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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5443-11T2

JUAN LUNA, AMANDA LUNA and
MARIA DEL CARMEN LOZADA,

Plaintiffs-Appellants,

v.

THE ESTATE OF MARTA GONZALEZ
(Deceased), VICTOR MARCEDA,
LAKEWOOD POLICE DEPARTMENT,
LAKEWOOD POLICE DEPARTMENT-
INTERNAL AFFAIRS, SGT. LOUIS
SASSO, SGT. STEVE ALLAIRE,
DEPUTY CHIEF CHARLES SMITH,
LIEUTENANT WILLIAM ADDISON,
BRICK TOWNSHIP, DIVISION OF
STATE POLICE, DEPARTMENT OF THE
TREASURY, DOVER TOWNSHIP, OCEAN
COUNTY DIVISION OF HIGHWAY
TRAFFIC SAFETY, OFFICE OF THE
ATTORNEY GENERAL, DEPARTMENT OF
LAW AND PUBLIC SAFETY, OCEAN
COUNTY PROSECUTOR'S OFFICE,
ALLSTATE INSURANCE COMPANY,
ESTEBAN CELESTINO,

Defendants,

and

LAKEWOOD TOWNSHIP and POLICE
OFFICER JOSEPH PREBISH,

Defendants-Respondents.

Telephonically argued March 11, 2013 -
Decided September 13, 2013

Before Judges Messano, Lihotz and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-3103-08.

Daniel N. Epstein argued the cause for appellants (Epstein Arlen, LLC, attorneys; Mr. Epstein, of counsel and on the briefs; Carol Matula, on the briefs).

Guy P. Ryan argued the cause for respondents (Secare, Ryan & Hensel, attorneys; Mr. Ryan, on the brief).

PER CURIAM

Plaintiffs, three surviving passengers in a fatal automobile accident, appeal from the trial court's grant of summary judgment in favor of defendants Lakewood Township, its police department, and various officers, including officer Joseph Prebish.[1] The court dismissed with prejudice plaintiffs' complaint seeking compensatory and punitive damages arising out of Prebish's actions after he arrested the driver of plaintiffs' vehicle less than an hour before the accident. Prebish entrusted the car keys to one of the arrestee's companions, Marta Gonzalez, who stated she had made arrangements for the passengers of the stopped vehicle to be picked up. Instead, she

[1] Plaintiffs also named as defendants the estate of the deceased driver; the insurer of the vehicle's owner, who was not present; a person who drove the vehicle earlier that evening; and other parties. However, we shall use "defendants" to refer to the Lakewood defendants who obtained summary judgment, as the claims against all other defendants have been separately resolved.

drove the vehicle herself, later colliding with a pole, killing herself and injuring plaintiffs. Gonzalez had a blood alcohol level of .092 at the time of death. Following our review of the arguments presented in light of the record and applicable law, we affirm.

I.

We discern the following facts from the record. In the early morning hours of September 9, 2006, plaintiffs — Maria Del Carmen Lozada, Juan Estrada Luna, and his sister, Amanda Luna — socialized with Gonzalez and Amanda's[2] boyfriend, Esteban Celestino, at Amanda's and Celestino's Toms River apartment. The three women got off work about 1:00 a.m. or 2:00 a.m. Celestino picked up the women after he got off work, between 2:00 a.m. and 3:00 a.m. The group consumed beer during the evening.

Celestino had the 1992 Saturn of a friend, Victor Marceda, who lived in Seaside Heights. As morning approached, all five individuals were in the vehicle while Celestino was on the way to take home Gonzalez and Lozada. Celestino stopped at the Lakewood Blue Claws Stadium parking lot in Lakewood shortly before 6:30 a.m. because the women wanted to relieve themselves.

[2] For convenience, we refer to Juan Estrada Luna and Amanda Luna by their first names and mean no disrespect in doing so.

Prebish spotted the vehicle in the stadium parking lot. He entered to investigate. He saw the two men on a hill near the woods holding open beer bottles. The women were also outside the car. He called dispatch to report the vehicle and the public drinking. Prebish did not activate his mobile video recorder (MVR).

Prebish testified that both men appeared intoxicated. He asked who drove the car, and Juan said he did. Then, Celestino said he was the driver and handed Prebish the car keys. Although both men were Spanish-speaking, Prebish concluded that both men could speak and understand "a little" English. Celestino confirmed in his deposition that he was able to communicate with Prebish.

According to Prebish, Gonzalez said she was Celestino's sister, although Prebish did not take her name. She also spoke English and translated for the group.

Prebish learned that neither man was a licensed driver. Celestino had an active arrest warrant. By that time, another officer had arrived. He assisted Prebish in arresting Celestino, who was placed in a patrol car. The assisting officer stood nearby. According to Prebish, Amanda protested.

Although he did not yet reach any conclusions about the women's sobriety at that point, Prebish observed in his report

that the three women did not appear intoxicated. He did not observe any other alcoholic beverages besides the two beers the men had.

In response to Prebish's questions, Gonzalez told him that none of the women had a driver's license. Prebish said he advised them repeatedly that they could not drive the vehicle, and asked Gonzalez if she could get a licensed driver to retrieve the vehicle. She made a cell phone call and advised Prebish that "she could get somebody to come get the car," and "they were coming from Seaside and they would take it[.]" Gonzalez also retrieved the registration and insurance from the vehicle for Prebish, who confirmed they were valid.

Prebish gave the keys to Gonzalez. He testified he did not believe she was intoxicated. He did not notice "anything unusual about her gait or her walk that would lead [him] to conclude that she would have been drunk or intoxicated." He also did not notice "anything about her motor skills," when she went to retrieve the registration and insurance documents from the car, "that would lead [him] to believe she was intoxicated or drunk." Neither did Prebish notice Gonzalez "slur[ring] her words," nor did he remember Gonzalez's eyes being "blood shot." He did not perform any psychomotor testing, nor did he obtain

any identification documents from Gonzalez. Prebish then left the scene with Celestino.

After Prebish left, Gonzalez drove away in the vehicle, with plaintiffs as passengers. At 7:20 a.m., shortly after entering Dover Township, traveling south on Hooper Avenue, Gonzalez lost control of the vehicle. She was believed to be traveling around sixty-six m.p.h. in a thirty-five m.p.h. zone. She collided with a utility pole, and was killed at the scene. An open bottle of beer was found between her legs. Plaintiffs suffered serious injuries. A postmortem toxicology exam revealed that Gonzalez had a blood alcohol level (BAC) of .092, and a brain alcohol reading of .107. Plaintiffs claim Gonzalez was visibly intoxicated when Prebish gave her the keys.

They rely on an expert report of Richard Saferstein, Ph.D., who opined that Gonzalez, then twenty years old, would likely have reached an "intoxicated state at lower blood alcohol concentrations when compared to adult drinkers." He opined that Gonzalez was not drinking in the vehicle, despite the location of the open, partly consumed bottle. He asserted that "[a]n unsteady gait, poor balance, slow and uncertain hand movements, and possible slurred speech are commonly the most obvious behavioral changes in intoxicated people experiencing the blood alcohol levels of Ms. Gonzale[z]." He asserted that "[a]

trained and reasonably perceptive police officer would have been able to observe Ms. Gonzale[z]' visible state of intoxication."

On the other hand, defendants' expert, John Brick, Ph.D., stated, "It would be difficult, in the absence of specific testing, to reliably detect overt symptoms of alcohol intoxication until blood alcohol levels reached 150 mg/dl (.15%) or higher." Although a person's relative tolerance to alcohol may increase or decrease signs of visible intoxication, the majority of people will show one or more signs of visible intoxication at .15 BAC. "Below that level (i.e., <.15%) the probability of detecting signs of visible intoxication ([]e.g., psychomotor impairment, decreased inhibitions, cognitive impairment) without special tests is less than chance, not reliably observed and does not reach any standard of reasonable scientific probability or certainty." However, Brick stated in his deposition that the odor of alcoholic beverages begins to be detectable in more than half the population once BAC exceeds .08.

No eyewitnesses clearly supported Saferstein's opinion that Gonzalez was visibly intoxicated. Lozada testified that Gonzalez was talking and walking as usual, and did not recall her drinking at all.

Juan did not see Gonzalez drink any alcoholic beverages before the accident. He saw Gonzalez speak to Prebish in English; she spoke to him normally. She also seemed normal when the group socialized earlier in the evening. He said he slept in the car on the way to the stadium. After Gonzalez got behind the wheel, he said, her driving was "bad," but he testified he did not know why. He did not say she appeared intoxicated.[3]

Amanda did not think Gonzalez's behavior in the parking lot was a cause for concern, and she behaved well toward the officer. She said that she, Gonzalez, and Lozada drank beer outside their factory, after they finished work. Gonzalez also drank three small Corona beers while the group was at her apartment starting at 3:00 a.m. Amanda said Gonzalez was behaving well while they were at the residence. At the stadium parking lot, she saw Gonzalez talk to Prebish but did not

[3] After oral argument, in an effort to support their claim that Gonzalez was visibly intoxicated, plaintiffs sought to supplement the appellate record to include an unofficial transcript of an interview of Juan, taken by the Ocean County Prosecutor's Office Internal Affairs Unit, with an investigator serving as interpreter. Juan answered yes when asked "Did [Gonzalez] seem intoxicated to you when the police . . . were there?" When asked if Gonzalez slurred her speech, he answered that she was "talkin' a lot and she was being (inaudible) talking too much." Juan also asserted in the interview that Prebish asked plaintiffs and Gonzalez who could drive; Gonzalez said she could; and Prebish gave her the keys. The transcript was not presented to the trial court. We denied the motion and do not consider the material here.

understand them, but, again, Gonzalez behaved well. However, once behind the wheel, Amanda said Gonzalez "was driving real ugly because she even went on the sidewalk." Amanda answered affirmatively when asked if it appeared that she was driving while intoxicated. She told Gonzalez to drive carefully, and thereafter, she did so. Before then, however, Amanda did not see anything in Gonzalez's behavior that caused a problem.

Celestino did not see any of the women drink before he drove them to his home. He had a twelve-pack of "Coronitas" — which were smaller than regular beer bottles. Like Amanda, he observed Gonzalez drink three of the small beers. Lozada also drank three. No other alcohol was consumed at his home. However, there was more beer in the car on the way to the stadium, but Celestino could not say where it came from. When Prebish arrived, Celestino testified, only Juan had a beer in his hand.

Celestino did not hear any conversations between Gonzalez and Prebish. He believed Juan was intoxicated, because he reacted loudly and rudely when Celestino was arrested. The women did not react the same way. When asked if he believed any of the women were sober, he stated, "Specifically, I couldn't tell you."

Plaintiffs filed their complaint September 5, 2008. They alleged that Prebish and other defendants were negligent, grossly negligent, and reckless in permitting Gonzalez to drive the vehicle. They asserted a claim under 42 U.S.C.A. § 1983, alleging that defendants' conduct was "possibly in disregard of the plaintiffs' State and/or Federal Constitutional rights and/or Civil rights and [was] grossly negligent in that this conduct shocks the conscience and is fundamentally offensive to a civilized society."

After a period of discovery, defendants moved for summary judgment. Judge E. David Millard granted the motion in a cogent written decision and order entered March 15, 2012. Although the court was "not convinced" plaintiffs' pleading was sufficient, the court indulgently read the complaint to set forth a claim of a state-created danger under 42 U.S.C.A. § 1983.

The court then found that plaintiffs could not meet the second prong of the four-part test, enunciated in Kneipp v. Tedder, 95 F.3d 1199, 1208 (3d Cir. 1996), for establishing constitutional liability on a state-created danger theory:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; (4) the state actors used their authority to create an opportunity that

> otherwise would not have existed for the third party's crime to occur.
>
> [Ibid. (internal quotation marks and citation omitted).]

Judge Millard wrote:

> Far from shocking the conscience, the behavior of Officer Prebish could at most be characterized as negligent. Although Gonzalez may have had a blood alcohol content in excess of .08 on the night of the accident during the police stop, no evidence suggests that Officer Prebish was aware of that fact. Officer Prebish had a conversation with Gonzalez and during that conversation he did not smell alcohol on her breath or observe anything about her conduct that would indicate that she was intoxicated. He specifically advised her not to drive, she agreed to the condition and advised him a third party was coming to pick them up. The fact that Officer Prebish gave Gonzalez the car keys can, at best, be characterized as negligent.

The court also found that "Prebish's decision to give the keys to Gonzalez did not result in a deprivation of [p]laintiffs' due process rights," as plaintiffs "failed to specify any Constitutional right that ha[d] been violated."

Judge Millard also found that defendants were entitled to immunity under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, as Prebish was not engaged in a ministerial function, but instead exercised discretionary decision-making. He held Prebish was therefore immune under N.J.S.A. 59:3-2b and d. The judge also grounded immunity under N.J.S.A. 59:3-3, as Prebish

acted in "'good faith in the execution or enforcement of any law.'" The court also found immunity under N.J.S.A. 59:3-5. The court consequently dismissed plaintiffs' state claims against Prebish and Lakewood Township.

Plaintiffs now appeal. They argue the court erred in dismissing their § 1983 action, arguing the court applied the wrong standard. They also contend the court erred in finding immunity under the TCA, specifically N.J.S.A. 59:3-2, -3, and -5. They also assert, primarily on the basis of Saferstein's report, that summary judgment was inappropriate as there existed a genuine issue of material fact regarding whether Gonzalez was visibly intoxicated.

II.

We review the trial court's summary judgment order de novo, applying the same standard that governs the trial court. W.J.A. v. D.A., 210 N.J. 229, 237 (2012); Lapidoth v. Telcordia Tech., Inc., 420 N.J. Super. 411, 417 (App. Div.), certif. denied, 208 N.J. 600 (2011). Pursuant to Rule 4:46, we "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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "[W]hen the evidence

'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant summary judgment." Ibid. (citation omitted). If no genuinely disputed fact exists, we must decide whether the trial court's ruling on the law, to which we owe no deference, was correct. W.J.A., supra, 210 N.J. at 237-38.

A.

We begin by addressing plaintiffs' argument that there existed a genuine issue of material fact regarding whether Gonzalez was visibly intoxicated when Prebish entrusted the vehicle to her.

We conclude, as did Judge Millard, that there was insufficient evidence to create a genuine dispute on the issue of visible intoxication. As we discussed, none of the plaintiffs or Celestino directly contradict Prebish's testimony that Gonzalez was not visibly intoxicated. Juan's and Amanda's testimony about Gonzalez's driving is of no moment, as the driving obviously occurred after Prebish left the scene. Moreover, her erratic driving may well have been because she was an unlicensed – and presumably – inexperienced driver.

Nor is Saferstein's opinion that, based on Gonzalez's .092 BAC, she would have been visibly intoxicated, sufficient to create a genuine issue of fact. We recently held that

eyewitness testimony is not essential to establish that a person was visibly intoxicated under N.J.S.A. 2A:22A-5b, governing liability of servers of alcoholic beverages. Halvorsen v. Villamil, 429 N.J. Super. 568, 573-75 (App. Div. 2013). In that case, Saferstein opined that a person would have been visibly intoxicated with a .10 BAC. Id. at 572.

However, we declined to find "that Dr. Saferstein's expert report alone creates a genuine issue of material fact on the visible intoxication issue." Id. at 579. Instead, we found there was a genuine issue based on additional circumstantial evidence, including the driver's extremely high BAC of .167 after the accident; the driver's report to paramedics he could feel no pain, although he was seriously injured; and his erratic driving. Ibid.

We recognize that Gonzalez was driving erratically before the accident. But, that is not enough in our view, even in combination with Saferstein's opinion, to create a genuine issue of fact regarding visible intoxication. As Brick explained in his report, a person who does not appear visibly intoxicated may still have been impaired in his or her driving ability. A key distinction between this case and Halvorsen is that Gonzalez was barely over the legal limit, while the driver in Halvorsen had a BAC more than triple the legal limit, presenting substantially

greater impairment and risk of collision. See State v. Henry, 418 N.J. Super. 481, 494 (Law Div. 2010) (citing study by National High Traffic Safety Administration that found male drivers over thirty-five years old with a BAC over .15 – which averaged .22 – were seven times more likely to be involved in a crash than a driver with a BAC between .10 and .149, and fourteen times more likely than a driver with a BAC between .08 and .099).

Also, Saferstein's assertion that a person with a .08 BAC would invariably appear visibly intoxicated was unsupported by any empirical data or research. We need not decide that Saferstein's assertion was a net opinion in order to conclude it was entitled to little weight, given the lack of empirical support for his conclusion. See Creanga v. Jardal, 185 N.J. 345, 360 (2005) (stating that the weight attributed to an expert opinion "can rise no higher than the facts and reasoning upon which that opinion is predicated") (internal quotation marks and citation omitted).

In sum, the evidence was one-sided in support of defendant's position that Gonzalez was not visibly intoxicated. Thus, there was no genuine issue of fact on the issue. See Brill, supra, 142 N.J. at 540.

B.

As we posit Gonzalez was not visibly intoxicated, we consider next plaintiffs' claim that their injuries resulted from a state-created danger, entitling them to a recovery under 42 U.S.C.A. § 1983. As the trial court noted, the United States Court of Appeals for the Third Circuit has recognized a cause of action for a "state-created danger" and has adopted a four-part test. See Kneipp, supra, 95 F.3d at 1208; see also Gonzales v. City of Camden, 357 N.J. Super. 339, 346-47 (App. Div. 2003) (discussing Kneipp and other federal authority, and citing the Kneipp four-part test).

As we observed in Gonzales, we are not bound by lower federal courts. Id. at 347. However, we "accept[ed] the Third Circuit's analytical framework for application of the doctrine." Ibid. In Gonzales, we affirmed the grant of summary judgment to municipal defendants – including police, fire, and health department officials – who declined to provide an escort to two shopkeepers after an inspection that detained them at their store until 11:00 p.m., in a high crime area, an hour-and-a-half later than usual. After they left their shop alone, the shopkeepers were shot, one fatally. Applying prongs two and four of the Kneipp test, we found a factfinder "could not find that [the] defendants 'acted in willful disregard for the safety

of the plaintiffs,'" id. at 350 (quoting Kneipp, supra, 95 F.3d at 1208); nor could one find that the defendants "'used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur,'" Gonzales, supra, 357 N.J. Super. at 349 (quoting Kneipp, supra, 95 F.3d at 1208).

We distinguished the facts in Gonzales from those presented in Kneipp, and another federal case, Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), which we held involved "aggravated official wrongdoing." Gonzales, supra, 357 N.J. Super. at 349. In Kneipp, we noted, the police allowed a severely and visibly intoxicated woman to walk home after detaining her; and she was found injured at the bottom of embankment. Gonzales, supra, 357 N.J. Super. at 347-48. In Wood, the police impounded a vehicle, arrested the driver, left the passenger to walk home at 2:30 a.m. in an area with a high violent crime rate, and wearing clothes unsuitable for the chilly weather. The passenger accepted a ride from an unknown man, who then raped her. Id. at 348-49.

We explained that the inspectors' behavior in Gonzales, while possibly negligent, did not rise to deprivation of the plaintiff's substantive due process rights. We held: "The only form of official conduct that can be found to violate the Due Process Clause is conduct that is so 'egregious[ly] wrongful

that it "shocks the conscience."'" Id. at 350 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846, 118 S. Ct. 1708, 1716-17, 140 L. Ed. 2d 1043, 1067 (1998)). "'[D]eliberate indifference' to public safety may be insufficient[.]" Gonzales, supra, 357 N.J. Super. at 351 (quoting Cnty. of Sacramento, supra, 523 U.S. at 849-54, 118 S. Ct. at 1718-21, 140 L. Ed. 2d at 1059-62).

In Estate of Strumph v. Ventura, 369 N.J. Super. 516, 526 (App. Div.), certif. denied, 181 N.J. 546 (2004), we again rejected a state-created danger claim, where police officers failed to enter a man's home, after hearing gunshots, despite his pleas that his wife needed medical attention. He accidentally shot her while also shooting her sexual assailant. The man's wife died during the police's one-hour delay. Police witnesses attributed the delay to their desire to protect themselves, in view of the fact that the man was armed, and his daughter, who fled the house, had said he was acting crazy. Id. at 520-22. We held that "the touchstone for the analysis . . . [was] whether the state actors acted with 'deliberate indifference'." Id. at 526 (quoting Kneipp, supra, 95 F.3d at 1208). We interpreted the "willful disregard" prong of the Kneipp test to require a showing that defendants "knowingly ignored" the woman's situation. We concluded no factfinder

could find the plaintiffs met the second or fourth prong of the Kneipp test. Id. at 528-29.

In Gormley v. Wood-El, 422 N.J. Super. 426, 440 (App. Div. 2011), appeal granted, 210 N.J. 25 (2012), we explained that even if a plaintiff can establish a state-created danger under the Kneipp four-part test, recovery also depends upon surmounting the qualified immunity afforded government officials for conduct that does not violate clearly established statutory or constitutional rights. In Gormley, the plaintiff was an attorney employed by the Department of the Public Advocate, who was attacked by her client, a patient at Ancora Psychiatric Hospital. The plaintiff contended the hospital staff knew of her client's violent propensity, and, in the exercise of deliberate indifference, did not provide supervision of her client. Id. at 430-32. We held that the plaintiff conceivably could meet the Kneipp four-part test. However, we held that the defendants were entitled to qualified immunity, because the state actors' liability in such a case was not clearly established. Id. at 444.

Applying these principles, we conclude that no reasonable jury could find that the first and second prongs of the Kneipp test could be met. Addressing the second prong first, there was insufficient evidence that Prebish and other defendants acted

"in willful disregard" of plaintiffs' safety. This case is clearly distinguishable from the facts in Kneipp, where the officer knew that the plaintiff was severely intoxicated. Gonzalez was not severely intoxicated, and not visibly intoxicated at all. She assured Prebish that a licensed driver was on the way to pick them up. Prebish warned all plaintiffs not to drive, and gave the keys to Gonzalez, an English-speaker, who apparently understood his directions.

As Gonzalez did not appear intoxicated, Prebish was at most negligent in relying upon her compliance, allowing her to retain the car keys, and failing to confirm her identity, or that a licensed driver was on the way. The evidence does not support a finding that Prebish acted with deliberate indifference. Without depreciating in any way the serious injuries that plaintiffs suffered, the evidence also does not support a finding that Prebish engaged in behavior that shocks the conscience.

Turning to factor one, in light of these circumstances, no reasonable factfinder could conclude that the accident "ultimately caused was foreseeable and fairly direct," as required by the first prong of the Kneipp test. Kneipp, supra, 95 F.3d at 1208. As Gonzalez was not visibly intoxicated, it was not clearly foreseeable that: Prebish's directions would

have been disobeyed; Gonzalez would have violated the law by driving under the influence and without a license; and Gonzalez would have driven erratically, at excessive speed, and ultimately collide with a utility pole.

Moreover, we question whether the tragic accident was a fairly direct result of Prebish's actions. Inasmuch as plaintiffs previously traveled in the vehicle driven by an unlicensed driver, Celestino, they apparently acquiesced in Gonzalez's decision to drive the car, and agreed to enter the vehicle. In a sense, plaintiffs resumed behavior that preceded their interaction with Prebish.

They were not like the ill-clad woman in Wood, who was stranded at 2:30 a.m. in a high crime area, and accepted a ride from a stranger. Plaintiffs were in a parking lot at close to 7:00 a.m. There was no evidence that they sought transportation or any other assistance from the officers, which they then refused. Moreover, there was no evidence that they could not reasonably have declined to ride with Gonzalez and found another way home. Two of the plaintiffs testified that they observed that Gonzalez was driving erratically, yet they remained in the vehicle, even after a brief stop in Lakewood.

In sum, plaintiffs have failed to establish a state-created danger. Consequently, Judge Millard correctly dismissed with prejudice their § 1983 claim.

C.

Finally, we consider whether Prebish enjoyed immunity under the TCA. We note at the outset that we have encouraged resort to summary judgment proceedings to resolve claims against public employees who assert an immunity defense under the TCA. B.F. v. Div. of Youth & Fam. Servs., 296 N.J. Super. 372, 386-87 (App. Div. 1997) (affirming summary judgment dismissing tort claim against DYFS employees and deputy attorney general who unsuccessfully prosecuted termination of parental rights case); Brayshaw v. Gelber, 232 N.J. Super. 99, 115 (App. Div. 1989) (granting summary judgment dismissing tort claim against deputy attorney general for allegedly defamatory statement). The mere fact that a public employee's state of mind may be in issue does not preclude summary judgment. Fielder v. Stonack, 141 N.J. 101, 129 (1995).

The TCA extends immunity to public employees for various activities including: a public employee's exercise of judgment or discretion vested in him or her, N.J.S.A. 59:3-2; good faith execution or enforcement of law, N.J.S.A. 59:3-3; and the failure to enforce any law, N.J.S.A. 59:3-5. These specific

grants of immunity are subject to a general exception that withholds immunity when the public employee's conduct "was outside the scope of his [or her] employment or constituted a crime, actual fraud, actual malice or willful misconduct." N.J.S.A. 59:3-14a. Also, the TCA does not "exonerate a public employee for negligence arising out of his [or her] acts or omissions in carrying out his [or her] ministerial functions." N.J.S.A. 59:3-2d. Where good faith immunity under N.J.S.A. 59:3-3, and more extensive immunity under N.J.S.A. 59:3-5 both apply, a court must apply the more extensive immunity. Fielder, supra, 141 N.J. at 131-33; see also Bombace v. City of Newark, 125 N.J. 361, 367-68 (1991) (distinguishing between immunity under N.J.S.A. 59:3-3, which requires showing of good faith, and N.J.S.A. 59:3-5, which does not).

Plaintiffs argue that Prebish was negligent by failing to prevent Gonzalez from driving unlicensed, and under the influence of alcohol. They assert that he failed to perform ministerial duties to carry out a basic investigation and to assure that plaintiffs, who did not speak English, understood his direction that no unlicensed driver operate the car. They also dispute the applicability of N.J.S.A. 59:3-5 immunity, governing the failure to enforce a law.

We recently explained, "[a] discretionary act . . . calls for the exercise of personal deliberations and judgment, which in turn entails examining the facts, reaching reasoned conclusions, and acting on them in a way not specifically directed." S.P. v. Newark Police Dep't, 428 N.J. Super. 210, 230 (App. Div. 2012) (internal quotation marks and citation omitted). "In contrast, a ministerial act is one which a person performs in a given state of facts in a prescribed manner in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act being done." Id. at 231 (internal quotation marks and citation omitted).

In Morey v. Palmer, 232 N.J. Super. 144, 155 (App. Div. 1989), we affirmed the grant of summary judgment to a defendant police officer who directed an intoxicated pedestrian to leave the middle of a road where he posed a hazard to himself and others. The pedestrian complied. The officer did not transport the pedestrian to a treatment facility or other safe place, notwithstanding that he was authorized to do so if the pedestrian were intoxicated, and mandated to do so if he were also incapacitated, N.J.S.A. 26:2B-16. The pedestrian later was struck and killed by a truck a quarter-mile away, almost four hours later. We held the officer exercised discretionary, not

ministerial duties, and was immune under N.J.S.A. 59:3-2d and 59:3-3. Morey, supra, 232 N.J. Super. at 152.

In Perona v. Twp. of Mullica, 270 N.J. Super. 19, 29-30 (App. Div. 1994), we affirmed the grant of summary judgment dismissing a claim that a police officer negligently failed to take into custody a woman who, her husband feared, was suicidal, after she left a farewell note. She later attempted suicide and suffered injuries. We held N.J.S.A. 59:3-2 and -5 immunized the officer from liability for the failure to enforce the law governing the taking into custody of mentally ill persons, N.J.S.A. 30:4-27.6. Perona, supra, 270 N.J. Super. at 29-30.

Based on this authority, we conclude Prebish was immune. Indeed, the circumstances in this case are more compelling than in Morey and Perona. Gonzalez was not visibly intoxicated. There was no basis to take her into custody nor a clear basis to disbelieve her representation that a licensed driver was on the way. Nor was Prebish clearly required by any law or directive to impound the vehicle, which was in a safe place, was properly registered and insured, and, Prebish assumed, was about to be retrieved by a licensed driver. See State v. Ercolano, 79 N.J. 25, 33-34 (1979) (discussing grounds for impoundment). Impoundment has a significant impact on the liberty interests of

a car's occupants. See State v. Pena-Flores, 198 N.J. 6, 37-38 (2009) (Albin, J., dissenting).

Prebish did not negligently perform a ministerial duty. He exercised his discretion. He made a judgment call to rely upon Gonzalez's representations that a licensed driver was on the way, and to allow her to hold the car keys. Consequently, Prebish was immune under N.J.S.A. 59:3-2, having exercised a discretionary decision. He was also immune under N.J.S.A. 59:3-5, as he determined not to take further steps to enforce the laws against unlicensed driving.

In Morey, we distinguished Suarez v. Dosky, 171 N.J. Super. 1 (App. Div. 1979), certif. denied, 82 N.J. 300 (1980), a case upon which plaintiffs rely. Our discussion of Suarez applies here:

> In Suarez, police officers responded to an accident which occurred on Interstate 80 where a vehicle had become inoperable. The officers failed to remove a mother and a number of small children from a position of obvious peril to a place of relative safety off the eight-lane interstate after being specifically asked to do so. As a result the mother and her child were struck and killed while attempting to reach an exit ramp only a few minutes after officers refused to assist them. Id. at 6. In that case, liability was based upon the failure of officers in performance of a ministerial duty to render aid. Id. at 9-10.
>
> The difference between the present factual scenario and that found in Suarez is that

> the officers in Suarez were duty-bound to render aid, particularly when they were requested to do so. Vinci [the defendant police officer] was not responding to an accident scene. Decedent was evidently able to understand, respond to and comply with Vinci's orders to leave the highway. Ultimately, he was struck and killed 3 hours and 40 minutes later. Vinci was only duty-bound to remove decedent to an intoxication treatment facility if he determined that decedent was incapacitated. The basis of defendants' immunity arises from Vinci's discretionary determination that decedent was not incapacitated. The officers in Suarez simply were required to perform a ministerial act to comply with their duty. Here, any duty to physically remove decedent and thus substantially interfere with his liberty would arise only after the officer made a judgment decision respecting his incapacity. If there is causality, it would have to arise from that asserted error in judgment, 3 hours and 40 minutes before the accident but not from a ministerial act.
>
> [Morey, supra, 232 N.J. Super. at 150-51 (footnote omitted).]

We likewise find distinguishable Ojinnaka v. City of Newark, 420 N.J. Super. 22 (Law Div. 2010), upon which plaintiffs rely, in which the court denied immunity to a police officer who negligently performed an accident investigation, and did not locate the victim, who was ejected and ultimately died twenty feet away. The officer had a ministerial duty to perform more than a cursory investigation of an accident scene, and to offer aid to the injured. Id. at 29, 34-35. By contrast, there was no accident triggering a ministerial duty here. Nor can

plaintiffs point to any directive or manual that imposed a ministerial duty that Prebish violated in failing to impound the vehicle, or to withhold the keys from Gonzalez.

In sum, the trial court did not err in concluding that Prebish was immune under the TCA.

Affirmed.