

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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 BARBARA B. KASTLE and MATTHEW L. :
 KASTLE, Individually and as Joint :
 Administrators of the Estate of MICHAEL :
 W. KASTLE, Deceased, :
 Plaintiffs, :
 v. :
 Town of Kent Police Officer CHRIS :
 TOMPKINS, Town of Kent Police Officer :
 DARREN M. CEA, Town of Kent Police :
 Chief ALEX DIVERNIERI, Town of Kent :
 Police Sergeant JERRY RANERI, Putnam :
 County Deputy Sheriff J.P. KERWICK, :
 Putnam County Deputy Sheriff DANIEL :
 HUNSBERGER, Town of East Fishkill :
 Police Detective KYLE P. DOUGHTY, :
 Town of East Fishkill Police Officer :
 DANIEL P. DIDATO, Town of East Fishkill :
 Police Detective RYAN J. ANGIOLETTI, :
 Defendants. :
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**MEMORANDUM OPINION
AND ORDER**

13 CV 2256 (VB)

Before the Court is Magistrate Judge Paul E. Davison’s Report and Recommendation (“R&R”), dated March 13, 2017 (Doc. #158), on defendants’ motions for summary judgment (Docs. ##122, 126, 130). Judge Davison recommended that the motions be granted in part and denied in part.

For the following reasons, the Court adopts the R&R, except that the Court rejects the recommendation that the Kent defendants Tompkins, Cea, DiVernieri, and Raneri, and the East Fishkill defendants Doughty, DiDato, and Angioletti, are entitled to summary judgment on plaintiffs’ wrongful death claim.

Familiarity with the procedural background of this case is presumed.

I. Standard of Review

A district court reviewing a magistrate judge's report and recommendation on a dispositive motion, such as a motion for summary judgment, "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Objections to the recommended ruling are reviewed de novo. Id.; accord, Fed. R. Civ. P. 72(b)(3). Unobjected to portions of the recommended ruling are reviewed for clear error. See Wilds v United Parcel Service, Inc., 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003).

II. Rule 56.1 Statements

Preliminarily, the Court notes its full agreement with Judge Davison's observations regarding plaintiffs' non-compliant (i) responses to defendants' Rule 56.1 Statements and (ii) Rule 56.1 counter-statement of material facts. (R&R at 2-6). This Court shares Judge Davison's justifiable frustration with plaintiffs' counsel's inability and/or failure to comply with the requirements of Local Rule 56.1, thus impeding the Court's ability to determine which, if any, material facts are in dispute. The Court will assume plaintiffs' counsel's failure to comply was merely sloppy and careless; regardless, the Court fully agrees with and adopts Judge Davison's decision to "take[] into account the admissible record evidence to which plaintiffs specifically cite and consider[] whether it raises issues of material fact but [to] otherwise deem[] admitted those facts in defendants' Local Rule 56.1 Statements which plaintiffs have failed to sufficiently controvert – provided defendants' factual assertions are duly supported by the record evidence." (R&R at 5-6).

III. The Parties' Objections

Plaintiffs object to all of Judge Davison's findings and recommendations, except that plaintiffs do not object to the recommendation that the motion of East Fishkill defendants DiDato and Angioletti for summary judgment be denied as to (i) the fair trial claim based on the

suppression of narrative reports containing information of Officer Bade's consumption of alcohol, and (ii) the conspiracy claim against these two defendants.

The East Fishkill defendants object to Judge Davison's recommendation to deny the motion as to the fair trial claim and the conspiracy claim against DiDato and Angioletti.

In conducting a de novo review of the R&R, the Court has independently and thoroughly reviewed the record and the relevant case law. Having done so, the Court finds no merit in plaintiffs' or defendants' objections, with one important exception: the Court respectfully disagrees with Judge Davison's finding and recommendation that there are no material issues of fact with respect to the wrongful death claim against the Kent defendants (Tompkins, Cea, DiVernieri, and Raneri) and against the East Fishkill defendants (Doughty, DiDato, and Angioletti). The Court finds that the R&R is correct in all other respects.

As to the wrongful death claim, the Court agrees with plaintiffs that – construing the facts, resolving all ambiguities, and drawing all permissible factual inferences in plaintiffs' favor – there is sufficient admissible evidence from which a reasonable jury could find a persistent course of harassment and intimidation by the Kent and East Fishkill defendants over a period of months prior to Michael Kastle's death that, when considered as a whole, constituted a “wrongful act, neglect or default which caused the decedent's death,” committed by persons “who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.” N.Y. Est. Powers & Trusts L. § 5-4.1; accord, Chong v. N.Y.C. Transit Auth., 83 A.D.2d 546, 547 (2d Dep't 1981).¹

¹ The evidence is likewise sufficient to establish the other elements of a wrongful death claim; namely, the survival of distributees who suffered pecuniary loss by reason of the decedent's death and the appointment of a personal representative. See Chong v. N.Y.C. Transit Auth., 83 A.D.2d at 547.

First, the evidence is undisputed that Michael had numerous police encounters with Kent and East Fishkill police officers starting with the Bade car accident on April 27, 2011, and continuing through his encounter with Officer Cea on March 30, 2012. There is also evidence East Fishkill defendants Doughty, DiDato, and Angioletti, and Kent defendants DiVernieri and Raneri, knew of and suppressed evidence that Bade had consumed alcohol prior to the accident – from which a permissible inference could be drawn that they were attempting to protect their colleague Bade, who had been seriously injured in the accident, from the consequences of being found to have driven while his ability to do so was impaired by alcohol. That inference is supported by the testimony of Michael’s lawyer, Scot F. Hersh, and Michael’s mother, Barbara Kastle. Hersh testified that Kent defendant Tompkins and other Kent police officers told Hersh the Kent police had “continued to look for” Michael after the accident and asked rhetorically, “Is the kid getting the message?” Hersh also testified a “systematic organized pattern . . . developed after” the car accident, in which Kent officers told Hersh that Michael could go to jail as a result of the accident, and East Fishkill officers told him Michael should therefore admit he caused the accident. Barbara Kastle testified that Kent defendant Raneri told her to stop asking for information because it “wasn’t helping Michael.”

Moreover, Michael’s neighbor, Kevin Mahony, testified that after the accident Michael told Mahony the police were harassing him, and that Michael went from being a “very relaxed calm kid” to being “frequently scared” and fearing for his life. According to Mahony, on at least five occasions, he saw a Kent police car drive slowly past Michael’s house and shine a spotlight in Michael’s bedroom window between 1:00 and 2:00 in the morning. Matthew Kastle, Michael’s father, testified that at least ten times in the fall of 2011, between the hours of 1:00 and 3:00 in the morning, he saw Kent police vehicles with mounted spotlights drive slowly past

Michael's home, and at least one time, a police car shone a spotlight into Michael's bedroom window. He also testified that once, when he was in the car with Michael, a Kent police officer followed Michael for no reason, and only did not pull Michael over because the officer saw Matthew in the car with Michael. Michael's friend, Zachary Barrett, testified he observed other harassment by Kent police officers, including defendant Cea, and that on one occasion, he was with Michael when Michael was followed by the police for no reason. Another friend, Bobby Hewitt, testified Michael repeated his allegations about police harassment so frequently that Hewitt distanced himself from Michael.

In addition, Michael told his therapist, Jennifer Culley, that he was very anxious due to the Bade car accident and his subsequent interactions with the police. On multiple occasions, Michael told Culley he had been targeted and stalked by the police, and that Kent police officers had frequently followed him, waiting for him to do something for which they could issue him a ticket. Michael also reported his anxiety due to the Bade accident and its aftermath to his psychiatrist, Dr. Thomas Van Aken.

The particular police officers involved in many of these interactions with Michael are not specifically identified. However, it is a fair inference that – and ultimately a jury question whether – the named Kent defendants were involved in these encounters, given the frequency of the encounters and Hersh's testimony that Tompkins and other Kent officers told him the Kent police continued to look for Michael after the Bade car accident in what a reasonable jury could conclude was a systematic effort to dissuade Michael from pursuing his claim that Bade was at fault. And, of course, it was the East Fishkill defendants who prosecuted the tickets issued to Michael after the Bade car accident, and who suppressed the evidence of Bade's consumption of alcohol.

Finally, plaintiffs' retained expert psychiatrist, Dr. Manuel Lopez-Leon, opined:

[T]he persistent police encounters constituted a substantial source of emotional stress which [led] to the development of the psychiatric symptoms and in the severity of them. The relentless episodes of police encounters caused Michael to develop hopelessness and helplessness which in turn increased his level of anxiety, exacerbated his Obsessive Compulsive Disorder, and caused him to experience intense panic attacks. Michael's intense reaction of fear, horror, helplessness, and vulnerability was aggravated by the persistence in the encounters.

Dr. Lopez-Leon also opined that these persistent police encounters caused Michael to "self-medicate . . . by taking medications not prescribed to him which caused his death. . . . The persistence of police encounters not only caused anxiety and panic attacks to Michael, but also vulnerability, since he couldn't trust those who are supposed to protect him."

If the testimony of these various witnesses is found credible by a jury, the jury could fairly infer that a dramatic decline in Michael's mental health resulting in physical harm or death was a foreseeable consequence of the proven conduct.

The R&R focuses principally on the absence of defendants' wrongful conduct under the various constitutional claims brought pursuant to Section 1983. But, with all respect to the magistrate judge, that is too narrow a view of "wrongful" under the circumstances of this case. Indeed, although plaintiffs have not specifically identified a New York cause of action underlying the wrongful death claim, the Court finds that the record evidence, considered as a whole and viewed in plaintiffs' favor, gives rise to a permissible inference that Michael's physical and mental well-being were harmed by a concerted and persistent course of harassment and intimidation by the Kent and East Fishkill defendants, such that these defendants may have committed the tort of intentional or reckless infliction of emotional distress. The elements of that tort are: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct

and injury; and (iv) severe emotional distress.” Howell v. N.Y. Post Co., 81 N.Y.2d 115, 121 (1993); accord, Chanko v. Am. Broad. Cos., 27 N.Y.3d 46, 56 (2016).

Although there is no question an intentional infliction of emotional distress claim is extremely difficult to prove – because the conduct has to be so extreme and outrageous as to be regarded as “atrocious and utterly intolerable,” Chanko v. Am. Broad. Cos., 27 N.Y.3d at 57-58 – here, if plaintiffs’ evidence is believed, that level of outrageousness can fairly be inferred from the fact that, it was police officers, not civilians, who persistently harassed and intimidated a 17-year old boy suffering from extreme anxiety, a condition of which the police officers were arguably aware given their numerous interactions with Michael over the one-year period before his death. See Vasarhelyi v. New Sch. for Soc. Research, 230 A.D.2d 658, 661 (1st Dep’t 1996) (upholding intentional infliction of emotional distress claim when defendant, the president of an academic institution, threatened criminal prosecution of a lower-level employee).

To be clear, the Court does not find that plaintiffs will or are even to likely to prove their wrongful death claim against the Kent and East Fishkill defendants at trial – but only that, in light of the record evidence, a reasonable jury could find in plaintiffs’ favor on this claim.

As to the Putnam County defendants, however, there is no admissible evidence of extreme or outrageous conduct. Kerwick and Hunsberger’s involvement, according to the admissible record evidence properly considered under Local Rule 56.1, was limited to the Home Depot arrest on September 15, 2011, and the traffic stop on March 11, 2012. Other than these two incidents, there is no evidence Kerwick and Hunsberger had any interactions with Michael, and they had no involvement in the Bade car accident investigation or its aftermath. The Court agrees with and adopts Judge Davison’s recommendation that summary judgment in these defendants’ favor is warranted.

CONCLUSION

For the reasons set forth above, the Court OVERRULES both parties' objections to Magistrate Judge Davison's thorough and well-reasoned R&R, with the exception that the Court SUSTAINS plaintiffs' objections to Judge Davison's recommendation as to the wrongful death claim against the Kent defendants and the East Fishkill defendants. The Court otherwise adopts the R&R in its entirety.

The motion of the Putnam County defendants J.P. Kerwick and Daniel Hunsberger for summary judgment is GRANTED.

The motion of the Kent defendants Chris Tompkins, Darren M. Cea, Alex DiVernieri, and Jerry Raneri for summary judgment is GRANTED with respect to all claims except the wrongful death claim, as to which it is DENIED.

The motion of the East Fishkill defendants Kyle P. Doughty, Daniel P. DiDato, and Ryan J. Angioletti for summary judgment is GRANTED with respect to all claims except (i) the wrongful death claim, (ii) the fair trial claim against DiDato and Angioletti based on the suppression of narrative reports containing information of Officer Bade's consumption of alcohol, and (iii) the conspiracy claim against DiDato and Angioletti, as to which it is DENIED.

The Clerk is instructed to terminate the motions. (Docs. ##122, 126, 130).

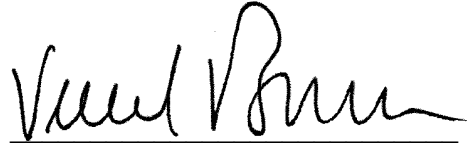
The Clerk is further instructed to terminate defendants J.P. Kerwick and Daniel Hunsberger.

By August 28, 2017, counsel shall submit a Joint Pretrial Order in accordance with paragraph 3(A) of the Court's Individual Practices.

All counsel, except counsel for the Putnam County defendants, shall attend a case management conference on August 29, 2017, at 9:30 a.m., at which time the Court will schedule the case for trial and set dates for pretrial submissions.

Dated: July 27, 2017
White Plains, NY

SO ORDERED:

A handwritten signature in black ink, appearing to read "Vincent L. Briccetti", written over a horizontal line.

Vincent L. Briccetti
United States District Judge