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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

APPELLANT'S REPLY BRIEF

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COUNTERSTATEMENT OF FACTS[1]

Spencer's Actions

In Appellant's Opening Brief, Plaintiff recited Spencer's voluminous record of misconduct including illegal and unethical documented activities and infractions. (OB at 4-6). Defendants do not acknowledge or dispute these in any way. Instead, Defendants speak only to the events of June 5, 2010, starting with the motor vehicle accident at approximately 2:12 a.m.

Defendants also do not dispute that on the evening of June 4, 2010, Spencer had attended a Wilmington Police Beef and Beer in support of the police academy class. (A-0659).[2] The event raised money for equipment and other necessities for the academy class, according to Spencer. (*Id*.). Some of Spencer's superiors were present, as well as fellow officer Christopher Cain ("Cain"). (A-0273). Cain told OPS Officers that Spencer drank mixed drinks throughout the night and appeared intoxicated when he left the Beef and Beer around midnight. (A-0273).

Finally, Defendants do not contest the fact that the gun Spencer "displayed," and gave to Plaintiff was a WPD issued weapon. (AR-0055-0063).

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[1] The abbreviations used in the Opening Brief ("OB") and Answering Brief ("AB") are also used herein.

[2] The references to the appendix are from the Appendix to Appellant's Opening Brief, with the exception of several items in the Appendix to Appellant's Reply Brief.

McCaffrey's Actions

City Defendants state that Plaintiff and Spencer, "reached an agreement," to "handle the accident between themselves." (AB at 6). This statement is false. After Spencer ran a red light and totaled Plaintiff's car, he asked her whether she wanted him to call in the accident. (A-0593). She said yes. (*Id*.) A vehicle that passed by the accident scene stopped to see if they needed help, and Spencer said no. **(**A-0598**).** When Spencer suggested they "handle" the accident themselves, Plaintiff thought that they still would be exchanging automobile insurance information. (A-0596-0597). She followed his suggestions because he was a police officer and authority figure. (*Id*.).

The interactions between Spencer and Plaintiff took place while Plaintiff was under duress. Plaintiff was all alone, at 2:12 a.m., when her car was totaled by a police officer. She was clearly upset and crying at the accident scene, and obeyed Officer Spencer because he was a police officer. (A-0600-0601).

The investigating officers asked Plaintiff inappropriate questions from the beginning, implying that Spencer's sexual advances were invited. (A-0619-0620). During the OPS hearing, Plaintiff was asked whether she thought Spencer was attractive. She interpreted the question as, whether

relatively-speaking, he was an attractive person. (A-0601). She replied yes. (*Id*.). Defendants continue to take her response out of context.

Molholm's Witness Statement

Kevin Molholm ("Molholm"), Plaintiff's neighbor who advised her to call the police after Spencer passed out in Plaintiff's apartment, testified that Plaintiff was scared and upset. (A-0909). The fact that she had an outstanding warrant for a parking ticket was not the reason she hesitated to call the police; rather, she was scared to report an officer to the police because he was an officer. (A-0909). Plaintiff told Molholm that she hadn't called the police, "Because it involved an officer and she was scared." (*Id*.). Molholm elaborated:

> She had an officer in her apartment. That officer had hit her, hit her vehicle. And she didn't – I don't know how old she was at the time. She's in her mid 20s now. So she would have been in her early 20s. And I think it was just one of those incidences that her age just meant that she had – I don't really know what to do here.

(*Id*.).

The Investigation on June 5, 2010

Despite knowing that Spencer, an off-duty police officer, was involved in a motor vehicle accident at 2:12 a.m. within mere blocks of the police station, no officers arrived at the scene until it was too late. This unreasonable delay caused Plaintiff harm, including emotional distress.

During the twenty-seven minutes that had passed, Spencer made sexual advances and had directed Plaintiff to move her barely drivable vehicle to her nearby apartment parking lot. (A-0600).

When Spencer later passed out in Plaintiff's apartment, she called 911 (A-0760). She reported that she was involved in an automobile accident with an officer who gave her his badge and gun. (*Id*.). Investigating officers arrived and met Plaintiff on the sidewalk in front of her apartment building. (A-0621). They were nonplussed by the fact that Spencer had given her his loaded gun and badge. (A-0621). Specifically, "They didn't seem concerned that I had his gun or his badge. I guess, more importantly, his gun. They didn't seem too concerned about that. And only took it after I told them that it was still in my purse." (*Id.*)

Once the investigating officers entered Plaintiff's apartment, they laughed and minimized the fact that a fellow officer was so intoxicated that he passed out. (A-0612). Despite the fact that they had to wake Spencer and watched him try to put on his shirt as pants, they chose not to do a breathalyzer or field tests. (*Id*.). Plaintiff explained, "They kind of made me feel a little bit uncomfortable. I almost felt like they were accusing – like accusing me of wrongdoing in that everything that had happened was my fault." (A-0619).

The City and Szczerba's Actions

In Appellant's Opening Brief's Statement of Facts, Plaintiff provided information proving that the City and Szczerba were informed and on notice of Spencer's record of misconduct. Defendants' Answering Brief does not dispute these factual allegations in any way.

ARGUMENT

I. The Court Erred in Not Allowing the Jury to Determine the Factual Dispute as to Whether Spencer was Acting in the Scope of Employment

A. Count One is Not Limited to Conduct Prior to the Motor Vehicle Accident

Count I of the Second Amended Complaint alleges Negligence and Recklessness in causing the motor vehicle accident on June 5, 2010, and the aftermath. Specifically, paragraph 43 states, "Immediately following the accident, Defendant Spencer identified himself as a Wilmington Police Officer and acted with authority in first calling in the accident and then cancelling the call, and in directing Plaintiff to pull her car over to her apartment parking lot." (A-0006). Further, Plaintiff re-asserts throughout the Second Amended Complaint that Spencer was an agent of the Wilmington Police Department and City of Wilmington and that his actions are imputed to the City of Wilmington. (A-0011-0012). Plaintiff also reasserts and incorporates the "previous paragraphs," which describe the entire encounter. (A-0005).

Despite Defendants' argument to the contrary, Plaintiff does not seek damages under Count I for only "negligence in causing the auto accident." (AB-11). Count I is entitled, "Negligence and Recklessness." (A-0005). Plaintiff reasserted the facts of the entire incident, and stated, "As a result of

Defendant's conduct, Plaintiff suffered severe personal injuries, pain and suffering, [and] emotional distress . . . " (A-0006).

B. The Scope of Employment Analysis Should Not be Limited to Actions Before the Accident

Defendants contend that, "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." (AB-13). On the contrary, Plaintiff more than satisfied the liberal notice pleading requirements of Delaware law. *See Wood v. Rodeway Inn & Choice Hotels International, Inc*., C.A. No. K14C-08-026, Young, J. at 4 (Del. Super. March 4, 2015) *citing VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

In the Second Amended Complaint, Plaintiff sets forth supporting facts in the Background Section (A-0002-0004) and in Count One (A-0005-0006). Specifically, Plaintiff pointed out that Spencer identified himself as a police officer, acted like a police officer by calling in the accident to a private police administrative phone line, and directed Plaintiff to move her vehicle out of the roadway. Defendants' argument that Spencer's acts were not, "the kind Spencer is employed to perform," is incorrect. Spencer was trained to investigate traffic accidents. He was specifically taught how to

manage an accident, report the accident and document the accident. Further, when Spencer caused an accident mere months before this one, he was supposedly re-educated on the internal police protocol that required calling a police superior to the scene of the accident of any off-duty officer.

There is no bright line rule that says if an employee is "off-duty," he or she is not acting in the course and scope of employment. The facts must be viewed on a case-by-case basis and are ordinarily a question for the jury. Defendants concede that, "[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 force is not unexpectable by the master." (AB at 12, *citing Draper v. Olivere Paving & Constr. Co*., 181 A.2d 565, 570 (Del. 1962), *citing* Restatement of Agency (2d), § 228.

While Defendants argue that Spencer's actions leading up to the accident were likewise not in the scope of employment, Defendants consistently ignore the fact that Spencer had been at a Wilmington Police Academy fund-raising event that evening. (A-0659). His superiors were on notice that he left the event intoxicated. They were also on notice that he had a poor driving record and had driven while intoxicated in the past.

Further, the Oath he took, as well as the WPD Mission Statement, required him to abide by Delaware law and ethical standards at all times.

C. Employees May be Acting in the Scope of Employment When Off Duty

Defendants fail to acknowledge that off-duty employees may be acting in the scope of employment under certain circumstances. A simplistic rule stating that scope of employment depends entirely on whether the employee is on-duty, does not exist. The *Draper* Court explained:

> Many factors enter into the decision as to whether or not a particular tort was committed by a servant within the scope of employment. They are set forth in Restatement of Agency (2nd), § 229(2) and in Prosser on Torts (2nd Ed.), § 63. Those which seem pertinent to the case at bar are: (1) whether the act is one commonly done by such servants; [54 Del. 443] (2) the time, place and purpose of the act; (3) whether or not the act is outside the enterprise of the master; (4) whether or not the master has reason to expect that such act will be done; (5) the similarity in quality of the act done to the act authorized; and (6) the extent of departure from the normal method of accomplishing an authorized result.

Draper at 571.

Plaintiff cited *Doe v. State,* 76 A.3d 774 (Del. 2013), because it provides guidance on an element of agency, not because the facts are identical to our facts. *Doe* is important in its reversal of the trial court's holding that the State was not responsible for the defendant officer's illegal behavior. The particular State police officer's sexual assault was found to be

activated, in part, to serve the employer, because it took place while the officer was transporting a prisoner. *Id*. at 777**.** The Court found that the sexual assault was "not unexpectable," and that "other jurisdictions have noted that sexual assaults by police officers and others in positions of authority are foreseeable risks." *Id*.

Plaintiff submits that the four elements listed under Restatement of Agency (2d) § 228 are satisfied. First, Spencer's controlling the accident scene is the kind of work he was employed to perform. Second, the incident occurred within authorized time and space limits in that officers are required to follow protocol and the law while on duty and off-duty. In addition, Spencer was within the City limits, mere blocks from the police station. Third, his offer to call an ambulance and police were activated, in part, to serve the master. Fourth, the sexual advances, i.e., force used, were not unexpectable or unforeseeable.

Defendants' argument that liability in this case would lead to a slippery slope is alarmist. The examples that Defendants provide are in no way similar to our case. A mechanic is not sworn to uphold the laws of the land and serve and protect the people, and does not hold a position of authority. With respect to those rendering first aid, they are afforded

protection from liability for negligent but not reckless acts. *See* 16 *Del. C*. § 6801**.**

In the alternative, if Spencer was acting outside the scope of employment, the City still had a responsibility since Spencer was using a chattel of the master (badge, gun, police identification), and the master knew or should have known that the City could have prevented him from driving away from the Beef and Beer while intoxicated. Restatement (Second) of Torts § 317 (1965).

D. The Court Erred in Determining that Spencer was not in the Scope of Employment Under Delaware Tort Law

Defendants argue that Plaintiff incorrectly relied upon *Anderson v. Warner*, 451 F.3d 1063 (9th Cir. 2006) to support her scope of employment argument. (AB-19). This is incorrect. Plaintiff cited multiple cases including *Doe, supra*, and *Draper v. Olivere Paving & Construc. Co*., 181 A.2d 565 (Del. 1962), to support her arguments. The *Anderson* case was simply cited as an example where an off duty jail commander was found to have been acting under color of law. The color of law analysis is actually done under a more rigorous Section 1983 analysis. Plaintiff contends that *Anderson*'s reasoning is helpful and persuasive to the scope of employment analysis in our case.

II. The Jury Should Determine Whether City and Szczerba were Negligent and Reckless in Hiring, Retaining and Supervising Spencer

A. Hiring, Retaining and Supervising a Police Officer are Not Discretionary When that Officer has Violated Delaware Law and Police Procedures

The Court erred by granting summary judgment to Defendants because there is a genuine dispute of material fact regarding City's negligence and recklessness in hiring, retaining and supervising Spencer. The Court incorrectly states that there are, "no policies . . . except for minimum qualifications," for hiring new officers. *McCaffrey v. City of Wilmington*, C.A. No. N12C-01-138 EMD, 2014 WL 6679176, at *13 (Del. Super. Nov. 3, 2014). The Court also erroneously held that the City had a "great deal of choice," on how to supervise officers. *Id*. In reality, there are voluminous directives, rules and procedures for officers ranging from personnel issues, to use of weapons and handling crimes, to professional conduct and ethics.

A governmental decision is not protected when it is ministerial. *Sussex County v. Morris*, 610 A.2d 1354 (Del. 1992). Ministerial means the official act is not personal or based on personal judgment. (*Id*. at 1358-59). *Morales v. Family Founds. Acad., Inc. School*, C.A. No. N12C-03-176 JRJ, 2013 WL 3337798 (Del. Super. June 11, 2013), provides 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. Examples are where a school policy required maintenance of wooded bleachers, and a school 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. Sept. 17, 1986); *Whitsett v. Capital School District*, No. C.A. 97C-04-032 JTV, 1999 WL 167836 (Del. Super. Jan. 28, 1999).

The Superior Court noted that the care of prisoners, and the driving of vehicles are ministerial. *McCaffrey v. City of Wilmington*, C.A. No. N12C-01-138 EMD, 2014 WL 6679176, at *12 (Del. Super. Nov. 3, 2014). Ministerial does not mean there cannot be an element of choice. *Id*. at 11.

While Defendants argue that hiring Spencer was totally discretionary, the fact remains that strict requirements had to be satisfied. For example, a criminal background check and driving record check was done, references were required, and a "passing" polygraph and psychological assessment were required. (A-0035-0117). Further, as an applicant, Spencer received a letter from the City stating, "Any diversion from the truth will cause immediate elimination from the process." (A-0016). Also, "Any employment is contingent upon the result of a complete character and fitness investigation. . . " (A-0017).

The City's retention and supervision should be considered ministerial. Voluminous mandatory rules and regulations exisited, including the Oath of Office, Mission Statement, Directives and other internal policies. A sampling of relevant mandatory procedures that were violated included not driving while intoxicated, not having a gun in your vehicle when drinking alcohol, not properly investigating fellow officers following a citizen complaint, not calling a supervisor when involved in an off-duty accident, and many others.

Plaintiff's expert, retired Delaware State Police Captain Dr. Greg Warren, opined that if the WPD had taken the appropriate steps regarding Spencer's prior infractions, Spencer should not have been driving at all. (AR-0007). Warren elaborated: "Well, the first example is obviously he has an alcohol problem. " (AR-0027). The second is that, "It's very obvious he can't drive a motor vehicle very well and that's a pretty critical skill set. . . . that's why I would never have passed him to come on because it shows some immaturity." (*Id.*). Once hired, Spencer's superiors did not send him to defensive driving courses, retrain him, or send him to counseling. (AR-0028). By not initiating the actions needed, the City allowed Spencer to remain on the streets with full police power, placing innocent citizens in danger. (A-0938).

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. 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 repeated failure to enforce these rules and others removes immunity for the City.

B. Spencer's Use of the City's Equipment Requires that Immunity be Waived

Whether the "equipment exception" applies under 10 *Del. C.* § 4012 is not moot. The issue of whether Spencer used "equipment" should have been addressed by the Court, because the Court should have determined that the City's actions were ministerial.

As Defendants point out, the Delaware Supreme Court has defined equipment as 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." (AB-28, *citing Sadler v. New Castle County*, 565 A.2d 917, 923 (Del. 1989).

Examples are an improperly equipped automobile of a constable, and electric utility poles and transmission lines. *See Sussex Cnty. v. Morris*, 610

A.2d 1354, 1359-60 (Del. 1992) and *Porter v. Delmarva Power & Light Co.,* 488 A.2d 899, 906 (Del. Super. Ct. 1984). 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 § 4012(1)." *Hedrick v. Blake*, 531 F.Supp. 156, 158 n.4 (D. Del. 1982).

As stated, the gun Spencer had in this case was obtained through, and issued by, the Wilmington Police. (AR-0059, 0061, and 0063). Spencer handed Plaintiff this gun, which was particularly dangerous because it was loaded and did not have a safety. Plaintiff could have accidentally injured or killed herself or anyone she came into contact with.

Public policy concerns strongly favor the interpretation of the gun as equipment. It is hard to imagine an item more hazardous than a gun. In its "normal use," guns are the cause of injuries and deaths every day. Immunity should be waived under 10 *Del. C.* § 4012 because the City's negligent and reckless failure to train and supervise Spencer's gun use resulted in harm to Plaintiff.

C. Szczerba Completely Shunned his Duty as Chief of Police, and his Reckless and Wanton Conduct Caused Plaintiff Harm

The Court erred by granting summary judgment to Defendants as to Plaintiff's Negligent and Reckless Hiring, Retention and Supervision Claims against Szczerba for several reasons. First, the Court misunderstood the facts. Secondly, the Court held that Szczerba acted appropriatly because, "WPD did take action with respect to Officer Spencer's conduct." *McCaffrey v. City of Wilmington*, C.A. No. N12C-01-138 EMD, 2014 WL 6679176, at *16 (Del. Super. Nov. 3, 2014). The analysis should have focused on Szczerba's actions, not WPD's actions. Finally, the Court erred by deciding a factual dispute that should have been presented to a jury.

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).

Szczerba had the responsibility, as the Chief, to oversee and supervise his officers. CALEA, the Commission for the Accreditation for Law Enforcement Agencies, and DPAC, the Delaware Police Accreditation Commission for the State of Delaware, required Szczerba to appropriately manage his officers. Further, as a member of the Delaware Police Chief Council, Szczerba committed to stringent police training standards, excellence in providing public safety, and the highest ethical standards. *See* http://delpolicechiefscouncil.org/index.html.

The Superior Court erroneously stated that Szczerba was aware of Spencer's alcohol-related incidents while an officer. *See McCaffrey v. City of Wilmington*, C.A. No. N12C-01-138 EMD, 2014 WL 6679176, at *16 (Del. Super. Nov. 3, 2014). At his deposition, Szczerba was asked, "Do you know whether Spencer had any infractions while he was on probation?" (A-0843). Szczerba replied, "No, I do not." (*Id.*). He also did not know about Spencer's failure to properly investigate a citizen complaint, or about his failure to follow departmental personnel protocol on domestic violence. (A-0843-0844).

Further, at his deposition, when asked whether he was informed about the June 5, 2010 incident with Plaintiff, he said that he may have been, but he did not read the Departmental Information until January 2011. (A-0821).

In contrast, Captain Victor Ayala testified that after the June 5th incident, "The whole department knew." (A-0488).

At his November 27, 2012 deposition, when asked what facts he knew about the June 5th incident, he replied:

> I'm still not aware of them to this day . . . it involved an off-duty accident involving an off-duty Officer Spencer with a citizen. It was investigated by the Wilmington Department of Police. I'm aware that there was a Complaint Hearing Board in this matter with Officer Spencer. I'm not aware of the penalty he received.

(A-0822). He never saw the State of Delaware Uniform Collision Report. (A-0823). In further testimony, Szczerba tried to dispute whether Spencer was even driving on June 5, 2010. (A-0830).

Spencer was charged with internal violations and went before a Complaint Hearing Board. (A-0825). Szczerba was not involved in the board and generally does not read their findings. (A-0826). He can appeal the findings but he never has, because he, "stand[s] by the decisions of the Complaint Hearing Board." (A-0826). "They handle it." (*Id.*).

In sum, Szczerba made a conscious decision to ignore Spencer's misconduct when it was reasonably apparent that someone would be harmed. Although he may not have intended to cause harm, Szczerba's failure to perform in his leadership and supervisory role was reckless and wanton.

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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