UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16-1868

Marc Stephens, et al., Appellants v. City of Englewood, et al., Appellees

(United States District Court for the District of New Jersey, No. 2:14-cv-05362, Hon. William J. Martini, U.S.D.J.)

BRIEF OF DEFENDANTS/APPELLEES, CITY OF ENGLEWOOD AND CITY OF ENGLEWOOD POLICE DEPARTMENT IN OPPOSITION TO PLAINTIFFS'/APPELLANTS' NOTICE OF APPEAL

Adam Kenny
Weiner Lesniak LLP
629 Parsippany Road
Parsippany, N.J. 07054-0438
T.: (973) 403-1100
E-mail: akenny@weinerlesniak.com
Attorneys for Defendants/Appellees
City of Englewood &
Englewood Police Department

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

It is the position of the City of Englewood and the Englewood Police Department (hereinafter "Englewood") that this court derives its subject matter jurisdiction over pro se plaintiff Tyrone Stephens' action against Englewood, which action includes claims arising under 42 U.S.C. §1983, from Article III, §2 of the Constitution of the United States and, also, from 28 U.S.C. §1331. Appellate jurisdiction is vested in this court in this matter pursuant to 28 U.S.C. §1291 ("Final decisions of District Courts").

Reiterating its position below, Englewood submits that pro se plaintiff Marc Stephens has no action against it. The Complaint filed in this action set forth twenty separate causes of action, fifteen of which were against Englewood and/or the five members of its police department individually named as defendants. Each of those fifteen causes of action belonged solely to pro se plaintiff Tyrone Stephens.

STATEMENT OF ISSUES

Englewood submits that the only issues before this court as it relates to the claims against it are the following:

(1) Whether the United States District Court properly granted summary judgment in Englewood's favor, in adherence to Fed.R.Civ.P. 56 and the case law interpreting and applying it; and

(2) Whether the United States District Court properly denied the pro se plaintiffs' motions for

reconsideration of its orders granting summary judgment in favor of the several defendants, including Englewood.

Englewood submits that the evidence presented for this court's consideration shall demonstrably prove that the answer to each of those questions is "Yes".

CONCISE STATEMENT OF THE CASE[1]

On August 26, 2014, pro se plaintiff Tyrone Stephens and his older brother, pro se plaintiff Marc Stephens, filed a twenty-count Complaint in the matter of Marc and Tyrone Stephens v. City of Englewood, et al., in the United States District Court for the District of New Jersey, which Complaint the plaintiffs identified as a Civil Rights Complaint. **ECF No.6.**

In the Complaint, the City of Englewood was named as a defendant, as was the Englewood Police Department. Five members of the Englewood Police Department (Detective Marc McDonald, Detective Desmond Singh, Detective Santiago Incle, Jr., Detective Nathaniel Kinlaw, and Detective Lieutenant Claudia Cubillos), were also named as defendants. Fifteen of the Complaint's twenty counts set forth a specific cause of action against the City of Englewood, the Englewood Police Department, and one or more of the five individually-named members of the Police Department. Each of those fifteen causes of action

[1] Englewood respectfully relies upon the recitation of Relevant Facts submitted by the individual Englewood Detective Defendants as part of their brief in opposition to this appeal.

belongs solely to pro se plaintiff Tyrone Stephens. It remains Englewood's position, as it was below, that pro se plaintiff Marc Stephens, while a party to this lawsuit, is not a party who has a single cause of action against Englewood or any of the five members of its police department named by the plaintiffs, individually, as defendants.

The Complaint also named Nina Remson, an attorney, and Comet Law Offices, LLC as defendants. Ms. Remson represented Tyrone Stephens in connection with charges arising out of juvenile matters that occurred prior to the October 31, 2012 incident that is the subject matter of this lawsuit. Jordan Comet, an attorney and the principal of Comet Law Offices, LLC, represented Tyrone Stephens in connection with the charges that the Bergen County Prosecutor's Office filed against him due to the October 31, 2012 incident.

The five individually-named members of its Police Department also filed an Answer to the Complaint on October 10, 2014. **ECF No. 11.** Englewood filed its Answer to the Complaint on October 10, 2014. **ECF No.13.** It must be pointed out that only the City, which is a public entity and municipal corporation organized pursuant to the laws of the State of New Jersey, filed an Answer to the Complaint. The Englewood Police Department, which is not a legal entity separate and apart from the City, did not file an Answer. Remson filed her Answer to the

Complaint on October 26, 2014. **ECF No. 16.** Comet Law Offices, LLC never filed an Answer to the Complaint.

Throughout pre-trial discovery, pro se plaintiff Tyrone Stephens did nothing to substantiate the allegations set forth in his Complaint. He did not conduct a single deposition. He did not retain the services of a single expert witness. He simply reiterated, over and over, the bare allegations of the Complaint as if repetition was a substitute for substance. When the pre-trial discovery period reached its end, Englewood moved for summary judgment, arguing that pro se plaintiff Tyrone Stephens had failed to carry his burden of proving the allegations of his Complaint. **ECF No. 64.** Englewood's summary judgment motion was fully briefed and vigorously opposed by the plaintiff. On November 3, 2015 the Hon. William J. Martini, U.S.D.J. signed an Opinion, **ECF No. 82**, and entered an Order granting summary judgment in Englewood's favor. **ECF No. 83.** The November 3, 2015 Order of summary judgment also granted summary judgment in favor of the five members of the Englewood Police Department who had been individually-named as defendants and in favor of Remson. **ECF No. 83.**

Subsequent to the District Court's entry of the Order granting summary judgment in Englewood's favor, the pro se plaintiff Tyrone Stephens and the pro se plaintiff Marc Stephens filed two separate motions for reconsideration, the first of

which the District Court denied in an Order entered on January 13, 2016, **ECF No. 92**, and the second of which the District Court denied in a Text Order that was entered on March 31, 2016 as being in violation of the District Court's Local Rule prohibiting additional motions for reconsideration. **ECF No. 98.**

Finally, on or about April 6, 2016, the plaintiffs filed their Notice of Appeal to the United States Court of Appeals for the Third Circuit was filed on that same day. **ECF No. 103.**

SUMMARY OF ARGUMENT

When Pro se plaintiff Tyrone Stephens filed his Complaint in the United States District Court for the District of New Jersey, it represented a formal acceptance by him of his burden, his responsibility, and his obligation of eventually proving its allegations. In this case, in the slightly less than one year that marked the time between the filing of the Complaint and the completion of pre-trial discovery, Tyrone Stephens did nothing to meet his burden. He provided no substance at all to the Complaint's bare allegations.

The District Court properly applied Fed.R.Civ.P. 56 and the case law interpreting it to Englewood's summary judgment motion, which it granted after being satisfied that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Here, when Englewood moved for summary judgment, pro se plaintiff Tyrone

Stephens failed to present the District Court with any competent evidence in support of his claims, whether they were federal law claims or state law claims.

Englewood submits that it is well-settled that a party opposing summary may not "rest upon mere allegations, general denials, or…vague statements." Quiroga v. Hasbro, Inc., 934 F.2d 497, 500 (3d. Cir.), cert. denied, 502 U.S. 940 (1991). That is precisely what pro se plaintiff Tyrone Stephens did. The result below was not merely appropriate but inevitable.

LEGAL ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT IN ENGLEWOOD'S FAVOR, WHICH ORDER SHOULD NOT BE VACATED OR REVERSED BY THIS COURT.

This court employs a plenary standard in reviewing orders entered on motions for summary judgment. Blunt v. Lower Merion Sch. Dist., 767 F.3d 247, 265 (3d Cir. 2014). See also, Catahama, LLC v. First Commonwealth Bank, 601 Fed. Appx. 86, 90 (3d Cir. 2015). In considering an order entered on a motion for summary judgment this court views, "the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion", Blunt, 767 F.3d at 265.

However, its view of the evidence presented in the light most favorable to the party opposing the motion does not vitiate the non-moving party's obligation to establish that an alleged

genuine factual dispute actually exists. Attention is directed, respectfully, again to Blunt:

> If the nonmoving party, however fails sufficiently to establish the existence of an essential element of its case on which it bears the burden of proof at trial, there is not a genuine dispute with respect to a material fact and thus the moving party is entitled to judgment as a matter of law. Further, mere allegations are insufficient and only evidence sufficient to convince a reasonable fact-finder to find all of the elements of the prima facie case merits consideration beyond the Rule 56 stage.

Id., citing Lauren W. v. DeFlaminis, 480 F.3d 259, 266 (3d Cir. 2007).

A. Summary Judgment Was Properly Entered In Englewood's Favor On All Counts Alleging A Civil Rights Violation Pursuant To 42 U.S.C. §1983.

Plaintiff Tyrone Stephens alleged in Count Two, Count Twelve and Count Thirteen of the Complaint that Englewood violated his civil rights pursuant to 42 U.S.C. §1983. In order to prevail on a §1983 claim a plaintiff must establish three things: (1) the conduct complained of was committed by a person acting under the color of State law; (2) this conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States; and (3) the defendant's acts were the proximate cause of the injuries and consequent damages sustained by the plaintiff. See Parratt v. Taylor, 451 U.S. 527 (1981); Adickes v. S.H. Kress and Co., 398 U.S. 144 (1970); Shaw by Strain v. Strackhouse, 920 F.2d 1135,

1142 (3d. Cir. 1990); and Groman v. Twp. of Manalapan, 47 F.3d 628, 638 (3d Cir. 1995).

Congress enacted §1983 to "enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Monroe v. Pape, 365 U.S. 167, 171-172 (1961) (Overruled on other grounds by Monell v. New York City Dept. of Soc. Servs. 436 U.S. 658 (1978)). Under §1983, both local government entities and their individual officers or employees may be held liable. Kentucky v. Graham, 473 U.S. 159, 165 (1985); see Monell, 436 U.S. at 690; In re: Opinion 552, 102 N.J. 194, 197 (1986). An officer may be sued in his individual or official capacity. Graham, 473 U.S. at 166. Individual-capacity action seeks to impose personal liability on an officer, whereas an official-capacity action, where it is claimed that the officer acted in furtherance of an official policy, is merely another way of pleading an action against the government entity. In re Opinion 552, 102 N.J. at 199-200.

In order to hold a government entity, such as Englewood, liable under §1983, a plaintiff must prove by a preponderance of the credible evidence that the entity, itself, supported the alleged violation of constitutional rights. Liability may not be affixed upon a government entity, such as Englewood, on the

basis of respondeat superior[2]. Bielevicz v. Dubinon. 915 F.2d 845, 849-50 (3d Cir. 1990).

In order to prove the entity's liability, a plaintiff must show that the alleged violation of his constitutional rights occurred as a result of an official policy or unofficial custom. Monell, 436 U.S. at 694 (liability attaches when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury"). A policy is created when a decision-maker with authority "issues an official proclamation, policy, or edict." Bielevicz, 915 F.2d at 850 (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d. Cir. 1990).

A course of conduct may be considered a custom when the practice of state officials, though not authorized by state law, is "so permanent and well-settled' that it constitutes law. Monell, 436 U.S. at 691; see Torres v. Kuzniasz, 936 F.Supp. 1201, 1206 (D.N.J. 1996). This may be proven by a showing of knowledge and acquiescence in that the policymakers were aware of the unlawful conduct, but their procedure of reprimand was so inadequate in that it ratified future occurrences of that

[2] The Fifteenth Count of the Complaint, which alleged that Englewood was liable under a theory of respondeat superior liability, failed as a matter of law and was properly dismissed with prejudice when the District Court granted summary judgment.

conduct. Torres, 936 F. Supp. at 1206; see Bielevicz 915 F.2d at 854.

In either instance, a plaintiff must prove that an officer, who had the power to set policy, was responsible for the policy or acquiescence in a well-settled custom. The plaintiff then must show a casual nexus between such proof and his injury. Bielevicz, 915 F.2d at 850. Moreover, the plaintiff just identify *with specificity* the official policy or unofficial custom that the plaintiff claims serves as the basis for establishing the entity's liability under §1983. Skevolix v. Quigley, 586 F. Supp. 532, 544 (D.N.J. 1984). Emphasis added. A plaintiff's vague assertions of a policy are not sufficient to impose liability under Monell. Groman, 47 F.3d at 637. It is the plaintiff's burden of providing evidence of something more than "conclusory allegations of concerted action", Abbott v. Latshaw, 164 F.3d 141, 148 (3d Cir. 1998), in order to establish the existence of a policy.

The Complaint's Second Count alleges that Englewood violated the plaintiff's constitutional rights because of its alleged failure to implement appropriate policies, customs, and practices. It alleges further, in Paragraph Forty-Two, that Englewood violated his constitutional rights and did so pursuant and custom to "a de facto pattern and practice of the

Defendant's deliberate indifference to the Constitutional rights of the plaintiff Tyrone Stephens."

"Deliberate indifference" is a theme prevalent throughout the Complaint's Second Count. Unfortunately for the plaintiff, it contains not even a trace of specificity as to what policies, customs or practices Englewood allegedly adopted - whether implicitly or explicitly - that form the basis of the plaintiff's §1983 claim against it. It is well-settled that, "under no circumstances is a court required to accept bald assertions, unwarranted inferences, or sweeping legal conclusions in the form of factual allegations." In re Rockefeller Ctr. Props. Ins. Secs. Litg., 311 F.3d 198, 215 (3d Cir. 2002); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 n. 8 (3d Cir. 1997).

Summary judgment was appropriately granted in Englewood's favor on the Second Count of the Complaint, which adjudication this court should affirm.

In the Complaint's Twelfth Count, the plaintiff alleged that Englewood failed to adequately train, supervise and properly control the five members of the police department who are defendants here. Inadequate police training serves as the basis for liability under §1983 where it "amounts to deliberate indifference to the rights of persons with whom the police come into contact." City of Canton v. Harris, 489 U.S. 378, 388

(1989). "[W]hen a failure to train reflects a "deliberate" or "conscious" choice by a municipality - a "policy" as defined by our prior cases -- …a city [can] be liable for such a failure to under §1983." City of Canton 489 U.S. at 388. To prevail on such a §1983 claim, plaintiff must introduce evidence of other incidents because deliberate indifference to constitutional rights generally cannot be established solely by reference to a single incident in question. City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-4 (1985).

In City of Canton, Justice White, writing for the Court, identified Monell as the crucible of the Court's creation of a rule that required the allegedly inadequate or deficient training to rise to the level of constituting deliberate indifference to one's rights in order to hold a municipality liable under §1983. "This rule is most consistent with our admonition in Monell, 436 U.S. at 694, and Polk County v. Dodson, 454 U.S. 312, 326 (1981), that a municipality can be liable under §1983 only where its policies are the moving force behind the constitutional violation. City of Canton, 489 U.S. at 388-389.

"Only where a municipality's failure to train its employees in a relevant respect evidences a deliberate indifference to the rights of its inhabitants can such a shortcoming be properly thought of as a city "policy or custom" that is actionable under

§1983." Id. at 389. "Only where a failure to train reflects a "deliberate" or "conscious" choice by a municipality – a policy as defined by our prior cases – can a city be liable for such a failure under §1983." Id. See also, Pembaur v. Cincinnati, 475 U.S. 469, 483-484 (1986) ("Municipal liability under §1983 attaches where -and only where- a deliberate choice to follow a course of action is made from among various alternatives by city policymakers".)

Plaintiff cited no policy created by any decision-maker in authority at the City of Englewood in regard to the conducting of a criminal investigation, or in regard to the filing of a criminal complaint, which official proclamation, policy or edict encouraged members of the City of Englewood Police Department to violate the civil rights of any person within the City, including but not limited to the plaintiff, Tyrone Stephens, himself.

In order to rely upon a claim of inadequate police training as the basis for holding a public entity liable in a §1983 action, a plaintiff must provide the court with some type of substantive evidence. Here, plaintiff Tyrone Stephens did not furnish any such evidence. An unsupported lay opinion concerning the adequacy of police training certainly cannot establish proof of deliberate indifference on the part of an entity or of its policymakers to the rights of persons with whom

the police come into contact. City of Canton v. Harris, 489 U.S. 378, 388 (1989). It is the plaintiff's failure to provide any evidence in support of this claim, and not any allegedly unjust or improper adjudication of this specific cause of action that resulted in the District Court's granting of summary judgment in Englewood's favor on the Twelfth Count of the Complaint.

Respectfully, attention is directed one more time to Justice White's opinion in City of Canton for its explanation of the Court's stated basis for enacting a rigorous standard for establishing a municipality's liability under §1983:

> To adopt lesser standards of fault and causation would open municipalities to unprecedented liability under §1983. In virtually every instance where a person has his or her constitutional rights violated by a city employee, a §1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. See Oklahoma City v. Tuttle, 471 U.S. at 823 (opinion of Rehnquist, J.). Thus permitting cases against cities for their "failure to train" employees to go forward under §1983 on a lesser standard would result in *de facto respondeat superior* liability on municipalities - a result we rejected in Monell, 436 U.S. at 693-694. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs. This is an exercise we believe the federal courts are ill-suited to undertake, as well as one that would implicate serious questions of federalism. Cf. Rizzo v. Goode, 423 U.S. 362, 378-380 (1976).

City of Canton, 489 U.S. at 391-392. Emphasis in original.

In the Complaint's Thirteenth Count, plaintiff Tyrone Stephens alleged that Englewood had failed to exercise

reasonable care in its selection, hiring, and retention of the five members of its police department who the plaintiff has named as defendants in this lawsuit. As was the case with regard to his §1983 claim for negligent supervision, the plaintiff retained no expert in furtherance of his §1983 claim predicated upon negligent hiring. He adduced no evidence whatsoever in discovery as to any of his liability claims against the City, including the §1983 claim for negligent hiring.

Almost two decades ago, writing for the Court in Bd. of the County Comm'rs v. Brown, 520 U.S. 397 (1997), Justice O'Connor declared:

> Cases involving constitutional injuries allegedly traceable to an ill-considered hiring decision pose the greatest risk that the municipality will be held liable for an injury that it did not cause. In the broadest sense, every injury is traceable to a hiring decision. Where a court fails to adhere to rigorous requirements of culpability and causation, municipal liability collapses into *respondeat superior* liability. As we recognized in Monell and have repeatedly reaffirmed Congress did not intend municipalities to be held liable unless *deliberate* action attributable to the municipality directly caused a deprivation of federal rights. A failure to apply stringent culpability and causation requirements raises serious federalism concerns, in that it risks constitutionalizing particularized hiring requirements that States have themselves elected not to impose.

Brown, 520 U.S. at 415. Emphasis in original.

Furthermore, Justice O'Connor articulated the Brown Court's rationale for imposing such an admittedly stringent burden on a

plaintiff prosecuting a §1983 claim based upon a municipality's allegedly negligent hiring of an employee:

> Where a plaintiff presents a §1983 claim premised upon the inadequacy of an official's review of a prospective applicant's record, however, there is a particular danger that a municipality will be held liable for an injury not directly caused by a deliberate action attributable to the municipality itself. Every injured suffered at the hands of a municipal employee can be traced to a hiring decision in a "but-for" sense: But for the municipality's decision to hire the employee, the plaintiff would not have suffered the injury. To prevent municipal liability for a hiring decision from collapsing into *respondeat superior* liability, a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged.

Brown, 520 U.S. at 410.

Here, plaintiff Tyrone Stephens did nothing in furtherance of his §1983 negligent hiring claim beyond present that allegation in the Thirteenth Count of his Complaint, which is indisputably far short of what the Brown Court established as his burden of proof – for purposes of being able to present this claim to a jury at trial. The District Court properly disposed of this claim on summary judgment and Englewood submits that no basis exists for disturbing that disposition.

B. The District Court Properly Granted Summary Judgment In Englewood's Favor On The State Law Claims Of Plaintiff Tyrone Stephens.

In addition to asserting federal law claims against Englewood pursuant to 42 U.S.C. §1983, plaintiff Tyrone Stephens also asserted state law claims against Englewood, all of which

the District Court disposed of by way of its November 3, 2015 Order granting summary judgment in Englewood's favor.

Among the plaintiff's state law claims was an allegation in the Complaint's Fourteenth Count that Englewood had violated his rights pursuant to the New Jersey Civil Right Act, (hereinafter "the NJCRA"), which is codified at N.J.S.A. 10:6-1 et seq.

The NJCRA provides that:

> Any person who has been deprived of substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages or for injunctive or other appropriate relief.

N.J.S.A. 10:6-2c.

New Jersey's Legislature created the NJCRA, "for the broad purpose of assuring a state law cause of action for violations of state and federal constitutional rights and to fill in state statutory anti-discrimination protection." Owens v. Feigin, 194 N.J. 607, 611 (1994). The NJCRA was modeled after 42 U.S.C. §1983. Trafton v. City of Woodbury, 799 F.Supp.2d 417, 443 (D.N.J. 2011). In Trafton, United States District Judge Hillman – in explaining the relationship between §1983 and the NJCRA – provided the following template:

> This district [the District of New Jersey] has repeatedly interpreted NJCRA analogously to §1983. See Chapman v. New Jersey, No. 08-4130, 2009 WL 2634888, *3 (D.N.J. August 25, 2009) ("Courts have repeatedly construed the NJCRA in terms nearly identical to its federal counterpart"); Slinger, 2008 WL 4126181 at *5 (D.N.J. September 4, 2008, rev'd on other grounds 366 Fed. Appx. 357 (3d Cir. 2010) (noting NJCRA's legislative history, this district utilized existing §1983 jurisprudence as guidance for interpreting the statute); Armstrong v. Sherman, No. 09-716, 2010 WL 2483911 at *5 (D.N.J. June 4, 2010) ("The New Jersey Civil Rights Act is a kind of analog to section 1983"). Therefore the Court will analyze Plaintiff's NJCRA claims through the lens of §1983. See Hedges v. Musco, 204 F.3d 109, 121 n. 12 (3d Cir. 2000) (concluding that New Jersey's constitutional provision concerning unreasonable searches and seizures is interpreted analogously to the Fourth Amendment) (citing Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370 (App. Div. 1993).

Trafton, 799 F.Supp.2d at 443.

Englewood submits that in view of the analogous relationship between 42 U.S.C. §1983 and the NJCRA, the plaintiff's inability to demonstrate Englewood's policymakers' "deliberate indifference" is fatal to his NJCRA claim just as it was to his §1983 claim. Englewood submits therefore that the District Court's decision to grant summary judgment in its favor on the Fourteenth Count of the Complaint was proper.

The Sixth Count of the Complaint asserted a claim against Englewood for the intentional infliction of emotional distress. As threshold consideration, the District Court's determination that the Englewood Detectives had probable cause to arrest Tyrone Stephens eviscerates the plaintiff's intentional

infliction of emotional distress claim. Plaintiff Tyrone Stephens cannot prove that any of the five members of the Englewood Police Department behaved tortuously. Absent being able to establish that fact, his claim against them, and by extension his claim against Englewood, fails as a matter of law.

Even assuming arguendo that the plaintiff had presented the court with any evidence to support an assertion that any of the five members of the Englewood Police Department had behaved tortuously, Englewood would nevertheless have been entitled to summary judgment on the Tenth Count of the Complaint.

More than a quarter century ago, writing for the Supreme Court of New Jersey in Buckley v. Trenton Sav. Fund Soc., 111 N.J. 355 (1988), Justice Pollock set forth what a plaintiff must prove to satisfy the elements of a claim for intentional infliction of emotional distress (or "outrage" as it is sometimes referred to in New Jersey's jurisprudence):

> Generally speaking, to establish a claim for intentional infliction of emotional distress, the plaintiff must establish intentional and outrageous conduct by the defendant, proximate cause, and distress that is severe. M. Minzer, Damages in Tort Actions, vol. I, § 6.12 at 6-22 (1987) (Minzer). Initially, the plaintiff must prove that the defendant acted intentionally or recklessly. For an intentional act to result in liability, the defendant must intend both to do the act and to produce emotional distress. Id. at 6-27. Liability will also attach when the defendant acts recklessly in deliberate disregard of a high degree of probability that emotional distress will follow. Hume, supra, 178 N.J. Super. at

> 319; Restatement, supra, § 46 comment d; Minzer, supra, § 6.12[1] at 6-28 to 6-29.
>
> Second, the defendant's conduct must be extreme and outrageous. Hume, supra, 178 N.J. Super. at 315; Minzer, supra, § 6.12[2] at 6-22. The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Restatement, supra, § 46 comment d. Third, the defendant's actions must have been the proximate cause of the plaintiff's emotional distress. Caputzal v. The Lindsay Co., 48 N.J. 69, 77-78 (1966); Minzer, supra, § 6.12[2] at 6-22. Fourth, the emotional distress suffered by the plaintiff must be "so severe that no reasonable man could be expected to endure it." Restatement, supra, § 46 comment j; Hume, supra, 178 N.J. Super. at 317-19; Minzer, supra, § 6.12[4] at 6-49 to 6-50.

Buckley, 111 N.J. at 366-7.

Justice Pollock continued by observing that, "By circumscribing the cause of action with an elevated threshold for liability and damages, courts have authorized legitimate claims while eliminating those that should not be compensable." Id. at 367. Under New Jersey law, in an Intentional Infliction of Emotional Distress case, the resulting distress must be "so severe that no reasonable man could be expected to endure it." Buckley, 111 N.J. at 366-67 (citing Restatement (Second) of Torts § 46, comment j). It is not sufficient for a party to merely assert that he or she has suffered distress, or even to describe symptoms such as aggravation, headaches, or difficulty sleeping. See Griffin v.

Tops Appliance City, Inc., 337 N.J. Super. 15, 26 (App. Div. 2001) (citing Taylor v. Metzger, 152 N.J. 490, 515 (1998)).

Respectfully, plaintiff Tyrone Stephens offered no evidence in support of this claim. Thus, when viewed through the prism of what New Jersey law requires him to offer, the District Court's dismissal of this court of the Complaint with prejudice as part of its grant of summary judgment in Englewood's favor was wholly appropriate. In other words, it is not enough to establish that a party is acutely upset by reason of the incident; a plaintiff must show that the claimed emotional distress was sufficiently substantial to result in physical illness or serious psychological sequelae. See Turner v. Wong, 363 N.J. Super. 186 (App. Div. 2003); Lingar v. Live-In Companions, Inc., 300 N.J. Super. 22 (App. Div. 1997)

Furthermore, there is a well-developed body of case law in New Jersey that has consistently and uniformly held that the types of complaints that plaintiff Tyrone Stephens offers here are insufficient to meet a plaintiff's burden of proving the tort of outrage. See, e.g., Harris v. Middlesex Cty. Coll., 353 N.J. Super. 31 (App. Div. 2002) (no evidence of severe emotional distress even though plaintiff was unable to concentrate, cried excessively, and was physically unable to work on doctorate for at least a year because there was no evidence that the distress interfered with day-to-day activities, and no evidence that

plaintiff sought counseling or treatment); Lascurain v. City of Newark, 349 N.J. Super. 251 (App. Div. 2002) (declining to find severe emotional distress where plaintiff claimed that she became nauseous and upset, was depressed, had nightmares, and no longer enjoyed her daily activities because, despite physician's diagnosis of depression, there had been no dramatic impact on her everyday activities or her ability to function and she had not sought regular psychiatric counseling); and Aly v. Garcia, 333 N.J. Super. 195 (App. Div. 2000) (finding no severe emotional distress as a matter of law where plaintiffs did not seek medical treatment or counseling and there was no evidence of physical illness).

Here, plaintiff Tyrone Stephens failed to put forth the evidence necessary to warrant submission of this claim to a jury. Englewood was entitled to summary judgment on the Tenth Count of the Complaint, which the District Court properly granted.

POINT II

THE DISTRICT COURT PROPERLY DENIED RECONSIDERATION

A. Failure To Meet The Requirements Of L.Civ.R. 7.1(i).

L.Civ.R. 7.1(i) ("Motions for Reconsideration") states:

> **(i) Motions for Reconsideration** Unless otherwise provided by statute or rule (such as Fed. R. Civ. P. 50, 52 and 59), a motion for reconsideration shall be served and filed within 14 days after the entry of the order or judgment on the original motion by the Judge

> or Magistrate Judge. ***A brief setting forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked*** shall be filed with the Notice of Motion. (Emphasis added).

In Fellenz v. Lombard Inv. Corp., 400 F. Supp. 2d 681 (D.N.J. 2005), this court summarized the burden that a party seeking relief pursuant to L.Civ.R. 7.1(i) faces:

> A motion under Rule 7.1(i) may address only those matters of fact or issues of law which were presented to, but not considered by, the court in the course of making the decision at issue. SPIRG v. Monsanto Co., 727 F. Supp. 876, 878 (D.N.J. 1989), aff'd, 891 F.2d 283 (3d Cir. 1989). Matters may not be introduced for the first time on a reconsideration motion, and absent unusual circumstances, a court should reject new evidence which was not presented when the court made the contested decision. See, e.g., Yurecko v. Port Authority Trans-Hudson Corp., 279 F. Supp. 2d 606, 609 (D.N.J. 2003); Resorts Int'l, Inc. v. Greate Bay Hotel and Casino, Inc., 830 F. Supp. 826, 831 & n.3 (D.N.J. 1992). Motions for reconsideration "are not an opportunity to argue what could have been, but was not, argued in the original set of moving and responsive papers." Bowers v. NCAA, 130 F. Supp. 2d 610, 613 (D.N.J. 2001).

Fellenz, 400 F. Supp. 2d at 683.

Plaintiff Tyrone Stephens clearly failed to meet his considerable burden here. In lieu of providing a meritorious basis for the reconsideration request, he once again attempted to elevate the never-substantiated allegations against Englewood into evidence, which is something that they have never been.

In search of relief from the District Court's November 3, 2015 Order, plaintiff simply rehashed an unpersuasive,

previously rejected argument. L.Civ.R. 7.1(i) does not allow parties to restate arguments which the court has already considered; rather, a difference of opinion with the court's decision should be dealt with through the normal appellate process. Florham Park Chevron, Inc. v. Chevron U.S.A., Inc., 680 F. Supp. 159, 162 (D.N.J. 1988). See also, Fellenz, 400 F. Supp. 2d at 683. A court will grant a motion for reconsideration only if the movant establishes that the court overlooked "dispositive factual matters or controlling decisions of law." Rouse v. Plantier, 997 F. Supp. 575, 578 (D.N.J. 1998). Here, the District Court did neither of those things and, properly, denied the reconsideration motion.

B. Failure To Satisfy Fed.R.Civ.P 59(e).

Fed. R. Civ. P. 59(e) ("Motion to Alter or Amend a Judgment), provides that, "a motion to alter or amend a judgment must be filed not later than 28 days after the entry of the judgment." A post-judgment motion "will be considered a Rule 59(e) motion where it involves 'reconsideration of matters properly encompassed in a decision on the merits.'" Osterneck v. Ernst & Whinney, 489 U.S. 169, 174(1989) (quoting White v. New Hampshire Dept. of Employment Security, 455 U.S 445, 451 (1982)).

The scope of a Fed.R.Civ.P. 59(e) motion is extremely limited. Blystone v. Horn, 664 F.3d 397, 415 (3d Cir.

2011). "Such motions are not to be used as an opportunity to relitigate the case; rather, they may be used only to correct manifest errors of law or fact or to present newly discovered evidence." Id. See also, United States v. Fiorelli, 337 F.3d 282, 287 (3d Cir. 2003). Reconsideration is an extraordinary remedy. The relief sought on such an application is, therefore, to be granted very sparingly.

Consistent with its extremely limited scope, a Rule 59(e) motion is to be granted only if (1) there has been an intervening change in the controlling law; (2) new evidence has become available since the court granted the subject motion; or (3) it is necessary to correct a clear error of law or fact or to prevent manifest injustice. Max's Seafood Café by Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999) (citing North River Ins. Co. v. CIGNA Reinsurance Co., 52 F.3d 1194, 1218 (3d Cir. 1995)). Manifest injustice pertains to situations where a court overlooks some dispositive factual or legal matter that was presented to it.

The District Court did not overlook any dispositive factual or legal matters. Englewood submits that the District Court's denial of the motion(s) for reconsideration of its order granting summary judgment was proper. Englewood prays therefore for this court's affirmance of the District Court's order.

POINT III

THE DISTRICT COURT DID NOT DENY PLAINTIFFS' MOTION FOR LEAVE TO AMEND THE COMPLAINT. RATHER, IT GRANTED THE DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT, DISMISSING THE MATTER IN ITS ENTIRETY AND WITH PREJUDICE WITHOUT HAVING TO RULE UPON THE PLAINTIFFS' PATENTLY FRIVOLOUS MOTION

To the extent that the plaintiffs' prayer for relief also touches upon the District Court's alleged denial of the plaintiffs' motion for leave to file an amended complaint, Englewood is constrained to point out that the District Court did not deny the plaintiffs' motion. Rather, the court's granting of the several defendants' summary judgment motions rendered the plaintiffs' motion moot. Presuming this court wishes to take up the issue and treat the District Court's ruling below as a denial of the plaintiffs' motion, Englewood submits that any such denial was proper.

A. Proposed Addition Of Officer Temple & Lt. Hayes.

"Among the grounds that could justify a denial of leave to amend are undue delay, bad faith, dilatory motive, prejudice, and futility." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997); Lorenz v. CSX Corp., 1 F.3d 1406, 1413-14 (3d Cir. 1993). "Futility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted. Burlington, 114 F.3d at 1434. The proposed addition of Officer Temple and Lt. Hayes of the Englewood Police Department

as parties was, among other things, futile. The plaintiffs' request to implead them was properly denied.

Plaintiffs' proposed Amended Complaint alleged that Officer Temple and Lt. Hayes, falsely arrested plaintiff Tyrone Stephens (Count One), falsified evidence against plaintiff Tyrone Stephens (Count Three, Count Four and Count Five), defamed plaintiff Tyrone Stephens (Count Six), maliciously prosecuted plaintiff Tyrone Stephens (Count Eight) and falsely imprisoned Tyrone Stephens (Count Nine). Neither Officer Temple nor Lt. Hayes played any role whatsoever in the arrest of plaintiff Tyrone Stephens or in the State's prosecution of plaintiff Tyrone Stephens. Officer Temple's involvement in the investigation into the October 31, 2012 fight was his completion of the two-page Investigation Report, which report is dated November 2, 2012. Lt. Hayes's entire involvement in the investigation of the October 31, 2012 fight was his review of Officer Temple's November 2, 2012 Investigation Report.

B. Marc Stephens' Proposed Claims Against Englewood.

This court is an Article III court. Its authority is derived from Article III of the Constitution of the United States. Article III limits federal judicial power to adjudication of cases or controversies. U.S. Const., Art. III, §2. A plaintiff satisfies the case-or-controversy requirement only by satisfying the requirement of having standing to assert

the claim, Sprint Commc'ns Co., L.P. v. APCC Servs., 554 U.S. 269, 273 (2008), which is established by being able to allege an injury that "affects the plaintiff in a personal and individual way." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992). In Powers v. Ohio, 499 U.S. 400, 410 (1991), the Supreme Court of the United States framed the issue thusly, "A litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties."

Plaintiff Marc Stephens lacks standing to assert a §1983 claim against Englewood and/or any of the members of its police department. Marc Stephens was not arrested due to the October 31, 2012 incident. Marc Stephens was not prosecuted due to the October 31, 2012 incident. Marc Stephens was not incarcerated due to the October 31, 2012 incident. There is no factual or legal basis for Marc Stephens being permitted to prosecute a §1983 claim.

He similarly lacked standing to assert a claim for intentional infliction of emotional distress (outrage). Marc Stephens was neither arrested nor prosecuted nor incarcerated due to the October 31, 2012 incident. Thus, none of the alleged actions of Englewood and/or the members of its police department were directed to him.

Finally, the court properly rejected Marc Stephens' requested amendment of the complaint to add a claim for negligent infliction of emotional distress pursuant to Portee v. Jaffee, 84 N.J. 88 (1980), since he could not make out the prima facie elements of a Portee claim ("(1) the defendant's negligence caused the death of, or serious physical injury to, another; (2) the plaintiff shared a marital or intimate, familial relationship with the injured person; (3) the plaintiff had a sensory and contemporaneous observation of the death or injury at the scene of the accident; and (4) the plaintiff suffered severe emotional distress." Portee, 84 N.J. at 97.) Here, Marc Stephens failed to meet the fourth prong.

The Supreme Court of New Jersey has defined severe emotional distress, "as any type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so, including … posttraumatic stress disorder." Taylor v. Metzger, 152 N.J. 490, 515 (1997). Marc Stephens failed to present a single piece of medical evidence. His claim was legal unsustainable

POINT IV

ENGLEWOOD'S RELIANCE UPON ARGUMENTS MADE BY AND ON BEHALF OF THE ENGLEWOOD DETECTIVE DEFENDANTS

The defendant/respondent City of Englewood respectfully relies upon not only its submission but also upon the submission

of the Englewood Detective Defendants, which submission applies to and touches upon plaintiff Tyrone Stephens's claims against the defendant, City of Englewood. To the extent that any legal arguments the Englewood Detective Defendants set forth in their papers apply to Englewood, said arguments are incorporated by reference and relied upon by Englewood as if set forth at length in this brief.

CONCLUSION

The defendant/respondent City of Englewood submits that it is entitled to the relief requested. It respectfully prays for the entry of an Order affirming the District Court in its entirety.

Respectfully submitted,
WEINER LESNIAK LLP
Attorneys for Defendant,
City of Englewood

By: *Adam Kenny*
Adam Kenny
Member of the Firm

Dated: _____