-18, A-0666.) Therefore, Plaintiff's claim does not fall within the exception set forth in § 4012(1) even if the gun were "equipment" for purposes of that subsection, because it was not used, owned, or maintained by the City of Wilmington.

Furthermore, Plaintiff's only allegations in the Second Amended Complaint related to Spencer's gun is intentional infliction of emotional distress, and it is undisputed that the gun did not cause any physical injuries. (*See* Deposition of Morgan McCaffrey at pp. 134-136, A-0617.) The *Sadler* court placed particular emphasis on an object's hazardousness in determining whether that particular thing is "equipment" such that its ownership or maintenance falls outside the general grant of immunity provided by the Tort Claims Act. As Plaintiff points out, the *Hedrick* court, in ruling that a police nightstick is not "equipment" for purposes of the exception in § 4012(1), grounded its ruling in the particular facts and circumstances of that case, and warned that its ruling should not be interpreted to mean that a nightstick could never be

considered "equipment." *Hedrick*, 531 F. Supp. 158, n.4. In interpreting the Tort Claims Act, *Hedrick* recognized that an object's status as "equipment" is not necessarily fixed, but can change with the circumstances and whether the legislature can reasonably have intended to waive liability in a given circumstance. *Id.* at 158. When read in conjunction with *Sadler*, as well as common sense, § 4012(1) of the Tort Claims Act simply does not create a cause of action for emotional distress in a plaintiff who is simply afraid of an allegedly dangerous piece of "equipment"—in this case a gun. Even if the Court were to accept that in some cases a gun could be "equipment" under § 4012(1), the gun did not harm any person in this case, and the facts do not support an assertion that the manner in which Spencer allegedly used his gun here transforms it into "equipment" as contemplated by the Tort Claims Act or *Sadler*.

4. The Superior Court correctly ruled that Chief Szczerba is immune from Plaintiff's negligent hiring, retention and supervision claims because Szczerba's actions did not rise to the requisite level of culpability.

The County and Municipal Tort Claims Act states that "except as otherwise expressly provided by statute, all government entities and their employees shall be immune from suit on any and all tort claims seeking recovery of damages." 10 *Del. C.* § 4011(a). A government employee may be personally liable for acts and omissions causing property damage, bodily injury or death, but only for those acts which were not within the scope of employment or which were performed with wanton negligence

or willful and malicious intent. 10 *Del. C.* § 4011(c). 10 *Del. C.* § 4012 sets forth exceptions to immunity; however these exceptions apply only to government entities themselves and not to employees thereof. As such, in order to maintain a viable state tort claim against Appellee Szczerba, Plaintiff was required but failed to show, first, that Szczerba acted with a level of culpability which rises above mere negligence. *Vannicola v. City of Newark*, 2010 Del. Super. LEXIS 629 at *24 (Del. Super. Ct. Dec. 21, 2010).[2]

"An employer is liable for negligent hiring or supervision where 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*, 2004 Del. Super. LEXIS 43 at *23. "The deciding factor is whether the employer had or should have had knowledge of the necessity to exercise control over its employee." *Matthews v. Booth*, 2008 Del. Super. LEXIS 178 at *8 (Del. Super. Ct. May 22, 2008). The basis for

[2] While Plaintiff never pled wanton negligence against Szczerba, the court nevertheless read such a pleading into the complaint. *See* July 22, 2014 *Order Granting Defendants City of Wilmington and Chief Michael Szczerba's Motion to Dismiss, or in the Alternative, for Summary Judgment of Plaintiff's Count IV(b)* at p. 14. Plaintiff continues to use the terms "gross negligence" and "wanton negligence" interchangeably, however wanton negligence requires behavior which is more egregious than gross negligence. *Morris v. Blake*, 552 A. 2d 844, 854. (Del. Super. Ct. 1988). (Cf. *City of Wilmington v. Sikander*, 897 A.2d 767, n. 4 (Del. 2006). *Sikander* suggests that gross negligence is sufficient to clear the bar for immunity set forth in 10 *Del. C.* § 4011(c). However that reading is inconsistent with the wording of the statute, particularly when compared with 10 *Del. C.* § 4001(3) (*i.e.*, the State Tort Claims Act), which, unlike the County and Municipal Tort Claims Act, specifically uses the term "gross negligence.")

liability rests upon whether it was foreseeable that the employee would engage in the type of conduct that caused the injury. *Id.*

A claim for negligent hiring, retention, and supervision is a claim based on an error of judgment. *Smith*, 2007 Del. Super. LEXIS 266 at *8 (citing *Jardel Co., Inc. v. Hughes*, 523 A.2d 518, 531 (Del. 1987)). Therefore, to succeed on a grossly negligent or reckless hiring, retention and supervision claim against Szczerba, Plaintiff must show that "the precise harm which eventuated [was] reasonably apparent but consciously ignored in the formulation of the judgment." *Smith*, 2007 Del. Super. LEXIS 266 at *8 (quoting *Jardel Co*, 523 A.2d at 530). Recklessness in a claim alleging an error of judgment is akin to "reckless indifference" or "conscious indifference." *Jardel Co.*, 523 A.2d at 529-30.

Wanton negligence and/or recklessness have been defined as an "I don't care" attitude or a conscious indifference to consequences where the probability of harm to others is reasonably apparent. *See Hedrick v. Webb*, 2004 Del. Super. LEXIS 379 at *21-22 (Del. Super. Ct. Nov. 22, 2004); *Washington v. Wilmington Police Dep't*, 1995 Del. Super. LEXIS 472 at *9-10 (Del. Super. Ct. Sept. 18, 1995); *Shepard v. Reinoehl*, 2002 Del. Super. LEXIS 188 at *23-24 (Del. Super. Ct. Aug. 21, 2002); *Morris v. Blake*, 552 A.2d 844, 847-48 (Del. Super. Ct. 1988). To constitute wanton conduct, the defendant's behavior must go beyond mere inadvertence or momentary

thoughtlessness. *Morris*, 552 A.2d at 847. Ordinary negligence, on the other hand, is the lack of ordinary care; that is, the absence of the kind of care a reasonably prudent and careful person would exercise in similar circumstances. *Russell v. K-Mart*, 761 A.2d 1, 5 (Del. 2000); *Duphily v. Delaware Elec. Coop., Inc.*, 662 A.2d 821, 828 (Del. 1995). If a person's conduct in a given circumstance does not measure up to the conduct of an ordinarily prudent and careful person, then that person was simply negligent. *Russell*, 761 A.2d at 5. This Court has defined gross negligence as "a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'" *Browne*, 583 A.2d at 953 (quoting W. Prosser, *Handbook of the Law of Torts* at 150 (2d ed. 1955)). It is the functional equivalent of criminal negligence. *Jardel Co.*, 523 A.2d at 530; 11 *Del. C.* § 231(d).

To prove a level of culpability beyond simple negligence, the Plaintiff had (but failed) to show more than mere inattention or carelessness. *See Jardel Co.*, 523 A.2d at 530.

> Two significant elements must be present for recklessness to exist. The first is the act [or omission] itself . . . . The second, crucial element involves the actor's state of mind and the issue of foreseeability, or the perception the actor had or should have had of the risk of harm which his conduct [or omission] would create. The actor's state of mind is thus vital. The Court must focus on their state of mind.
>
> Where the claim of recklessness is based on an error of judgment, a form of passive negligence, the plaintiff's burden is substantial. It must be shown that the precise harm which eventuated must have been reasonably

apparent but consciously ignored in the formulation of the judgment. *Id*. at 530-31.

Therefore, in order to determine whether Szczerba's alleged negligent hiring, retention, and supervision of Spencer was grossly negligent or wanton, such that Szczerba's actions would fall into the exception for immunity set forth in 10 *Del. C.* § 4011(c), the Court would need to determine whether Szczerba's conduct amounted to reckless or conscious indifference. However, Plaintiff wholly failed to meet her burden. There is simply no evidence in the record establishing that Szczerba's actions in hiring or supervising Spencer amounted to gross negligence or wantonness. Instead, the record plainly demonstrates that the WPD performed an extensive background check on Michael Spencer. (*See* Application and Background Investigation File of Michael Spencer, A-0013-0118, cont'd at B-57-59)[3]. As part of this process, Spencer was cleared for duty *by Plaintiff's own expert witness, Dr. Raskin*, who performed a psychiatric examination of Spencer and called him a "man of integrity." *See*, 2008 report of Dr. Raskin, B-57-59. Chief Szczerba did not play any direct role in the incident alleged by Plaintiff. *See* Deposition of Michael Szczerba, at pp. 9-13, A-0819-0920. Szczerba was not present at the scene, nor was he aware of the incident as

[3] While the Appendix to Appellant's Opening Brief contained almost the entirety of Spencer's Application and Background Check file, two pages were missing: Dr. David Raskin's report, following an examination, confirming Spencer's psychological fitness for duty. Accordingly, this report is included in Defendants' Appendix, but should be read as being a part of the entire

it was taking place. *Id.* Further, nothing in the record suggests Szczerba was aware of any prior incidents where it was determined that Spencer assaulted a person, such that Szczerba should have expected Spencer might do so again. In short, there is no evidence in the record to suggest that Szczerba's hiring, retention, or supervision of Spencer rose to a level of even ordinary negligence, let alone gross negligence or recklessness. As such, the Superior Court correctly ruled that Szczerba is entitled to immunity from Plaintiff's tort claim under 10 *Del. C.* § 4011, and properly dismissed Count IV(b) against him.

WHEREFORE, Appellees City of Wilmington and Chief Michael Szczerba respectfully request that this Honorable Court deny the Appellant's appeal and affirm the decision of Superior Court.

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application and background check, the remainder of which is in contained in A-0013-0118. Dr. Raskin has also been retained by the Appellant as an expert witness in this matter.