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J.S.C.

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Plaintiff RICHARD DESIERVO, as Administrator ad Prosequendum for the heirs-at-law of Diane Mascolo, deceased; and Administrator of the Estate of Diane Mascolo, deceased, and individually, CONNER MASCOLO, a minor, individually through his Guardian, RICHARD DESIERVO, and NICHOLAS MASCOLO, individually, vs. ***Defendant(s)*** TOWNSHIP OF ELMWOOD PARK, POLICE DEPARTMENT OF ELMWOOD PARK, POLICE OFFICER MICHAEL MULLIGAN, POLICE OFFICER JOSEPH BARONE, POLICE OFFICER JOHN EITEL, ELMWOOD PARK AMBULANCE CORPS., ST. JOSEPH'S HEALTHCARE SYSTEM, INC., PULSE MEDICAL TRANSPORTATION, INC., JOHN & JANE DOES 1-10,	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: BERGEN COUNTY DOCKET NO. BER-L-3317-11 **CIVIL ACTION** ~~**PROPOSED FORM OF**~~ **ORDER** Granting Defendants' Motion for Summary Judgment

THIS MATTER being opened to the Court by Keenan & Doris, LLC., attorneys for Defendants, Township of Elmwood Park, Elmwood Park Police Department, Police Officer Michael Mulligan, Police Officer Joseph Barone, Police Officer John Eitel and Elmwood Park Ambulance Corps and the Court having reviewed the papers indicated and good cause being shown, and upon oral argument and hearing heard on April 11, 2014,

IT IS on this 25 day of April, 2014;

SEE RIDER ATTACHED

ORDERED that Summary Judgment be and is hereby granted in favor of Defendants, Township of Elmwood Park, Elmwood Park Police Department, Police Officer Michael Mulligan, Police Officer Joseph Barone, Police Officer John Eitel and Elmwood Park Ambulance Corps, dismissing Plaintiffs Complaint, including any and all claims and crossclaims, with prejudice; and it is further

ORDERED that a copy of the Order shall be served on counsel within seven (7) days of receipt back from Court.

J.S.C.

LISA A. FIRKO, J.S.C.

(✓) Opposed
( ) Unopposed

RIDER TO ORDER

DESIERVIO, *et al.* v. TOWNSHIP OF ELMWOOD PARK, *et al.*

BER-L-3317-11

Before the Court is a Motion for Summary Judgment submitted by Co-Defendants, the Borough of Elmwood Park ("Elmwood Park"), Elmwood Park Police Department ("EPPD"), police officers, Michael Mulligan ("Mulligan"), Joseph Barone ("Barone"), and John Eitel ("Eitel"), and the Elmwood Park Ambulance Corps ("EPAC"). Opposition was submitted by Co-Plaintiffs, Richard DeSiervo, Conner Mascolo, and Nicholas Mascolo, on behalf of the Estate of Diane Mascolo ("Decedent"). These individuals are the Decedent's brother and sons, respectively.

By way of background, this case arises out of alleged negligent and palpably unreasonable conduct on the part of the police officers and emergency responders who were called to the home of Decedent, who resided in Elmwood Park, because she suddenly collapsed from Fluoxetine intoxication, derived from the consumption of Prozac. It is asserted that Co-Defendants failed to act in an objectively reasonable matter, and that they failed to exercise due diligence in their emergency care for her. Specifically, Plaintiffs allege that Defendants collectively failed to provide care consistent with their training by not taking vital signs; by not moving Decedent to a better location instead of a crammed hallway in the house to administer treatment; using an oxygen machine with a leaky hose; allowing her to become cyanotic, which led to cardiac arrest; and for failing to bring out the defibrillator and shocking her heart at her home because, as Plaintiff's expert, Dr. Kurtz opines, she could have had a "shockable" rhythm. Co-Defendants disagree, and argue that Mulligan, Barone and Eitel responded to the scene first, and they provided basic life support measures to Decedent before handing her over to the Emergency Medical Service ("E.M.S."). Decedent was still alive when the police officers handed her over to E.M.S. During the time E.M.S. was in charge, Decedent had a pulse; she was still breathing; and she was alive. Thereafter, she unfortunately coded. Mulligan argues that he had absolutely nothing to do with the "standard of care" or with Decedent's evaluation and treatment because he did not provide any medical

care. He was talking to the family members at the scene, and providing emotional support. Do-Defendants argue that one of the officers did, in fact, bring a defibrillator into Decedent's home but that use of it was contra-indicated because she had a pulse. As to the purported defect with the oxygen tank, Decedent's brother testified that a "hissing sound" came from the tank, and that ten seconds later, it stopped. The care was enhanced to provide a valve mask to Decedent, which is commonly referred to as, "rescue breathing", and arguably is superior to mouth to mouth resuscitation. The paramedics noted that Decedent was warm, pink, and dry, which evidences the fact that the oxygen administration was working. Her estate, family, and sons have brought suit claiming survival, wrongful death, and negligent infliction of emotional distress claims.

Co-Defendants first assert that Elmwood Park is entitled to Summary Judgment as a matter of law. New Jersey law provides that a municipality may not be sued in addition to a police department. See Dunmore v. Franklin Twp., 2008 U.S. Dist. LEXIS 62080 (D.N.J. 2008). Consequently, Co-Plaintiffs cannot file suit against both Elmwood Park and EPPD, and, therefore, the claim against Elmwood Park must be dismissed.

It is further asserted that Co-Defendants are entitled to a presumption of immunity as a matter of law. Since the enactment of the New Jersey Tort Claims Act, case law has been established providing that the powerful, legislative mandate of the Act is to broadly limit public entity liability. See Manna v. State, 129 N.J. 341, 346 (1992); and Rochinsky v. N.J. Dept. of Transportation, 110 N.J. 399 (1988). Furthermore, the New Jersey Supreme Court has directed trial courts to employ an analysis that assumes public entity immunity unless there is a specific provision for liability, when assessing potential public entity liability under the Tort Claims Act. See Pico v. State, 116 N.J. 55, 59 (1989). Public entities, such as EPPD and EPAC, are only liable for negligence within the confines of the New Jersey Tort Claims Act. McGowan v. Borough of Eatontown, 151 N.J. Super. 440, 446 (App. Div. 1977). Essentially, the Tort Claims Act was intended to re-establish sovereign immunity, except in very limited and exceptional

circumstances. See LaBarrie v. Houseing Authority of Jersey City, 143 N.J. Super. 61, 63 (Law Div. 1976).

Furthermore, Co-Defendants claim that they are entitled to a ruling on the immunity issue as a matter of law prior to trial. The Supreme Court has examined immunity applications and noted that a defendant claiming immunity is entitled to: "...resolution of the essentially legal question" of the immunity prior to trial. Mitchell v. Forsyth, 472 U.S. 511, 526 S.Ct. 2806, 86 L.Ed 2d 411 (1970). The Court further reasoned that: "The entitlement is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." Id. Consequently, the immunity determination must necessarily precede the finding of any facts in dispute unless this Court finds, as a matter of law, that immunity does not apply.

It is next asserted that Co-Defendants are entitled to immunity under one or more statutory immunity mandates. Co-Defendants assert that one or more of the following statutes entitles them to immunity: N.J.S.A. 59:3-3 stating that: "A public employee is not liable if he acts in good faith in the execution of enforcement of any law". N.J.S.A. 2A:53A-13.1 states in pertinent part that "... [no] volunteer first aid, rescue or emergency squad...which provides services for emergency public first aid and rescue...shall be liable in any civil action to respond in damages as a result of any acts of commission or omission arising out of and in the course of the rendition in good faith of any such services..." N.J.S.A. 26:2K-29 states that "...[no] officers or members of a first aid ambulance or rescue squad shall be liable for any civil damages as the result of an act or omission of an act committed while...in the rendering of intermediate life support services in good faith ..." N.J.S.A. 26:2K-43, in summation, reiterates the previous statute, and applies it to the administration of cardiac defibrillation. N.J.S.A. 2A:62A-1.1 states that: "A municipal, county, or state law enforcement officer is not liable for any civil damages as a result of any acts or omissions undertaken in good faith in rendering care at the scene of an accident or emergency to any victim thereof, or in transporting any such victim to a hospital...provided...that nothing in this section shall exonerate a law enforcement officer for gross negligence." N.J.S.A. 2A:62A-1

provides in summation that "...[any] person licensed to practice any method of treatment of human ailments... or who is a volunteer member of a duly incorporated first aid emergency or volunteer ambulance or rescue squad association, who in good faith renders emergency care at the scene of an accident or emergency to the victim or victims thereof to a hospital or other facility...shall not be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care." Co-Defendants argue that all of the life support services undertaken by them in this case fall within one or more explicit grants of immunity noted above. It is asserted that when considering the actions of Co-Defendants, even in the light most favorable to Plaintiffs, each Co-Defendant, individually, acted in good faith in caring for Decedent under the circumstances.

It is next asserted that all actions undertaken by Co-Defendant police officers, Mulligan, Barone, and Eitel, were objectively reasonable, or based upon subjective good faith beliefs. It has been held that a public employee can satisfy the good faith requirement of N.J.S.A. 59:3-3 either by demonstrating 'objective reasonableness', or that the public employee behaved with, 'subjective good faith'. See Hottenstein v. City of Sea Isle City, *et al.*, 2013 U.S.Dist. LEXIS 147270 (October 11, 2013); Alston v. City of Camden, 168 N.J. 170 (2001). It is undisputed that the police officers arrived on the premises in response to an emergency call and that they responded with immediate medical assessment and treatment until medical responders arrived and took over the care of Decedent. Plaintiffs' claim for liability against the police officers and the EPAC is based upon three basic theories: 1) they failed to perform CPR; 2) they failed to use the AED (Automatic External Defibrillator); and 3) the ambulance driver delayed care to the Decedent by looking for his cell phone at the scene of the emergency.

As to the first claim, Co-Defendants assert that CPR took place in the ambulance. While the police officers were at the scene and later when the E.M.S. crew arrived, Decedent was still breathing. CPR is not warranted or the standard of care when a patient is breathing. As to the issue of administering the AED, it is not to be utilized on a patient who has a discernible pulse, as Decedent arguably had. She did not lose her pulse until she was transported into the ambulance, and her heart rhythm was noted as,

'asystole', which means it had no electrical activity, which is considered to be clinically dead. Lastly, as to the issue of the purported ambulance delay, it is asserted that Co-Defendant searched for his phone while Decedent was being treated in the ambulance, which had to be stationary when administering treatment. Therefore, this did not delay the ambulance's departure to the hospital emergency room. Co-Defendants argue that Plaintiffs' expert abandoned any theory of liability as to the ambulance driver. In light of the aforementioned, it is argued that under N.J.S.A. 59:3-3, the police officers were all acting in good faith and, therefore, they are immune from liability.

It is also asserted that all actions undertaken by the EPAC were objectively reasonable, or based upon subjective, good faith beliefs. The Appellate Division held in Frields v. St. Joseph's Hosp. & Med. Ctr., 305 N.J. Super. 244 (App. Div. 1997), that:

> "Good faith has been defined as 'honesty of purpose and integrity of conduct without knowledge, either actual or sufficient to demand inquiry, that the conduct is wrong'...Summary Judgment is appropriate when the employee demonstrates that his/her actions were objectively reasonable or that [he/she] performed them with subjective good faith...This test recognizes that even a person who acted negligently is entitled to a qualified immunity, if he acted in an objectively reasonable manner." Id.

The EPAC workers argue that they all acted in good faith and in an objectively, reasonable manner under the emergent circumstances presented to them at the time, and therefore, they are entitled to immunity pursuant to the statutes set forth above.

Co-Defendants further allege that Co-Plaintiffs cannot sustain a valid cause of action for negligent infliction of emotional distress. Pursuant to the holding of Portee v. Jaffe, 84 N.J. 88 (1980), a cause of action rooted in intentional infliction of emotional distress requires proof of the following elements: 1) the death or serious injury of another caused by defendant's negligence; 2) A marital, intimate, familial relationship between plaintiff and the injured person; 3) observation of the death or injury at the scene of

the accident; and 4) resulting severe emotional distress. The Portee court, in considering a cause of action for bystander liability, specifically noted that shock and fright are needed to sustain this type of claim. Id. at 100.

Co-Defendants assert that while the death of Decedent was tragic, the facts of this case do not give rise to the level of severe trauma required for a bystander, liability claim. See e.g., Frame v. Kothari, 115 N.J. 638, 678 (1989) ("To justify recovery, plaintiff should observe the kind of result that is associated with the aftermath of an accident, such as bleeding, traumatic injury, and cries of pain.") In the case at bar, Co-Plaintiffs did not witness the death of Decedent since she was pronounced dead at the hospital, and not at her home or in the ambulance in their presence. The New Jersey Supreme Court has held that bystander liability claims are to be narrowly applied, and carefully limited to certain circumstances where the cause of action is viable. See McDougall v. Lamm, 211 N.J. 203 (2012). The instant matter is not one of those cases, as per Co-Defendants.

Lastly, it is asserted that Plaintiffs' expert report constitutes a, "net opinion", and is therefore, inadmissible. The report of Francis R. Murphy ("Murphy") is based upon several unsupported, factual foundations. At his deposition, he described instances of his confusion and misunderstanding of the record. For example, there was never any testimony that the police officers performed CPR, yet Murphy testified that they did perform CPR. There was never any evidence in the record to suggest any airway obstruction, from either vomit or dentures, yet Murphy opined that there was, "gross negligence", in failing to check for same. Furthermore, Murphy admits that there was no delay in the transportation of Decedent to the hospital; therefore, any claim that the search for the cell phone caused a delay in her transportation to the hospital is completely unfounded and constitutes mere speculation. Murphy later abandoned this claim at his deposition. For these reasons Murphy's report should not be allowed in the instant proceeding, and it should be stricken in its entirety as a, "net opinion", under the holding in Buckalew v. Grossbard, as it contains both unfounded speculation and un-quantified possibilities,

resulting in prohibited, 'bare conclusions'. See Buckalew v. Grossbard, 87 N.J. 512 (1981) ("An expert's bare conclusions, unsupported by factual evidence, are inadmissible").

In opposition, Plaintiffs assert that Elmwood Park is not entitled to Summary Judgment because Co-Defendants have failed to provide any evidence that Elmwood Park and the EPPD are not separate entities. N.J.S.A. 40A:14-118 states that: "The governing body of any municipality, by ordinance, may create and establish, ...a separate police force, whether as a department or as a division, bureau or other agency thereof, and provide for the maintenance, regulation and control thereof." Co-Defendants have failed to provide any evidence that Elmwood Park passed an ordinance in respect of this statute. If this matter should be dismissed as between Elmwood Park or the EPPD, Plaintiffs argue that is should be the EPPD, the reason being that a municipal police department is not a distinct and separate entity from the municipality under N.J.S.A. 40A:-14-118. See Hussein v. New Jersey, 403 Fed. Appx. 712, 716 (3rd Cir. 2010).

It is next asserted that Co-Defendants are not entitled to an outright presumption of immunity and that they have not met their burden of persuasion in order to establish immunity. The burden of persuasion to prove that any potential immunities apply to Co-Defendants rests with them, and does not shift to Plaintiffs. See Kolitch v. Lindedahl, 100 N.J. 485, 497 (1985). When a court is faced with the question of public entity immunity, it must identify the culpable cause of the accident and conclude whether the cause of action is one that the legislature intended to immunize. Davenport v. Closter, 294 N.J. Super. 635, 639 (App. Div. 1996). It has been held that where the State actors were, "protagonist partners", and partially liable for resulting damages, statutory immunization has to be rejected even in the instance of, "but-for" causation where the State actors did not cause the accident at issue. See Manna, supra. In this instance, the Elmwood Park emergency response personnel, as part of the EPPD and EPAC, had a duty to render treatment without committing gross negligence or displaying wanton behavior. Their actions made them, "protagonist partners", in this wrongful death action and, therefore immunity is not applicable.

It is next asserted that Co-Defendants are not entitled to Summary Judgment without the Court's consideration of the record. Co-Defendants' claims that this court should determine immunity before trial are overly broad. Co-Plaintiffs note that the cases of Davenport, supra and Manna, supra, which are relied upon by Co-Defendants, are not applicable as they pertain solely to common law immunity afforded to State actors for snow removal in instances where same was the cause of plaintiff's injuries. More importantly, in those cases, the court applied the Summary Judgment standard, notwithstanding the theories of immunity. In the case *sub judice*, each of the immunity statutes relied upon by Co-Defendants should be considered in favor of the non-movant's facts and arguments, and the final ruling on such immunity claims should be decided as a matter of law.

Plaintiffs claim that Co-Defendants are not entitled to any of their six asserted statutory tort claim immunities because they provide no legal or factual bases for their applicability. New Jersey case law has established that public entities and public employees have the burden of proving that they are immune from suit. Crystal Ice-Bridgeton, LLC v. City of Bridgeton, 428 N.J. Super. 576, 585 (App. Div. 2012)(citing Leang v. Jersey City Bd. Of Educ., 198 N.J. at 582).

Concerning whether N.J.S.A. 59:3-3, immunity should not be granted as, "good faith", is a factual determination for a jury. It is asserted that the good faith immunity derived from this statute does not apply where claims arise out of emergency medical assistance rendered by city employees because this immunity only applies to acts or omissions in the course of the enforcement of a statute, which is distinct from emergency medical assistance. Frields, supra. Plaintiffs argue that the legislature opted to provide immunity when a public employee acts in good faith in the execution or enforcement of any law, but not for all functions, or pre-existing duties within the public employee's scope of employment. Public employees lose their good faith immunity under N.J.S.A. 59:3-3 if they fail to provide emergency medical treatment to those to whom they owe a duty. See Del Tufo v. Twp. Of Old Bridge, 278 N.J. Super. 312 (App. Div. 1995), affirmed 147 N.J. 95 (1996) (Holding wrongful death action viable against police officers who arrested decedent, and failed to provide emergency aid despite decedent's behavior and

injuries, which decedent's estate alleged was a proximate cause of decedent's injuries); See also Rosario v. Union City Police Dep't, 131 Fed. Appx. 785, 789 (3rd Cir. 2005).

N.J.S.A. 2A:53A-13.1 is also not an appropriate authority for providing immunity to Co-Defendants. The tort claim immunity set forth in this section of the statute does not apply to volunteer ambulance squad members if they engage in conduct which is intentional, and if there is an absence of good faith. Lauder v. Teaneck Volunteer Ambulance Corps, 368 N.J.Super. 320, 327 (App. Div. 2004). Furthermore, immunity under the good faith standard is revoked if the public entity, or employee, exhibited willful or wanton behavior that resulted in injury to another. Stollenwerk v. Twp. Of Mullica, 316 N.J. Super. 379, 382 (App. Div. 1998). If a complaint alleges more than mere negligence with regard to the rendering of first aid, and a genuine question of material fact exists as to whether or not the volunteer rescue squad's members exhibited willful or wanton behavior, then tort claim immunity under N.J.S.A. 2A:53A-13.1 does not obtain, and summary judgment is inappropriate. Id. at 382-83. The totality of the "mistakes" made by members of the EPPD and EPAC equate to willful and wonton conduct, and therefore, immunity should be denied, according to Plaintiffs.

Concerning N.J.S.A. 26:2K-29 and N.J.S.A. 26:2K-43, it is alleged that this statute only immunizes emergency squads, and that it only provides immunity to, "officers and members". However, Plaintiffs complaint only sets forth a cause of action against EPAC. It has been held that a principal can be liable for the injurious misconduct of an agent, even when the agent has personal immunity to a suit. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 596 (2012) (holding that "Based on the plain language of N.J.S.A. 26:2K-29, a rescue squad, as an entity, is not granted immunity from liability."). N.J.S.A. 26:2K-43 applies the above statute to cardiac defibrillators and is not applicable under the same theories noted above.

Lastly, the provisions set forth in New Jersey's Good Samaritan Act, N.J.S.A. 2A:62A-1.1 and N.J.S.A. 2A:62A-1, are not applicable according to Plaintiffs because Co-Defendants had a duty to render emergency care to Decedent. N.J.S.A. 2A:62A-1 is also applicable as the wording of the statute applies to

members of a volunteer first aid or emergency rescue squad. Plaintiffs have made no claims against the individual members of the EPAC, therefore, this claim for immunity is irrelevant. Furthermore, the statute concerns physicians and other volunteers who come by chance upon a victim who requires immediate emergency assistance. See Velazquez v. Jiminez, 172 N.J. 240, 262 (2002). Co-Defendants did not come to Decedent's aid by chance; they were called to her home and thus, they were acting within the scope of their duties. Concerning N.J.S.A. 2A:62A-1.1, the Good Samaritan Act does not confer immunity to any public employee who has a pre-existing duty to render emergency services, including police officers. Aversano v. Palisades Interstate Parkway Commission, 363 N.J. Super. 266, 282 (App. Div. 2003). Police officers have a pre-existing duty to render emergency services when responding to a scene in the course of their employment. See Praet v. Sayreville, 218 N.J. Super. 218 (App. Div. 1987). In circumstances where police officers have a pre-existing duty to render emergency services, they are liable for neglecting their duty to render emergency services, "...as they would be for the negligent performance of any other administrative or ministerial duty imposed upon them by their employment." Id. at 223. These Co-Defendants were not gratuitous volunteers, but rather, they were operating pursuant to a pre-existing duty to render emergency services.

It is next asserted by Plaintiffs that they have a valid claim for negligent infliction of emotional distress which falls within the realm of the injury contemplated by the courts. Severe emotional distress has been defined as "...any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so, including...post-traumatic stress disorder." Taylor v. Metzger, 152 N.J. 490, 515 (1998). A jury is free to accept, or reject, an expert's opinion that finds a causal connection between a defendant's conduct and a plaintiff's emotional distress. Id. In the case at bar, Summary Judgment should not be granted as it is up to a jury to determine whether or not Plaintiffs have suffered from negligent infliction of emotional distress. Recovery under the theory of negligent infliction of emotional distress is meant for a claimants' witness relative to "...shocking event[s] that do not occur in the daily lives of most people." Frame, supra at 644. Post-traumatic distress

similarly qualifies as emotional distress for the purpose of a negligent infliction of emotional distress claim. Maldonado v. Leeds, 374 N.J. Super. 523, 529 (App. Div. 2005). Plaintiffs, Connor Mascolo and Nicholas Mascolo, ostensibly witnessed the death of their mother, as members of the EPPD and EPAC allegedly failed to fulfill their duties to render emergency assistance. It is noted that Co-Defendants represent that Decedent died at the hospital, and the children did not witness her die. Their severe, emotional distress has been described by their expert witness, Dr. Moti Peleg, who opines in her expert reports that all three Plaintiffs suffer from severe, post-traumatic distress. As such, this cause of action should be permitted to go to trial.

Lastly, Plaintiffs assert that the expert report of Francis Murphy is not a net opinion, and it should be permitted as admissible evidence at trial. Plaintiffs state that Murphy is qualified to offer an opinion as to emergency medical services as he has valid CPR and First Aid Certification. Furthermore, Murphy's expert report was prepared based upon the facts of the case, and not opinions of a speculative nature.

In reply, Co-Defendants reiterate their assertions that the previously noted six New Jersey statutes grant immunity to all Co-Defendants in the case at bar. They argue that to label their actions as, "misconduct", is incorrect. This Court agrees. Misconduct has been determined to be "[a] transgression of some established and definite rule of action, a forbidden act, a dereliction of duty...but not negligence or carelessness." Marly v. Borough of Palmya, 193 N.J.Super. 271, 294 (Law Div. 1983). Concerning the alleged negligent actions of Co-Defendants, it has been held that ordinary negligence is an insufficient basis for holding a public employee liable under N.J.S.A. 59:3-3. See Fielder v. Stonack, 141 N.J. 101, 123-25, (1995). Co-Defendants note that Summary Judgment is appropriate if public employees can establish that their acts were objectively reasonable, or that they performed same with subjective good faith. See Canico v. Hurtado, 144 N.J. 361, 365, (1996). In the case at bar, Mulligan, Barone and Eitel have shown that they were public employees, and that their acts in the home of Decedent were objectively reasonable and performed in good faith. The Court finds this to be the case since Plaintiffs have not provided any factual or expert evidence to the contrary.

Co-Defendants, in response to Plaintiffs' assertion that N.J.S.A. 26:2K-29 is not applicable because it addresses agents of a public entity and not the organization as a whole, suggest that immunity can be found in favor of EPAC pursuant to N.J.S.A. 59:2-2(b), which states that: "A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable." The failure of Plaintiffs to name the individual members of the EPAC means that the public entity as a whole cannot be held vicariously liable. See Seals v. County of Morris, 417 N.J. Super. 74 (App. Div. 2010) rev'd on other grounds 210 N.J. 157 (2012). EPAC is covered by the immunity provided in N.J.S.A. 59:2-2(b).

Lastly, it is claimed that Plaintiffs' Affidavits violate R. 1:6-6, which requires same to set forth, "...only facts which are admissible in evidence to which the affiant is competent to testify". Co-Defendants argue that the Affidavits of Richard DeSiervo, Connor Mascolo, Anna Faye Ferrari, and Nicholas Mascolo, all violate this rule, and therefore, should not be considered by the Court.

APPLICABLE LAW & ANALYSIS

It is well established that an order for summary judgment, "Shall be rendered if the pleadings...show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." N.J. Court Rule 4:46-2(c). In the case of Brill v. Guardian Life Insurance Company, 142 N.J. 520 (1995), the New Jersey Supreme Court held that:

> Whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party.

Id. at 540.

An issue is considered to be "genuine" if "the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issues to the trier of fact." R. 4:46-2(c). Under this standard, "where the evidence 'is so one-sided the one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Ibid., quoting Anderson et al. v. Liberty Lobby, Inc., et al, 447 U.S. 252 (1986).

Based on the submissions of the parties, and the arguments made at the time of oral argument on April 11, 2014, the Court is *granting* Defendants' Motion for Summary Judgment.

The basis of Co-Defendants' arguments is that they were acting with good faith within the scope of the emergency situation as it was presented to them on the date in question. No wanton or willful conduct has been proven by the Plaintiffs. The testimony of witnesses and experts fails to demonstrate gross negligence on the part of any Co-Defendants or a lack of due diligence. Mere negligence is not enough to defeat the Motion. The six statutes which Co-Defendants rely upon to provide statutory immunity under the Tort Claims Act are all subject to the stipulation that immunity is granted when an individual(s) utilized good faith in their actions. Testimony of Co-Plaintiffs suggests that members of the EPPD who arrived at the scene of the emergency did very little to evaluate and treat Decedent including the failure to administer an automated external defibrillator, failure to monitor her vital signs, and failure to administer CPR. However, none of these arguments rise to the level of willful, wanton disregard. Members of the EPAC were said to have been, "overwhelmed", and allegedly the driver of the ambulance stalled to look for his phone at the scene of the accident after the Decedent had been placed inside the vehicle. Co-Defendants argue that the actions of all the Defendants were in good faith. There is no evidence to suggest otherwise. The record establishes that the police officers responded to the scene first and they provided basic life support to Decedent before turning her case over to EPAC. The evidence from the records, reports and deposition testimony submitted in support of the Motion confirm that when EPAC assumed care of Decedent, she was breathing and had a pulse. Thereafter, she coded. Plaintiffs have produced no agreement or evidence to refute these facts. Plaintiff's experts, Tully and Murphy

concede that you cannot use a defibrillator on a person who is breathing. Therefore, no palpably unreasonable, willful, wanton or gross negligence is shown. Notably, the members of the EPPD and the EPAC followed standard procedures in administering medical protocol in the form of CPR, AED monitoring, and other emergency medical procedures. Plaintiff's expert abandoned his theory against the ambulance driver. The Court finds that whether the Defendants could have performed a different or better job is not the standard. Immunity applies as to all Defendants.

The Court also finds that Plaintiff's arguments that the municipality never passed an ordinance to create a police department, is form over substance, and not fatal to the Motion.

Concerning the claim of negligent infliction of emotional distress, pursuant to the holding of Portee v. Jaffe, 84 N.J. 88 (1980), a cause of action rooted in intentional infliction of emotional distress requires proof of the following elements: 1) the death or serious injury of another caused by defendant's negligence; 2) A marital, intimate, familial relationship between plaintiff and the injured person; 3) observation of the death or injury as the scene of the accident; and 4) resulting severe emotional distress.

Since the Court is granting Summary Judgment as to the issue of liability, then the negligent infliction of emotion distress claim must be dismissed as well, *with prejudice*.

Dated: 4/25/14

Honorable Lisa A. Firko, J.S.C.