Superior Court of New Jersey

Appellate Division

Docket No. A-4044-08T2

PARIS WILSON, an infant by his *Guardian ad Litem* SONYA MANZANO, and D'ARTAGNAN MANZANO, Individually and as Administrator of the Estates of DEQUAN WILSON and DARTAGNANIA WILSON, and DEQUAN WILSON and DARTAGNANIA WILSON, Individually, *Plaintiffs-Appellants* vs. CITY OF JERSEY CITY, Police Officer JOSE M. SANTANA (Shield No. 2853), Police Officer ERNEST VIDAL (Shield No. 2395), *(For Continuation of Caption See Next Page)*	:	CIVIL ACTION ON APPEAL FROM ORDERS OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY Docket No. HUD-L-4232-06 Sat Below: HON. FRANCES L. ANTONIN, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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Defendants-Respondents,

and

CITY OF JERSEY CITY, Police Officer JOSE M. SANTANA (Shield No. 2853), Police Officer ERNEST VIDAL (Shield No. 2395), 911 Operator LAURA JEAN PETERSEN (Operator No. 35), Radio Dispatcher MICHAEL EDWARD CLARK, 911 Operator BRENDA MURDAUGH-JONES (Operator No. 326),

Defendants/Third-Party Plaintiffs,

vs.

DWAYNE WILSON and 185 MARTIN LUTHER KING DRIVE, LLC; STATE OF NEW JERSEY, NEW JERSEY STATE POLICE; JOHN DOES 1-10 AND JANE DOES 1-10,

Third-Party Defendants.

911 Operator LAURA JEAN PETERSEN (Operator No. 35), Radio Dispatcher MICHAEL EDWARD CLARK, 911 Operator BRENDA MURDAUGH-JONES (Operator No. 326), STATE OF NEW JERSEY, NEW JERSEY STATE POLICE, 911 Operator LU ANN BURD,

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PRELIMINARY STATEMENT

In the very early morning hours of September 20, 2005, nine year old Paris Wilson was at home in his apartment in Jersey City with his mother, Marcia, his brother DeQuan, age eleven, and his sister Dartagnania ("Tania"), also age eleven. A little before 1:00 a.m., Dwayne Wilson, Marcia's brother, entered the bedroom where the family was and brutally attacked them. Hearing the commotion in the apartment next door, a neighbor, Anthony Andrews, immediately called 911. The apartment building had two addresses, 207 Wegman Parkway and 185 Martin Luther King Drive. Andrews mistakenly gave the address as 185 Wegman Parkway, but because the 911 operator failed to follow policy and procedure, and did not obtain Andrews's name, telephone number or exact location, or the exact location of the emergency, no help ever came. About 22 hours later, Andrews called 911 again to report that his prior call had not been responded to, only to be instructed that since he did not have a "life-threatening emergency that's going on right now" he should call back on a non-emergency line. Again, no basic information was obtained from Andrews, and no police were dispatched in response to his second call.

While it appears that Marcia Wilson died very shortly after the attack, Paris, DeQuan and Tania survived. Paris, who was gravely injured, slipped in and out of consciousness, but

remembers speaking to his sister, who asked for water, and his brother, who urged him to find their mother's phone and call for help. Finally, approximately 34 hours after the first 911 call and twelve hours after the second 911 call, Paris summoned the strength to call 911 himself and lead police to his apartment. By the time they arrived, however, DeQuan and Tania were dead, and Paris had endured unimaginable physical and psychological suffering.

Plaintiffs filed this case in August 2006 against the City of Jersey City ("Jersey City") and the individual call takers, dispatcher and police officers involved in this incident. They then spent more than two years conducting discovery, resulting in conclusive evidence that defendants' failures to follow mandatory policies and procedures and to perform their jobs properly caused these untimely deaths. During this period, the Trial Judge, Judge Frances L. Antonin, denied two defense motions claiming that plaintiffs' claims were barred by various statutory immunities, and leave to appeal was also denied. Then, on the eve of trial, the Trial Court reversed itself and granted defendants' summary judgment motion (their third attempt at dismissal on these issues) on the grounds that the defendant 911 call takers, dispatcher and police officers, as well as their employers, were entitled to immunity under both the Tort Claims Act (Title 59) and the Enhanced 911 Statute (Title 52).

The Trial Court's dismissal under Title 59 was incorrect because this Court has clearly held that a 911 operator's failure to follow written policies and procedures constitutes the negligent performance of a ministerial task for which there is no immunity. The Trial Court's decision under Title 52 was also plainly wrong because N.J.S.A. 52:17C-10, entitled "Forwarding Subscriber Information," was not intended to, and by its express terms does not, immunize 911 operators, dispatchers and municipalities for the negligent handling of a 911 call. The subsection defendants relied upon, 52:17C-10(e), grants immunity to an entity providing "lawful assistance to . . . any lawful investigation . . . ." The statute does not immunize 911 operators and dispatchers from their negligently performed duties simply because certain information obtained is then forwarded by a dispatcher to the police. If the Trial Court's reading of the statute were correct, the result would be that 911 operators and dispatchers handling calls concerning criminal activity would be immunized, while those tending to fire and medical emergencies would not. That would be an untenable result, and the Trial Court's decision must be reversed.

PROCEDURAL HISTORY

On October 27, 2005, the instant plaintiffs ("Plaintiffs") served notice of their claim upon the Jersey City Police

Department, County of Hudson, and the State of New Jersey pursuant to N.J.S.A. 59:8-1, et seq. (Pa182).

On August 24, 2006, Plaintiffs filed their Complaint, which named Call Taker Petersen, Dispatcher Clark, Police Officer Vidal, Police Officer Santana (Vidal and Santana collectively referred to as the "Officers") and Call Taker Jane Doe (later named as Jones), (collectively, the "Individual Defendants"). (Pa1). On November 17, 2006, the Individual Defendants and Jersey City (collectively, the "Jersey City Defendants") made a pre-Answer motion to dismiss on the ground that they were immune from suit pursuant to New Jersey's Tort Claims Act N.J.S.A. 59:3-2(b), 59:3-3, 59:3-5 and 59:5-4. That motion was denied. The Jersey City Defendants then sought leave to file an interlocutory appeal, which was denied as well.

On or about June 20, 2008, the Jersey City Defendants and the State of New Jersey, New Jersey State Police and Call Taker LuAnn Burd (collectively, the "State Defendants"),[1] moved for summary judgment for lack of standing, claiming immunity for Petersen, Jones, Clark, Jersey City, and the State Defendants under N.J.S.A. 52:17C-10, and for Petersen under N.J.S.A. 59:3-2(a). At the same time, Plaintiffs brought their own motion for partial summary judgment against Petersen based on her admitted

[1] The State Defendants had been brought into the case as third-party defendants by the Jersey City Defendants.

breaches of the standard of care. All motions were denied, citing issues of fact for the jury to decide. The Jersey City Defendants then, for the second time, sought leave to file an interlocutory appeal, which was again denied by the Appellate Division.

In or about November 2008, Plaintiffs sought leave to amend their Complaint to assert direct claims against the State Defendants.

Trial was originally scheduled for September 2, 2008, was adjourned to January 5, 2009, and was then further adjourned to February 17, 2009. Trial was once again adjourned to May 4, 2009 due to a defense attorney's illness.

In March 2009, the Defendants moved for summary judgment. Defendants Petersen, Jones, Clark, Jersey City and the State Defendants claimed immunity under N.J.S.A. 52:17C-10, and Defendants Petersen, Jones, Vidal and Santana claimed further immunity under N.J.S.A. 59:3-2(d) (exercising discretion in the allocation of resources while in the face of competing demands). Jersey City also claimed immunity based on 59:2-3 (the public entity version of 59:3-2) and 59:2-10 (immunizing public entities for employees' crime, actual fraud, actual malice or willful misconduct) and claimed that Plaintiffs lacked expert testimony establishing negligent training, retention and supervision.

On March 24, 2009, Plaintiffs opposed Defendants' motion for summary judgment and cross-moved for partial summary judgment against Petersen and Jones (collectively, the "Call Takers" or "Operators") for their admitted failures in following Jersey City's written policies and procedures for the handling of 911 calls.

On April 15, 2009, the Trial Court issued a decision denying Plaintiffs' cross-motion for partial summary judgment, granting Defendants' motions for summary judgment and dismissing the entirety of Plaintiffs' Complaint (the "Decision").

STATEMENT OF FACTS

Jersey City's Mandatory Policies and Procedures

All 911 operators in Jersey City are given the same training and course materials, which include and focus primarily on the Jersey City Call Taker Policy and Procedure Manual (the "Manual"). (Pa1028, Pa1056-1058). All 911 operators are taught that when responding to any call, there is certain required basic information they must obtain from the caller under the general categories of who, what, where, and when. (Pa 1031-1032, Pa1034-1039, Pa1057-1058). Updated Manuals were to be distributed throughout their employment. 911 operators must sign an acknowledgement page upon receipt of the Manual which states that "non-compliance with any of [its] contents"

constitutes "neglect of duty" and could "result in disciplinary action." (Pa 909, Pa1058).

Petersen testified she was never provided with a Manual upon her employment and Jones testified she was never provided with the Manual that was operative in 2005. (Pa935, Pa1136-1137). Neither Petersen's nor Jones's signed acknowledgment pages were produced by Jersey City during discovery.

The deposition testimony of Chief of Police Robert Troy established that each policy and procedure contained in the Manual is mandatory, and that a failure to follow anyone of them would constitute a breach of those policies and procedures. (Pa913, Pa915-920). The Manual was also used to determine whether a call taker handled a call properly and on numerous occasions, call takers were disciplined for failing to comply with its policies and procedures. (Pa1065-1067, Pa1039-1040).

The Attack

At approximately 12:50 a.m. on September 20, 2005, in their second floor apartment located at 185 Martin Luther King Drive (or 207 Wegman Parkway), Marcia Wilson and her three children, Tania, DeQuan and Paris, were repeatedly stabbed by Ms. Wilson's brother, Dwayne Wilson.[2] (Pa187, Pa318).

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[2] D'Artagnan Manzano, one of the Plaintiffs, is the father of Tania, DeQuan and Paris Wilson.

The First 911 Call

While Dwayne Wilson was attacking his sister and her children, Anthony Andrews made his first 911 call from his cell phone, from inside his sister's neighboring apartment. (Pa280, Pa294). The call was first routed to the New Jersey State Police and was answered by Call Taker Burd. (Pa315, Pa187). Upon Andrews's reporting that people were screaming inside 227 Wegman in Jersey City, Burd transferred the call to the Jersey City Police Department, where it was received by Petersen. Burd immediately disconnected from the 911 line after Petersen answered the call and Andrews uttered the word "uh." (Pa187). She did not remain on the line to ensure that all of the information she received was passed on to Petersen. Andrews reported to Petersen that he heard screaming and fighting next door and he identified the address as 185 Wegman Parkway. (Pa1114).[3] This confusion may have been caused by the fact that the building is at the corner of Wegman Parkway and Martin Luther King Drive and the numerals 185 are printed on an awning facing Wegman Parkway.

Although the Manual requires call takers to obtain basic information from all callers, regardless of the type of service requested, Petersen completely failed to do so. (Pa905-909).

[3] The entire transcript of the call between Andrews and Petersen appears at Pa1114.

Specifically, although the Manual mandated she do so, Petersen neither asked for, nor obtained, Andrews' name, phone number, floor and apartment number where he was calling from, the floor and apartment number of the incident being reported, the names of the actors or subjects of the call, whether the actors or subjects of the call were injured, and whether the event being reported was occurring at the present time. (Pa1145-1146, Pa1150-1151, Pa1154-1155, Pa1157, Pa1161, Pa1163-1164, Pa1166-1168).

Petersen testified that despite not having been provided with the Manual upon her employment, she knew that policies and procedures are mandatory and that she was required to ask the foregoing questions, yet she failed to do so. (Pa1136-1137, Pa1173-1174). She also acknowledged that when she created the CAD ticket, which was electronically sent to Clark and then verbally communicated to the Officers, she improperly described the location of the incident as the "house" next door, a word that Andrews never used. (Pa1114, Pa318).

The Police Response

Vidal and Santana had been on the job for one month and five months, respectively, when they were dispatched on this 911 call. (Pa1002, Pa976). They understood that the call was for

"persons screaming and calling for help."[4] (Pa982). When the Officers arrived at 185 Wegman Parkway, a house, they were less than 200 feet away from the apartment building where the Wilson family awaited help. (Pa193-194). Had Petersen not erroneously entered the word "house" into the CAD, the Officers would have realized instantly that they were at the wrong location. After ringing the doorbell and looking through the windows into an unfurnished and unoccupied house, the Officers requested that Clark call back the 911 caller to obtain more information. (Pa996-997, Pa576-577). Though dispatchers are prohibited by Jersey City's policies and procedures from calling 911 callers without the permission or supervision of a Sergeant, Clark attempted to call back Andrews on his own. (Pa464, Pa1068, Pa1069, Pa1071). Because Petersen had failed to ask Andrews for his phone number, the only number Clark had was the one that had appeared automatically on the 911 system ("ANI screen") during Andrews' 911 call. (Pa1151-1152). When Clark called that number, it rang several times and after an automated voicemail message began to play, Clark hung up without leaving a message. (Pa463).

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[4] The 911 call was classified as a priority 2 call since it involved people screaming for help. Jersey City implements a priority system of 1 through 9, with 1 being the highest priority, reserved for the most serious calls such as murder or officer requiring assistance.

The number that auto-populated on the ANI screen was not the number for the phone Andrews had used to call 911. (Pa294, Pa318).

Unable to learn additional information from Andrews, Vidal and Santana returned to patrol. During their depositions, the Officers testified that they satisfied all of their obligations by merely responding to the address they were given, though they also testified that they are often sent to the wrong address by 911 callers and that they sometimes look elsewhere to try to locate the caller or the event. (Pa993-994). Yet despite this past practice and even though they did not find the people screaming and calling for help, the Officers returned to patrol without attempting to gather information from any of the neighbors of 185 Wegman Parkway. (Pa1018, Pa994-995).

In an apparent attempt to support Jersey City's position in this case, Vidal and Santana testified that even if they had known they were looking for an apartment building and even if they had seen "185" on the awning which faced Wegman Parkway less than 200 feet away, the Officers would not have investigated that location and still would have resumed patrol despite not having found the source of the call. (Pa1014-1018, Pa998). Although Chief Troy testified that given those set of circumstances, "common sense" should have led them into that apartment building, according to Vidal and Santana, their job

was only to go to the address they were given. (Pa1014-1018, Pa998). In sum, the Officers' position is that "Detectives do investigations," not them. (Pa1009) (emphasis added).

The Second 911 Call

On September 20, 2005 at 11:00 p.m., approximately 22 hours after the first 911 call, Andrews again called 911. (Pa295). Andrews reported that the police had never responded to his first 911 call from the night before, that people had been fighting next door, and that he saw someone flee from the building and speed off in a car. (Pa1070). Instead of processing this information and inquiring into the matter further, Jones interrupted Andrews and asked, "do you have a life threatening emergency that's going on right now," to which Andrews responded, "no it happened last night." (Pa1070) (emphasis added). Jones instructed Andrews to get off the 911 line and to call back on a non-emergency number. (Pa1070).[5]

During the second 911 call, Jones failed to ask the same basic questions that Petersen had failed to ask, concerning who, what, where and when. (Pa939, Pa1070). She also failed to inquire into the specific information provided -- that a 911 call for people screaming and fighting was not responded to and that Andrews witnessed a man flee the scene. (Pa1070). Jones

[5] The entire transcript of the call between Andrews and Jones appears at Pa1070.

did not ask Andrews for any information relating to his first 911 call, nor did she ask him for a description of the man who fled the building or of the car he sped off in. (Pa945, Pa1070). While she understood that Andrews was reporting a prior 911 call that was never responded to by the police, Jones testified that she did not know whether Andrews was telling the truth because 911 callers can lie. (Pa941). Instead, Jones did not create a CAD ticket which would have dispatched police to the scene of the ongoing emergency. (Pa946-947). At this time, 22 hours after the assault, Paris Wilson lay critically injured, surrounded by his deceased mother and his dying siblings. (Pa970-971).

Paris Wilson's Own 911 Call

On September 21, 2005 at 11:30 a.m., approximately 34 hours after the first 911 call and twelve hours after the second 911 call, a third 911 call was made by the sole surviving child, Paris Wilson. Although Paris and his brother DeQuan discussed needing to find their mother's cellular phone while they were laying critically injured awaiting help, it was not until this point that Paris regained enough strength to grab the phone and dial 911. (Pa966-973). The 911 operator that handled Paris's call asked all of the questions required by the Manual, those which Petersen and Jones had failed to ask: Who he was, where he was, his floor and apartment number, who was injured, who

attacked them, a description of the attacker, when the attack took place, etc. As a result, the police were able to respond properly to the location, and ambulances were dispatched to render medical aid and to transport Paris to the hospital. By the time the police arrived, however, Tania and DeQuan were deceased.

The Photographs

On September 21, 2005, less than two hours after Paris and his deceased siblings were found, the police commissioned the Bureau of Criminal Investigation to take photographs of the line of sight between 185 Wegman Parkway and the numerals "185" facing Wegman Parkway at 185 Martin Luther King Drive, a distance separated by less than 200 feet. (Pa1116-1123, Pa192-193).

ARGUMENT

The Decision granting summary judgment in the Defendants' favor must be reversed, and partial summary judgment instead granted to Plaintiffs. As a preliminary matter, the Trial Court completely failed to follow its mandate on summary judgment: to consider the evidence presented in the light most favorable to the non-movant, and merely to identify the factual issues mandating the denial of summary judgment, not to resolve them for itself. The Trial Court ignored the volumes of evidence Plaintiffs presented in this case establishing the Defendants'

liability, and improperly took away from the jury crucial factual issues to be decided here.

On the issue of whether the Defendants are immune from suit under Title 52, the Trial Court completely misinterpreted that statute, which grants immunity to a Public Safety Answering Point ("PSAP"), "the first point of reception" for 911 calls. Without any basis in the law, the Trial Court inexplicably concluded that in this case there are two PSAPs, the State, which first received Andrews's call, and Jersey City, to which the call was transferred. (Pa1190). Moreover, the Court relied on the Title 52 immunity for actions taken to assist any "lawful investigation" by law enforcement, yet ignored here that no "investigation" was occurring. In other words, the Trial Court read Title 52 as immunizing all internal police communications, as opposed to those regarding some outside assistance to law enforcement, which is what was clearly intended. Essentially, the Trial Court held that Title 52 immunizes all 911 operators, dispatchers, and the municipalities that employ them, for all police-related calls. Similarly, the Court failed to analyze how Title 52 could be applied consistent with this Court's decision in Massachi v. AHL Services, Inc., 396 N.J. Super. 486 (App. Div. 2007).

The Trial Court's Title 59 analysis was similarly flawed. Leaving aside for the moment that the Court invented the notion,

from whole cloth, that the "who, what, where and when" requirements contained in the Manual were discretionary, the Court also failed to apply the discretion standard properly. Under the plain reading of N.J.S.A. 59:3-2(d), a public employee is immune when, in the face of competing demands, he exercises discretion in the allocation of resources, and where a decision was actually made. Here, there is absolutely no evidence on the record to suggest that competing resources were actually considered and that a decision was made. Massachi went on to decide, in any event, that where written rules exist for 911 operators, those rules are ministerial, rendering the discretionary immunity of 59:3-2(d) inapplicable.

Finally, the Court granted summary judgment to Jersey City based upon N.J.S.A. 59:2-10, which states that a public entity is not liable for a public employee's "crime, actual fraud, actual malice, or willful misconduct." That statute naturally does nothing to immunize Jersey City for liability for its employee's mere negligence, which, of course, is the standard that should have been applied under Massachi. Indeed, the Appellate Division Decision in Reis v. Delaware River Port Authority, 2008 WL 425522, at *5 (App. Div. Feb. 19, 2008) certif. denied, 195 N.J. 521 (2008), explicitly held that N.J.S.A. 59:2-10 does not immunize a municipality for its employees' unintentional conduct. (Pa1214).

The Trial Court also wrongly granted Jersey City summary judgment under N.J.S.A. 59:2-3(d) with respect to Plaintiff's negligent training, retention and supervision claims. Yet it is clear that Jersey City failed to train Petersen and Jones properly as the evidence established that they were not even provided with the relevant policy and procedure Manual, nor did they acknowledge its receipt, two requirements of Jersey City's own policy. Clearly, no discretionary decision was made in that regard.

The Court also determined that an expert was necessary to establish the "standard of care," a holding that either mistook or misstated Plaintiffs' argument. Plaintiffs' claim is not that Jersey City failed to provide training equal or better than other municipalities. But rather, Jersey City did not properly train with respect to its own policies and procedures when it failed to provide the relevant Manual to Petersen and Jones. (Pa935, Pa1137). This critical failure presents an issue of fact that should have been decided by the jury.

POINT I

THE TRIAL COURT APPLIED THE INCORRECT STANDARD OF REVIEW AND IMPROPERLY USURPED THE PROVINCE OF THE JURY

An appellate court reviewing an award of summary judgment uses the same standard as the trial court; it first decides whether there are genuine issues of fact, then if there are not,

the Appellate Court will decide whether the lower court's ruling on the law was correct. See Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998), certif. denied, 154 N.J. 608 (1998); Antheunisse v. Tiffany & Co., Inc., 229 N.J. Super. 399, 402 (App. Div. 1988).

Under Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995), an issue of fact exists, and summary judgment for the defendant must be denied, if the plaintiff provides competent evidence on that issue, when viewed in the light most favorable to the plaintiff, that is sufficient to permit a rational fact finder to resolve the alleged disputed issue in the plaintiff's favor. See Id. at 540, see also id. at 535 ("In each case, the court must accept as true all the evidence which supports the position of the party defending against the motion and must accord him or her the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied.") (internal citations omitted); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); see also R. 4:46-5.

This Court recently reaffirmed the well-established Brill standard in Leang v. Jersey City Board of Education, 399 N.J. Super. 329 (App. Div. 2008) (rev'd in part on other grounds, 969 A.2d 1097 (2009)):

> [A] determination 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 factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Id. at 355 (emphasis in original) (necessary determination is whether the evidence "'is so one-sided that one party must prevail as a matter of law.'") (quoting Brill, 142 N.J. at 536, 540).

In Leang, the Appellate Division reversed another award of summary judgment by Judge Antonin, also in favor of Jersey City municipal defendants, because the trial court ignored the existence of substantial issues of material fact.[6] The Leang Court "cautioned that the function of a judge reviewing a summary judgment motion 'is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Id. at 358 (quoting Brill). The Court concluded that it was readily apparent that Judge Antonin "failed to follow the Brill mandate when she viewed the facts in a light most favorable to the school and medical defendants." Id. The Court also criticized

[6] Although the Appellate Division's decision in Leang does not mention Judge Antonin's name, there is no doubt that she was the judge who decided the case in the trial court. See Order, No. HUD-L-3422-04, 2006 WL 6210824 (Law. Div., Feb. 17, 2006). (Pa1219).

Judge Antonin for discrediting the sworn testimony of the plaintiff, something that must be left for the trier of fact. Id.

In the instant case, as in Leang, Judge Antonin completely ignored the Brill standard by, among other things, refusing to consider crucial evidence presented by the Plaintiffs (much less considering it in the light most favorable to Plaintiffs) and improperly deciding for herself disputed factual issues, rather than leaving them to the jury. Her Decision reads more like one handed down by a single arbitrator (charged with resolving both the factual and legal issues before her) than one by a trial judge bound by the Brill summary judgment standard.

For example, one of Defendants' bases for summary judgment was that they were immune from suit pursuant to Sections 59:3-2(d) and 2-3(d) of the Tort Claims Act, which, as discussed in more detail below, shields discretionary, but not ministerial acts from liability. Plaintiffs provided reams of evidence that established Defendants' failure to execute their ministerial duties properly. Plaintiffs showed that neither 911 Operator asked Andrews for his name, phone number, or exact location, including whether he was in an apartment building, and if so, what his floor and apartment number were. (Pa939, Pa1146, Pa1150-1151). Plaintiffs presented Petersen's admission that she was supposed to ask for that information and did not.

(Pa1146, Pa1151, Pa1173-1174). Plaintiffs provided testimony from the Chief of Police that the failure to ask those questions was a breach of the written policies and procedures of Jersey City. (Pa915-918). Plaintiffs submitted the testimony of 911 trainers, who swore that 911 call takers are all taught to ask those questions, and are disciplined for failing to follow the Manual. (Pa1034-1035, Pa1038-1040). Plaintiffs also showed that Jones did not take the second 911 call seriously, and did not dispatch any police, while Paris and his siblings were waiting for help to arrive. (Pa941).

Instead of considering this evidence in the light most favorable to Plaintiffs, as she was bound by Brill to do, Judge Antonin instead completely ignored it; the Decision never mentioned or discussed this evidence. In fact, absolutely no evidence supports Judge Antonin's finding that the Call Takers had discretion concerning whether or not to ask those questions.

Moreover, in deciding that the dispatcher Clark was entitled to summary judgment, the Trial Court usurped the jury's function to make the factual determination that Clark did not act with "wanton and willful disregard of safety" and that Clark's actions were not "palpably unreasonable." (Pa1197). In so doing, the Trial Court ignored the uncontested evidence that Clark called Andrews back without supervisor permission and hung up as soon as the voicemail message began to play, without

waiting to learn the caller's name and without leaving a message. (Pa463-464). Plaintiffs also presented evidence of numerous suspensions and disciplinary actions taken against Clark prior to the call in question, yet, without discussion, the Court inexplicably concluded that Plaintiffs had presented no evidence of negligent retention. (Pa1071, Pa1102-1113).

Similarly, the Court found as a matter of law that the State Defendants were entitled to Title 52 immunity because there was no evidence to suggest that Burd acted with wanton and willful disregard for Plaintiffs' safety. But again the Court ignored Plaintiffs' evidence, making no mention of Burd's handling and subsequent "blind transfer" of the call, which caused Petersen to be unaware that Andrews had previously provided a different address than he provided to Petersen, which allegedly would have caused Petersen to ask additional questions concerning the caller's location.

In other circumstances, Judge Antonin blithely decided hotly disputed factual issues. For example, the Trial Court found in Defendants' favor on the factual issue of whether "Call Takers Petersen and Jones entered the information provided to them by Andrews correctly into the 9-1-1 computer system" (Pa1194) in the face of Plaintiffs' undisputed evidence that Petersen erroneously entered into the CAD system that Andrews's call was coming from the "house" next door (he never said the

word "house") and that Jones entered no information into the 911 computer system at all.

The Trial Court also decided the factual issues the parties presented with respect to the police investigation, in concluding as a matter of law that police officers have no obligation to "go beyond the location provided by 9-1-1 dispatch to ensure that the correct location of the incident was indeed provided." (Pa1196). The Trial Court accepted as true that the police officers in this case "investigated" the "premises" for a half hour, even though Plaintiffs presented contrary evidence -- that the Officers did not detail anything like an investigation and, in fact, countered questions about the quality of their search of 185 Wegman Parkway, which was less than 200 feet from the actual crime scene, by stating that "detectives do investigations." (Pa1009).

In sum, the Trial Court completely ignored the Brill standard she was bound to follow by in some cases ignoring Plaintiffs' evidence, and in other cases going so far as to resolve factual issues in the Defendants' favor. The Decision must be reversed.

POINT II

THE COURT WRONGLY ALLOWED THE DEFENDANTS SOVEREIGN IMMUNITY FOR THEIR MINISTERIAL ACTS

The undisputed evidence presented to the Trial Court shows that the Call Takers totally failed to follow the mandated procedures of the Jersey City Police Department in their handling of the 911 calls in this case. Despite this, and despite this Court's clear holding in Massachi that the failure of a 911 operator to follow written policies and procedures is the negligent performance of a ministerial act that falls outside of the limited sovereign immunity provided under the Tort Claims Act, the Trial Court found the Call Takers entitled to immunity. This decision is wrong on both the law and the facts and must be reversed.

A. The Tort Claims Act Does Not Immunize the Negligent Performance of Ministerial Acts

The stated purpose of the Tort Claims Act is to balance the "inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity" against the problems that would likely ensue if the government, which has almost limitless "power to act for the public good," could be sued for "everything that might be done." N.J.S.A. 59:1-2. Thus, the Tort Claims Act does not provide blanket immunity for municipalities and their employees, instead

it sets forth circumstances under which they may or may not be sued.

The Trial Court granted Defendants immunity based on section 59:2-3(d) and the employee analog 3-2(d), which provide that a public entity or employee of a public entity "is not liable for the exercise of discretion when, in the face of competing demands, it [he/she] determines whether and how to utilize or apply existing resources," though such a determination cannot be "palpably unreasonable." N.J.S.A. 59:2-3(d). More importantly, it goes on to say that "[n]othing" in this section granting immunity for discretionary acts "shall exonerate a public entity [or employee of a public entity] for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions." Id. A ministerial function is one that a "'person . . . performs under a given state of facts in a prescribed manner . . . without regard to or the exercise of . . . judgment upon the propriety of the act being done.'" Kemp by Wright v. State, 147 N.J. 294, 308 (1997) (quoting BLACK'S LAW DICTIONARY 996 (6th ed. 1990)). Thus, there is no immunity under the Tort Claims Act for the negligent performance of a "ministerial act."

B. The Defendants Ignored Mandatory Policies and Procedures for Handling of 911 Calls

The Court below found that Petersen, Jones, Santana, Vidal, and Jersey City were immune from suit under Sections 3-2(d) and 2-3(d) of the Tort Claims Act despite the clear fact that the wrongful actions by each of them were ministerial and not discretionary in nature.

Plaintiffs presented clear evidence below that Petersen completely ignored Jersey City's mandatory policies and procedures for 911 call takers, an oversight that unfortunately resulted in the tragic loss of multiple lives. The record shows that when Andrews called 911 to report that people next door were screaming, Petersen only stayed on the line with him for 23 seconds, and only asked him for the address of the emergency. (Pa1114-7). Even that information was incomplete as she failed to ask the other required questions with respect to the location of the emergency such as apartment building or house, floor, apartment number and location in street. (Pa908, Pa1114). She never once asked Andrews for the most basic information: his name, his telephone number, whether he was calling from an apartment building or a house, what apartment number and floor he was calling from, or any details regarding the disturbance he heard. (Pa1114, Pa1146, Pa1150-1151, Pa1154-1155, Pa1157, Pa1161, Pa1164, Pa1167-1168). Finally, Petersen incorrectly

described the location as the "house" next door, a word that Andrews never used. (Pa1114, Pa318).

Unbelievably, when Andrews called 911 a second time, about 22 hours after his first call to Petersen, and tried to communicate that the police had never responded to the apartment next door, Jones cut him short and ushered him off the phone, insisting that he call back on a non-emergency line because he did not have a current emergency. Like Petersen, Jones utterly failed to request the same basic information, including his name, address and telephone number and never obtained the location of the emergency. (Pa939). Meanwhile, Paris Wilson was drifting in and out of consciousness, watching his brother and sister slowly die before his eyes. (Pa966-972). Help would not come for Paris until some twelve hours after Andrews's second call, when Paris managed to dial 911 himself and lead police to his apartment. (Pa972-973).

The basic information that both Call Takers failed to request was not only mandated by common sense, but was explicitly required by the Manual. The Manual contains a section entitled "Basic Information Required for All Requests for Service" which provides that:

> Regardless of the type of request for service received or the specific event being reported, there is pertinent information relative to that specific event that is **basic** information which should be gathered and recorded whenever possible:

This basic information can be categorized as generally relating to: "WHO" "WHAT" "WHERE" "WHEN"

(Pa906) (emphasis in original). Each of these categories is then further expanded upon in the Manual. For instance, under the "WHO" category, the "Call Taker should obtain the following basic information . . . Caller's name, Caller's address, Caller's telephone number, Caller's location, if different from the incident location." (Pa 907) (emphasis in original). Under "WHERE," the Manual is clear that the Call Taker should get the "**EXACT** Location," "recorded as specific as possible regarding apartment, floor, location in street, or any other specifics which could assist the responding officers to locate the event." (Pa908) (emphasis in original).

Not only does the Manual expressly state that this basic information is "Required" for all calls, Chief Troy testified that these questions are mandatory, and the failure to ask any one of them constitutes a breach of the policies and procedures. (Pa915-920). Indeed, Troy testified that "across the board policies and procedures are mandatory." (Pa918). Call Takers are also required to sign a "Manual Registration Call Taker" page, which says that "[l]oss of the manual or non-compliance with any of the contents will constitute neglect of duty and result in disciplinary action. You will be responsible for knowledge of its contents." (Pa909).

As clear as these policies and procedures are, it is even clearer that Petersen and Jones did not follow them.[7] Neither asked Andrews for basic, yet crucial, information that would have led police to Paris and his mortally wounded siblings.

C. The Precedent of this Court Holds that Failure to Follow Policies and Procedures Is the Negligent Performance of a Ministerial Act, for Which No Immunity Can Apply

Plaintiffs having established these crucial facts that the Call Takers failed to follow Jersey City Policies and Procedures, the Trial Court had but one choice under the precedent of this Court -- to find that Petersen and Jones (and their employer, Jersey City) were not immune from suit.

In 2007, this Court decided Massachi, 396 N.J. Super. at 486. The unfortunate facts of that case were as follows: One afternoon, two off-duty Essex County Sheriff's Officers observed Sohayla Massachi, a Seton Hall University student, being pulled into a car and abducted by her former boyfriend. Id. at 491. The officers immediately called 911 and provided the call taker with a complete description of the car and its direction of travel. Id. The call taker then made several critical errors. In violation of official police department policies and procedures governing the handling of 911 calls, the call taker

[7] Dispatcher Clark also failed to follow policy and procedure when he called back Andrews's cell phone without getting permission from his supervisor first. (Pa464, Pa1068, 1069).

failed to, among other things, "advise the dispatcher that the suspect's car was moving and not stationary . . . obtain the names, addresses and phone numbers of the people who called in the complaint . . . [and] enter the correct description of the vehicle into the [CAD] system . . . ." Id. at 492-93 (emphasis added). Due to the call taker's errors, police dispatched to the scene of the abduction were unable to locate the vehicle, and the suspect eventually murdered Massachi. Id. at 492. Massachi's administratrix brought suit against the City of Newark, among others, seeking to hold the City liable for the call taker's negligence.

The City of Newark moved for summary judgment on the ground that it was immune from suit under Section 59:5-4 of the Tort Claims Act.[8] Id. at 490. The trial court granted Newark's motion, holding that immunity under the Tort Claims Act applied regardless of whether the actors involved "acted carelessly or negligently, or whether their conduct was ministerial or not ministerial." Id. at 493. The Trial Court determined that even "the negligent performance of ministerial acts" received immunity. Id.

[8] Section 59:5-4 provides that public entities and their employees are not liable for the failure to provide police protection. See N.J.S.A. 59:5-4.

On appeal, this Court reversed, observing first that N.J.S.A. 59:3-2 "does not 'exonerate a public employee for negligence arising out of his acts or omissions in carrying out his ministerial functions.'" Id. at 495 (quoting N.J.S.A. 59:3-2(d)). A ministerial act was defined as one a "person performs under a given state of facts in a prescribed manner . . . without regard to or the exercise of . . . judgment upon the propriety of the act being done." Id. at 495 (quoting Kemp by Wright, 147 N.J. at 308). This Court then discussed its decision in Suarez v. Dosky, 171 N.J. Super. 1 (App. Div. 1979), where it held that while "the government's essential right and power to allocate its resources in accordance with its conception of how the public interest will be best served . . . should be insulated from interference by judge or jury in a tort action," once police officers responded to a scene, neither those officers nor the public entity employing them should be insulated "from the unfortunate results of [their] negligently executed ministerial duties." Id. at 498 (quoting Suarez, 171 N.J. Super. at 10 (State not immune where police officers responding to accident scene refused to escort stranded passengers off busy highway, resulting in their deaths).

The Appellate Division then specifically held that while the City of Newark might be immune for high-level decisions regarding the allocation of its resources, for example the

decision of how many 911 operators to hire, or what equipment to provide, "once the City made a decision to hire 9-1-1 operators and provide them with specific procedural regulations governing the manner in which they must respond to calls, then the negligent performance of those 9-1-1 operator duties is not entitled to any immunity . . . ." Id. at 498 (emphasis added). Restating its holding, this Court concluded that "[t]he failure of a 9-1-1 operator to abide by the public entity's written guidelines for responding to emergencies constitutes the negligent performance of a ministerial task." Id. at 507 (emphasis added). Thus, no immunity was available, and the trial court's grant of summary judgment to the City of Newark was reversed.

Reiterating its holding in Massachi, just last year, this Court decided in Reis, 2008 WL 425522, at *1, that a 911 operator's failure to follow policies and procedures is the negligent performance of a ministerial task for which no immunity applies. (Pa1210). In Reis, a bystander observed Christine Eberle being grabbed by two assailants and pushed into a car in a train station parking lot in Camden. Id. The bystander followed the car and immediately called 911, providing the call taker with a description of the car and its general direction of travel. Id. In violation of departmental policy and procedure, the call taker wrote the information down on a

piece of scratch paper and inadvertently failed to enter the call into the 911 dispatch system. Id. No police units were ever dispatched, and Eberle was murdered by her assailants. Id.

Relying on its decision in Massachi, this Court reversed the trial court's grant of summary judgment in favor of Jersey City and its call taker, holding that the call taker was "responsible under Camden's police department's procedural guidelines to at least enter [the bystander's] 9-1-1 call into the system and to do so in a non-negligent fashion . . . . [I]n this regard she was required to carry out a ministerial function devoid of any discretionary decision-making on her part." Id. at *3.

The parallels between Massachi and Reis and the instant case are obvious. Just as in those two cases, Petersen and Jones violated the written policies and procedures of the Jersey City Police Department when they failed to obtain required basic information from Andrews. Under Massachi and Reis, these failures to follow policy and procedure constituted the negligent performance of ministerial tasks. See, e.g., Massachi, 396 N.J. Super. at 508; Reis, 2008 WL 425522, at *3 (Pa1212-1213). As a result, the general immunity afforded to municipalities and employees is simply not available to

Petersen, Jones, or Jersey City.[9] See N.J.S.A. 59:2-3(d) & 3-2(d) (no immunity for public entities or their employees for "negligence arising out of [their] acts or omissions of [those employees] in carrying out [their] ministerial functions").

D. The Trial Court Ignored Plaintiffs' Evidence and This Court's Prior Holdings

Here, though the precedential effect of Massachi and Reis could not be clearer, the Trial Court nonetheless granted summary judgment in favor of these Defendants. The Trial Court first quibbled with the mandatory nature of the policies and procedures the call takers violated. The Court held that since the Manual said that basic information "should" be gathered and recorded "whenever possible," the "Who, What, Where and When" line of questioning was discretionary, not a ministerial act that had to be performed. (Pa1192). First of all, "whenever possible" refers to the fact that a caller can refuse to give certain information. Specifically, a caller can insist on remaining anonymous. It does not mean that the operator does not have to ask the question. The record contains testimony from Petersen and Jones on both of these points. (Pa1035, Pa1145-1146). Furthermore, the record is replete with evidence

[9] Dispatcher Clark also violated Jersey City policy and procedure when he called Andrews back without his supervisor's knowledge or permission. He should therefore not be entitled to immunity as well.

that this information-gathering policy was mandatory, not discretionary. Among other things, although the Trial Court held that "the regulations in the [Manual] do not *require* call takers to ask, 'Who, What, Where and When,'" (Pa1192), the very section of the Manual the Court was referring to was called "Basic Information *Required* for All Requests for Service," certainly not Basic Information to be Collected in the Call Taker's Discretion. (Pa906) (emphasis added).[10] Moreover, Chief Troy admitted that these policies and procedures were mandatory "across the board," and that a failure to ask those questions was a breach of the policies and procedures of the Jersey City Police Department. (Pa913, Pa915-920). This testimony should have been determinative of this issue.

The Trial Court also distinguished Massachi on the basis that while the facts of Massachi involved a 911 operator "entering the information . . . incorrectly into the 911 system," this case involved a caller giving the 911 operator the incorrect information. (Pa1194). But Massachi did not only

[10] The Court also misinterpreted the word "should." See BLACK'S LAW DICTIONARY 1379 (6th ed. 1990) (defining "should" as "[t]he past tense of shall; ordinarily implying duty or obligation....It is not normally synonymous with 'may'. . . ."); Id. at 1375 ("As used in statutes . . . [shall] is generally imperative or mandatory. . . . It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly . . . when addressed to public officials . . . .").

involve the improper entering of information into the 911 system, it also concerned call takers failing to obtain required information. Massachi, 396 N.J. Super. at 492-93. The Massachi Court also did not narrowly hold that only when a 911 operator enters the wrong information is she amenable to suit, but rather that any "failure of a 9-1-1 operator to abide by the public entity's written guidelines for responding to emergencies constitutes the negligent performance of a ministerial task," whether that involved entering the wrong information, or failing to obtain critical information from the caller in the first place. Massachi, 396 N.J. Super. at 508.[11]

The Court below also held that Santana and Vidal were immune from suit under Section 59:5-4, which immunizes public entities and their employees from liability for "failure to provide police protection service . . ." N.J.S.A. 59:5-4. The Court misunderstood Plaintiffs' position. Plaintiffs have never complained that Santana and Vidal failed to protect the Wilson family from their attacker, nor for that matter have they complained that these officers violated a specific policy and procedure by leaving the scene without locating Paris and his

[11] Plaintiffs also presented evidence that Petersen did enter information incorrectly. For instance, she entered into the CAD that Andrews was calling from a "house," through he said no such thing. (Pa1114, Pa318). Jones, of course, entered nothing into the CAD at all. (Pa1070, Pa947).

family. Plaintiffs instead allege that the Officers' investigation was not reasonable as required by a long line of cases holding that police investigations and responses must be subjectively or objectively reasonable. See, e.g., Lippincott v. City of Burlington Police Dep't, 2006 WL 1217128, at *3-*4 (App. Div. May 8, 2006) (Pa1215); Del Tufo v. Township of Old Bridge, 278 N.J. Super. 312, 325-26 (App. Div. 1995), aff'd, 147 N.J. 90 (1995); Shore v. Hous. Auth. of Harrison, 208 N.J. Super. 348, 352 (App. Div. 1986); Suarez v. Dosky, 171 N.J. Super. 1, 9-10 (App. Div. 1979); Marley v. Borough of Palmyra, 193 N.J. Super. 271, 293-94 (Law Div. 1983). Among other things, the Officers testified that they only had a duty to respond to the address they were given, and on finding an empty house they were not required to do anything more.[12] Whether Santana and Vidal conducted a reasonable investigation is, at the very least, an issue of fact that should have been left to the jury.

Judge Antonin also found that the Operators were entitled to summary judgment because Plaintiffs failed to show that Defendants' conduct was "palpably unreasonable" in failing to

[12] In fact, Officer Vidal testified that "detectives do investigations," not him, and that he would not have gone inside 185 Martin Luther King even if had seen the awning marked "185" on that apartment building and knew that he was looking for an apartment building. (Pa1009, Pa1014-1018).

elicit basic information from Andrews. (Pa1194-1195). But the "palpably unreasonable" standard only comes in to play where a defendant is entitled to immunity for "exercis[ing] . . . discretion . . . in the face of competing demands." See, e.g., N.J.S.A. 59:2-3(d).

Under the express terms of N.J.S.A. 59:3-2(d) and 59:2-3(d), Defendants would only be entitled to immunity if a particular exercise of discretion was (1) a conscious decision made in the face of competing demands, which (2) concerned whether or how to utilize or apply existing resources, and only then if (3) the decision was not palpably unreasonable. Here, in order for Defendants to take advantage of that immunity, they would have had to introduce some evidence that such a discretionary choice was actually made. They utterly failed to do so, and summary judgment should not have been granted in their favor. See, e.g., Del Tufo, 278 N.J. Super. at 326 (no statutory immunity where there was no evidence in trial record that police consciously considered whether to summon emergency assistance and decided not to because they were weighing competing demands on public resources); see also Brown v. Brown, 86 N.J. 565, 577 (1981) (examining the Department of Transportation's conscious decision, based upon competing resources, not to correct the design and condition of a

dangerous highway and finding that determination palpably unreasonable).

Here, the record is devoid of any evidence to suggest, let alone satisfy, that any of the above requirements were met. On that basis alone, the Decision must be reversed.

POINT III

TITLE 52:17C-10(e) DOES NOT IMMUNIZE 911 CALLERS AND DISPATCHERS FOR THEIR DEALINGS WITH THE GENERAL PUBLIC

The Trial Court found below that all of the Defendants (except the Officers) were entitled to immunity pursuant to a subsection of the Enhanced 911 Statute, N.J.S.A. 52:17C-10(e). But that subsection has no application in this case. Section 52:17c-10(e) provides that a very narrow category of entities, called PSAPs, which are the "first point of reception" for 911 calls, are immune from liability that results from the provision of a very specific kind of service, "lawful assistance to any investigative or law enforcement officers of this State . . . ." It does not, nor was it ever intended to, shield 911 operators and dispatchers (and their employers) from liability in failing to handle 911 calls properly. To the extent that 911 operators are entitled to any immunity in the performance of their duties, that immunity is created by the Tort Claims Act, Title 59, as interpreted by this Court in Massachi.

The Court below came to the bewildering conclusion that even though Andrews's initial call was received first by the State, then was subsequently transferred to Jersey City, both of those entities could be considered "first point[s] of reception," because, in the Court's words, there were "two PSAPs." (Pa1198). The Court then decided that even though the Call Takers were not assisting a law enforcement investigation, they could receive immunity anyway. If the Trial Court is correct, and these Defendants were indeed assisting a law enforcement investigation merely by passively answering a citizen's 911 call that warranted a law enforcement response, then all 911 operators and dispatchers handling calls concerning criminal activity would be immunized, while those tending to fire and medical emergencies would not. The catastrophic ramifications of such a misguided public policy are self evident. The Decision must be reversed.

A. The Legislative History Shows that the Statute's Intended Purpose Was Not to Immunize 911 Operators and their Employers from the Negligent Handling of 911 Calls

The intent behind the enactment of the New Jersey Enhanced 911 Statute and similar statutes throughout the country was not to extend protection to 911 operators and public entities so as to immunize negligent conduct at the expense of the public. The intent was to enhance the public safety by incorporating advanced technologies into the provision of emergency services

to members of the public who were reporting crimes or accidents or other emergencies.

An understanding of the history of Title 52 and its statutory scheme is essential to the resolution of the issues here. The statute was first passed in 1989 to "enhance" the 911 system in New Jersey by making telephone companies upgrade their hardware and software, to increase the information automatically provided to 911 operators. See 1989 N.J. Sess. Law Serv. 3 (West). In order for the system to be built and to function effectively, it was essential that the telephone companies and the providers of the necessary telecommunications equipment cooperate fully in the creation of the system. The new statute defined the call centers that would receive initial emergency calls from the public as Public Safety Answering Points ("PSAPs") and imposed substantial technical and logistical obligations on each PSAP to ensure that each was capable of handling and transmitting the calls that would be received. See id. Then, in section 10, the statute obligated telephone companies to transmit to PSAPs the telephone number and street address of any telephone used to place a 911 call ("subscriber information") to "be used only for the purpose of responding to emergency calls or for the investigation of false or intentionally misleading reports . . . ." N.J.S.A. 52:17C-10(a).

Thus, since the new statute held telephone companies responsible for providing subscriber information to PSAPs, it also brought them and their equipment manufacturers directly into the chain of a 911 call, and potentially right into the sights of callers who were harmed when that chain broke down.[13]

In order to allay telecommunication industry concerns over potential liability arising from the provision of subscriber information, or from the inevitable technological breakdowns in the system, the statute, as then passed into law, provided that the providers of subscriber information would be immune from liability for any one of three circumstances: (i) for the release of the subscriber information itself on a claim by the caller; (ii) for an equipment breakdown; or (iii) for any other "act or the omission of any act committed. . . in rendering PSAP services in good faith and in accordance with this act." 1989 N.J. Sess. Law Serv. 3 (West) (quoting former N.J.S.A. 52:17C-10(b)). Although the scope of the last leg of this immunity scheme was left ambiguous, the reference to "this act" seems to show a clear intent to limit the providers' immunity to the

[13] For example, here, the telephone number that showed up on the ANI screen was not the number of the phone Andrews was actually using.

specifically enumerated provisions and requirements of the statute.[14]

Section 52:17C-10 was amended in 1999 to require wireless telephone companies providing service within New Jersey to provide enhanced 911 service pursuant to recently enacted requirements issued by the Federal Communications Commission. See N.J. Assembly Comm. Stmt., S.B. 1495 (May 3, 1999).

In addition, and most significantly for purposes of this case, the amendment "clarifies existing limitations of liability for telephone companies, wireless telephone companies and other entities in connection with enhanced 9-1-1 service and wireless enhanced 9-1-1 service and in connection with supplying assistance to investigation or law enforcement officers." Senate Comm. Stmt., S.B. 1495 (Jan. 25, 1999). To that end, the 1999 amendment deleted former subsection (b) that, as discussed above, had previously identified the situations under which the providers of subscriber information would receive immunity and replaced it with three new subsections that provided greater

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[14] By a 1996 amendment, the legislature added commercial mobile communication providers to the list of entities entitled to immunity. See 1996 N.J. Sess. Law Serv. Ch. 63, Sen. No. 291 (West). In doing so, the legislature stated that: "Under this amendment, a commercial mobile communications provider, just like a telephone company, would be able to release information relating to a subscriber who is being investigated for placing 'false alarm' or 'intentionally misleading' calls to 9-1-1." N.J. Assembly Floor Stmt., S.B. 291 (Mar. 28, 1996).

detail as to the circumstances under which such immunity would attach. The new, and current, statute reads as follows:

> 52:17C-10. Forwarding information about 9-1-1 caller to jurisdictional public safety answering points by telephone company; immunity from liability
>
> a. Whenever possible and practicable, telephone companies shall forward to jurisdictional public safety answering points via enhanced 9-1-1 network features, the telephone number and street address of any telephone used to place a 9-1-1 call. Subscriber information provided in accordance with this section shall be used only for the purpose of responding to emergency calls or for the investigation of false or intentionally misleading reports of incidents requiring emergency service.
>
> * * * *
>
> c. No telephone company, person providing commercial mobile radio service as defined in 47 U.S.C.s. 332(d), public safety answering point, or manufacturer supplying equipment to a telephone company, wireless telephone company, or PSAP, or any employee, director, officer, or agent of any such entity, shall be liable for damages to any person who uses or attempts to use the enhanced 9-1-1 service, wireless 9-1-1 service or wireless enhanced 9-1-1 service established under this act for release of the information specified in this section, including non-published telephone numbers. This limitation of liability is inapplicable if such failure resulted from a malicious purpose or a wanton and willful disregard for the safety of persons or property.
>
> d. No telephone company, person providing commercial mobile radio service as defined in 47 U.S.C.s. 332(d), public safety answering point, or manufacturer supplying equipment to a telephone company, wireless telephone company, or PSAP, or any employee, director, officer, or

> agent of any such entity, shall be liable to any person for civil damages, or subject to criminal prosecution resulting from or caused by any act, failure or omission in the development, design, installation, operation, maintenance, performance or provisioning of any hardware, software, or any other aspect of delivering enhanced 9-1-1 service, wireless 9-1-1 service or wireless enhanced 9-1-1 service. This limitation of liability is inapplicable if such failure resulted from a malicious purpose or a wanton and willful disregard for the safety of persons or property.
>
> e. No telephone company, person providing commercial mobile radio service as defined in 47 U.S.C.s. 332(d), public safety answering point, or manufacturer supplying equipment to a telephone company, wireless telephone company, or PSAP, or any employee, director, officer, or agent of any such entity, shall be liable to any person for damages resulting from or in connection with such entity's provision of any lawful assistance to any investigative or law enforcement officer of this State, or a political subdivision of this State, of the United States, or of any other state or a political subdivision of such state in connection with any lawful investigation by or other law enforcement activity of the law enforcement officer unless the entity, in providing such assistance, acted in a manner exhibiting wanton and willful disregard for the safety of persons or property.

(Pa697-698).[15] Subsections (c) and (d) essentially restate the immunities provided in former subsection (b) as to any possible liability to the caller for providing subscriber information, see N.J.S.A. 52:17C-10(c), or for any possible liability for technical equipment failures. See N.J.S.A. 52:17C-10(d).

[15] The Decision below materially misquotes section (e) of the statute.

However, new subsection (e), upon which the Trial Court relied in finding that these Defendants were entitled to immunity under Title 52, is substantially different from the last clause of former subsection (b). Instead of providing immunity for any good-faith act of providers, the new subsection limits this third category of immunity to actions taken by a PSAP or its employees only in connection with providing "lawful assistance to any investigative or law enforcement officer . . . in connection with any lawful investigation by or other law enforcement activity of the law enforcement officer . . . ." N.J.S.A. 52:17C-10(e). Then, the amendment states that the immunity created by the section is not absolute, but instead can be lost when "the entity, in providing such assistance, acted in a manner exhibiting wanton and willful disregard for the safety of persons or property." Id.

Thus, subsection (e) is clearly limited to situations where the PSAP provides assistance, most likely in the form of information about calls previously received, to aid an ongoing "lawful" police investigation. The term "lawful assistance" certainly implies that the request was initiated by law enforcement and directed to any of the enumerated entities, presumably concerning the "investigation of false or intentionally misleading reports" specifically referred to in subsection (a). (Pa697). The entities are permitted by the

statute to comply and provide the subscriber information, with immunity, so long as the request was "lawful." (Pa698). Indeed, the word "lawful" would be wholly unnecessary, and confusing, if every aspect of a 911 operator's duties was intended to be covered by the immunity.

As discussed more fully below, in this case, no law enforcement investigation existed before the Jersey City Police Department received the two 911 calls and the Call Takers in their handling of the calls were not in any way assisting an ongoing, lawful investigation. Thus the immunity provided in subsection (e) does not apply.

B. Jersey City Was Not a PSAP as Defined By the Statute

As to whether the Jersey City Police Department was acting as a PSAP in connection with the two 911 calls at issue, the Trial Court recognized both that a call center only qualifies as a PSAP for purposes of the statute if "it is the first point of reception by a public safety agency of 911 calls" and that in this instance, the first 911 call at issue "was received by a State Call Taker." Despite these accurate findings, the Trial Court then without any discussion distorted both the language and the logic of the statute, N.J.S.A. 52:17C-1(l), to find that the Jersey City became the "initial point of reception" because the State PSAP transferred the call to Jersey City which is the location of the caller.

In reaching its conclusion, the Trial Court characterized as "unpersuasive" the Plaintiffs' argument that the Jersey City Police Department was acting as a secondary call center when it received the call from the State PSAP. However, the Trial Court does not point to any language in the statute or any precedent interpreting the statute to support its conclusion that a call center within a municipal police department qualifies as the "initial point of reception" even when it receives a call from another call center such as the State PSAP. Given that the word "initial" means "first", and given that the State was the first PSAP to handle the first 911 call, there can be no question that the State was the "initial point of reception" and that Jersey City does not qualify as a PSAP, which is a prerequisite for immunity under this Statute.

The absurdity of the Trial Court's conclusion was revealed completely when the court was faced with the motion by the State of New Jersey for summary judgment dismissing the claims against it on the ground that its call center was the "initial point of reception" and, therefore, entitled to immunity. Not deterred by having conferred "initial" status on the Jersey City Police Department, the Trial Court noted that the 911 call first went to the State so that it was "the first PSAP to receive the call" and is "entitled to immunity." (Pa1190). Thus, in order to accomplish its goal of depriving plaintiff of any remedy in this

case, the Trial Court conjured up two "initial points of reception" specifically acknowledging in its discussion of the State's purported immunity that it was finding that the 911 call at issue would end up with two "initial" recipients. Such a result is not supported by the language of the statute.

C. The Defendants Were Not Providing Lawful Assistance to a Law Enforcement Investigation Within the Meaning of the Statute

The most striking deficiency in the Trial Court's decision is its extension of the subsection (e) immunity to all Defendants without discussing at all the clear limitation of the immunity to situations where the PSAP was providing "lawful assistance to any investigative or law enforcement officer . . ." N.J.S.A. 52:17C-10(e). In this case, there was no law enforcement investigation into the events at the Wilson home at the time that either call was received. [16] In fact, the purpose of the Enhanced 911 System is for the operators to take the mandated information from the caller and dispatch appropriate emergency personnel to determine if an emergency exists and whether it warrants attention by an emergency first responder. Here, the only connection of Andrews's 911 calls to law enforcement is that Clark chose to dispatch police personnel

[16] Indeed, a particular irony is that, as described above, the responding police officers specifically denied during their depositions that their response could be considered an investigation.

rather than fire or emergency medical responders to inquire into the circumstances at the Wilson home. The mere fact that he dispatched police officers, rather than fire or emergency medical personnel, cannot be the relevant factor in determining whether an immunity under subsection (e) attaches. [17]

Moreover, although the immunity provision recites that the immunity is for lawful assistance to law enforcement, the Court below applied that immunity to Petersen, Jones and Clark, who are themselves employees of the Jersey City Police Department. In other words, the statute was read by the Court to immunize internal police communications, which is far from the implication of the statute.

In addition, under the Trial Court's interpretation of Subsection (e), each and every step Petersen took, or more importantly failed to take, before the police were even dispatched constituted lawful assistance with a police investigation. That is absurd.[18]

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[17] Moreover, if, as the Trial Court found, section (e) was intended to immunize all 911 operator and dispatcher conduct which precedes any law enforcement response, then, with respect to those responses, sections (c) and (d) would be rendered wholly superfluous. It would have been completely unnecessary for the legislature to provide specific immunities for forwarding subscriber information or for mechanical breakdowns if section (e) could read so broadly as to apply to the call takers' interaction with the public, their information gathering and dissemination.

[18] There is also simply no conceivable manner to characterize Jones' interaction with Andrews as lawful

Any doubt as to the intended scope of the subsection (e) immunity is dispelled by the Senate report that accompanied the 1999 amendment that added the sections defining the three different immunities available to PSAPs. The report explained that the purpose of the new sections was to "clarif[y] existing limitations of liability for telephone companies, wireless telephone companies and other entities in connection with enhanced 9-1-1 service and wireless enhanced 9-1-1 service and in connection with supplying assistance to investigations or law enforcement officers." See Senate Comm. Stmt., S.B. 1495 (Jan. 25, 1999). Thus, the legislature clearly viewed the immunities for release of subscriber information or for the breakdown of equipment as "limitations of liability . . . in connection with supplying enhanced 9-1-1 service" while subsection (e) was intended to embody an immunity for "supplying lawful assistance to investigative or law enforcement officers." No such assistance was involved in the response to either of the calls in this case and no immunity under Title 52 excuses the clear misconduct of either 911 operator.

Simply put, the legislature could not have intended for every 911 call which leads to a police response to be protected by Title 52 immunity, whereas every 911 call that leads to a

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assistance to law enforcement, as she intentionally did not dispatch the police. (Pa1070, Pa947).

fire or ambulance response remains subject to liability. Such a strained reading of the statute would improperly lead to absurd and inconsistent results. See Carpenter Tech. Corp. v. Admiral Ins. Co., 172 N.J. 504, 513 (2002) ("[W]here a literal reading will lead to a result not in accord with the essential purpose and design of the act, the spirit of the law will control its letter").

D. The Trial Court Erred in Straining to Apply Title 52 to the Circumstances of this Case, and Improperly Invaded the Province of the Jury

As shown above, Title 59 and this Court's prior holdings in Massachi and Reis definitively govern the issue of whether and when call takers and their employers are immune from suit. The Trial Court had no need to resort to Title 52, which by its clear language simply does not apply here. Statutes must be interpreted in the context of the larger statutory scheme, so that other statutory provisions are not nullified. See, e.g., Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., ____ A.2d ____, 2009 WL 1286356, at *8 (May 11, 2009) ("[W]e attempt to construe statutes on the same subject as part of a harmonious whole."); Chasin v. Montclair State Univ., 159 N.J. 418, 427 (1999) ("[A] legislative provision should not be read in isolation or in a way which sacrifices what appears to be the scheme of the statute as a whole.").

Moreover, even if Subsection (e) were to apply to call takers merely receiving 911 calls from the public, as opposed to those assisting in ongoing law enforcement investigations, the Trial Court here wrongly concluded that Plaintiffs had failed to "provide evidence that defendants acted with wanton or willful disregard for plaintiff's safety to defeat the immunity provided to PSAPs and [their] employess under Title 52." (Pa1195). Although no such showing by Plaintiffs was necessary, since Title 52 does not apply, at the very least the Trial Court should not have ignored Plaintiffs' evidence, and should have left this issue to the jury to decide. The Decision must be reversed.

POINT IV

EXPERT TESTIMONY IS NOT NECESSARY TO ESTABLISH JERSEY CITY'S NEGLIGENT TRAINING, SUPERVISION AND RETENTION

The Trial Court dismissed Plaintiffs' claims that Jersey City had negligently trained, supervised and retained[19] the Individual Defendants on the ground that no expert witness testimony was provided as to the standard of care.

It is clear, however, that expert testimony as to the standard of care is not required where careless acts are obvious to anyone of average intelligence and ordinary experience.

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[19] Plaintiffs previously withdrew their claims of negligent retention as to Santana and Vidal.

Thus, in Butler v. Acme Markets, Inc., 89 N.J. 270 (1982), the New Jersey Supreme Court stated as follows:

> As to the absence of expert testimony, except for malpractice cases, there is no general rule or policy *requiring* expert testimony as to the standard of care.
>
> . . .
>
> The test of need of expert testimony is whether the matter to be dealt with is so esoteric that jurors of common judgment and experience cannot form a valid judgment as to whether the conduct of the party was reasonable.

Id. at 283 (citations omitted) (emphasis in original).

The Butler Court went on to state that even in malpractice cases, the facts may lead to the conclusion that expert testimony is not required. Id. Subsequent New Jersey cases have followed this rule, developing the "common knowledge" exception and holding that where a defendant's careless acts are obvious, expert testimony is not required to establish the standard of care. See, e.g., Palanque v. Lambert-Woolley, 168 N.J. 398, 405 (2001) (citing Estate of Chin v. Saint Barnabas Med. Ctr., 160 N.J. 454 (1999)); Farrell v. Janik, 225 N.J. Super. 282, 289-90 (Law Div. 1988) (expert testimony not required because standard of care for real estate broker within common knowledge and ken of lay person).[20]

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[20] The corollary rule is that expert testimony is only permitted for subject matter that is "beyond the ken of the average juror." Landrigan v. Celotex Corp., 127 N.J. 404, 413 (1992); see also N.J.R.E. 702; Biunno, Current N.J. Rules of Evidence, comment 1 on N.J.R.E. 702 (1994-95) (stating that

A. Negligent Training and Supervision

Readily apparent from Petersen and Jones' testimony is that Jersey City negligently trained and supervised these employees. With respect to Petersen, it is undisputed that Jersey City never gave her the Manual that governs the conduct of call takers. (Pa1137). She testified that she first saw the Manual one month before her October 2007 deposition, which was two years after the September 2005 incident and seven years after her employment began. (Pa1136). Jones testified that she received a manual during training in 1997 but was not provided with the Manual that was operative in 2005. (Pa933, Pa935). She further testified that in 2005 she no longer had the original manual, had "no idea" where it was, and that many call takers do not have the Manual. (Pa936).

Call taker trainers testified that the Manual was supposed to be provided to every student in the call taker training course. (Pa1031-1032, Pa1057-1058). Further, one trainer testified that he required students to sign an "acknowledgement

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"primary justification for permitting expert testimony in the first place is the relative helplessness of the average juror in dealing with a subject matter which is not a matter of common knowledge"). Therefore, in contrast to the Court's dismissal of Plaintiffs' claim for lack of expert testimony on this issue, expert testimony is not permitted unless it relates to a subject matter which is so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average laymen. Nesmith v. Walsh Trucking Co., 247 N.J. Super. 360, 369 (App. Div. 1989), rev'd on other grounds, 123 N.J. 547 (1991).

of receipt" page indicating that they received a copy of the Manual and that the failure to know its contents constitutes neglect of duty. (Pa909, Pa1058). Jersey City has never produced Petersen's or Jones's acknowledgment pages and therefore there is nothing in the record to dispute their testimony.

It is plainly obvious that Jersey City failed to follow its own internal procedures for training and supervising the Operators. Jersey City did not properly disseminate the Manual that defined their duties and responsibilities and did not ensure that call takers retained their Manuals for reference, despite Jersey City's own policy of providing manuals upon employment and updating operator's manuals with revised versions. (Pa1136-1137, Pa933, Pa935, Pa1031-1032, Pa1057-1058). The resulting basic and fundamental failures of Petersen and Jones further expose flagrant deficiencies in training and supervision. As discussed at length supra, the most routine questions were not asked by two different 911 operators.

Petersen's failure to ask a series of questions required for all requests for services resulted in the Officers' inability to locate the emergency and to contact or locate Andrews to obtain more information. (Pa906-908, Pa1146, Pa1150-1152, Pa1154-1155, Pa1157, Pa1161, Pa1164, Pa1167-1168). Jones's determination that the second 911 call was a non-

emergency despite being told by Andrews that the police never responded to his previous 911 call and that he saw a man flee from the building is incomprehensible, as Jones asked no questions concerning the prior 911 call or the underlying emergency. (Pa1070). The subsequent failure to dispatch foreclosed the "second chance" Jersey City had been given to provide aid to a Jersey City family in desperate need.

B. Negligent Retention

Plaintiffs' allegations that Jersey City negligently retained Petersen, Jones and Dispatcher Clark are fully supported by the record. (Pa1071, Pa1097-1113). Portions of the personnel records of Petersen, Jones and Clark, which contained a slew of disciplinary complaints, were submitted to the Trial Court in opposition to Defendants' motions for summary judgment. Indeed, many of these disciplinary actions relate directly to what is alleged here -- their improper handling of 911 calls. (Pa1071, Pa1097-1098, Pa1101-1104, Pa1109-1113). For example, Jones's personnel file reflects that in the eight years of employment with the Jersey City Police Department prior to this incident, she received eight written warnings and was suspended five times, two of which were for failure to follow policy and procedure. (Pa1097-1100).

Petersen's file demonstrates that she received one suspension and two written warnings during the course of her

employment. Additionally, Petersen was threatened with a written warning for her failure to place a return call for a 911 hang-up and for her failure to place an emergency call through to dispatch on June 15, 2005, three months before the incident in this case. (Pa1101).

Dispatcher Clark received an astonishing thirteen suspensions, seven written warnings and one probation. (Pa1102-1113, Pa1071). Four of the written warnings were for failure to follow policy and procedure. (Pa1102). Specifically, two concerned his failure to dispatch the police to a call in a progress when a unit was available, the consequences of which was his being directed to review his Dispatchers Policy & Procedures Manual and being threatened with dismissal. (Pa1103-1104, Pa1109). With regard to his numerous suspensions, five were for failing to follow policy and procedures, such as failure to dispatch and failure to answer a call. (Pa1102, Pa1071, Pa1110-1113). Additionally, on one particular day, Clark earned four of these suspensions during a call in which he affirmatively cancelled an EMS unit without cause, telephoned the complainant without the required authority to do so (same action complained of in this case), used an abusive demeanor with the caller, and threatened the caller with arrest. (Pa1071, Pa1111-1113).

As the record demonstrates, these employees' personnel files are filled with disciplinary actions, many of which concern their failures to follow policy and procedure. In failing to terminate Petersen, Jones and Clark, Jersey City ignored the real possibility that these employees' repeated negligence would cause harm to its citizens - and tragically that is just what happened.

Indeed, this aspect of the Trial Court's Decision, perhaps more than any other, most clearly illustrates the Court's failure to adequately analyze the evidence presented. Faced with this large volume of evidence, including Clark's 13 prior suspensions, the Court held that "this Court finds that plaintiff has provided no evidence to suggest that Jersey City's actions in training, supervising and or retaining the individual defendants was palpably unreasonable."[21] (emphasis added).

In sum, Plaintiffs complain not that Jersey City was negligent in its training, supervision, and retention of these employees as compared to other jurisdictions, but rather that Jersey City simply failed to follow its own internal procedures in this regard. As such, expert testimony is not necessary and

[21] In addition, there was no reason whatsoever for the Court to apply the "palpably unreasonable" standard since there was no showing that Jersey City exercised some discretion, in the face of competing demands, to retain the Individual Defendants.

the material facts in dispute required the jury to decide this issue.

POINT V

PLAINTIFFS ARE ENTITLED TO PARTIAL SUMMARY JUDGMENT

In this case, the Operators, their supervisors, trainers, and the then Chief of Police testified that basic questions as outlined in the Policy & Procedure Manual (caller's name, phone number, apartment number and floor, etc.) were mandatory and not discretionary. (Pa936-937, Pa1146, Pa1150-1151, Pa1154-1155, Pa1157, Pa1164, Pa1166-1168, Pa1173-1174, Pa915-920, Pa1034-1035, Pa1038-1040, Pa1064-1066). This testimony is directly contrary to the Court's factual finding that those same policies and procedures were discretionary. These numerous admissions formed the basis of Plaintiffs' motion for partial summary judgment. See Group Health Inc. v. Tagayun, 2009 WL 562986, at *3 (App. Div. March 6, 2009) (summary judgment appropriate where depositions show that there is no genuine issue of material fact) (Pa1220); see also R. 4:46-2(c); Puder v. Buechel, 183 N.J. 428, 440-41 (2005) (conclusory and self-serving statements inadequate to raise issue of material fact sufficient to defeat motion for summary judgment). The governing law as set forth in Massachi and Reis is clear. Plaintiffs are entitled to summary judgment under the established facts and applicable law.

POINT VI

JUDGE ANTONIN SHOULD BE REMOVED FROM THIS CASE

The Trial Court's Decision should not only be reversed, but Judge Antonin should be removed from this case upon remand because she has already sought to resolve the most basic of the disputed issues of fact without an evidentiary hearing and has, without factual support, expressed significant opinions respecting the merits of the case. Leang, 399 N.J. Super. at 380; see also Johnson v. Johnson, 390 N.J. Super. 269, 275-76 (App. Div. 2007); P.T. v. M.S., 325 N.J. Super. 193, 200 (App. Div. 1999); Carmichael v. Bryan, 310 N.J. Super. 34, 49 (App. Div. 1998).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the Trial Court's Decision dismissing Plaintiffs' Complaint, grant Plaintiffs' motion for summary judgment, remove Judge Antonin from this case, and award such other and further relief as this Court deems just and proper.

Dated: June 8, 2009

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City of Jersey City, et al.
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via **Express Mail** by depositing **2** copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Express Mail.

Sworn to before me on June 8, 2009

Robyn Cocho
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