IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

MORGAN MCCAFFREY, Plaintiff,)
V.) C.A. No. N12C-01-138-PLA
CITY OF WILMINGTON,)
PATROLMAN MICHAEL)
SPENCER, WILMINGTON)
SERGEANT DONALD)
BLUESTEIN, SERGEANT)
GERALD MURRAY, CORPORAL)
RALPH SCHIFANO, MASTER	
SERGEANT SHERRI TULL, and	
CHIEF MICHAL J. SZCZERBA,)
Defendants.)

Submitted: June 19, 2012 Decided: August 9, 2012

UPON DEFENDANT CITY OF WILMINGTON'S MOTION TO DISMISS COUNT V OF THE COMPLAINT – **GRANTED** UPON DEFENDANT CITY OF WILMINGTON'S MOTION TO DISMISS COUNT VI OF THE COMPLAINT - **GRANTED**

Laura J. Simon, Esquire, DALTON & ASSOCIATES, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Louis B. Ferrara, Esquire, FERRARA & HALEY, Wilmington, Delaware, Attorney for Defendant Michael Spencer.

Jeffrey A. Young, Esquire, YOUNG & MCNELIS, Dover, Delaware, Co-Attorney for Defendant Michael Spencer.

Daniel F. McAllister, Esquire, CITY OF WILMINGTON LAW DEPARTMENT, Wilmington, Delaware, Attorney for Defendants City of Wilmington and Wilmington Police Department.

Before the Court is Defendants City of Wilmington ("City"), Gerald Murray ("Murray"), Ralph Schifano ("Schifano") Sherri Tull ("Tull"), Michael Szczerba ("Szczerba") and Donald Bluestein ("Bluestein") (collectively "the Officers") Motion to Dismiss the Second Amended Complaint Pursuant to Rule 12(b)(6) of the Superior Court Civil Rules in this personal injury and civil rights action filed by Plaintiff Morgan McCaffrey ("McCaffrey") against the named Wilmington Police Officers and the City of Wilmington. The Motion more precisely seeks dismissal of the City and the named officers as to Counts V and VI of the Complaint, alleging the torts of assault and battery and negligent infliction of emotional distress respectively. The City and the Officers contend that they are immune from suit under the Delaware County and Municipal Tort Claims Act, 10 Del. C. §4010, et seq. ("the Act") as Plaintiff has failed to plead any of the exceptions set forth in the statute.

Plaintiff concedes in her Response to the Motion that the City should be dismissed from Count V of the Complaint alleging assault and battery against both the City and defendant Patrolman Michael Spencer ("Spencer") as there are no exceptions in the immunity statute applicable to the City with regard to this tort. Since Spencer has not filed any motions seeking

dismissal on his behalf, Count V will remain in the case as to him.

Accordingly, the City's Motion to Dismiss Count V is hereby **GRANTED**.

Having conceded that dismissal of the City is appropriate under Count V, the Court will focus on the allegations set forth in Count VI of the Amended Complaint which alleges intentional infliction of emotional distress against the City and the named officers.

This is a personal injury lawsuit that was precipitated by a traffic accident late in the evening of June 5, 2010. The Amended Complaint alleges that Spencer, a patrolman in the Wilmington Police Department ("WPD"), ran a red light and collided with McCaffrey's car, injuring her. Immediately following the accident, Spencer advised the plaintiff that he was an off-duty police officer and admitted that he had been drinking alcohol that evening. Spencer called the police to report the accident and the two together waited at the scene for the police to arrive. During that time Spencer placed his hands on McCaffrey's back and proceeded to kiss her. He then called the police to cancel his earlier request that an officer arrive at the scene and instead suggested to McCaffrey that they drive to her nearby apartment to clear the road.

After arriving at McCaffrey's residence, Spencer removed his firearm, magazine, and badge from the glove compartment and asked McCaffrey to

hold them for him. He then asked to enter McCaffrey's apartment. McCaffrey, who claims that she felt pressured by the fact that Spencer was a police officer, allowed him into her apartment. Once inside, Spencer undressed, climbed into McCaffrey's bed, and asked her if she wanted to have sex. When McCaffrey refused Spencer straddled her on the bed and again requested that they have sex. After McCaffrey again refused Spencer fell asleep in her bed within about five minutes.

McCaffrey went to a neighbor's apartment and called the police from there. Schifano, Bluestein, and Murray, all officers of the WPD, arrived at the apartment shortly thereafter. McCaffrey described the events of the evening and turned over Spencer's gun and other items to the officers. The officers responded by describing Spencer as "so out of it" that he probably did not even know where he was, and they assured her that he was drunk and harmless. The officers then woke Spencer, who was still asleep in McCaffrey's bed, at which time he attempted to put on his T-shirt as if it were his pants.

Rather than administering a field test on Spencer and processing him according to standard DUI procedure, the officers let time lapse before any field test was administered. At the station, Spencer initially refused to take a sobriety test or provide a statement but later took a sobriety test which he

passed. Although no criminal charges were brought against Spencer, he was disciplined after an internal investigation and hearing.

In her original complaint, filed on January 19, 2011, McCaffrey alleged, *inter alia*, negligence and recklessness and civil rights violations against both Spencer and the City. She also alleged negligent hiring and supervision against the City and sought to recover for assault and battery against Spencer, and for intentional infliction of emotional distress against all of the individual police officers.

On March 12, 2012, the City filed a Motion to Dismiss Counts I (alleging negligence and recklessness) and II (civil rights violations) of the Complaint, alleging that the civil rights claims against either the City or WPD cannot be sustained. It maintained that, since Spencer was not acting within the course and scope of his employment, the City could not be liable for any of Spencer's negligence or recklessness as alleged in Count I either.

In a decision, dated April 15, 2012, this Court granted the Motion to Dismiss the City as to Count I, which only addressed Spencer's alleged negligence and recklessness in causing the traffic accident. This Court found that Spencer's conduct on the night of June 5, 2010 was outside the scope of his employment as a police officer as driving while intoxicated and causing a motor vehicle accident while off-duty could not have been

activated by a purpose to serve the City. This Court also rejected plaintiff's theory of liability as to Spencer's apparent authority with respect to Count I because the acts of negligence and recklessness alleged there all occurred before Spencer and McCaffrey interacted.

After the Court granted the City's Partial Motion to Dismiss, McCaffrey then filed an Amended Complaint, which *inter alia*, eliminated the Wilmington Police Department as a defendant but added in several counts its Chief, Michael J. Szczerba, as the supervisor of the officers, added the City as a defendant in Count V, which alleged assault and battery, and amended the intentional infliction of emotional distress count to eliminate negligence being imputed to the City. Although the allegations of Count VI do not refer specifically to conduct on the part of the individual police officers as being "reckless" or "wanton" the factual allegations describing the officers conduct could reasonably be interpreted to rise to that level.

Now before the Court is a Second Motion to Dismiss, this time seeking dismissal of Counts V and VI as to the City and all of the individual officers, on the ground of municipal immunity pursuant to 10 *Del. C.* §4011(a). The City and officers contend that none of the exceptions to that statute have been pled, that there are no bodily injuries as a result of the officers' conduct in Count VI, and that, while the individual officers other

than Spencer were indeed acting within the scope of their employment, their acts were not performed with wanton negligence or willful and malicious intent such as to fit within the exception to the immunity statute.

Upon a Motion to Dismiss, this Court's role is to determine "whether [the] plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint. In evaluating a Motion to Dismiss, the Court is required to assume that all well-pled allegations in the Complaint are true. If recovery is possible, the Court must deny the Motion to Dismiss. In addition, every reasonable factual inference will be drawn in favor of the plaintiff.

The Delaware County and Municipal Tort Claims Act⁵ provides sovereign immunity protection from tort liability for local governmental bodies and their employees. Ordinarily, municipal employees and entitites are immune from liability arising out of acts performed in their official capacities unless an exception under Section 4012 exists.⁶ There is an

¹ Spence v. Funk, 396 A.2d 967, 968 (Del. 1978).

 $^{^{2}}$ *Id*.

³ *Id*.

⁴ Doe v. Cahill, 884 A.2d 451, 458 (Del. 2005).

⁵10 *Del. C.* §§4010-4013.

⁶ 10 *Del. C.* §4012 provides that a governmental entity may be liable for negligent acts or omissions causing property damage, bodily injury, or death in certain prescribed situations, none of which are applicable to the case pending before the Court.

exception to this broad protection, set forth in Section 4011(c) which states, however, that:

An employee may be personally liable for acts or omissions causing property damage, bodily injury or death in instances in which the governmental entity is immune under this section, 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.

Since the officers have conceded that they were acting within the scope of their employment, the focus of the Court's inquiry here must be on whether plaintiff sustained personal injury as a result of the defendants' actions, and if so, whether those actions were performed in such a manner as to rise to the level of wanton negligence or willful and malicious intent. In *Dickerson v. Phillips*, this Court recently reaffirmed the principle that emotional distress does not constitute bodily injury for purposes of the exception to municipal immunity under Section 4011(c).

Even after having reviewed the allegations of the Complaint in light of the liberal standard applicable to a motion to dismiss, and accepting all

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⁷ 2012 WL 2236709, at *2 (Del. Super. June 13, 2012) ("It is well-established that allegations of emotional distress do not amount to bodily injury for purposes of the Tort Claims Act."); *see also Davis v. Town of Georgetown*, 2001 WL 985098 985098, at *9 (Del. Super. Aug. 22, 2001) (granting summary judgment to defendant on plaintiff's claims, including intentional infliction of emotional distress, because the claim is barred by the Tort Claims Act); *Sekscinski v. Harris*, 2006 WL 509541, at *3 (Del. Super. Jan. 18, 2006) (holding that plaintiff's claim for negligent infliction of emotional distress against a Wilmington police officer could not be maintained because the officer was immune from liability under the Tort Claims Act).

well-pleaded allegations as true, the Court concludes that McCaffrey's

claims against the individual officers cannot survive the motion to dismiss.

Plaintiff's claim of negligent infliction of emotional distress, with no

physical injury alleged whatsoever, simply does not meet the requirements

for the immunity bar to be raised under section 4011(c). While it is true that

the officers' alleged indifference to McCaffrey's legitimate reporting of

Spencer's highly inappropriate, if not criminal, behavior, coupled with the

officers' obvious efforts to conceal Spencer's disturbing conduct, could

fairly be characterized as willful and malicious, the character of the officers'

actions alone is not sufficient to evade the immunity bar. McCaffrey must

have pleaded some kind of physical injury in order to hold the officers

personally liable for their conduct under section 4011(c). In the absence of

any allegation of injury beyond emotional distress, the Court concludes, as it

must, that the officers are immune from suit under the County and Municipal

Tort Claims Act.

Accordingly, the Motion to Dismiss Counts V and VI of the

Complaint is GRANTED in its entirety.

IT IS SO ORDERED.

/s/ Peggy L. Ableman

Peggy L. Ableman, Judge

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Original to Prothonotary cc: All counsel via File and Serve