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WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials&TRIBULATIONS

Words of assurance can and will be used against you

A chilling effect on how police officers counsel victims of domestic violence will most likely occur as a result of a recent decision from the New York State Court of Appeals. The court, in *Coleson v. City of New York*, __ NY2d __, 2014 NY Slip Op. 08213 (Nov. 24), found that conduct by the police, including words of assurance, raised a triable issue of fact as to the existence of a "special relationship," exposing the defendants to potential negligence liability.

Facts

In May 2014, plaintiff Jandy Coleson ordered her drug abusing husband, Samuel Coleson, to leave their apartment and then changed the locks. Since 2000, the plaintiff had suffered both verbal and physical abuse at the hands of Samuel Coleson. He was jailed on a number of occasions and the plaintiff obtained previous Orders of Protections against him.

By JAMES S. WOLFORD
Daily Record Columnist

Two months later, Samuel Coleson tried to force himself into the plaintiff's building and threatened to kill her and stab her with a screwdriver. Not surprisingly, the plaintiff called the New York City Police Department. Samuel Coleson, who had fled, was apprehended a short time later. That same day, the plaintiff applied for another Order of Protection and was transported to the police precinct with her son.

According to the plaintiff's deposition testimony, a police officer advised her, while at the precinct, that "they had arrested (Samuel) Coleson, he's going to be in prison for a while, and that she should not worry, she was going to be given protection," Slip Op. at *1 (alterations omitted).

Later that day, the plaintiff received a phone call from NYPD Officer Reyes, who advised the plaintiff that Samuel Coleson was "in front of the judge" and that he was going to be "sentence[d]," *Id*. Officer Reyes also advised the plaintiff that "everything was OK, that everything was in process, [and] that she was going to keep in contact with [her]," *Id.* This phone call lasted approximately two hours.

Unfortunately, only two days later, the plaintiff went to pick her son up from school and saw Samuel Coleson at a nearby car wash. He approached the plaintiff, took out a knife and stabbed her in the back.

The child, who was seven at the time, testified that he saw Samuel Coleson chasing the plaintiff with a knife while she screamed for help; he then hid behind a car and was ultimately locked in a broom closet by a man who worked at the car wash. Approximately five to 10 minutes later, the boy came out of the closet and saw his mother on the ground in a pool of blood.

A lawsuit was commenced against the City of New York and the NYPD (collectively, "the City") for negligence and negligent infliction of emotional distress on the child who was in the zone of danger during the incident.

Trial court decision

After the City moved for summary judgment, Supreme Court, Bronx County, found that the plaintiff did not establish a special relationship existed, thus the City had no liability for negligence because she failed to "demonstrate that the verbal assurance of protection at the precinct was followed by any visible police protection" and "fail[ed] to show any post arraignment promise of protection," *Coleson v. City of New York*, 2012 WL 10478836, *2 (Sup. Ct. Bronx Co. 2012). Additionally, the trial court found that because the child was in the broom closet at the time of the incident, he was not in the zone of danger.

The First Department unanimously affirmed and found that "i[n] the absence of any evidence that defendants assumed an affirmative duty to protect plaintiff from attacks by her husband, [the City does] not owe a duty of care to plaintiff," *Coleson v. City of New York*, 106 AD3d 474 (1st Dept. 2013), citing *Valdez v. City of New York*, 18 NY3d 69 (2011).

The First Department found that the statements made by Officer Reyes "were too vague to constitute promises giving rise to a duty of care," and based upon the lack of a special relationship, the child's claim for negligent infliction of emotional distress was dismissed, *Id.* at 475. The plaintiff was granted leave to appeal to the

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Court of Appeals and, in a four to three decision, the court modified the First Department's decision and found that the acts of the police were sufficient to raise triable issues of fact as to whether a special relationship existed.

Court of Appeals

The majority opinion, written by Judge Sheila Abdus-Salaam, emphasized that liability for a municipality negligently exercising a governmental function "turns upon the existence of a special duty to the injured person, in contrast to a general duty owed to the public," Slip Op. at *2. This special relationship can be formed in three ways:

> (1) when the municipality violates a statutory duty enacted for the benefit of a particular class of persons; (2) when it voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or (3) when the municipality assumes positive direction in the face of a known blatant and dangerous safety violation, *Id*.

The court then analyzed the second prong of the test to determine whether the City voluntarily assumed a duty and created a justifiable reliance by utilizing the previously established test set forth in *Cuffy v. City of New York*, 69 NY2d 255 (1987). The "*Cuffy* test" consists of four factors:

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking, Slip Op. at *2.

The court emphasized that "the injured party's reliance is critical" and concluded that the plaintiff did, in fact, raise a triable issue as to whether a special relationship existed, *Id*. First, the court found that a jury could conclude that the police officers made promises to protect the plaintiff because she was notified by the police that Samuel Coleson was arrested, in front of a judge to be sentenced, would be in jail for a while, and that the police would be in contact with her.

With respect to the second element, the police officers knew that Samuel Coleson could harm the plaintiff if he was not apprehended, as evidenced by his arrest and the issuance of an Order of Protection to the plaintiff. The court found that there was an issue of fact as to whether the police knew that their inaction could lead to harm, given that the plaintiff was told by Officer Reyes that everything was in process and she would be in contact. The court posited that the third factor was easily met because the plaintiff had direct contact with the police, the police responded to her call about Samuel Coleson's threats, made an arrest, escorted her to the police precinct, and Officer Reyes ultimately participated in a two-hour phone call with the plaintiff.

Finally, given the assurances that the plaintiff received from Officer Reyes that Samuel Coleson was in jail and that he would be there for a while, according to the court, a jury could find that it was reasonable for the plaintiff to believe that Samuel Coleson would be jailed for the foreseeable future and that the police would contact her if he was not incarcerated.

The court found that the statements made by Officer Reyes "lulled" the plaintiff into believing that she could relax her vigilance for a reasonable period of time, certainly more than two days, *Id.* at *3. Based upon the aforementioned analysis, the court determined that whether or not a special relationship existed was a question for the jury.

The dismissal of the zone of danger claim, however, was affirmed on different grounds. The court held that the child was not in the zone of danger because he was in a broom closet while his mother was stabbed. He neither saw the incident, nor was he immediately aware of the incident at the time it occurred.

Dissenting opinion

Judge Eugene F. Pigott Jr., writing for the dissent, penned that the majority opinion creates "a paradox," professing to protect victims of domestic violence, while discouraging the police from engaging in meaningful interaction with the victim, Slip Op. at *4. According to the dissent, the majority retreated from precedent because it found that the police did four things that exposed the City to potential liability: (1) made promises to protect the plaintiff; (2) "conceivably knew" that plaintiff's husband would harm her if he was not apprehended because they had arrested him and the Court issued an Order of Protection; (3) had direct contact with the plaintiff because Officer Reyes spoke with her on the telephone, advised that everything was in process, and that the officer would keep in contact; and (4) advised the plaintiff, through Officer Reyes, that Samuel Coleson was in jail and that he would be there for a while, thus allowing the plaintiff to justifiably rely on this assurance and go about her daily life.

Judge Pigott posited that if the police had actually made specific assurances to the plaintiff detailing how she would be protected, then a question of fact would have been presented. However, at her deposition, the plaintiff was unable to state what, if any, protection the police had promised to provide. In fact, the plaintiff never asked.

Without any indication as to the type of protection to be provided, Judge Pigott took issue with the majority opinion's failure to explain how the plaintiff could have justifiably relied upon such a vague offer of "protection" or how such a question could be answered by a jury without engaging in speculation.

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Equally troubling to the dissent was the majority's addition of new factors to the justifiable reliance prong of the "*Cuffy* test," namely that police may make assurances "only to the extent that they have an actual basis for such assurances," *Id.* at *5. Judge Pigott also highlighted that the police must now "watch what they say" and "must also be prepared to back up what they say, no matter how vague the assurances may be. For example, statements such as, 'it's going to be OK' or 'We'll send him away so he doesn't hurt you again,' will undoubtedly be utilized in potential civil suits as examples of assurances that the police made that had no 'actual basis,'" *Id.*

Judge Pigott believed that such statements are on the same spectrum as the vague promises of "protection" and to "keep in contact" that were made to the plaintiff, *Id.* As a result, the "police will be deterred from providing any assurances to the victims of domestic violence, those victims may be less than willing to cooperate in the prosecution of their significant others (or family members), and the cycle will continue, with victims in all likelihood returning to their abusers, all because the police were (justifiably) wary about making any comment that could be considered a promise of safety," *Id.* at *6.

Finally, with respect to the phone call between the plaintiff and Officer Reyes, Judge Pigott found that the statements indicating that "(Samuel) Coleson was in front of a judge," was going to be "sentenced" and that the police would "keep in contact," did not raise a triable issue of fact for justifiable reliance. If they did, any status report "akin to the one given in this case will expose a municipality to liability, even if, as in this case, the municipality has not made an affirmative undertaking," *Id.*

Conclusion

This decision will certainly have a chilling effect on what police officers say to victims of domestic violence. Unfortunately, it may encourage law enforcement to provide victims of domestic violence with as little information as possible, out of concern that anything they say can and will be used against them (and their employer) in a potential civil lawsuit.

Police officers have extremely dangerous and difficult jobs, especially when responding to a domestic violence situation. They must now be mindful that simple statements to reassure a victim could later be used to prove liability through a "special relationship" that an officer may have unwittingly created. Most importantly, what statements can now create a special relationship remain unclear. Municipalities across the state would be wise to require police officers to offer only pre-approved statements to crime victims, to ensure against civil liability.

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