

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4585-13T2

RICHARD DESIERVO, as Administrator
ad Prosequendum for the heirs-at-law
of Diane Mascolo, deceased; and
Administrator of the Estate of Diane
Mascolo, deceased, and individually,
CONNER MASCOLO, a minor, individually
through his Guardian, RICHARD DESIERVO,
and NICHOLAS MASCOLO, individually,

Plaintiffs-Appellants,

v.

TOWNSHIP OF ELMWOOD PARK, POLICE
DEPARTMENT OF ELMWOOD PARK, POLICE
OFFICER MICHAEL MULLIGAN, POLICE
OFFICER JOSEPH BARRONE, POLICE OFFICER
JOHN EITEL and ELMWOOD PARK AMBULANCE
CORPS.,

Defendants-Respondents,

and

ST. JOSEPH'S HEALTHCARE SYSTEM, INC.
and PULSE MEDICAL TRANSPORTATION, INC.,

Defendants.

Submitted January 19, 2016 – Decided April 25, 2016

Before Judges Accurso, O'Connor and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No. L-
3317-11.

Fisher Porter & Thomas, P.C., attorneys for appellants (Arthur L. Porter, Jr., of counsel; James N. Faller, on the brief).

Keenan & Doris, L.L.C., attorneys for respondents (Ian C. Doris, of counsel; Bernadette M. Peslak, on the brief).

PER CURIAM

This appeal arises out of the tragic death of thirty-eight year old Diane Mascolo, found unconscious by her teen-aged sons on the floor of her bathroom following a prescription drug overdose. Although the police and ambulance squad quickly responded, followed by paramedics, their efforts to revive Mascolo were futile, and she was pronounced dead at the hospital an hour later.

Mascolo's sons and her estate brought this survivorship, wrongful death and negligent infliction of emotional distress action against the Township of Elmwood Park, its police department, police officers Michael Mulligan, Joseph Barrone and John Eitel, the Elmwood Park Ambulance Corps., St. Joseph's Healthcare System, Inc. and Pulse Medical Transportation, Inc. Plaintiffs alleged defendants failed to properly administer necessary emergency assistance to Mascolo or take appropriate life-saving measures, thereby causing her death. Finding

defendants' immune for their actions, the trial judge granted their motion for summary judgment.¹

Having reviewed the record and considered the facts in the light most favorable to plaintiffs, we are satisfied the trial court was correct that plaintiffs cannot surmount the statutory immunities accorded these defendants, and entry of summary judgment was appropriate.

Diane Mascolo had been prescribed Prozac (fluoxetine) for bipolar disorder. She also had a history of anxiety and alcoholism. She was hospitalized twice in the year preceding her death, once after she drank a significant amount of alcohol and took several medications, including ten to fifteen Prozac pills, and the other for renal impairment and electrolyte abnormalities.

Her sixteen-year-old son discovered her in her bathroom unconscious, slumped over the bathtub at about ten after seven on the evening of January 6, 2010. He moved her onto the floor and ran upstairs to find his older brother. The boys called 911 and their uncle, plaintiff Richard DeSiervo.

¹ Plaintiffs' claims against defendants St. Joseph's Healthcare System and Pulse Medical Transportation had already been dismissed. Plaintiffs have not appealed those dismissals and these defendants are not participants in this appeal.

The 911 call came in at 7:17 pm. Elmwood police officers Barrone and Eitel were dispatched at 7:18 pm and arrived at 7:23 pm carrying an oxygen mask and an automatic external defibrillator (AED). They found Mascolo on the floor unresponsive, but alive and breathing with a faint pulse. The officers were administering oxygen as Officer Mulligan arrived. DeSiervo arrived shortly thereafter. Plaintiffs claim the oxygen mask was leaking, and the officers had to remove the mask to fix the leak.² When they did so, plaintiffs claim Mascolo's lips were blue.

Asked at their depositions, none of the officers recalled the mask leaking or Mascolo's lips turning blue. Plaintiffs, however, claimed the officers "didn't care," "did not seem to take the emergency situation seriously" and just "stood there."

Officer Barrone testified that after administering oxygen, Mascolo had a "thready" pulse and was breathing, which was why they did not administer CPR or use the defibrillator. Because Mascolo's breathing remained shallow, however, he sent Mulligan to retrieve a bag valve mask from his patrol car. As the officers began to employ the bag valve mask, the ambulance crew arrived and assumed Mascolo's care.

² DeSiervo conceded at deposition, however, that the officers fixed the leak within "ten, fifteen seconds," and the oxygen worked properly thereafter.

Upon arrival, the ambulance crew chief, a twenty-one year old first year medical student, immediately assessed Mascolo's condition, checking her breathing, pulse and responsiveness to physical and auditory stimuli. She found a "thready" pulse and saw Mascolo's chest rising and falling, although her breathing was "not the best." She noted Mascolo was unresponsive and cyanotic (bluish). The ambulance crew took over administration of the valve mask from the officers, and the crew chief determined the "most prudent" thing to do was to get Mascolo into the ambulance where the paramedics "could do a better workup." She testified at deposition that she did not employ a defibrillator because Mascolo had a pulse and attaching it prophylactically would have delayed getting her into the ambulance.

DeSiervo claimed that the crew chief "a young lady . . . no more than 20 years old - if that," appeared "quite panic stricken" and "overwhelmed." He certified "she did not take the time [to] take Diane's blood pressure nor take her pulse," and "also did not initiate any CPR and instead said they needed to move Diane to the ambulance." Plaintiffs also claimed that the ambulance's departure was delayed because the Elmwood Park ambulance driver was looking for his lost cell phone.

The EMTs of the ambulance crew put Mascolo on a stretcher and transported her to the ambulance, where the paramedics, who had arrived at 7:30 pm, just after the ambulance crew entered the house, took charge of her care. The paramedics noted upon their arrival that Mascolo was being ventilated via a bag valve mask by the Elmwood Park ambulance squad and was "pink, warm and dry." Although the paramedics noted finding a "thready" or very weak pulse upon their initial assessment, Mascolo was shortly thereafter discovered to be without a pulse in the ambulance. The ambulance squad crew chief testified at deposition that she started CPR immediately at that point, at the direction of one of the paramedics, and continued CPR until the ambulance arrived at the hospital.

While the crew chief was performing CPR, the paramedics attached the leads for their cardiac monitor and defibrillator, which showed that Mascolo was in asystole, meaning no electrical activity was detected in her heart. For the next seventeen minutes, the paramedics initiated a series of measures, including intubation, placement of a nasal gastric tube, placement of an IV and the administration of several drugs at the direction of an emergency room physician, all geared to restarting her heart.

One of the paramedics testified at deposition that they did not leave sooner for the hospital because those interventions could not be accomplished while the ambulance was moving, not because the driver lost his cellphone. The paramedic confirmed the "run sheet" noted no delays leaving the scene. Although the paramedics detected some electrical activity in Mascolo's heart after their efforts, no heart rhythm returned. The same paramedic explained that they did not employ their own cardiac defibrillator, more sophisticated than the AED carried by the police and ambulance squad, because Mascolo had no "shockable rhythm" in her heart. Defibrillation, he maintained, is to correct certain irregular rhythms; it cannot create a rhythm for someone in asystole. The ambulance departed for the hospital at 7:48 pm and arrived there at 7:58 pm. Mascolo was pronounced dead by hospital staff at 8:18 pm. Following an autopsy, the cause of Mascolo's death was listed as accidental fluoxetine intoxication.

Included in the summary judgment record were the reports and deposition transcripts of the three experts plaintiffs relied on for opinions as to the conduct of the police and ambulance squad in responding to the emergency at Mascolo's home. All agreed, as do the parties, that police as first responders provide medical care until higher medical authority

arrives. When EMTs arrive at the scene, they assume responsibility for care and relinquish it to any paramedics who arrive thereafter.

Plaintiffs' police liability expert, who was not a physician, claimed the police officers responding to the scene were grossly negligent for failing to: check Mascolo's airway for vomit and obstructions; follow up on the son's initial report of choking; properly interview Mascolo's sons; properly position Mascolo's head; attach Mascolo to the defibrillator; monitor constant breathing assistance; anticipate cardiac arrest; and write their report for one week. At deposition, however, the expert conceded there was no evidence to suggest that Mascolo was choking or vomiting and admitted the officers' failure to ask Mascolo's sons about her medications or write a report sooner had no effect on the outcome here. Although conceding that it is not appropriate to perform CPR on a person with a pulse, and that Mascolo was breathing while still inside her home, the expert maintained that had Mascolo been hooked up to the AED immediately, responders would have known when she stopped breathing and thus when to start CPR.

An emergency medicine physician opined on behalf of plaintiffs that "EMT personnel for the Elmwood Park Ambulance Corp[s.] acted in a manner that was not objectively reasonable"

by failing to record Mascolo's vital signs, to assign a numeric value to her "thready" pulse and to reassess vital signs every ten feet while moving Mascolo from the floor of her home to the ambulance. The doctor opined that there was "a question whether the patient may have been in fact pulseless at some point before the patient was assessed in the ambulance." He wrote:

If this were the case, it was more likely than not that a lost window of opportunity, that a rhythm amenable to defibrillation i.e. ventricular fibrillation most commonly, may have been the case at this juncture and CPR would needed to have been started. Given this scenario then it was more likely than not that prompt defibrillation and CPR would have significantly increased the survival rate to hospital discharge.

Another expert, an EMT, opined on behalf of plaintiffs that "the emergency care given . . . by both the police and EM[T] crew in this case was negligent and in violation of applicable standards from pre-hospital care." Specifically, he opined the dispatcher failed to relay to the officers the son's report of his mother choking and the officers failed to take vital signs and evaluate Mascolo's airway. Had they done so, the EMT opined they would have found Mascolo's "breathing was clearly not adequate and the pulse was either absent or dangerously slow warranting the application at this time of their AED." The expert also opined there was a negligent delay in moving Mascolo out of the bathroom, that the ambulance squad crew chief failed

to document complete vital signs, and the ones she did document "should have made her and the police react with much more urgency."

The EMT also wrote that "[g]iven the fact that there were no pulses present upon evaluation of the paramedic and that the initial heart rhythm upon arrival was asystole, it is my opinion[] that the patient did not receive adequate and necessary ventilations." Like the emergency medicine doctor, the EMT opined "that the patient lost her pulse minutes before placing her in the ambulance." He noted "[a] heart rhythm that proceeds from a normal sinus rhythm to asystole most commonly deteriorates first into ventricular fibrillation (a rhythm that is corrected by electric shock therapy), especially from hypoxia over a period of time." He concluded that "[i]t appears to me to a reasonable degree of pre-hospital/emergency certainty that Ms. Mascolo progressed into one of the rhythms prior to the ambulance, thereby warranting the use of the AED." He also concluded the ambulance crew chief was grossly negligent in failing to monitor Mascolo and protect her airway, and, based on Mascolo's lack of pulse "upon presentation to the ambulance, grossly failed to monitor then treat the patient's dangerous deteriorating condition."

The summary judgment record also included the report of defendants' expert, an emergency medicine doctor, who analyzed the timeline of events and actions of the police and ambulance squad against the American Heart Association Emergency Cardiovascular Care guidelines in effect in January 2010, to which the police and ambulance squad members were trained. The doctor concluded the care rendered by both the police officers and the ambulance squad members "was timely and completely met the requisite medical standards." He also rejected any suggestion that either the police officers or ambulance squad should have initiated AED defibrillation, noting that it

is in direct conflict with the universally accepted practice, the training the police officers and EMTs received and the American Heart Association guidelines for both lay rescuers and EMTs. The use of an AED is limited to patients who do not have a pulse and are not breathing. The testimony of all parties involved has consistently stated that Ms. Mascolo had a pulse and was breathing; therefore attaching an AED was not indicated. Attaching an AED to a patient with a pulse and inadvertently shocking a person with a pulse could kill the patient by sending them into a fatal arrhythmia from which you cannot revive them.

After hearing argument, the trial judge entered an order granting defendants' motion for summary judgment. Upon reviewing the facts in a written opinion accompanying the order, the judge determined that defendants claimed immunity based on

one or more of six statutes: N.J.S.A. 59:3-3; N.J.S.A. 2A:53A-13.1; N.J.S.A. 26:2K-29; N.J.S.A. 26:2K-43; N.J.S.A. 2A:62A-1.1; and N.J.S.A. 2A:62A-1, all of which she concluded provide immunity so long as "individual(s) utilized good faith in their actions."

With regard to the police officers, the judge concluded that plaintiffs' claims that they failed "to administer an [AED], . . . monitor [Mascolo's] vital signs, and . . . administer CPR" did not "rise to the level of willful, wanton disregard." The judge similarly concluded that there was no evidence to suggest the members of the ambulance squad failed to act in good faith in treating Mascolo. Because both the police and the ambulance squad followed standard procedures in rendering emergency assistance to Mascolo, the judge concluded "no palpably unreasonable, willful, wanton or gross negligence is shown."

On appeal, plaintiffs argue that the trial judge erred in failing to specify the immunity provisions that protected defendants from suit. They also claim the trial judge failed to view the facts most favorably to them and that doing so makes clear "that defendants exhibited willful or wanton behavior that resulted in injury to plaintiffs." Finally, they contend the record presents "a genuine dispute of material fact as to when

Diane Mascolo 'coded' and became asystolic" precluding summary judgment.

We review summary judgment using the same standard that governs the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Thus, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp., Inc. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). Applying that standard here, we are satisfied that summary judgment was appropriately granted.

We address the immunities applicable to each defendant in turn, beginning with police officers Mulligan, Barrone and Eitel. N.J.S.A. 2A:62A-1.1, part of the Good Samaritan Act, N.J.S.A. 2A:62A-1 to -2, provides:

A municipal, county or State law enforcement officer is not liable for any civil damages as a result of any acts or omissions undertaken in good faith in rendering care at the scene of an accident or emergency to any victim thereof, or in transporting any such victim to a hospital or other facility where treatment or care is to be rendered; provided, however, that nothing in this section shall exonerate a law enforcement officer for gross negligence.

Although this statute would on its face appear plainly applicable to the actions of the police officer defendants here, plaintiffs argue it does not apply. Relying on our opinion in Murray v. Plainfield Rescue Squad, 418 N.J. Super. 574, 587-88 (App. Div. 2011), rev'd on other grounds, 210 N.J. 581 (2012), they contend this court has held that the Good Samaritan Act was enacted to encourage the rendering of medical care to those discovered by chance and was not intended to confer immunity on public employees under a pre-existing duty to render emergency aid, as the police officers in this matter.

Plaintiffs reliance on Murray is misplaced because there we were addressing another part of the Good Samaritan Act, N.J.S.A. 2A:62A-1, which addresses not police officers, but individuals and members of volunteer ambulance or rescue squads who render emergency care to victims in need. Although Murray is not on point, in that case we cited another, Praet v. Borough of Sayreville, 218 N.J. Super. 218, 224 (App. Div.), certif. denied, 108 N.J. 681 (1987), where we did decline to apply N.J.S.A. 2A:62A-1 to the acts of police officers.

Some years after our decision in Praet, however, the Legislature amended the Good Samaritan Act by adding a new section, N.J.S.A. 2A:62A-1.1, to expressly provide immunity to police officers for acts taken in good faith in rendering care

at the scene of an emergency. Accordingly, the officers here are entitled to the immunity afforded by N.J.S.A. 2A:62A-1.1, notwithstanding our earlier views about the statute as it existed prior to the amendment, so long as they can demonstrate that their actions were undertaken in good faith and were not grossly negligent.

"'Good faith' has been defined as 'honesty of purpose and integrity of conduct without knowledge, either actual or sufficient to demand inquiry, that the conduct is wrong.'" Fields v. St. Joseph's Hosp. & Med. Ctr., 305 N.J. Super. 244, 248 (App. Div. 1997) (quoting Marley v. Borough of Palmyra, 193 N.J. Super. 271, 294 (Law Div. 1983)). Although such questions are often left to a jury, summary judgment "is appropriate if public employees can establish that their acts were objectively reasonable or that they performed them with subjective good faith." Canico v. Hurtado, 144 N.J. 361, 365 (1996). Under this test, even an officer who was negligent in the performance of his or her duties is entitled to qualified immunity, if their acts were undertaken in an objectively reasonable manner. Fields, supra, 305 N.J. Super. at 248.

Applying that test here, we have no hesitation in affirming the trial court's grant of summary judgment to these officers. Viewing the facts in the light most favorable to plaintiffs and

giving them the benefit of all reasonable inferences, no reasonable jury could conclude on the facts presented that the officers' actions were anything other than objectively reasonable and performed in good faith.

The officers arrived on the scene within five minutes of being dispatched. In the five or so minutes they were responsible for Mascolo's care before the ambulance squad arrived, they determined she had a thready pulse and was breathing, although non-responsive. They immediately thereafter began administration of oxygen. Assuming the mask they initially employed was leaking, DeSiervo admitted the problem was corrected within fifteen seconds. When Mascolo's breathing did not improve, the officers determined to increase oxygen flow by employing a bag valve mask. As all evidence shows that Mascolo was breathing and had a pulse while she was in the officers' care, their failure to start CPR or apply an AED cannot be said to be objectively unreasonable.

Turning to defendant Elmwood Park Ambulance Corps., plaintiffs do not dispute that they are a volunteer organization entitled to assert qualified immunity under N.J.S.A. 2A:53A-13 and 2A:53A-13.1, which cloak volunteer ambulance squads and their members providing emergency public first aid and rescue services with immunity from "damages as a result of any acts of

commission or omission arising out of and in the course of the rendition in good faith of any such services." As we have explained elsewhere, these statutes provide broad immunity to volunteer rescue squads and fire companies and their members for their actions while engaged in firefighting or first-aid rescue services. See Stollenwerk v. Twp. of Mullica, 316 N.J. Super. 379, 382 (App. Div. 1998) (holding the willful and wanton standard in N.J.S.A. 2A:53A-13, also applies in N.J.S.A. 2A:53A-13.1).

To establish willful or wanton injury, a plaintiff must show "that one with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result." Ibid. (quoting Egan v. Erie R.R. Co., 29 N.J. 243, 254-55 (1959)). There is certainly no view of the facts that could fairly characterize the actions of the ambulance squad as willful and wanton.

The ambulance crew chief made a decision that the best course of action was to get Mascolo out of the house and into the ambulance as quickly as possible to allow the paramedics, who had already arrived, to provide a higher degree of care than

what the EMTs could offer. Although plaintiffs' experts fault the squad for not reassessing Mascolo's condition every ten feet, and surmise that Mascolo lost her pulse during that move before coming under the paramedics' care, the evidence does not support their speculations. See Townsend v. Pierre, 221 N.J. 36, 55 (2015) (holding "[a] party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record").

The paramedic testified at deposition that the run sheet confirmed he found a thready pulse at Mascolo's wrist on his initial assessment of her, and that she was "pink, warm and dry," proving that she still had a pulse and had successfully been receiving oxygen when the EMTs relinquished care to the paramedics. Because the only evidence in the record demonstrates that Mascolo was not pulseless before the ambulance squad turned her care over to the paramedics, plaintiffs' experts' speculations to the contrary were not sufficient to stave off summary judgment. See *ibid.* As with the police officers, because the evidence shows that Mascolo was breathing and had a pulse while she was in the care of the ambulance squad, their failure to start CPR or apply an AED cannot be said

to be objectively unreasonable much less willful and wanton conduct.

Because the police officers and the ambulance squad and its members are immune for all claims arising out of their actions in response to the emergency at Mascolo's home, defendants were also entitled to summary judgment on plaintiffs' claims for negligent infliction of emotional distress. Summary judgment against Elmwood Park and its police department was likewise appropriate as plaintiffs' only claims against them were vicarious ones. See N.J.S.A. 59:2-2b; Stollenwerk, supra, 316 N.J. Super. at 383-84.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION