IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL C. VANNICOLA	)	
	)	CIVIL ACTION NUMBER
Plaintiff	)	
	)	07c-03-040-JOH
v.	)	
	)	
CITY OF NEWARK, NEWARK POLICE DEPARTMENT, TRACY SIMPSON, GEORGE STANKO, and KURT DAVIS	)	
	)	
Defendants	)	
	)	

Submitted: August 3, 2010
Decided: December 21, 2010

MEMORANDUM OPINION

Upon Motion of Defendants to Strike - ***DENIED***

Upon Motion of Defendant Simpson for Summary Judgment - ***DENIED***

Upon Motion of Defendants Jones, Stanko, and Davis for Summary Judgment - ***GRANTED***

Appearances:

Vincent J. X. Hedrick, II, Esquire, of the Law Offices of Beverly L. Bove, Wilmington, Delaware, Attorney for Trevor Knight

Daniel A. Griffiths, Esquire, of Whiteford Taylor Preston, LLC, Wilmington, Delaware, Attorney for Tracy Simpson, George Stanko, and Chris Jones

J. Scott Shannon, Esquire, of Marshall, Dennehy, Warner, Coleman, & Goggin, Wilmington, Delaware, Attorney for Rachel Davis

HERLIHY, Judge

Defendants Newark police officers Tracy Simpson, Chris Jones, and Sgt. George Stanko, and defendant Newark Communications Officer Rachel Davis have moved for summary judgment. Plaintiff Michael C. Vannicola has sued them for personal injuries arising out of a detention during which he claims their conduct caused him injury. As local government police officers and employees they can only be personally liable if their conduct amounts to wanton negligence or willful or malicious intent.

The defendants argue they were not negligent, at worst, merely negligent. If so, they are immune from liability. Vannicola argues, however, they were wantonly negligent and that the issue of whether they were is for the jury to decide, making summary judgment inappropriate.

Intertwined with the parties' positions over the appropriateness of summary judgment is the defendants' motion to strike an affidavit and second report of Vannicola's police conduct expert. Since the expert's first report stated the defendants were only negligent, they argue Vannicola's action must fail. In a supplemental report sent to plaintiff's counsel after the defendants filed their summary judgment motion, the expert described defendants' conduct as "unreasonable, unnecessary, reckless" and that the force they used was excessive. The defendants contend this second report and an accompanying affidavit are a "sham."

The Court finds it unnecessary to rule on the motion to strike the affidavit and the second report. Despite the expert's original label that the police conduct here as negligent,

the Court is not bound by it. Further, the conduct as shown by the depositions alone which is described by the expert's first report, gives rise to a genuine issue of material fact making summary judgment impossible.

Facts & Procedural Posture

On April 1, 2006, around 11:30 a.m., the Newark Police Department received an anonymous call about a possible drunk driver in the area of Alexander's Feed Store (formerly Southern States) on Route 273. A man was allegedly seen driving a white pick-up truck while drinking a can of beer. The truck was alleged to contain several tires in the bed.[1] Plaintiff Michael C. Vannicola ("Vannicola") was at that store to buy horse feed. He had driven to the store in a white truck with tires in the bed. While parked outside the store, he was approached by Defendant Tracy Simpson, a Newark Police officer ("Simpson"). Simpson asked to search the truck, and Vannicola complied. No evidence of alcohol was found, and Vannicola provided his drivers' license and registration to Simpson. She has testified that she radioed Vannicola's full drivers licence information[2] back to the station, where communications officer Rachel Davis ("Davis") ran the information through the DELJIS system for a "wanted check."[3] Davis told Simpson that the check revealed that Vannicola was wanted for a Family Court capias and for violation

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[1] Defs.' M. at ¶1; Pl.'s Resp. at ¶2.

[2] Defs.' B, Simpson Deposition, p. 55.

[3] Defs.' M. at ¶¶2-3; Pl.'s Resp. at ¶2.

of probation.[4] It is now undisputed that the police were mistaken, and that the plaintiff's cousin, Michael G. Vannicola, was actually the wanted individual. The middle initial, address, date of birth, social security number, and driver's license number differed from the plaintiff.[5] Vannicola repeatedly insisted he was not wanted, and that the wanted person would be his cousin.[6] Simpson testified that it is common for people to say it is someone else. She was not going to take his word for it but would check again when he was back at the police station.[7] She informed Vannicola that she was going to handcuff him. His description of what happened next is:

> A: And then I believe she said, I'll check again. So checked again. Came back. They still wanted me.
>
> At the time, I just said, I'm telling you, there's something wrong. She said, I have to take you downtown or down to the police department. I said okay.
>
> So she goes to handcuff me. And I said, can you cuff me in the front? I said, I just had neck surgery. And after three weeks, my scar was very obvious. And I pointed to my scar and showed her.
>
> And she said no, I have to do it for my own protection. Please don't give me a hard time, something to that effect, or don't resist me.
> I said, I'm not. I'm just asking if there's an alternative method to cuffing me.

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[4] Defs.' M. at ¶3; Pl.'s Resp. at ¶2.

[5] Pl.'s Resp. at ¶3.

[6] Defs.' M, Ex. C at p. 76-78.

[7] *Id.* at p. 60.

And then she wanted to do it on the back. And I said something, well, can you use two cuffs? I said, I'm a big man. Your going to stretch my neck and it's going to hurt.

Q: How big are you?

A: I'm 6 foot, about 240. I was probably close to 300 pounds then.

Q: Okay. I'm sorry.

A: No. So she said no, I don't have another set of handcuffs. So she cuffs me. I told her that it was very uncomfortable and that it was causing me a lot of pain.

She opens the back door of the police car. I don't know if you've ever seen one, but it's a little plastic seat that sits on the floor of the car. And with her front seat all the way back, there's no room.

And I said, ma'am, I can't get in there. I said, is there some other way? Can we call a Durango, which I know they have, a pickup truck? I said, I'll walk. And I wasn't being flippant. I just couldn't see how I could get in that car.

Again, she repeated about resisting or giving her a hard time. I said, I'm not trying to. You've got the wrong guy. I just know it's not me.

So we go to get in. I said, whatever you do, don't help me. And as we went in, she pushed down on my head. And I remember extreme pain. And I yelled out, and she buckled me in, but I had to twist around like this, because the way I was - -

Q: You're going to have to describe it because she can't take that down.

A: I apologize. I had to contort my way so that the pain wasn't as extreme.

She gets me down to the police station, reaches back and uncuffs me. I had to roll out onto the floor. Then she helps me up. Takes me back in. Uncuffs me. And I repeated a number of times, you have the wrong

person.[8]

Davis described the situation in this way:

Q: When you told him that you had to put cuffs on him, what did he say to you?

A: I believe at that time is when he mentioned to me that he had that plate in his neck; that he had had a surgery.

And I said, "Don't worry. You know, I'm a careful person. I'm going to take care of you. Don't worry about it." And I reassured him that, you know, I wouldn't do anything to hurt him.

Q: Do you remember what he was wearing?

A: No. No I don't.

Q: Did he have any kind of cervical collar on or anything like that?

A: No. No. I just remember seeing the sutures or I saw I believe he had like sutures or something on the back of his neck.

Q: Are you sure it was in the back and not in the front?

A: No. It was the back.

It was the back of his neck because I remember when I placed him into the car, I positioned myself the same way every time because that's how we're trained to do it.

Q: I'm not there yet.

Mr. Griffith: I don't think there's a question pending on that yet.

A: Okay.

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[8] Defs.' M., Ex. C at p. 75-78.

Q: Did you ask him what kind of surgery he had?

A: No.

Q: Did you have an understanding of what he had?

A: I believe he was telling me what the surgery was, but I really - -

Q: Don't remember?

A: I don't remember and was not particularly, you know, interested in his medical details as far as, you know, why he had surgery and what his background was. I just knew that he had had a surgery.

Q: Did you know at that time whether or not he had any plates put in his body in the area?

A: I believe he told me he had a plate put in. That's how I knew to look at the back of his neck.

Q: Did he tell you when he had had surgery?

A: It was not long before this incident. I don't recall exactly when, but it wasn't, it wasn't years before. It was fairly soon before this incident.

Q: How soon before? What understanding did you have?

A: Maybe a month or two. I knew he hadn't just gotten out of surgery, but it was still an issue for him.

Q: Did he tell you what kind of problems he was having as far as any kind of pain that the he was having related to the surgery or any limitations?

A: He told me that he might have trouble getting into the car.

Q: Okay. Did he tell you anything else?

A. I don't recall him telling me anything else, no.

Q: And he told you that before you put the handcuffs on.

A: I don't know if it was before or after the handcuffs. I believe it was - I believe he already had the handcuffs on and I was getting ready to put him into the car and he was concerned that he's a big guy and he might have trouble getting into the car.

Q: Are you permitted to put the handcuffs in the back as well as the front, although the back is preferable?

A: Under certain circumstances, we can put them on the front?

Q: When can you put them on the front?

A: Generally with a person that has limited mobility of their upper extremities, pregnant individuals and certain circumstances where we have some very obese people that can't get their hands behind their back, situations like that.

Q: And did you assess his mobility of his upper extremities?

A: Yes. He had no trouble putting his hands behind his back.

Q: Did he ever ask you if you could put them in the front?

A: That I don't recall.

Q: And after you placed the handcuffs on, what did you do next?

A: Started moving him towards the rear door of my vehicle.

Q: What kind of vehicle do you have?

A: It's a Ford Crown Victoria, a marked police vehicle.

Q: Do you remember the year?

A: No.

Q: Do you still drive the same vehicle or a different one?

A: No. No.

Q: A different one?

A: Yeah. Well, it's still a Crown Vic, but it's not the same vehicle.

Q: Okay. And you were placing him in the back?

A: Yes.

Q: And when you were placing him in the back, which door did you go in through?

A: It would have been the passenger-side rear door.

Q: And is there a cage in the back?

A: Yes.

Q: And as a result of that, is it pretty cramped?

A: yes.

Q: And how tall is Mr. Vannicola and how much did he weigh at the time, roughly?

A: I believe he is six two, six three, maybe 220, something. He's a pretty big guy, 220 maybe.

Q: It looks like his driver's license at that time indicated that he was 260 pounds.

Would that be in the ballpark of what you recall?

A: I don't recall him being quite that big, but he may have been. He was big. He was considerably bigger than I was.

Q: Was it awkward getting him in the car?

A: Yes. It's awkward getting just about everybody in the car.

Q: Was it more awkward getting him in than somebody that was smaller than he is?

A: Of course.

Q: And can you describe for me how it was awkward?

A: He, he was having trouble with his head clearing the doorway. But the way we're trained and the way that I always do it, I put my hand on top of their head so that they don't bang their head on the metal door frame. So I had my hand on top of his head so that he would clear. Because if my hand can't clear, his head can't clear.

* * * * *

Q: Do you specifically recall the positioning of his legs?

A: No.

Q: Did he say anything to you during the time that he was outside of the vehicle and then you were helping him get in the vehicle?

A: The only thing he said was that he was concerned about his neck.

Q: Did he say that before he got into the vehicle.

A: Yes. And that is when I told him "Don't worry. I'll take care of you. You're going to be all right."

Q: As he was getting into the vehicle and when he was in the back of the vehicle, did he say anything to you that you recall?

A: No.

Q: Does that mean that he didn't say anything to you or that you don't recall?

A: I don't recall. I mean, people generally talk, but if he said anything I don't recall.[9]

He was at no time uncooperative. Officer Chris Jones ("Jones") arrived on scene, and moved Vannicola's truck to the back parking lot of the store.[10] Simpson handcuffed Vannicola behind his back, put him in the back cage of her police cruiser, and took him to the Newark Police Station.[11] Once at the station, it was determined that Vannicola was not wanted, and he was released. Sergeant George Stanko ("Stanko") was Simpson's supervisor, and he signed off on her report of the incident.[12]

Immediately following this incident, Vannicola allegedly began experiencing severe increasing neck pain and trouble swallowing. On April 4, 2006, he consulted his doctor, Dr. Matthew J. Eppley (Dr. Eppley), who performed the prior surgery which Vannicola mentioned to Davis. Dr. Eppley discovered that plates had been dislodged in Vannicola's neck, and he underwent surgery again on April 13, 2006. Vannicola claims to have problems with his neck to this day.[13]

The parties have argued over the lateness, or not, of the production of all the expert reports. There have been five scheduling orders in this case starting with the first which

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[9] Simpson Dep. at 62-68, 71.

[10] Simpson Dep. at 150.

[11] Pl.'s Resp. at ¶3.

[12] Simpson Dep. at 155.

[13] Pl.'s Resp. Ex. F.

was issued October 7, 2008. The first three did not specify expert report deadlines. The last two did; the fourth was issued May 19, 2009. In that order, Vannicola's expert's report was due August 3, 2009, and the defendants' expert's report was due on September 4, 2009. Vannicola's counsel requested more time but not necessarily for the police conduct experts to supply reports. In the fifth scheduling order, Vannicola's expert's reports were due October 3, 2009 and the defense reports November 4th. Vannicola's police conduct expert, Andrew Sutor, supplied his initial report on July 31, 2009, within the deadline. He has not been deposed. That report included his curriculum vitae, a review of the items and records he had reviewed, and his comments on the conduct of the officers. His summary states:

> Furthermore, it seems reasonable to expect that the Plaintiff would inform the arresting officer of his recent neck operation and show the scars to prove it. Had the Defendants undertaken these reasonable measures, it is likely that the Plaintiff's mistaken detention and his resultant injury would not have occurred.
>
> There were serious deviations from sound law enforcement standards by Newark's law enforcement personnel in connection with this incident. Mr. Michael C. Vannicola was entitled to an adequate level of personal protection, which was sorely lacking in this matter. Newark's Police Department Defendant employees handled the police operation negligently and improperly which resulted in an arrest that should never have happened and caused a serious injury which should not have occurred.
>
> The Defendants were negligent in that, despite the apparent previous surgery to the Plaintiff, excessive force was use to place an infirm middle-aged, large man into a cramped cage in the rear of Defendant Simpson's patrol vehicle.

> Furthermore, the Defendants violated their own written standards in this matter in that they failed to follow their own general orders as outlined in Para. III, D & E of this report.
>
> Also, the Defendants failed to follow state and departmental guidelines on the wanted information, detention, and processing of the Plaintiff as outlined in Para. II, D, E, F and Para. III, B of this report.
>
> Finally, the Newark Police Department Supervisory and Command personnel failed to conduct a timely investigation of this matter and to ensure corrective measures were implemented to avoid other innocent citizens from being improperly arrested on faulty information and negligent police procedures.
>
> The improper and negligent handling of this case by the Defendants was the proximate cause of the Plaintiff's serious injury and the requirement for subsequent corrective surgery shortly after the flawed police action.[14]

The defendant police officers filed their motion for summary judgment on January 4, 2010. Among other points in their brief, they noted Sutor described the officer's conduct as negligent. As such, their conduct would not rise to the level of severity necessary to strip them of individual immunity. Their brief included a report dated December 27, 2009, from their expert, Edward Leach, which was past the deadline. He in part, opines:

> It was prudent and standard operating procedure for M/CPL Simpson to handcuff the Plaintiff and transport him to the police station.
>
> - M/CPL Simpson had reasonable grounds to believe that there was a warrant for the arrest of the Plaintiff based on Communications Officer Davis's response to M/CPL Simpson's inquiry.

[14] Sutor Report, Pl.'s Ex. E.

- For their safety, it is standard operating procedure nationwide for officers to handcuff subjects behind their back who are being detained on a warrant. Handcuffing behind the back is standard practice, as cuffing in front allows a subject to utilize both hands to assault and/or use the cuffs from behind to choke an officer.

- It is germane to note that the Plaintiff in his deposition stated he was 6 feet tall and weighed close to 300 pounds and he did not believe M/CPL Simpson was trying to hurt him when he was handcuffed.

- It is standard operating procedure for officers to transport subjects detained for warrants to their police facilities for further investigation/processing. This is especially appropriate as the Plaintiff's Expert Witness identifies Newark as; "...a high crime area..." and officers would be in a potentially unsafe situation by conducting a further investigation in the field. The police facility provides a secure setting in which to investigate further, complete required paperwork and process the subject.

- A reasonable officer would not release a subject taken into custody where there had been notification of a warrant solely on te protestations of the subject being detained that they were not the subject/did not have an outstanding warrant. A reasonable officer knows that offenders typically deny who they are, that there is an outstanding warrant for their arrest or provides other false information to avoid arrest.

- The Plaintiff's Expert Witness suggested that the Newark Police should have realized that; "...Mr. Vannicola does not represent the profile of person actually arrested for serious crimes." Among the descriptors mentioned by Mr. Sutor is that the Plaintiff is "white". "Racial profiling" is unethical, unprofessional and Newark Police Department personnel utilizing it would be subject to criticism, disciplinary action and legal action. "Racial Profiling" is not an acceptable law enforcement practice.

* * * * *

I. A prudent and reasonable law enforcement officer under identical circumstances would have believed there was a warrant for the Plaintiff and detained him.

II. A prudent and reasonable law enforcement officer under identical circumstances would have handcuffed the Plaintiff's hands behind his back before transporting him to the Newark Police facility.[15]

Vannicola filed his brief in opposition to the summary judgment motion on March 5, 2010. Included was a supplemental report from Sutor dated February 22, 2010. Some of it was repetitious of his earlier report but his conclusion section was revised and reads:

> An officer must have a reasonable sense of "situational awareness" and not take unreasonable police actions or use too much force when dealing with the public.
>
> By failing to make a second check on the wanted message and her failure to call for a supervisor during a doubtful police situation, Officer Simpson exhibited an "I don't care" attitude in this matter. Her actions are reckless because she ignored both his prostrations of innocence and the scars on the Plaintiff's obvious vulnerable neck as she placed a large man in a very small space in the rear of her patrol car. Officer Simpson should have known that any force used in this police action could result in the possibility of serious harm resulting to Mr. Vannicola.
>
> The actions of Officer Simpson indicate a caviler (sic) disregard of Mr. Vannicola's rights and personal safety. Furthermore, Officer Simpson should have known that any force applied to the Plaintiff's head could injure him further.
>
> Moreover, the lack of care extended by the Defendants, and specifically Rachel Davis and Officer Simpson in their failure to confirm that the individual with the outstanding warrant and Mr. Vannicola were the same person also demonstrates reckless conduct in that his address, name, and date-of-birth did not match. As indicated in my initial report, the actions of the Defendants were unreasonable, unnecessary, reckless, and they used

[15] Defts.' M, Ex. F.

excessive force in detaining him.[16]

It is Sutor's second report which prompted the defendants to move to strike it as hearsay, a sham, beyond the deadline for expert reports, etc. There was, of course, no provision in the scheduling order for a supplemental report.

Parties' Contentions

Defendants Simpson, Jones, and Stanko claim that the opinion in Sutor's supplemental report is an improper update and a "sham affidavit." They argue that it is in contradiction to Sutor's earlier expert report, and was conjured up by Vannicola to bolster his case against defendants' motion for summary judgment. Because they contend that Sutor's second report cannot be relied upon, and that Vannicola has no additional evidence to show wanton negligence, his claim fails to overcome their immunity as Newark employees and summary judgment must thus be granted in their favor.

Defendant Davis claims in both her motion for summary judgment and her motion to strike that the evidence, including Sutor's reports, clearly demonstrate that she made a "mistake" when she informed Simpson that plaintiff Vannicola was wanted. Such a mistake is, at most, negligent. She argues she is entitled to statutory immunity from suit unless her conduct arises to the level where it was performed with wanton negligence or willful and malicious intent. Because an unintentional mistake does not reach that heightened level of conduct, she must be granted summary judgment.

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[16] Pl.'s Resp., Ex. E.

Vannicola opposes all motions. He cites several issues of material fact that he asserts preclude summary judgment. Among these are Sutor's two reports, but also factual and other deposition evidence from his physician and the police officers. In his opposition to the motion to strike, Vannicola argues that the two reports are not substantially different, and that the second report is merely a response to defense expert Leach, and should not be stricken. Vannicola also argues that even if the supplemental report is stricken, evidence outside the report shows that the officers' conduct rose to the levels of wanton negligence, and summary judgment should be denied.

Discussion

Motion to Strike

Courts do not favor motions to strike, and such motions will only be granted if clearly warranted.[17] Superior Court Rule 12(f) controls motions to strike, providing that the "Court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter."[18] When determining whether to grant a motion to strike, the Court must determine if the averment is relevant to the case, and if so, whether that averment is unduly prejudicial.[19] The motion to strike will only be granted if the Court determines the material to be unduly prejudicial.

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[17] *Mills v. Gosling Creek, Inc.*, 1993 WL 485901 at *2 (Del. Super 1993).

[18] Super. Ct. R. 12(f).

[19] *Mills,* 1993 WL 485901 at *2.

Sutor is a security and safety consultant who opined whether the police conduct here fell short of the requisite standard of care. Defendants' claim that Sutor's first report merely evaluates the alleged police conduct toward Vannicola as negligent, which does not rise to the level of wanton negligence. Vannicola argues that, by describing in the first report the police action as "faulty, flawed, unreasonable, inadequate, unnecessary, used excessive force, wrongful, unfounded flawed, false arrest, unreasonable detention, incomplete, based on wrongful information, violation of orders, unwarranted detention, serious deviations, and improper," Sutor is clearly indicating that police made repeated, egregious errors that harmed Vannicola.

Experts are not required to state their opinions with "magic words," excluding, of course, the requirement that the opinion is made with a reasonable degree of professional certainty or probability. While Sutor's first report did not specifically use the statutory "wanton negligence" language to describe the police conduct, he does use language that clearly indicates intentional conduct by the Newark police officers which he characterized as wanton negligence. In addition, in the second report he states that he only intends to clarify his previous position in response to defense expert Leach. A comparison of Sutor's two reports shows that they are not substantially different and are certainly not as contradictory as defendants allege. The difference between the reports is that he puts a different conclusory label on the identical conduct. Obviously, Sutor's intent is to label the defendants' conduct in a way to strip them of their immunity.

Motions to strike will only be granted if the contentious material is unduly prejudicial.[20] The two reports are substantially similar, and the second report appears to merely be a clarification in response to the defense expert's opinion, and to label the conduct at issue here in a way to get over the immunity hurdle. There was, of course, no authority to supplement the first report. In any event, this Court has no need to rely on the second report to address the issue of statutory immunity raised in the current motions. The second report is, therefore, not unduly prejudicial to defendants, and all motions to strike Sutor's second report and affidavit are DENIED.

Motions for Summary Judgment

Applicable Standard

Summary judgment may only be granted when the moving party has shown that there are no genuine issues of material fact remaining and that it is entitled to judgment as a matter of law.[21] The Court must view all evidence in the light most favorable to the non-moving party.[22] If a summary judgment motion is properly supported, the burden shifts to the non-moving party to demonstrate that there are material issues of fact.[23] If any material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts

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[20] *Mills,* 1993 WL 485901 at *2.

[21] *Brzoska v. Olson*, 668 A.2d 1355, 1364 (Del. 1995).

[22] *Brzoska* at 1364.

[23] *Howard v. Food Fair Stores, New Castle, Inc.*, 201 A.2d 638, 640 (Del. 1964).

in order to clarify the application of the law, summary judgment is inappropriate.[24] Thus, if it appears that there is any reasonable hypothesis by which the non-moving party might recover, the motion for summary judgment will be denied.[25]

Discussion

At this stage of the proceedings the only question is whether there is a genuine issue of material fact concerning any police officer's conduct or the conduct of Davis rose to the level of severity to remove the shield of immunity to which each is entitled. By law, employees of local governmental units in Delaware are immune from personal liability. The same law provides, however, they can lose that protection:

> 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.[26]

Exceptions to the broad grant of immunity are to be construed narrowly.[27] If the defendant's conduct were merely negligent, they retain their immunity. This Court views the issue at hand as only one whether there is a genuine issue of wanton negligence, not willful and malicious intent.

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[24] *Grasso v. First USA Bank*, 713 A.2d 304, 307 (Del. Super. 1998).

[25] *Vanaman v. Milford Mem'l Hosp., Inc.*, 272 A.2d 718, 720 (Del. 1970).

[26] 10 *Del. C.* § 4011(c).

[27] *Dale v. Town of Elsmere*, 702 A.2d 1219, 1222 (Del. 1997).

The terms "willful" and "malicious intent" have been defined to mean:

> "Wanton, in turn, means heedless, malicious or reckless, but does not require actual intent to cause harm (citation omitted), while 'willful' implies actual, specific or evil intent."[28]

> "Malice, in law, is either express or implied. Express malice, as applied to a malicious prosecution, has been defined by this court to mean ill will against a person, and is indicated by the disposition or temper of mind with which the party did a particular act, as where he did it with the view to injure a particular individual generally, or in some specific manner, or that the he acted from personal animosity or an old grudge. And it has likewise been held that, if it be shown that there was a want of any probable cause for the prosecution, the law implies malice from that circumstance."[29] (Footnote ommitted).

Those definitions do not describe any defendant's conduct here when examining the evidence in a light most favorable to Vannicola. Nor does he claim any defendants' actions fall within those terms. However,

> Wanton conduct occurs when a person, with no intent to cause harm, performs an act so unreasonable and dangerous that he either knows or should know that there is an imminent likelihood of harm which can result (citation omitted). It is manifest in an "I don't care" attitude that demonstrates a conscious indifference to the consequence of one's actions (citation omitted).[30]

The police need not be cruel for their conduct to rise to the level of wanton negligence. Wanton conduct exists where the person's behavior "reflects a 'conscious

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[28] *Boughton v. Div. of Unemployment Ins. of Dept. of Labor*, 300 A.2d 25, 26 (Del. Super. 1972).

[29] *Herbener v. Crossan*, 20 Del. 38, 55 A. 223, 224 (Del. Super. 1902).

[30] *Sadler v. New Castle Co.*, 524 A.2d 18, 23 (Del. Super. 1987).

indifference' or an 'I-don't-care' attitude."[31] Most importantly, whether any conduct, including police conduct, constitutes negligence or wanton negligence is undeniably a question for jury determination.[32] Because wanton negligence requires a much higher burden then ordinary negligence, it is necessary to analyze the conduct of the each defendant individually to determine their potential liability for Vannicola's injuries.

This Court finds that enough evidence exists that could lead a reasonable jury to find that Simpson was wantonly negligent. In her deposition, she made several statements that raise issues of material fact and preclude summary judgment. Confirming what Vannicola testified that he told her about his recent surgery, she said she was aware of his recent surgery, saw the sutures in his neck, and knew that it was "still an issue" for him.[33] Additionally, she stated that "I believe he was telling me what the surgery was, but I really…I don't remember and was not particularly, you know, interested in his medical details as far as, you know, why he had surgery and what his background was."[34] Vannicola informed her that he might have trouble getting in the back cage of the car, and

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[31] *Couden v. Duffy,* 446 F.3d 483, 498 (3d Cir. 2006), quoting *Foster v. Shropshire,* 375 A.2d 458, 461 (Del. 1977).

[32] *Jones v. Crawford*, 1 A.3d at 303; *Schueler v. Martin*, 674 A.2d at 885.

[33] Simpson Dep. at 62:4-62:16, 64:8.

[34] Simpson Dep. at 63:12-19.

she was also permitted to put him in the front seat if necessary.[35] He asked to be handcuffed in front because of his surgery or to be transported in a larger vehicle where he would not be as cramped as he was in the back of her car. When he said the wanted person was his cousin she ignored that, and did not double check with Davis. In the totality of this incident, that may reflect an "I don't care attitude." Simpson disregarded Vannicola's statements, and is alleged to have pushed his head down, perhaps excessivley, to get him into the cage of the police cruiser.[36] She said it was normal practice to push on the head a bit to prevent the detainee from bumping it on the door frame. But it may be she pushed too hard or could have avoided it altogether by getting a different vehicle.

Vannicola's physician, Dr. Eppley, who performed the first surgery, has sworn and will testify that this incident caused injuries leading to a second surgery which was performed a short while later.[37] These facts could lead a reasonable jury to determine that Simpson was aware of Vannicola's fragile medical condition, disregarded it, and handled Vannicola in a manner that rose to the level of wanton negligence and proximately caused his injuries. Only a jury may decide this.

It is unclear and or unknown if Sutor was or is aware of the statutory threshold which must be met to expose local government employees to personal liability or whether

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[35] Simpson Dep. At 64:14-15, 65:1-13.

[36] Pl.'s Resp. at ¶6.

[37] Pl.'s Resp. at ¶6; Ex. F.

counsel did not acquaint him with the standard prior to his initial report. At this stage, the Court does not need either of Sutor's reports to make its determination. That determination comes alone from the testimony of Vannicola and Simpson which creates the genuine issue of material fact.

Drawing all inferences favorable to the non-moving party, Vannicola, the Motion for Summary Judgment with regard to Simpson is DENIED.

As for the other officers and Davis, no issues of material fact preclude summary judgment, and no facts indicate that their conduct rose to the level of wanton negligence. Jones and Stanko are only accused of doing nothing to verify the incorrect identification information after the disputed DELJIS check.[38] This conduct clearly does not arise to the level of wanton negligence. Stanko was Simpson's supervisor, and was not even on scene when Vannicola was detained. Although Jones was on scene, he arrived after Vannicola was detained, and merely moved Vannicola's truck to a secure location in the parking lot.[39] The motion for summary judgment with respect to officers Jones and Stanko is GRANTED.

Communication officer Davis is in a different position. Simpson said she relayed to Davis the exact information from Vannicola's driver's license. Yet Vannicola's middle initial and other information did not match the capias information available to Davis.

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[38] Pl.'s Resp. at 3 (March 5, 2010).

[39] Simpson Dep. At 150-151.

Looking at the evidence in a light most favorable to Vannicola, however, Davis was negligent but her conduct was not wanton.

Conclusion

For the foregoing reasons, defendants' Motions to Strike are DENIED. Defendant Simpson's Motion for Summary Judgment is DENIED. Defendants Jones, Stanko, and Davis' Motions for Summary Judgment are GRANTED.

IT IS SO ORDERED.

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J.