SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

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Re: ***Johnny L. Hedrick v. Angela M. Webb***
C.A. No. 01C-06-031-RFS

Date Submitted: August 2, 2004
Date Decided: November 22, 2004

Dear Counsel:

This is my decision regarding Defendant Abate of Delaware, Inc.'s Motion for Summary Judgment and Defendants', Commissioners of Bridgeville's, James A. Powell's and Charles Manusiuk's Motions for Summary Judgment. For the reasons set forth herein, Abate's Motion is denied and Bridgeville's, Powell's and Manusiuk's Motions are granted.

STATEMENT OF THE CASE

On August 27, 2000 Plaintiffs Johnny L. Hedrick ("Hedrick") and Diane Fillyaw ("Fillyaw") were injured during a motorcycle rally fundraiser. Hedrick was the road captain, i.e. the lead rider, for a motorcycle procession, and Fillyaw was his passenger. They were injured when the procession reached an intersection in Bridgeville where two police officers were supposed to be waiting to direct traffic. The two police officers had arrived at the intersection, but may not have yet secured it. When Hedrick approached the intersection of County Route 40, traveling north on U.S. Route 13, the light was green.[1]

At that time, Defendant Angela M. Webb ("Webb") was stopped at the red light for westbound traffic on County Route 40. Her light turned green, and when she entered the intersection, Hedrick, who was also entering the intersection "was forced to suddenly lay his motorcycle down in the roadway to avoid a direct collision . . . ." Complaint, ¶ 18. He then rolled and bounced off of the motorcycle as Webb drove through. Plaintiff Fillyaw was allegedly thrown off the motorcycle. Hedrick claims that Webb either ignored the hand signals given by a police officer or, in the alternative, that she entered the intersection as a police vehicle approached, lights flashing, and that she knew or should have known that it was not safe to enter. Fillyaw claims that Webb was negligent in violating rules of the road found in 21 *Del. C.* §§ 4176(a) and (b), 4103(a), 4134(a).[2] Furthermore, she claims that Webb failed to keep her vehicle under proper control.

In addition to bringing a negligence action against Webb, Plaintiffs have brought suit against Defendants Abate of Delaware, Inc. ("Abate"), Bridgeville police officers, James A. Powell ("Powell") and Charles Manusiuk ("Manusiuk") (collectively referred to as "the

Officers"), and the Commissioners of the Town of Bridgeville ("Bridgeville"). Fillyaw has also filed a cross-claim against Hedrick, alleging he negligently drove his motorcycle in violation of 21 *Del. C.* §§ 4176(a) and (b), 4103(a) and 4107[3], and that he negligently failed to keep his vehicle under proper control.

Abate is a political rights organization designed to protect the rights of motorcyclists. It was responsible for sponsoring and organizing the "Run for the Kids" program, an annual fundraiser in which motorcycle enthusiasts ride to Ronald McDonald House in New Castle County and donate toys. The riders from Sussex and Kent counties meet at various rendezvous points along the route. Abate was responsible for the safety of the event. Abate volunteers were to contact local law enforcement agencies to request police escorts for traffic control for the riders. Plaintiffs claim Abate was negligent in failing to ensure the necessary police support, and in failing to conduct a participant safety briefing to ensure Hedrick and other riders were properly apprised of the traffic safety operations. Abate has filed a Motion for Summary Judgment, claiming that it breached no duty to either plaintiff. It alleges there is no dispute that it contacted the Bridgeville police and arranged to have police escorts, which were provided, and that it advised Hedrick about the safety issues, about the route, and to follow the instructions from the police escort.

The Commissioners of Bridgeville and officers Powell and Manusiuk have also filed a Motion for Summary Judgment[4] alleging they have immunity pursuant to 10 *Del. C.* §4011 of The County and Municipal Torts Claims Act, 10 *Del. C.* §§4001 - 4013 ("the Tort Claims Act"). Plaintiffs claim Officers Powell and Manusiuk proximately caused the accident by willfully and wantonly failing to properly control the intersection. Allegedly, they did not secure it before the

motorcycles arrived and did not prevent Webb from entering the intersection. There is some evidence that one or both of the officers may have arrived too late at the intersection to either lead the motorcycles through or to stop and direct traffic. Plaintiffs claim that the Town of Bridgeville is vicariously liable for the negligence of Officers Powell and Manusiuk, according to agency principles and the doctrine of respondeat superior.

DISCUSSION

A. Standard of Review

This Court will grant summary judgment only when no material issues of fact exist, and the moving party bears the burden of establishing the nonexistence of material issues of fact. *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979). Once the moving party meets its burden, the burden shifts to the nonmoving party to establish the existence of material issues of fact. *Id*. at 681. The Court views the evidence in a light most favorable to the nonmoving party. *Id*. at 680. Where the moving party produces an affidavit or other evidence sufficient under *Superior Court Civil Rule 56* in support of its motion and the burden shifts, the nonmoving party may not rest on its own pleadings, but must provide evidence showing a genuine issue of material fact for trial. *Super. Ct. Civ. R.* 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

B. Defendant Abate's Motion for Summary Judgment

Defendant Abate argues that it cannot as a matter of law be found negligent for its actions in regard to the August 27, 2000 fundraising event during which Hedrick and Fillyaw were injured. It claims that it has met its duty of care because it obtained the assistance of the Bridgeville police department and because it provided a safety briefing to the motorcyclists before they commenced the trip. According to Abate, even if Hedrick had reached the

intersection before the officers arrived, he understood that he required police authority before he could enter the intersection on a red light. Abate also argues that proximate cause has not been established because, regardless of the actions taken by Abate to secure the safety of the riders, the accident would still have occurred. It alleges that the conduct of the Officers and of Webb were the proximate causes of the injuries and not its own attempts to coordinate safety. Finally, Abate claims that its responsibilities are outside the knowledge of laymen, so that Plaintiffs would be required to obtain an expert to establish their case.

Generally, actions based on negligence are not a proper subject for summary judgment. The moving party must show the absence of all material issues of fact relating to negligence. *Ebersole v. Lowengrub*, 180 A.2d 467, 469 (Del. 1962). Only after a moving defendant produces evidence of "necessary certitude negating the plaintiff's claim" does the burden shift to the plaintiff to show a genuine issue of material fact exists. *Id*. at 470. Defendant Abate is correct in its assessment that summary judgment may be granted when a party fails to sufficiently establish an element essential to their case. *See Reybold Group, Inc. v. Chemprobe Technologies Inc.*, 721 A.2d 1267, 1271 (Del. 1998). This is not one of those cases, however. Plaintiffs have shown that in viewing the facts in the light most favorable to them, there exists a material issue of fact as to Abate's negligence.

1. Duty of Care

Neither side is disputing that Abate, as the coordinator of the event, owed a duty to ensure the safety of the riders. However, Abate claims it discharged its duty to the full extent possible and that there is no material issue of fact about whether they should have done anything more to provide for safety at the event. Jeff Larrimore, an Abate volunteer, requested that Officer Powell

provide a police escort through Bridgeville. In addition, Charles Larrimore[5], another Abate volunteer, advised the riders on the morning of the event about the route and about obeying speed limits and the instructions of the police escorts.

Plaintiffs counter that Abate's efforts were negligent for several reasons. First, they picked Hedrick to be the lead rider, when he had never held that position before. Second, the safety briefing did not prepare the drivers for contingencies, such as what to do if they arrived at an intersection before the police officers. Third, Jeff Larrimore did not adequately coordinate safety with Officer Powell because the two did not arrange destination times for the Bridgeville intersections. Plaintiff Hedrick also claims that Abate had knowledge of prior incidents in which police departments failed to properly secure intersections prior to an event. Plaintiffs' allegations are supported with statements in the depositions of Hedrick, Jeffrey Larrimore, Officer Powell, Ed Brown and James Golden. They have met their burden of showing that a material issue of fact exists. Therefore summary judgment is not warranted as to whether Abate breached its duty of care.

2. Proximate Cause

> In Delaware, in order to prevail in a negligence action, a plaintiff must prove by a preponderance of the evidence that the defendant's action breached a duty of care in a way that proximately caused plaintiff's injury. . . . [A] proximate cause is one "which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred."

Russell v. K-Mart Corp., 761 A.2d 1, 5 (Del. 2000).

Delaware applies the "but for" rule to define and determine proximate cause. *See, e.g., Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991). However, saying that a defendant's action or omission must be the direct cause, does not mean there cannot be more than one cause of the

harm. "Delaware has long recognized that there may be more than one proximate cause of any injury." *Id*. at 1097.

According to Abate, no matter what extra actions it may have taken, the accident would have occurred. The Officers were responsible for control of the intersection. Ms. Webb was the one who may have negligently ignored their instructions. Hedrick had been given the instructions to follow the speed limit, to ride staggered and to stay together and follow the Officers' instructions. He was the one who allegedly failed to yield to a red light. Abate argues that no matter what it had said or done, these actions would have happened, and the accident would have resulted.

In response, Plaintiffs argue that Abate chose Hedrick to lead although he had never ridden "point" before. They claim the safety briefing given to the riders did not include a discussion of the safety procedures to be followed if the intersections were not secured in time. In addition, they argue that Jeffrey Larrimore did not adequately coordinate with the police officers because he did not set up specific destination times for the arrival of the procession.

Just because Abate's actions or omissions may not have been the only proximate cause of the injury, that does not mean their failure to adequately provide safety might not also be a proximate cause. *See, e.g., Sweetman v. Strescon Indus., Inc.*, 389 A.2d 1319, 1323 (Del. Super. Ct.) (finding that a sub-contractor was not relieved from negligence liability despite the fact that it may not have had sole responsibility for the securing of planks at a construction site.). Proximate cause has also been described as "a cause which 'brings about or produces, or helps to bring about or produce the injury and damage, and but for which the injury would not have

occurred.'" *Nutt v. Gaf Corp.*, 526 A.2d 564, 566 (Del. Super. Ct. 1987), *quoting*, *Biddle v. Haldas Bros*., 190 A. 588, 596 (Del. Super. Ct. 1937).

In this case, Abate sponsored and organized the "Run for the Kids" event. It was responsible for arranging for the safety of the riders. Abate initially created the risk to the riders. It set up an event which required deviations from normal traffic procedures in order to ensure that the mass of motorcyclists could travel together. If Abate, therefore, had a duty to prepare the riders for all of the contingencies which may result from the traffic abnormalities created by a motorcycle procession, and if it failed to execute that duty in a way that was free of negligence, it follows that it may have been one proximate cause of the injuries to the Plaintiffs. *See, e.g., Kuczynski v. Mclaughlin*, 835 A.2d 150, 156-57 (Del. Super. Ct. 2003) ("'[O]ne will be held liable for the injuries that flow from his participation in a joint concerted tortious activity, if that activity was the proximate cause of injury.'" (citation omitted)); *Lemons v. Kelley*, 397 P.2d 784, 787 (Or. Supr. 1964), *cited in Kuczynski*, 835 A.2d at 157 n.28 ("One who does participate in setting in motion such hazardous conduct cannot thereafter turn his liability off like a lightswitch."). An issue of material fact remains as to the issue of proximate cause, and summary judgment is not warranted.

3. Expert Witnesses

Finally, Defendant Abate argues that summary judgment should be granted because the Plaintiffs have failed to produce an expert who could explain how Abate was responsible for the accident. It cites the case *USH Ventures v. Global Telesystems Group., Inc.*, 796 A.2d 7, 21 (Del. Super. Ct. 2000), for the proposition that "[i]f the matter in issue is one within the knowledge of experts only, and not within the common knowledge of laymen, it is necessary for

the Plaintiff to introduce expert testimony in order to establish a prima facie case." While *USH Ventures* dealt with the complex issue of equity investments, that Court also pointed out: "It is permissible for a Plaintiff to make a prima facie case that a Defendant's conduct was a proximate cause of the Plaintiff's injuries based upon an inference from the Plaintiff's competent evidence, if such a finding relates to a matter which is within a lay person's scope of knowledge." Here, the Court finds the subjects of whether Abate gave a proper safety briefing, and whether it adequately coordinated the event with the police officers, are matters well within a lay person's scope of knowledge. There is no requirement that every proximate cause issue be opined by an expert. The Plaintiffs need not produce an expert in order to proceed with their claim.

C. Defendant Bridgeville and Defendants Officers Powell and Manusiuk's Motion for Summary Judgment

The Commissioners of Bridgeville and Officers Powell and Manusiuk claim they are immune from liability under the Tort Claims Act. Defendants argue that Bridgeville, as a "government entity" should be immune pursuant to 10 *Del. C.* §§ 4010(2) and 4011(a), and that the Officers should be immune under § 4011(c). Plaintiffs counter that Bridgeville should be liable under the equipment exception in § 4012(1), and that the Officers are subject to liability because they acted either outside the scope of their employment, or with wanton negligence or willful or malicious intent. In addition, Plaintiffs claim that Bridgeville should be vicariously liable for the conduct of the Officers.

1. Officers Powell and Manusiuk

10 *Del. C.* § 4011(a) provides, "except as otherwise expressly provided by statute, all governmental entities and their employees shall be immune from suit on any and all tort claims

seeking recovery of damages." Under 10 *Del. C.* § 4011©), "[a]n employee may be personally liable for acts or omissions causing . . .bodily injury . . . in instances in which the governmental entity is immune . . ., 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." Thus, if Officers Powell and Manusiuk were acting outside the scope of their employment, or if they acted with wanton negligence or willful and malicious intent, they will not be immune under the Tort Claims Act.

Although Plaintiff Fillyaw argues that the issue of scope of employment should be left to the jury to decide, it is clear from the facts that Officers Powell and Manusiuk were acting officially, as police officers. Officer Powell chose to aid in the procession as a favor to Abate; however, he indicated in his deposition that he had the authority to make such a decision. Although he was not in uniform, he was operating his police cruiser and carrying his duty weapon. He enlisted Officer Manusiuk, who was in uniform, to help him, and together they received permission from the State Police to regulate the intersection. Both were acting as police officers and there has been no allegation that either or both were not permitted by their employers to aid the procession in their capacity as officers.

Fillyaw suggests that the jury decide the issue because Defendants amended their Response to a Request for Admissions to say that Officer Powell[6] was acting within the scope of his employment, when they had initially denied the point. The Defendants respond that Officer Powell's deposition, which was taken after the initial response, clarified the facts. Defense Counsel allegedly learned during the deposition that Powell had the authority to make the

decisions to aid the procession. Consequently, the request that Powell was within the scope of employment was admitted.

It is true that superseded pleadings may be admissible, for example, as a party admission. "A party . . . cannot advance one version of the facts in its pleadings, conclude that its interests would be better served by a different version of the facts in its pleadings, and amend its pleadings to incorporate that version, safe in the belief that the trier of fact will never learn of the change in stories." *United States v. McKeon*, 738 F.2d 26, 31-33 (2d Cir. 1984), *cited in Jackson v. Rotach*, 2000 WL 1211516, at *6 (Del. Super. Ct.).

Here, however, the question is whether or not there is a dispute of the facts for the jury to weigh. The change in the response itself does not prove that Officer Powell was not acting within the scope of his employment. Fillyaw would have to present evidence that this were the case. Other than the amended answer, Plaintiffs have made no arguments that Powell was not on duty on August 27th. Rather, they claim Bridgeville should be vicariously liable for the actions of the Officers because they were acting within the scope of their employment.

In this context, it cannot be said that a change from a negative to an affirmative answer constitutes a material issue of fact. Superior Court Civil Rule 36 Requests for Admissions[7] are meant to clarify and to set in stone those facts over which there is no real dispute. *See Laskowski v. Atomic Cleaners & Dyers, Inc.*, 89 A.2d 157, 159 (1952) ("The device created by Rule 36 should be used to obtain admissions as to which there is no real dispute and which the 'adverse party can admit cleanly, without qualifications'." (Citation omitted)). The Rule states that a matter admitted is "conclusively established unless the Court on motion permits withdrawal or amendment of the admission." Super. Ct. Civ. R. 36(b). With the change in their response to the

request for admission, the Defendants are agreeing with the Plaintiffs' contention that Officer Powell was acting within the scope of his employment. The Court is satisfied with Defendants' response to this allegation. The reason for the change has been satisfactorily explained, and Plaintiffs do not dispute the facts surrounding Officer Powell's authority and actions related to whether he was on duty or not.

It is also apparent that there is no evidence in the record tending to show that the Officers acted with wanton negligence or willful intent. Wanton conduct reflects a "conscious indifference" or an "I don't' care attitude." *See Washington v. Wilmington Police Dep't.*, 1995 WL 654158, at *4 (Del. Super. Ct. 1995). "The question of wanton conduct is ordinarily reserved for the trier of fact. The Court may only grant judgment as a matter of law if it can draw but one inference from the uncontroverted facts." *Id*. (citations omitted).

Plaintiffs base their claim that the Officers' conduct was wanton and malicious on the fact that the two had no explanation for why they failed to reach the intersection in time to secure it. Allegedly, Officers Powell and Manusiuk discussed no advance plan with Jeffrey Larrimore of Abate, nor did they arrange the timing for the event. They failed to use their radios to communicate and did not discuss the hand signals to be used ahead of time. The Officers testified in their depositions that they did discuss a plan of attack beforehand.

"To constitute wanton conduct, the behavior must go beyond mere inadvertence, momentary thoughtlessness, or mere negligence." *Morris v. Blake*, 552 A.2d 844, 847 (Del. Super. Ct. 1988)[8]. The Plaintiffs have not shown how the Officers' conduct exhibited an "I don't care" attitude or how it may have gone beyond mere inadvertence. They have not presented sufficient facts to support a claim of wanton negligence or a willful or malicious intent

on the part of the officers. *Cf. Patton v. Simone*, 1993 WL 144367, at *16-19 (Del. Super. Ct.) (finding that City defendants' decisions not to inspect a building were arguably passive negligence and an error of judgment, but that they did not rise to the level of wanton negligence.) The Court finds that as a matter of law, based on the facts presented, only one conclusion can be reached. The conduct of Officers Powell and Manusiuk did not rise to the level of wanton negligence or willful or malicious intent.

Furthermore, conditions of mind may be averred generally in the complaint and claims of wanton negligence and willful intent need not be spelled out with the same specificity as the other elements of the claim. *See* Super. Ct. Civ. R. 9(b) ("Malice, intent, knowledge and other condition of mind of a person may be averred generally.") However, the term aver also implies that there must be at least a positive assertion of the state of mind. *Cf., NVF Co. v. Garrett Snuff Mills, Inc.*, 2002 WL 130536, at *4 (Del. Super. Ct.)(finding the claim that "Defendant's conduct was reckless, willful and wanton, warranting an award of punitive damages," was specific enough to withstand a motion to dismiss). The Plaintiffs mention nothing of wanton negligence or malicious or willful intent in their complaints. A plaintiff must plead wanton negligence in order to challenge the defendant's immunity under the Tort Claims Act. *See, e.g.*, *Smith v. New Castle County Vocational-Technical Sch. Dist.*, 574 F. Supp. 813, 823 (D. Del. 1983). Here, the Plaintiffs have not done so, and, thus cannot now claim that the Officers' conduct rose to that level.[9]

2. Town of Bridgeville

Plaintiffs Hedrick and Fillyaw allege that Bridgeville is vicariously liable for the negligence of Officers Powell and Manusiuk under principles of agency and respondeat superior.

They argue that Bridgeville is vicariously liable for the Officers because they were acting in the course and scope of their employment when their negligence allegedly caused injury to the Plaintiffs.

Section 4011(a) provides immunity for government entities and their employees. "Governmental entity" is defined in 10 *Del. C.* § 4010 to include any municipality, town, or county. 10 *Del. C.* § 4012 allows for exceptions to governmental immunity, providing:

> A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following instances:
>
> > (1) In its ownership, maintenance or use of any motor vehicle, special mobile equipment, trailer, aircraft or other machinery or equipment, whether mobile or stationary.
> >
> > (2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.
> >
> > (3) In the sudden and accidental discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines and toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water.

"The activities listed in Section 4012 are an exclusive list and 'are the only activities as to which municipal immunity is waived.'" *Sussex County v. Morris*, 610 A.2d 1354, 1357 (Del. 1992) (citations omitted). The statute also enumerates in § 4011(b) six examples[10] of when a governmental entity shall not be liable for damage claims. It provides that, *inter alia*, "[n]otwithstanding § 4012 . . ., a governmental entity shall not be liable for any damage claim which results from . . . (3) [t]he performance or failure to exercise or perform a discretionary

function or duty, whether or not the discretion be abused. . . ." As concluded in the section itself, paragraphs (1) through (6) of § 4011(b) are meant to be examples only and do not limit the general blanket of immunity provided by the section. *See Patton v. Simone*, 1993 WL 144367, at * 16 (Del. Super. Ct.).

It has also been said that § 4011(b) provides exceptions to § 4012, which in turn provides exceptions to § 4011(a). *Quereguan v. New Castle County*, 2004 WL 2271606, at *3 (Del. Ch.), *quoting*, *Middleton v. Wilmington Housing Authority*, 1994 WL 35382, at *2 (Del.). In other words, the Town of Bridgeville is immune from liability unless its conduct falls into one of the three § 4012 exceptions. But, even if Bridgeville's activities do fall into one of the exceptions, it may still be immune if the conduct in question was discretionary.

a. Respondeat Superior

Plaintiffs contend the Town of Bridgeville should be vicariously liable for the conduct of Officers Powell and Manusiuk under a theory of respondeat superior. For two reasons, this claim must fail. First, the Court has found that the Officers were neither acting outside the scope of their employment nor were they acting wantonly, willfully or maliciously; but, even if Officers Manusiuk and Powell were divested of immunity under either of those two criteria, Bridgeville would be immune from liability. As the District Court stated in *Farris v. Moeckel*, 664 F. Supp. 881, 897 (D. Del. 1987), "[g]iven the plain wording of the state, it would be inappropriate to engraft respondeat superior liability onto § 4011(c), which addresses itself solely to employees, not municipal entities." *See also Schueler v. Martin*, 674 A.2d 882, 888 (Del. Super. Ct. 1996) ("There is no ambiguity present [in §§ 4011(b) and 4012] which would allow for an interpretation that a local governmental entity is liable for wanton negligence or willful and

malicious conduct of its employees."); *Washington v. Wilmington Police Dep't*, 1995 WL 654158, at * 3 (Del. Super. Ct.) ("§ 4011(c) . . . expressly separates the tortious acts of employees of the municipality from the municipality itself. . . . If it could be held liable for the acts of its employees under *respondeat superior*, the Tort Claims Act would be rendered meaningless.").

Second, § 4012 lists the only activities for which municipal immunity is waived, and there is no enumerated exception for respondeat superior liability. The scope of Section 4011 is expansive and "covers 'any and all tort claims;'" however, "there is no statutory exception for those claims based on the principles of *respondeat superior*." *Washington* at *3. Thus, even if Officers Manusiuk and Powell were found to have been negligent in the performance of their duties, Bridgeville would still be immune, unless its own conduct fell into one of the § 4012 exceptions. In sum, a municipal entity cannot lose immunity granted by the Tort Claims Act under a theory of respondeat superior.

b. Agency liability

Plaintiffs also contend that Bridgeville should be vicariously liable for the conduct of the Officers under principles of agency. A principal may be liable for the torts of its agents. *See* Restatement (Second) of Agency, Chapter 7, Topic 1 and § 219 (1958). Under this theory, the acts of the agent are the acts of the principal and the principal is directly liable for the agent's negligence, as long as the agent was acting within the scope of his employment. *Id. See also Morris v. Blake,* 552 A.2d 844, (Del. Super. Ct. 1988) (finding that the issue of Sussex County's immunity remained unresolved because, under principles of agency, the employee's choice of the vehicle causing the injury may have been the County's choice). The principal may also be liable

for its own negligence, for example, in hiring or directing its agents. *See* Restatement (Second) of Agency at §§ 212 - 213. In addition, even though an agent may be immune from liability, suit may still be brought against the principal for the torts of that agent. *See Blake*, 552 A.2d at 849.

Beginning the analysis with the alleged negligence of the agents, Officers Powell and Manusiuk, the Plaintiffs argue that the Officers were performing the type of non-discretionary duties that would expose Bridgeville to liability under § 4011(b). Despite the fact that Powell and Manusiuk are immune from liability because their conduct was not wanton, willful or malicious, the statute does contemplate that Bridgeville may be liable for their negligence. *See, e.g.,* § 4012 ("A governmental entity shall be exposed to liability for its negligent acts . . . ."). Section 4011(b) states that a governmental entity is immune from liability for "[t]he performance or failure to exercise or perform a discretionary function." The use of the term "performance" has been held to include the "manner or method selected by governmental employees to discharge the police power." *Sadler v. New Castle County*, 565 A.2d 917, 922 (Del. 1989). In this regard, it is necessary to explore whether the conduct of the Officers amounted to a discretionary function. Here, liability is being predicated on the performance of their duties, and not upon their initial decision to provide traffic safety for the procession.

In *Simon v. Heald*, 359 A.2d 666, 669 (Del. Super. Ct. 1976), the Court found that "where a police officer is performing routine functions, he may be held personally liable for injuries he causes by his negligence just as employees of other employers may be held personally liable." The *Simon* Court was addressing the issue of governmental immunity under the common law. However, as the *Smith* Court noted, the Tort Claims Act combined common law rules of immunity relating to executive and lower level officials. 574 F. Supp. at 821.

The reasoning in *Simon* is directly applicable to the case at hand because the Act codified the common law rule that policy level decisions or discretionary actions are generally protected from suit. *See Smith*, 359 A.2d at 821, *citing*, *Simon*, 359 A.2d at 667. The Court, in *Simon*, determined that a police officer, who allegedly negligently directed traffic, was not performing a discretionary activity. 359 A.2d at 669. There, the officer had decided to help a stranded vehicle on the side of a busy highway. In his attempt to direct the motorist across the road, another motorist interpreted his hand signal as a sign to stop and a rear-end collision resulted. The Court noted, "the crucial determination is not whether or not a police officer's Position involves the exercise of discretion, but rather the issue is whether or not the Activities which the officer was performing at the time of his alleged negligence were discretionary." *Id*. at 668.

In *Simon*, the Court found that an officer's acts of aiding a stranded motorist and signaling traffic "are not such executive level decisions that an officer is entitled to be protected from liability if he acts negligently." *Id*. at 669. While it pointed out that the trooper's conduct was self-initiated and that he had made the decision to signal the Plaintiff of his own choice, the Court found that one of the routine duties of an officer is to investigate cars stopped on highway shoulders and to render aid to stranded drivers. "[A] police officer's duties and his methods of carrying out these duties are routine procedures, sometimes called standard operating procedures. What he does and how he does it is often the product of routine training and orders rather than discretion. . . ." *Id*.

Following the reasoning in *Simon*, which this Court finds to be sound, the question arises in this case as to whether providing traffic safety services for a charitable event would be considered discretionary activity or part of a routine duty. Officer Powell was asked by a

member of Abate to escort the motorcycles and to secure two major intersections through Bridgeville. He stated in his deposition that he was the senior officer at the time of the event and that he had the authority to decide to aid the procession. Officer Powell asked his partner, Officer Manusiuk, to help him and they received permission on the morning of the event from the Desk Sergeant of Troop 5 of the State Police with this purpose in mind. Once they decided to carry out the job, they only briefly discussed a plan of attack. According to their depositions, during the procession they did not communicate at all. Despite the fact that Officers Powell and Manusiuk made the decision to help out with the procession, the traffic safety services they provided are part of routine procedure for police officers. Officers can often be seen directing traffic at intersections and leading processions, whether they be funeral processions or charitable events.

As the Delaware Supreme Court stated in *Sussex County v. Morris*, 610 A.2d at 1358, "[t]he immunity granted to discretionary acts does not extend to every circumstance in which some element of choice is involved." In that case, the Court noted that non-discretionary acts are commonly referred to as "ministerial" or "operational acts." It adopted the general definition of "ministerial" as it is set out in the Restatement (Second) of Torts: "An act is ministerial if the 'act of the official involves less in the way of personal decision or judgment or the matter for which judgment is required has little bearing of importance upon the validity of the act . . . .'" *Id*. at 1359, *citing*, Restatement (Second) of Torts § 895D cmt. h (1979). While Officers Powell and Manusiuk did have the choice of whether to aid with the procession, once they did so, the manner or method they selected to discharge their duty was merely operational, a product of routine.

The Officers argue that their plan was discretionary and compared their situation to the one in *Sadler v. New Castle County*, 565 A.2d 917 (Del. 1989). There, the Court found rescuers to be immune from liability when they decided to transport an injured man across a river rather than move him by other means, such as by helicopter or by boat. Here, however, it is clear from the facts that the decisions made by Officers Powell and Manusiuk did not arise to the same level of thought, creativity, and inventive judgment as that required of the rescuers in *Sadler*. This Court is persuaded by the reasoning of the *Simon* Court, and finds that an officer's acts of aiding a motor vehicle procession through several intersections and securing traffic at those intersections "are not such executive level decisions that an officer is entitled to be protected from liability if he acts negligently." 359 A.2d at 669. Liability allegedly arose not from the Officers' decision to aid the procession, but from their handling of the procedure for carrying it out. Thus, the Officers' manner of leading the procession and of securing the intersections was ministerial and not discretionary.

Of course, this analysis does not affect the immunity of the Officers, themselves. Section 4011(c) clearly states that an employee may only be divested of immunity for wanton negligence, willful or malicious intent, or for acting outside the scope of his employment. As the Court concluded above, the Officers are immune from suit pursuant to those criteria. The issue of Bridgeville's immunity from liability, however, does not end with the conclusion that the Officers actions were non-discretionary. "The statutory scheme creates two hurdles for plaintiffs asserting claims against local entities." *Heaney v. New Castle County*, 672 A.2d 11, 14 (Del. 1995). The claim must fall within one of the three statutory exceptions to the general grant of

immunity listed in § 4012, *along with* the fact that it must not result from a discretionary duty or function. *Id*.

In this regard, Plaintiffs argue that Bridgeville should be excepted from immunity under the Tort Claims Act because the Officers were using motor vehicles in the pursuit of their duties. Under § 4012, negligent ownership, maintenance, or use of a motor vehicle can be cause for governmental exposure to liability. However, as the Delaware Supreme Court pointed out in *Sadler*, 565 A.2d at 922, such an approach is not warranted when the equipment or motor vehicle did not produce or was not the instrument of the harm. Hedrick and Fillyaw are not claiming that they were injured because the Officers' use of the motor vehicles were negligent, nor are they alleging that the vehicles themselves were defective or that Bridgeville maintained them negligently. The facts show that both Officers used their vehicles properly. The Court finds no basis for application of the equipment exception because there is a lack of causation between the use of a police cruiser and the injuries claimed by the Plaintiffs. The Officers' vehicles were not the instrument of the harm alleged. *Accord Sussex County v. Morris*, 610 A.2d at1360 ("The motor vehicle exception in Section 4012(1) applies when the vehicle itself is the instrument of the harm.").

Nor is the Court convinced that this reasoning would be any different if it were to follow Plaintiff Fillyaw's rationale that the flashing overhead and grill lights and the hazard lights on the vehicles are mobile equipment. The analysis is the same. Fillyaw is not claiming that the lights were defective. She merely says that he was using the lights, and since he was operating mobile equipment, there can be no immunity under the Tort Claims Act. Here again, there have been no

allegations that the lights on the vehicle were the instrument of the harm. Thus the § 4012(1) exception does not apply.[11]

CONCLUSION

Considering the foregoing, Defendant Abate's Motion is denied. Defendants Powell's, Manusiuk's and Bridgeville's Motions are granted, and all three are dismissed from this case.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary

ENDNOTES

1. Allegedly, the light had turned red by the time Hedrick reached and began to enter the intersection. There is some dispute as to whether there was an officer in the intersection directing traffic. It is also argued that the Officers may not yet have arrived or that one or both had arrived but had remained in their vehicles.

2. 21 *Del. C.* § 4176 governs careless or inattentive driving. It provides:

> (a) Whoever operates a vehicle in a careless or imprudent manner, or without due regard for road, weather and traffic conditions then existing, shall be guilty of careless driving.
> (b) Whoever operates a vehicle and who fails to give full time and attention to the operation of the vehicle, or whoever fails to maintain a proper lookout while operating the vehicle, shall be guilty of inattentive driving.

21 *Del. C.* § 4103(a) provides:

> No person shall willfully fail or refuse to comply with any lawful order or direction of any police officer or authorized flagperson or fire police officer or uniformed adult school crossing guard invested by law with authority to direct, control or regulate vehicle and pedestrian traffic. This subsection shall not operate to relieve a driver of the duty to operate the driver's vehicle with due regard to the safety of all persons using the highway.

21 *Del. C.* § 4134(a) states:

> Upon the immediate approach of an authorized emergency vehicle making use of audible or visual signals, or of a police vehicle properly and lawfully making use of an audible signal only, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway clear of any intersections and shall relinquish the right-of-way until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

3. 21 *Del. C.* § 4107 governs obedience to traffic control devices and provides:

> (a) The driver of any vehicle shall obey the instructions of any traffic-control device applicable thereto placed in accordance with this title, unless otherwise directed as authorized in § 4103 of this title, subject to the exceptions granted the driver of an authorized emergency vehicle in this title.
>
> (b) No provision of this chapter for which traffic-control devices are required shall be enforced against an alleged violator if at the time and place of the alleged violation an official traffic-control device is not in proper position and sufficiently legible to be seen by an ordinarily observant person. This subsection shall not operate to relieve a driver of the duty to operate a vehicle with due regard to the safety of all persons using the highway.
>
> (c) Whenever a particular section does not state that traffic-control devices are required, such section shall be effective even though no traffic-control devices are erected or in place.
>
> (d) In the event a traffic-control signal is erected and maintained at a place other than an intersection, this title shall be applicable except as to those provisions which by their nature can have no application.
>
> (e) Whenever traffic-control devices are placed in position approximately conforming to the requirements of this title, such devices shall be presumed to have been so placed by the official act or direction of lawful authority, unless the contrary shall be established by competent evidence.
>
> (f) Any traffic-control device placed pursuant to this title and purporting to conform to the lawful requirements pertaining to such devices shall be presumed to comply with the requirements of this title, unless the contrary shall be established by competent evidence.

4. Decision on both motions has been postponed twice without prejudice in order to permit further discovery. The parties requested additional time in order to allow the depositions of the Officers and of other witnesses to be taken. At this time all the depositions are accomplished and the record is complete

5. Jeff Larrimore and Charles Larrimore are father and son and both are members of Abate.

6. Plaintiffs do not dispute that Officer Manusiuk was acting within the scope of his employment. The Amended Response to the Request for Admission apparently only involved Officer Powell.

7. Superior Court Civil Rule 36 provides:

> (a) Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.
> . . .
> A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why the party cannot admit or deny it.
> . . .
> (b) Effect of Admission. Any matter admitted under this Rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the Court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the Court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this Rule is for the purpose of the pending action only and is not an admission for any other purpose nor may it be used against the party in any other proceeding.

8. This case was affirmed by *Sussex County v. Morris*, 610 A.2d 1354 (Del. 1992). The issues, applicable to this case, raised on appeal related only to the scope of immunity conferred on a county official under the Tort Claims Act and to the affect of the agency relationship on the immunity of the county. The Superior Court's decision as to the immunity of the county official was affirmed and its decision about the agency relationship was also affirmed, but for other reasons. *Blake* is cited only for those issues to which the Superior Court's decision is still

applicable.

9. Since the Court finds that Officers Powell and Manusiuk's conduct did not rise to the level of wanton, willful or malicious behavior, it need not address the issue of whether they were performing a discretionary duty, and whether this might then render them immune under § 4011(b)(3). The issue is discussed below, however, as it relates to the immunity of Bridgeville.

10. The full text of § 4011(b) is as follows:

> (b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:
>
> (1) The undertaking or failure to undertake any legislative act, including, but not limited to, the adoption or failure to adopt any statute, charter, ordinance, order, regulation, resolution or resolve.
>
> (2) The undertaking or failure to undertake any judicial or quasi-judicial act, including, but not limited to, granting, granting with conditions, refusal to grant or revocation of any license, permit, order or other administrative approval or denial.
>
> (3) The performance or failure to exercise or perform a discretionary function or duty, whether or not the discretion be abused and whether or not the statute, charter, ordinance, order, resolution, regulation or resolve under which the discretionary function or duty is performed is valid or invalid.
>
> (4) The decision not to provide communications, heat, light, water, electricity or solid or liquid waste collection, disposal or treatment services.
>
> (5) The discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalines, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water, except as provided in subdivision (3) of § 4012 of this title.
>
> (6) Any defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such ways including but not

> limited to street signs, traffic lights and controls, parking meters and guardrails.
>
> Paragraphs (1) to (6) of this subsection to which immunity applies are cited as examples and shall not be interpreted to limit the general immunity provided by this section.

11. Plaintiff Fillyaw also argues that § 4012(1) should apply because Bridgeville, through its employees, took control of traffic equipment at an intersection. This argument does not withstand scrutiny, however. No allegations have been made that any of the traffic control devices at the intersection were being operated by the Officers, or that they malfunctioned. The only "equipment" alleged to have been used during the incident were the police cruisers, which the Court found were not the instruments of the harm.