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2 No. 62
Lewis Kovit et al., Respondents,
 v.
Estate of Katherine Hallums,
 Respondent,
City of New York, Appellant,
et al., Defendant.

2 No. 63
Norman Lazan, et al., Respondents,
 v.
County of Suffolk, Appellant.

Case No. 62:

Pamela Seider Dolgow, for appellant.
Stephen C. Glasser, for respondents Kovit.
Submitted by David C. Smith, for respondent Estate of
Hallums.

Case No. 63:

Christopher A. Jeffreys, for appellant.
Submitted by Peter G. Lavrenchik, for respondents.

ROSENBLATT, J.:

As we explained in Pelaez v Seide (2 NY3d 186, 193
[2004]), municipalities generally enjoy immunity from liability
for discretionary activities they undertake through their agents,
except when plaintiffs establish a "special relationship" with

the municipality. The two cases before us present questions of municipal liability for the actions of police officers in traffic situations. We conclude that in both instances the plaintiffs have not established a special relationship, and their claims must therefore be dismissed.

I. Kovit v Hallums

While driving her car, Katherine Hallums collided with a vehicle carrying security officers from the Kings County Hospital. According to witnesses, the accident left her shaken and so "hysterical" that the security officers tried to calm her down. When New York City police arrived on the scene, an officer told her to move her car forward and out of the middle of the intersection where it had stopped. Although plaintiff was standing directly behind Hallums's car, she moved the vehicle backward instead of forward, crushing plaintiff's legs between her car and the one behind her. In his suit against the City, plaintiff alleged that the police officer acted negligently when he told Hallums to move her car while she was unfit to drive.¹ A jury found the City 100 percent responsible for plaintiff's injuries, even though it found that Hallums was also negligent. The Appellate Division reversed, concluding that on the facts, it was impossible for Hallums to have been negligent but not in some

¹Plaintiff also sued Hallums and the other driver. Only the issue of the City's liability is before us.

degree responsible for plaintiff's injuries (see 261 AD2d 442 [2d Dept 1999]). Upon retrial, another jury found the City 97% at fault. In a second appeal, the Appellate Division upheld the liability determination (see 307 AD2d 336 [2d Dept 2003]).² We granted leave and now reverse.

The police officer was exercising his discretion when he told Hallums to move her car. Even if we were to assume Hallums was unfit to drive and that the officer knew or should have known it, municipal liability to plaintiff would not follow. To hold the City liable for the negligent performance of a discretionary act, a plaintiff must establish a special relationship with the municipality.

We made this point in Kenavan v City of New York (70 NY2d 558, 569 [1987]). There, the plaintiff was injured because firefighters had parked firetrucks improperly. The Court held that there is municipal immunity from suit when the conduct complained of "involves the exercise of professional judgment," even if the judgment was poor in retrospect (see also Balsam v Delma Eng'g Corp. (90 NY2d 966, 967 [1997])). We have municipal immunity because of what we demand from public officials in the performance of their duties. If liability flowed from every negligent action, officials would be trained to shrink from their responsibility so as to avoid possible costs to their municipal

²Finding the award excessive, the Appellate Division modified the judgment by ordering a new trial unless plaintiff agreed to a reduction in damages.

employers. We expect better of our government, and therefore protect the discretion of its agents so municipalities will encourage them to carry out their duties in the service of the public.

The exception to the rule, as we noted in Pelaez (2 NY3d at 193), is when the plaintiff establishes a special relationship with the municipality.³ Here, plaintiff fails to do so. Establishing a special relationship based on a municipality's assumption of a duty requires (1) an assumption by a municipality, through promises or actions, of an affirmative duty to act on behalf of the injured party; (2) knowledge on the part of a municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (see Pelaez, 2 NY3d at 202; Cuffy v City of New York, 69 NY2d 255, 260 [1987]).

Plaintiff does not satisfy the third element of this test.⁴ The police officer's contact was with Hallums, not plaintiff. Not only was there a lack of a special relationship

³See also Kircher v Jamestown, 74 NY2d 251, 255 (1989) (describing as "legion" the cases of this Court holding municipalities immune from suit for exercising governmental powers including police protection absent a special relationship, and holding there could be no liability when a police officer learned about a possible crime in progress but took no action).

⁴Although the parties dispute the application of the other three elements, we need not consider them because plaintiff's failure to satisfy the third is dispositive.

between plaintiff and the police officer, there was no material communication or relationship at all. As we held in Lauer v City of New York (95 NY2d 95, 100 [2000]), "[w]ithout a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." Factually and legally, plaintiff and the police were strangers. Under those circumstances, the City cannot be held liable.

II. Lazan v County of Suffolk

After plaintiff pulled his car over to the shoulder of the Long Island Expressway, a Suffolk County highway patrol officer came up behind him with flashing lights. Plaintiff left his car and walked back to the police cruiser to speak with the officer. In his complaint, plaintiff alleges that he told the officer he had chest pains and was not feeling well. He did not, however, allege that he told the officer he was too ill or dizzy to drive.⁵ After explaining that it was not safe to park on the side of the road, the officer told plaintiff to move his car to the nearest service station. Plaintiff drove off, but soon lost

⁵At one point in his deposition, plaintiff explained that he told the police officer that he only parked on the shoulder because he did not feel well. He also said that he had felt dizzy and faint and did not feel like driving, but was unclear as to whether he told those things to the officer. Later in the same deposition, plaintiff stated that he could not remember what he told the officer. Moreover, the record includes a transcript of a police department internal investigation hearing where plaintiff testified that he himself did not realize he was not well enough to drive when he pulled off the shoulder.

control of his car and suffered serious injuries after driving it into a guardrail and a telephone pole. Plaintiff sued Suffolk County, asserting that the police officer -- with whom he alleged a special relationship -- was to blame for his injuries. Supreme Court denied the County's motion for summary judgment and the Appellate Division affirmed, certifying to us the question whether its order was proper. We answer in the negative.

The second prong of the Pelaez/Cuffy test for special relationship liability requires "knowledge on the part of a municipality's agents that inaction could lead to harm" (Pelaez, 2 NY3d at 202). Here, plaintiff never expressly told the police officer he was too sick to drive, and the record shows it was not manifestly clear to the officer that plaintiff was so disabled that he could not drive a short distance to a safer location. Therefore, as a matter of law, neither plaintiff's explanation to the police officer nor his appearance put the officer on notice that instructing plaintiff to remove his car from the shoulder of the expressway could lead to harm. Under these circumstances, we cannot expect the police to make a refined, expert medical diagnosis of a motorist's latent condition. Requiring them to do so would improperly burden police in carrying out their duties.

For there to be special relationship-based liability, a municipality's agent must be clearly on notice of palpable danger, as where it is so obvious that a layman would ascertain it without inquiry, or where a person unambiguously communicated

his incapacity to the officer. At that point, the officer would have to weigh the danger of leaving the car in a dangerous situation (at least until help arrived) against the danger posed by having the driver move the car. This calls for discretion and could result in liability only when it is clear that the danger in having the driver move the car outweighs the danger inherent in leaving the car in place for some time. In this case, however, the highway patrol officer was not adequately on notice to satisfy this test.

Accordingly, in Kovit, the order of the Appellate Division should be reversed, with costs, and the complaint against the City dismissed. In Lazan, the order of the Appellate Division should be reversed, with costs, defendant's motion for summary judgment dismissing the complaint granted and the certified question answered in the negative.

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Case No. 62: Order reversed, with costs, and the complaint against defendant City of New York dismissed. Opinion by Judge Rosenblatt. Chief Judge Kaye, and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

Case No. 63: Order reversed, with costs, defendant's motion for summary judgment dismissing the complaint granted and certified question answered in the negative. Opinion by Judge Rosenblatt. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Graffeo, Read and R.S. Smith concur.

Decided May 3, 2005