

<b>McMullin v Village of Spring Val.</b>
2024 NY Slip Op 35051(U)
March 25, 2024
Supreme Court, Rockland County
Docket Number: Index No. 036896/2021
Judge: Sherri L. Eisenpress
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

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DERRICK T. McMULLIN II, as Administrator of  
The Estate of TINA MARIE DAVIS, and on his  
own behalf,

Plaintiff,

- against -

VILLAGE OF SPRING VALLEY,

Defendant.

-----X  
EISENPRESS, J.S.C.

**DECISION & ORDER**

Index No.: 036896/2021  
Motion Seq.: 2

The papers filed electronically as NYSCEF 31-79 were read on this Notice of Motion by defendant for an Order, pursuant to CPLR 3212, for summary judgment and dismissing this action in its entirety.

Upon the foregoing papers, the motion is determined as follows:

Plaintiff, decedent's adult son and administrator of her estate, commenced the instant negligence/wrongful death action on December 28, 2021, arising out of the police response to pre-dawn 911 calls on January 4, 2020, that decedent, Tina Davis, was outdoors breaking car windows and chasing an individual with a stick. The Complaint, which contains three causes of action, to wit: a negligence claim and two derivative claims of wrongful death and loss of consortium, listed six "actions and omissions evincing negligence or gross negligence" including: (1) the failure by the dispatcher to identify Davis as a person suffering from mental illness and a person with a history of substance abuse and to provide responding officers with such information; (2) the failure of the dispatcher to dispatch mental health providers to the scene to de-escalate any conflict between the reporting officers and Davis; (3) the responding police officers' negligent failure to de-escalate the situation and instead

escalated the conflict with the decedent, needlessly using a stun gun or taser and further aggravating her mental and medical distress; (4) that the use of force was unnecessary and significant increased the likelihood of the tragic outcome which followed; 5) that after subduing decedent, defendant failed to promptly respond with appropriate and necessary urgency to her physical/medical decompensation and the lack of urgency reduced the chance of medical interventions which could have saved Ms. Davis's life; and (6) that the medical units which defendant controlled failed to promptly respond to the scene and failed to actually administer treatment and care in a timely manner. The Court notes that no intentional tort such as use of excessive force was pled and/or argued in opposition to the motion to dismiss.

Defendant sought to dismiss the action pursuant to CPLR § 3211(a)(7) for failure to state a cause of action. By Decision and Order dated September 12, 2022, this Court dismissed all causes of action and claims "except as to Plaintiff's allegations that defendant-once decedent was under its officers' positive control- proximately caused decedent's pain, suffering and death by delaying provision of emergency medical care and particularly administration of naloxone pending arrival of paramedics and/or an ambulance." Additionally, the Court made clear that even if Plaintiff could prove a delay in providing medical care pending the arrival of medical professionals, the claim would still fail if that delay stemmed from an affirmative exercise of governmental discretion.

#### **Relevant Facts**

Defendant Village of Spring Valley ("Spring Valley") has a police department consisting of about 50 police officers, including patrol officers, sergeants, lieutenants, and a Chief of Police. The Department has its own 24-hour dispatch system and during the overnight shift, instead of a dispatcher, a police officer answers "911" calls for the Department. The Village does not own, operate, control or otherwise manage its own ambulance service and does not employ any paramedics or emergency medical technicians.

Once a year, police officers receive training relating to the administration of Narcan and other medical resuscitation efforts from the Spring Valley Police Department. One

training day is exclusively for medical training, including training on how and when to administer Narcan and CPR, as well as how and when to use a defibrillator. Officer John Roper testified with respect to department policy. He testified that Narcan was to be used when an individual is unresponsive, not breathing and illicit drug use is suspected and a defibrillator is to be used when a person is unresponsive with no discernible pulse. Officer Sean Jordan testified that defibrillation was to be started after CPR.

Surveillance footage from approximately 5:09 a.m. on January 4, 2020, shows Ms. Davis exiting 79 Fred Hecht Drive, Spring Valley, NY, and as she reaches the sidewalk, she falls and begins convulsing on the ground. Approximately one minute after falling to the ground, Ms. Davis lifts herself up and begins to fight with another person. Ms. Davis falls to the ground again as a man runs away and when she gets up and walks to a red car, it appears as if she rips off a car antenna.

At 5:11 a.m., Rockland "911" receives a call from an anonymous caller, later determined to be Benita Giles, reporting, "[D]avis is out here bugging the [expletive] out. She's busting peoples' car windows out." The 911 call was transferred to the SVPD where the dispatcher told the caller that officers were *en route*. Video surveillance shows that at the time Giles made her 911 call, Davis was smashing the windshield, hitting the car and trying to open the car doors. The video also shows Davis chasing an individual around the car and down the street holding what looks like the car antenna she had ripped off a vehicle. At 5:11 a.m., three officers- PO Levy, PO Pettiford, and PO Jordan- are dispatched to the scene and told "[a]pparently, Tina Davis is out there smashing car windows." At 5:12 a.m., a second 911 call is received wherein a woman later identified as Celeste Clauser reports "[T]here's this girl named Tina Davis. She smashed my windshield. She's chasing me with a stick."

At 5:16 a.m., PO Levy advised headquarters that he was pulling up to 179 Fred Hecht Drive. At 5:17 a.m., PO Levy arrived at the scene and saw Davis chasing Clauser down the street towards his direction. The officer testified that he tried to calm Davis down, but she refused to follow commands, stating multiple times "you will have to kill me." PO Levy testified

that he tried to step in between Davis and Clauser but Davis tried to push past him, and Officer Levy tried to place Davis into handcuffs, but she became resistant and combative. Sgt. Thomas Koziak was second to arrive at approximately 5:16 a.m., after hearing dispatch say that a person was breaking car windows. Upon arrival, Sgt. Koziak went on the police radio to ask if any other officers were responding to the call.

Thereafter, a struggle ensued between Davis and Sgt. Koziak and PO Levy as they tried to handcuff Davis. At one point, as Sgt. Koziak tried to resecure Davis's right arm from behind, Davis pushed backwards causing everyone to stumble and slowly fall to the ground. Davis screamed and spit and when one of Davis's wrists was handcuffed, she pulled on PO Levy's vest and then spit towards him. Sgt. Koziak announced he was going to "drive stun" Davis's arm and when she would not release PO Levy's vest after being directed to do so, Sgt. Koziak used the taser against Davis's left forearm and delivered an electric shock to Davis on her sweatshirt. Sgt. Koziak pulled the taser away allowing it to finish its five-second cycle, deactivated it, and return it to his holster.

At 5:19 a.m., once Davis was in handcuffs, Sgt. Koziak contacted the police dispatcher to request a medic because he noticed Davis had a white foamy substance coming from her mouth and her eyes were very wide, leading him to conclude, according to his testimony, that Davis was under the influence of some type of narcotic. Within seconds the dispatcher requested a medic to the scene. PO Jordan arrived on scene and secured Davis's legs as she kept trying to kick everyone. Once Davis stopped kicking, PO Jordan released her feet and she remained in the "recovery position," with her hands handcuffed in front of her. At 5:21 a.m., Sgt. Koziak radioed PO Edwin Pineda-Mata, the dispatcher on duty, to confirm that EMS was on the way. Also, at 5:21 a.m. Officer Pettiford arrived on the scene and testified that he observed Davis to be subdued but still struggling on the ground.<sup>1</sup> PO Roper arrived at

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<sup>1</sup> Plaintiff contends that Davis was unconscious at 5:19 a.m. and cites Sgt. Koziak's testimony at pages 57-59 to support this contention. However, the Court finds this testimony to be unclear as to whether Davis was unconscious for the entire ten minutes or for a portion of that time. Nonetheless for purposes of this motion, the Court will accord Plaintiff the benefit of the doubt with respect to his interpretation of the testimony.

5:24 a.m. and testified that upon arrival, he saw Davis lying on the ground on her left side and Sgt. Koziak kneeling behind her with his body between a parked car and Davis's back. PO Roper observed at this time that Davis's eyes were closed and testified that she appeared to be "sleeping."

At 5:29 a.m., Sgt. Koziak called Officer Mata over the radio requesting EMS to "step it up." Koziak testified that at this time Davis appeared to be unconscious with her eyes closed, breathing heavily and grunting. Sgt. Koziak testified that moments later it appeared Davis stopped breathing while she had a faint pulse, but by 5:32 a.m., he detected no pulse after which he rolled her over, handcuffs were removed by PO Roper, and CPR begun by Sgt. Koziak between 5:32 and 5:33 a.m. While Sgt. Koziak gave CPR to Davis, PO Roper retrieved an AED kit from his police vehicle which Narcan in it. Officer Jordan administered one dose of Narcan around 5:32 a.m., which had no noticeable effect upon Davis. At 5:33 a.m., the medic that covers the area arrived on the scene and took over CPR. Spring Hill EMS arrived roughly 3 minutes after the medic, at about 5:36 a.m.

After a paramedic inserted a breathing tube and administered epinephrine and sodium bicarbonate, Davis regained her pulse but never regained consciousness. Hospital records indicate that Davis arrived at Good Samaritan Hospital's Emergency Room at 6:13 a.m., and upon arrival was given a primary diagnosis of a cardiac arrest. On January 5, 2020, after Davis was declared brain dead, she was removed from life support and pronounced dead at 11:10 p.m. that evening.

An autopsy was performed by Dr. Laura Carbone, Medical Examiner, who issued a report. The autopsy report lists the cause of death as:

Complications of anoxic encephalopathy with multi-organ failure and acute myocardial infarct approximately 42 hours status-post sudden cardiac arrest due to acute cocaine and alcohol intoxication with seizure activity, agitated behavior and police restraint

The manner of death is listed as "could not be determined." Dr. Carbone noted various external injuries consistent with the agitated behavior of Davis depicted on video footage and

found no external injuries related to the police interaction with Davis. Dr. Carbone opined that the way police officers positioned Davis when handcuffing her did not contribute to the cause of death. Toxicology tests collected around 6:30 a.m. on January 4, 2020, showed high amounts of cocaine and ingestion of alcohol.

### **The Parties' Contentions**

After the conclusion of discovery, Defendant moved for summary judgment and dismissal of the action. Defendant asserts that there are no triable issues of fact as to whether the police officers were negligent in administering medical care to Davis pending the arrival of medical professionals, and therefore breached no duty owed to her. More specifically, Defendant asserts that the medical care provided followed their mandatory in-service training and acceptable police practice. Furthermore, Defendant contends that the negligence claim also falters under the "proximate cause" element as there is no evidence that any actions by responding officers proximately caused Davis's drug and alcohol-induced cardiac arrest and subsequent death. Lastly, it asserts that the common law doctrine of governmental or discretionary immunity blunts any claim of negligence for discretionary actions by government officials taken during the performance of governmental functions.

In opposition to the motion, Plaintiff argues that a reasonable jury could conclude that Ms. Davis became unresponsive at 5:21 a.m. and that she was surrounded by four Spring Valley Police Officers that did not intervene for at least twelve minutes. More specifically, Plaintiff defines said "intervention" as meaning the use of CPR, Narcan/Naxolone or the available defibrillator which he asserts, should have been used immediately upon her unresponsiveness. With respect to the use of Narcan, Plaintiff argues that Davis was not administered it until eleven minutes after she lost consciousness. In addressing the governmental immunity claim made by Defendant, Plaintiff argues that Defendant owed Davis a special duty, that Spring Valley police officers knew plaintiff was in an unconscious state and Defendant's agents "arguably created the medical emergency," and had exclusive control over her to "afford non-negligent medical care." Plaintiff concedes that the officers made

discretionary decisions but argues that these decisions were not "reasoned" or consistent with departmental policy or proper police practices.

Plaintiff submits the affidavit of Dr. Peter Lawrence, a Board-Certified physician in emergency medicine who represents that he is "fully aware of the standard of care for board certified emergency physicians, Advanced Cardiac Life Support (ACLS) certified and other physicians in New York." Dr. Lawrence opines that Davis sustained Sudden Cardiac Death due to ventricular fibrillation<sup>2</sup> ("VF") caused by the taser and that the failure to use the defibrillator in the management of VF bespeaks to inadequate training or the negligent failure to implement training and the nine-minute delay was a critical and catastrophic departure from good and acceptable care<sup>3</sup>. Although Dr. Lawrence opines that Naloxone should have been administered sooner, he concedes that it would not work to treat the cocaine in Davis's system and would only result in a decrease in blood alcohol concentration. Dr. Lawrence opines that the failure to utilize the defibrillator until nine minutes after Ms. Davis lost consciousness deprived her of her last opportunity to live and constituted negligence.

In reply, Defendant asserts that regardless of when Davis became unconscious, she did not stop breathing and start needing resuscitation until 5:32 a.m. With respect to Dr. Lawrence's affidavit, Defendant asserts that it offers only unsupported conjecture about Davis's cause of death, particularly his claim that the taser killed Davis. With respect to use of a defibrillator ("AED"), Defendant notes that paramedics did so in under two minutes after Sgt. Koziak began CPR when Davis stopped breathing and no medical records show that Davis was ever in VF, thus Dr. Lawrence's affidavit is speculative.

With regard to the issue of whether there existed a special duty, while Defendant disputes one existed, it argues that it nonetheless met that obligation, as the law

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<sup>2</sup> Ventricular Fibrillation is an irregular heart-beat associated with cardiac arrest that can only be treated with defibrillation by electricity.

<sup>3</sup> Notwithstanding this diagnosis, Dr. Lawrence concedes that he "has not seen this exact case where a taser induced ventricular fibrillation," but submits that he is well aware of it through the medical literature, interactions with colleagues, educational rounds and continuing medical education," the source of which is not identified.<sup>3</sup>

merely required Defendant's agents to procure medical attention for her once they knew or reasonably should have known she needed it, and Sgt. Koziak summoned medical attention at the earliest opportunity before Davis became unconscious and before she stopped breathing. Defendant further argues that it did more than call for medical professionals but acted to safeguard Davis by placing her in the "recovery position", monitoring her for signs of breathing and once she stopped breathing and needed resuscitation, Sgt. Koziak began CPR while another officer obtained a medical kit with an AED and a dosage of Narcan which was administered. As for the issue of a negligent delay in applying an AED, Defendant argues that the evidence is undisputed that Davis did not stop breathing until 5:32 a.m. and the paramedics arrived at 5:33 a.m. when they applied an AED and took over CPR.

Defendant argues that in addition to wrong facts, Plaintiff, and his expert attempt to hold officers to the wrong standard of care- that expected of a medical professional and the law does not expect police to act like doctors in an emergency room. Thus, the issue is whether the officers' actions fit the standard of care that would be exercised by a reasonably prudent non-medical person or a police officer in similar circumstances. Defendant further asserts that officers followed protocol by placing Davis in the recovery position and there is no officer training requiring officers to retrieve an AED kit from their vehicle before someone stops breathing.

Defendant also argues that Plaintiff cannot recover damages for negligence based on the responding officers' use of a taser, as this Court disposed of any negligence claim sounding in an intentional tort because no action for negligent assault exists in New York. Lastly, Defendant argues that the police officers' actions in rendering medical care while waiting for an ambulance were discretionary and protected by immunity. It asserts that Plaintiff failed to raise a triable issue of fact that the officers deviated from acceptable police practice.

### Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). "On a motion for summary judgment, facts must be viewed 'in the light most favorable to the non-moving party.'" Vega v. Restani Const.Corp., 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13 (2012).

When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose. Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 425, 972 N.Y.S.2d 169 (2013). If the municipality's actions fall in the proprietary realm, it is subject to suit under ordinary rules of negligence applicable to nongovernmental parties. Id. "A government entity performs a purely proprietary rule when its "activities essentially substitute for or supplemental traditionally private enterprises." Id. "In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts

are 'undertaken for the protection and safety of the public pursuant to the general police powers.'" *Id.* Police and fire protection are examples of long-recognized, quintessential governmental functions. *Valdez v. City of New York*, 18 N.Y.3d 69, 75, 936 N.Y.S.2d 587 (2011). Here, the Court finds that the police response to Ms. Davis's medical situation constituted a governmental function.

The second principle relevant here relates not to an element of plaintiffs' negligence claim but to a defense that is potentially available to Defendant- the governmental function immunity defense. *Id.* "A public employee's discretionary acts- meaning conduct involving the exercise of reasoned judgment- may not result in the municipality's liability even when the conduct is negligent." *Lauer v. City of New York*, 95 N.Y.2d 95, 711 N.Y.S.2d 112 (2000). "In other words, even if a plaintiff establishes all elements of a negligence claim, a state or municipal defendant engaging in a governmental function can avoid liability if it timely raises the defense and proves that the alleged negligent act or omission involved the exercise of discretionary authority." *Valdez*, 18 N.Y.3d at 76. Thus, in summary, "[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general. *McLean v. City of New York*, 12 N.Y.3d 194, 203, 905 N.Y.S.2d 238 (2009).

A municipal defendant cannot be held liable for negligent acts of its police officers when it shows the alleged negligent acts involved the exercise of discretionary authority. *Devlin v. City of New York* 193 A.D.3d 819, 821, 148 N.Y.S.3d 149 (2d Dept. 2021). "Discretionary acts 'involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.'" *Id.* Moreover, the immunity afforded a municipality presupposes an exercise of discretion in compliance with its own procedures. *Id.* Stated another way, municipalities are immune from liability based on the discretionary acts of their employees- including police officers- provided the actions of the officers were not

inconsistent with acceptable police practice. Bancroft v. City of Mount Vernon, 672 F.Spp.2d 391, 409 (S.D.N.Y. 2009)(citing McCormack v. City of New York, 80 N.Y.2d 808, 811 (1992))

Applying the law to the facts in this matter, the Court finds that the police officers' decisions regarding the emergency medical care rendered to Davis before emergency medical services arrived were of a discretionary nature, and as such, no liability can lie even if their actions could be found to be negligent by a fact-finder. More specifically, Officer Koziak made a discretionary decision to place Davis on her side in the "recovery" position after they hand-cuffed her and the officers continued to monitor her until such time as she ceased breathing. It was at that time that he made the decision to use Narcan and begin CPR. Approximately, one minute later, emergency medical personnel arrived and took over. While this Court will accept Plaintiff's contention for purposes of this motion that Ms. Davis was rendered unconscious at 5:21 a.m., there is no contrary evidence in the record that she ceased breathing, and did not have a pulse, before 5:32 a.m. when resuscitation efforts were undertaken. Medics arrived one minute later at 5:33 a.m. and continued with Ms.' Davis's medical care.

Defendant demonstrated in its moving papers that it complied with the police departments procedures with respect the use of Narcan and the use of an AED, to wit: Narcan was to be used when an individual is unresponsive, not breathing and illicit drug use is suspected, and a defibrillator or AED is to be used when a person is unresponsive with no discernible pulse. The undisputed evidence in this case is that while Ms. Davis may have been unconscious as early as 5:21 a.m., she was breathing and had a discernible pulse until approximately 5:32 a.m.

In opposition to the prima facie showing, Plaintiff failed to demonstrate a triable issue of fact that the officers' actions were inconsistent with acceptable police practices. Much of Dr. Lawrence's affidavit is based on conjecture and not supported by the evidence,

particularly his conclusion that Ms. Davis was in VF<sup>4</sup> caused by the application of a taser<sup>5</sup>. “The opinion testimony of an expert must be based upon facts in the record or personally known to the witness.” Zeppetelli v. 1372 Broadway, LLC, 222 A.D.3d 813, 814, 201 N.Y.S.3d 236 (2d Dept. 2023). “An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion.” Id.

Moreover, Dr. Lawrence seeks to hold the police officers to the wrong standard of care- that of a medical professional instead of the standard of care to be exercised by a reasonably prudent non-medical person. He does not opine that the police officers, with the training they received, would have been able to diagnose that Ms. Davis was in VF, allegedly as the result of being tasered, and would have known to immediately apply an AED device, despite their observations that she was breathing and still had a pulse. With respect to Dr. Lawrence’s opinions that Narcan should have been administered sooner, this claim must fail because by Dr. Lawrence’s own admission, said failure could not be a proximate cause of her death. More specifically, Dr. Lawrence concedes in his affidavit that Narcan did not have any effect on the cocaine ingested by Ms. Davis. As such, any delay in administering Narcan could not have contributed to Ms. Davis’s death as a matter of law. As Plaintiff has failed to demonstrate a triable issue of fact that would defeat the police officers’ qualified immunity defense, the Complaint requires dismissal.

Accordingly it is hereby

ORDERED that Defendant’s Notice of Motion for summary judgment is GRANTED in its entirety, and the action is dismissed.

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<sup>4</sup> When emergency services arrived, her presenting heart rhythm was asystole (flatline) and not VF and no medical shows Davis was ever in VF. Dr. Lawrence concedes in his affidavit that when a person is not in VF, an AED would report “no shock is advised.”

<sup>5</sup> Dr. Lawrence fails to specify whether the medical literature relied upon related to the application of a taser in the unused “probe” mode (shoots barbs under the skin to lock a person’s neuromuscular system) or the “drive stun” mode (administered over the cloths, as in this case.)

The foregoing constitutes the Decision and Order of this Court on Motion #2.

Dated: New City, New York  
March 25, 2024



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HON. SHERRILL EISENPRESS, J.S.C.

cc: All counsel via NYSCEF