DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2011

PETER MILANESE, as Personal Representative of the ESTATE OF CHRISTOPHER MILANESE,
Appellant,

v.

CITY OF BOCA RATON, FLORIDA,
Appellee.

No. 4D09-5247

[July 20, 2011]

STEVENSON, J.

This appeal stems from a complaint alleging negligence and wrongful death against the City of Boca Raton for the death of Christopher Milanese, which occurred shortly after his release from police custody. The trial court dismissed the complaint with prejudice for failure to state a claim. Because we conclude that the complaint sufficiently alleges a cause of action, we reverse.

The complaint alleges that, on the night Milanese was taken into custody, he had consumed large amounts of alcohol at a bar, reaching a blood alcohol level exceeding three times the legal limit. Milanese was accompanied by his cousin. Milanese left the bar, walked to his truck and began "driving erratically, hitting curbs, driving over the grass and running red lights" while his cousin followed behind in her car. Around approximately 3:14 a.m., as Milanese's cousin dialed 911, a City police officer pulled over Milanese and took him into custody. The officer ordered Milanese's cousin to return to her own car and leave. At the point of detention, Milanese's blood alcohol level was .24 and he "exhibited overt signs of impairment, drunkenness and inebriation."

The officer placed Milanese in his patrol car and transported him to the police station, which was in a neighborhood unfamiliar to Milanese. Between 3:14 a.m. and 3:41 a.m., Milanese was issued five traffic citations while detained at the police station. Another police officer then called a taxi cab for Milanese, which arrived at the station at around 4:29 a.m. The officer escorted Milanese to the front door of the station and

released him from custody around 4:30 a.m. The cab driver did not see Milanese and left the station without him. At 5:20 a.m., Milanese was observed lying parallel next to some railroad tracks by the conductor of an approaching train. The engineer blew the train's horn, but Milanese did not move and was struck and killed by the train. At the time of his death, his blood alcohol level was .199. The complaint alleged that the officers who detained Milanese breached their duty of care when they released the intoxicated Milanese into an unfamiliar neighborhood in the wee hours of the morning, without first determining that a safe mode of transportation away from the area was in fact available to him. The complaint further alleged that an active railroad track was located less than 50 feet from the rear of the police station. After a motion to dismiss was filed by the City, the trial court granted the motion on the basis that the complaint failed to allege that a duty was owed to Milanese.

A trial court's dismissal for failure to state a cause of action is reviewed de novo. *See Wallace v. Dean*, 3 So. 3d 1035, 1045 (Fla. 2009). The complaint's allegations, and all reasonable inferences therefrom, must be accepted as true. *See id.* at 1042–43. However, "there can be no governmental liability unless a common-law or statutory duty of care existed that would have applied to an individual under like circumstances." *Id.* at 1046. In the police officer context, a tort duty arises where officers directly involve themselves in circumstances placing the tort victim within a "zone of risk" by creating or permitting danger to exist, taking persons into custody, detaining them, or subjecting them to danger. *Id.* at 1048. Where an officer's conduct creates a "zone of risk," a duty is placed on the officer to lessen the risk, or to take precautions to protect others from the harm. *See Henderson v. Bowden*, 737 So. 2d 532, 535 (Fla. 1999).

The complaint alleges facts establishing that a duty was owed to Milanese. The officer placed Milanese within a "zone of risk" by taking him into custody. *See, e.g.*, *Kaisner v. Kolb*, 543 So. 2d 732, 734 (Fla. 1989) (finding petitioner was owed duty by police officer where officer ordered petitioner to stop, thus placing him in custody); *Walston v. Fla. Highway Patrol*, 429 So. 2d 1322, 1324 (Fla. 5th DCA 1983) (state liable for negligence by officer during roadside detention). Thus, the officer had a duty to act reasonably to protect Milanese from harm. *See Henderson*, 737 So. 2d at 535. Although Milanese's death occurred after his release from custody, the complaint's allegations are focused on the officers' actions while Milanese was still in custody, specifically the officers' manner of releasing him. We also note that Milanese's cousin, who was following behind him in her car and therefore a possible means of safe

transportation for Milanese, was ordered to return to her car and leave upon the initial detention.

The dissent argues that *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. 4th DCA 1998), is instructive. In *Lindquist*, this court addressed whether the plaintiff was denied due process and entitled to relief pursuant to 42 U.S.C. § 1983, for injuries sustained in a car accident occurring directly after his release from police custody. When the plaintiff was arrested by police officers, he was driven about two miles to the police station. *Id.* at 359. At the point of arrest, the plaintiff was "intoxicated, disoriented, confused, unaware of his surroundings, and otherwise incapacitated." *Id.* The plaintiff was charged with disorderly conduct at the police station and then released. *Id.* While crossing a nearby highway, the plaintiff was hit by a vehicle and seriously injured. *Id.* The plaintiff alleged that the police officers knowingly released him in "'an area more dangerous than the area where [he] was arrested,'" which, given his intoxicated state, exposed him to increased danger. *Id.* This court ultimately denied the plaintiff's due process claim. *Id.* at 362. In so doing, we relied, in part, on the "state-created danger" theory, addressed in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), as follows:

> "While the State may have been aware of the dangers that [the plaintiff] faced in the free world, it played no part in their creation, *nor did it do anything to render him any more vulnerable to them*. That the State once took temporary custody of [the plaintiff] does not alter the analysis, for when it returned him to his father's custody, *it placed him in no worse position than that in which he would have been had it not acted at all*; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter."

Lindquist, 706 So. 2d at 361 (quoting *DeShaney*, 489 U.S. at 201).

Although *Lindquist* presents facts similar to the instant case, we did not engage in a "zone of risk" analysis, nor did the plaintiff seek relief pursuant to a negligence claim. Liability under the Due Process Clause is narrow and not meant as a substitute for tort law. *See, e.g.*, *DeShaney*, 489 U.S. at 202 (noting that "the Due Process Clause . . . does not transform every tort committed by a state actor into a constitutional violation"). Rather, "negligent conduct . . . 'is categorically beneath the threshold of constitutional due process.'" *Sitzes v. City of W. Memphis Ark.*, 606 F.3d 461, 466 (8th Cir.) (quoting *County of*

Sacramento v. Lewis, 523 U.S. 833, 849 (1998)), *cert. denied*, 131 S. Ct. 828 (2010). Thus, *Lindquist* simply did not address the negligence issue presented by the instant case. Florida tort law, rather than federal constitutional law, is instructive.

Significantly, the Florida Legislature has enacted a statute regarding the treatment of intoxicated drivers taken into police custody. Section 316.193(9), Florida Statutes (2007), requires that a person who is arrested for a DUI may not be released from custody until (1) that person is no longer under the influence of intoxicating substances and affected to the extent that his or her normal faculties are impaired; (2) the person's blood-alcohol level or breath-alcohol level is less than 0.05; or (3) 8 hours have elapsed from the time the person was arrested. Milanese was not arrested for DUI, and we do not suggest that the same safeguards of section 316.193(9) should have been employed in his case. Rather, the statute is indicative of the recognition that the release of an intoxicated person from police custody is fraught with possible dangers and should be accomplished utilizing a reasonable level of care. As our supreme court noted in *Henderson v. Bowden*:

> "There may be no duty to take care of a man who is ill or intoxicated, and unable to look out for himself; but it is another thing entirely to eject him into the danger of a street or railroad yard; and if he is injured there will be liability. But further, if the defendant does attempt to aid him, and takes charge and control of the situation, he is regarded as entering voluntarily into a relation which is attended with responsibility."

737 So. 2d at 537 (quoting with approval, W. Page Keeton, et. al., *Prosser and Keeton on the Law of Torts*, § 53, at 378 (5th ed. 1984)).[1] Based on the facts alleged in the complaint, a jury might conclude that Milanese was not afforded the minimal level of reasonable care.

For the above reasons, the complaint alleges facts sufficient to survive dismissal at this early stage in the proceeding. *See Wallace*, 3 So. 3d at 1046 ("A duty of care is 'a minimal threshold legal requirement for opening the courthouse doors.'") (quoting *McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502 (Fla. 1992) (footnote and emphasis omitted)). Whether the officers breached their duty of care, or proximately caused Milanese's

---

[1] We also note that the supreme court's opinion in *Henderson* was decided after *Lindquist* and, unlike *Lindquist*, does involve the "zone of risk" analysis as applied to police officers.

death, may yet yield to resolution by summary judgment after the record is more fully developed or could remain properly left to a jury. *See id.* at 1047.

Reversed and remanded.

WARNER, J., concurs.
GERBER, J., dissents with an opinion.

GERBER, J., dissenting.

I respectfully dissent for six reasons: (1) the majority's decision is not in uniformity with one of our own decisions; (2) the complaint contains no factual allegations supporting the legal conclusion that the police created a "zone of risk"; (3) the cases which the majority cites to support its decision are distinguishable; (4) section 316.193(9), Florida Statutes (2007), does not apply to this case; (5) the majority's decision has imposed new duties of care upon the police not found in the common law or the Florida Statutes; and (6) the majority's decision raises a number of civil rights and other questions.

First, the majority's decision is not in uniformity with one of our own decisions, *Lindquist v. Woronka*, 706 So. 2d 358 (Fla. 4th DCA 1998). In *Lindquist*, the police arrested the plaintiff for disorderly conduct. *Id.* at 359. At the time of the arrest, the plaintiff was "intoxicated, disoriented, confused, unaware of his surroundings, and otherwise incapacitated." *Id.* The police took the plaintiff to the police station. *Id.* The police later released the plaintiff with a notice to appear at a future court date. *Id.* After being released, the plaintiff was crossing a highway near the police station when a vehicle struck and injured him. *Id.* The plaintiff sued the police for a civil rights violation, claiming that the police "should have kept him in custody for his own protection because he was obviously inebriated." *Id.* Alternatively, the plaintiff alleged, "the police officers should have driven him home." *Id.* However, according to the plaintiff, the police "knowingly released him from [their headquarters], 'an area more dangerous than the area where [he] was arrested,' thus exposing him to increased danger." *Id.* The circuit court dismissed the plaintiff's claim. *Id.* at 359–60. We affirmed, reasoning:

> Here, plaintiff was not in custody at the time of the accident, nor was his liberty otherwise restrained. Thus, we find that plaintiff's . . . theory of liability, based on a special relationship, does not apply.

Id. at 361. The same reasoning applies to this case.

Second, the complaint contains no factual allegations to support the legal conclusion that the police created a "zone of risk" which posed a general threat of harm to Milanese. *See McCain v. Fla. Power Corp.*, 593 So. 2d 500, 502–03 (Fla. 1992) ("The duty element of negligence focuses on whether the defendant's conduct foreseeably *created* a broader 'zone of risk' that poses a general threat of harm to others.") (emphasis added; citations omitted). The police did not create Milanese's impaired condition or the surroundings into which he was released. The police also did not do anything to make Milanese more vulnerable to those surroundings. The police simply did what they were obligated to do after issuing Milanese's traffic citations – they released him from custody at the police station. By releasing Milanese, the police placed him in no worse position than if they had not acted at all. Thus, contrary to the dicta which the majority quotes from *Henderson v. Bowden*, 737 So. 2d 532 (Fla. 1999), the police did not "eject [Milanese] into the danger of a street or railroad yard." *Id.* at 537. Rather, the police attempted to place Milanese in a better position by calling him a cab when they had no duty to do so. The fact that Milanese apparently chose not to enter the cab should not thereby expose the police to liability.

Lindquist is again persuasive. There, after rejecting the plaintiff's application of the "special relationship" theory, we addressed whether the plaintiff's allegations were sufficient to state a cause of action under the "state-created danger" theory of liability. *Id.* That theory, which derives from the United States Supreme Court's opinion in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), is strikingly similar to the "zone of risk" theory:

> While the State may have been aware of the dangers that [the plaintiff] faced in the free world, *it played no part in their creation, nor did it do anything to render him any more vulnerable to them*. That the State once took temporary custody of [the plaintiff] does not alter the analysis, for when it returned him to his father's custody, *it placed him in no worse position than that in which he would have been had it not acted at all*; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

Id. at 201 (emphasis added). We concluded in *Lindquist* that the plaintiff's reliance on the "state-created danger" theory lacked merit:

> Although plaintiff alleges that defendants placed him in a more dangerous position by his arrest and release, the release of plaintiff at the . . . police station which happens to be located near an intersection, is insufficient . . . to impose civil rights liability on defendants. No court has yet found a violation of an individual's due process rights under similar facts.

Lindquist, 706 So. 2d at 362 (footnote omitted). The majority's decision today makes this court the first to allow for a possible finding of liability under these facts.[1]

Third, the cases which the majority cites to support its decision are distinguishable. Unlike this case and *Lindquist*, none of those cases involve a situation in which a person is simply released from custody at a police station. *See Wallace v. Dean*, 3 So. 3d 1035, 1040 (Fla. 2009) (deputies undertaking a safety check on an unresponsive woman placed her in a "zone of risk" by rebuffing her neighbors' suggestion that she was in a diabetic coma and by assuring neighbors that she was simply asleep and did not need an ambulance or medical attention); *Henderson*, 737 So. 2d at 536 (deputies, after conducting a traffic stop of a vehicle, more likely than not created a "zone of risk" for the vehicle's passengers by directing the vehicle's intoxicated driver to drive to a nearby store); *Kaisner v. Kolb*, 543 So. 2d 732, 734 (Fla. 1989) (police officer created "zone of risk" for plaintiff by directing him to stand between his vehicle and police cruiser during traffic stop, thus depriving him of his ability to protect himself from oncoming traffic); *Walston v. Fla. Highway Patrol*, 429 So. 2d 1322, 1324 (Fla. 5th DCA 1983) (jury issue was presented regarding whether troopers caused an increased risk to an intoxicated person by allowing him to stand between cars during a traffic stop without warning him of any danger).

Fourth, section 316.193(9), Florida Statutes (2007), does not apply to this case. The police, for whatever reason, did not arrest Milanese for

[1] The majority attempts to bolster its conclusion that the police created a "zone of risk" by "also not[ing] that Milanese's cousin, who was following behind him in her car and therefore a possible means of safe transportation for Milanese, was ordered to return to her car and leave upon the initial detention." However, the complaint did not allege that fact as a basis of how the police created a "zone of risk." The complaint merely alleged that fact as background. The majority should view the complaint as it is pled, not how it could have been pled. *See Edwards v. Landsman*, 51 So. 3d 1208, 1213 (Fla. 4th DCA 2011) ("In reviewing an order granting a motion to dismiss, this court's gaze is limited to the four corners of the complaint.") (citation and internal quotations omitted).

driving under the influence. Thus, the police were not required to hold him in custody: (a) until he was no longer under the influence; (b) until his blood-alcohol level or breath-alcohol level was less than 0.05; or (c) until eight hours elapsed from the time he was arrested. § 316.193(9), Fla. Stat. (2007). Moreover, nothing within section 316.193 suggests that the legislature intended to impose these requirements as civil duties of care upon the police.

Fifth, the majority's decision has imposed new duties of care upon the police not found in the common law or the Florida Statutes. According to the complaint which the majority approves today, the police now are responsible for releasing impaired persons from police stations "in a safe and reasonable manner." Complaint at ¶ 15. What does that mean? According to the complaint, it means that the police must ensure that the impaired person has transportation to go home. Complaint at ¶¶ 15, 16. It means that, if necessary, the police must call a cab for the impaired person, escort the impaired person to the cab, and place the impaired person in the cab. Complaint at ¶ 17. No court or legislature has imposed those requirements upon the police until today.

Sixth, the majority's decision raises a number of civil rights and other questions. What if Milanese told the police he refused to get into the cab – would the police have been required to illegally force Milanese into the cab? Would the police have been required to illegally detain Milanese until he agreed to get into the cab? What if Milanese got into the cab and told the driver to let him out at the end of the block in plain sight of the police – would the police have been required to illegally force Milanese back into the cab? Would the police have been required to illegally order the cab driver not to let Milanese out of the cab until delivering him to his home? What if the released person's impairment was not due to temporary intoxication but rather was due to permanent mental illness – would the police be required to ensure that person's safety upon release? What if the released person is homeless or lives in other dangerous circumstances – would the police be required to ensure that person's safety upon release?

Based on the foregoing six reasons, I would affirm the trial court's order concluding that the police owed no duty to Milanese for the manner in which they released him from custody at the police station.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Robin L. Rosenberg, Judge; L.T. Case No. 50 2007 CA 018509 XXXX MB.

James K. Green of James K. Green, P.A., West Palm Beach, for appellant.

Matthew H. Mandel and Laura K. Wendell of Weiss Serota Helfman Pastoriza Cole & Boniske, P.L., Coral Gables, for appellee.

Not final until disposition of timely filed motion for rehearing.