

SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

October 21, 2009

Augustus H. Evans, Jr.
James T. Vaughn Correctional Center
1181 Paddock Road
Smyrna, DE 19977

Daniel A. Griffith, Esquire
Whiteboard, Taylor, Preston, LLC
1220 N. Market Street, Suite 608
Wilmington, DE 19801

**RE: Augustus H. Evans, Jr. v. Sergeant Tommy Lee
Civil Action No. S07C-03-009 THG**

Dear Mr. Evans and Mr. Griffith:

Before the Court is Sergeant Tommy Lee's Motion for Summary Judgment. Because Mr. Augustus Evans, Jr. ("Plaintiff") is incarcerated and *pro se*, the Court extended him an opportunity beyond that required by the Superior Court Civil Rules in order to allow him to identify the proper Defendant and to explore fully any factual matters. Now, with briefing complete with regard to Sergeant Lee's Motion for Summary Judgment, the Court has determined summary judgment must be granted in favor of Sergeant Lee.

UNDISPUTED FACTUAL BACKGROUND

1. Augustus H. Evans, Sr. was the Plaintiff's father. He resided in Seaford and was a personable fellow, who, at times, drank too much alcohol. The term "happy drunk" has been used to describe him, i.e., a likeable person who sometimes drank to intoxication. Plaintiff agrees with this description of Mr. Evans, Sr.

2. The City of Seaford police officers knew Mr. Evans, Sr. They would regularly and routinely give him a ride back to his residence when they saw him out and about in Seaford.

3. On July 14, 2006, Sergeant Lee observed Mr. Evans, Sr. in the Third and North Street area of Seaford. Sergeant Lee observed that Mr. Evans, Sr. appeared intoxicated. Later that evening, a blood test determined Mr. Evans, Sr.'s Blood Alcohol Content was .14.

4. As Sergeant Lee had done in the past, he gave Mr. Evans, Sr. a ride to Mr. Evans, Sr.'s residence at the Virginia Crest Apartments in Seaford.

5. After Sergeant Lee dropped off Mr. Evans, Sr., Sergeant Lee departed and continued his patrol responsibility.

6. Unbeknownst to Sergeant Lee, Mr. Evans, Sr. had been temporarily relocated to a motel because a flood had damaged his Virginia Crest apartment. Simply put, Sergeant Lee dropped off Mr. Evans, Sr. at the place Sergeant Lee believed Mr. Evans, Sr. lived but not where Mr. Evans, Sr. was actually living at the time.

7. Mr. Evans, Sr. wandered away from the Virginia Crest Apartments in a direction opposite from the motel where he was temporarily living.

8. Mr. Evans, Sr. was subsequently struck and killed by an automobile.

9. Plaintiff seeks damages from Sergeant Lee arising from the death of Plaintiff's father based upon the above facts.

DEFENDANT'S POSITION

The defense argues Sergeant Lee is protected under the County and Municipal Tort Claims Act as set forth in 10 *Del. C.* §4010, *et seq.*

Sergeant Lee's position is twofold:

First, the defense argues that Sergeant Lee's conduct cannot, under any conceivable theory, be considered to have been performed with "wanton negligence or willful and malicious intent" as required for a municipal employee to be subject to civil liability under 10 *Del. C.* § 4011(c).¹

Second, the defense argues that Plaintiff, while experiencing the unfortunate loss of his father, has failed to establish "bodily injury" to himself arising from the death of his

¹This section reads, "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." 10 *Del. C.* § 4011(c).

father. Absent “bodily injury”, the lawsuit must be dismissed pursuant to 10 *Del. C.* § 4011(c).

PLAINTIFF’S POSITION

Plaintiff argues that Sergeant Lee was negligent in executing his duty to exercise reasonable care on behalf of Mr. Evans, Sr. Plaintiff argues that the negligence issue is a fact question for the jury and that summary judgment should be denied. To the extent Plaintiff argues that the wrongful death statute, 10 *Del. C.* §3724, trumps the immunity granted by the Tort Claims Act, Plaintiff is simply mistaken. The wrongful death statute gives Plaintiff the status and standing to bring this suit, but Sergeant Lee’s conduct is to be judged pursuant to the Tort Claims Act.

Plaintiff argues that Sergeant Lee, when he decided to take an intoxicated person off the streets, had the duty to deposit the intoxicated person in a place of safety. I agree with Plaintiff that Sergeant Lee had this duty.

Plaintiff argues that because his father was dropped off at an apartment building from which his father had been temporarily displaced, Sergeant Lee was negligent. In making this argument, Plaintiff fully acknowledges that Sergeant Lee mistakenly dropped off Mr. Evans, Sr. at the Virginia Crest Apartments because Sergeant Lee did not know of Mr. Evans, Sr.’s temporary move to a motel due to damage to the Virginia Crest residence. Plaintiff does not explain how Sergeant Lee was negligent in failing to know that Mr. Evans, Sr. was not living at the Virginia Crest Apartments at the time.

While Plaintiff correctly argues that factual issues concerning negligent conduct are usually left for the jury, Plaintiff ignores the higher threshold concerning the conduct of a police officer under the Tort Claims Act.

To circumvent the immunity granted the police officer, Plaintiff must establish some course of conduct that would demonstrate “wanton negligence or willful and malicious intent”. No reasonable juror could find that Sergeant Lee’s actions in taking Mr. Evans, Sr. to the place Sergeant Lee thought Mr. Evans, Sr. was living were wantonly negligent or were performed with willful or malicious intent. Whether or not Sergeant Lee should have walked Mr. Evans, Sr. to his door and made sure he was safely inside could only be a question of potential negligence. Indeed, Plaintiff argues that Sergeant Lee’s actions were simply negligent, not wanton or willful.

Plaintiff has failed to point to any evidence that could give rise to a jury finding that the officer acted wantonly or that the officer’s conduct was done with a willful and malicious intent as to the safety of Mr. Evans, Sr.

Therefore, summary judgment is granted.

Alternatively, summary judgment must be granted because Plaintiff's grief as to the loss of his father is not "bodily injury" required under the Tort Claims Act. 10 *Del. C.* § 4011(c).

It is true that the Tort Claims Act does not define "bodily injury", but common sense and a construction of bodily injury based on its commonly accepted meaning dictate there must be some physical injury or other manifestation of a physical problem such as an illness. Mental anguish, whatever the cause, is not a "bodily injury". *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298 (D. Del. 1999).

Therefore, Summary Judgment is granted as Sergeant Lee has immunity under 10 *Del. C.* § 4011(c).

In summary, Defendant's summary judgment motion is granted because no facts or inferences give rise to wanton negligence or willful and malicious intent. Alternatively, summary judgment is entered because Plaintiff has not provided any proof or evidence of any bodily injury to Plaintiff.

IT IS SO ORDERED.

Yours very truly,

/s/ T. Henley Graves

T. Henley Graves

THG:baj
cc: Prothonotary