

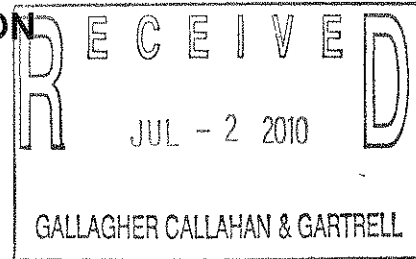
**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH**

Rockingham Superior Court
Rockingham Cty Courthouse/PO Box 1258
Kingston NH 03848-1258

Telephone: (603) 642-5256
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NOTICE OF DECISION

**Charles P Bauer
Gallagher Callahan & Gartrell PC
PO Box 1415
Concord NH 03302-1415**



Case Name: **Charles J. Bowser, Jr. Admin., et al vs. Town of Epping, et al**
Case Number: **218-2009-CV-00232**

Enclosed please find a copy of the court's order of June 30, 2010 relative to:

RE: Town of Epping's Second Motion to Dismiss

July 01, 2010

Raymond W. Taylor
Clerk of Court

(510)

C: Donald Kennedy; Peter L Eleey

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT

Charles Bowser, Jr.,
Special Administrator of the Estate of Kenneth Countie

v.

Town of Epping,
Police Sergeant Sean Gallagher,
And Police Officer Richard Cote

Docket No.: 09-C-0232

ORDER ON TOWN OF EPPING'S SECOND MOTION TO DISMISS

This case arises out of the untimely death of Kenneth Countie. Specifically, Plaintiff, as Special Administrator of Mr. Countie's Estate, alleges that defendants Town of Epping ("the Town"), Police Sergeant Sean Gallagher ("Sergeant Gallagher"), and Police Officer Richard Cote ("Officer Cote")¹ negligently failed to protect Mr. Countie from domestic violence perpetrated by Sheila Labarre, who eventually killed Mr. Countie.

On July 23, 2009, the defendants filed their first motion to dismiss, claiming that they owed Mr. Countie no duty, that their actions did not proximately cause his death, and that Plaintiff's claims were barred by official immunity. On October 23, 2009, this Court denied that motion to dismiss relative to Sergeant Gallagher, Officer Cote, and the Town. (Order on Defendants' Motion to Dismiss, McHugh, J.).

On June 2, 2010, the Town filed a second motion to dismiss,

¹ Plaintiff originally brought suit against two additional defendants: Police Chief Gregory Dodge and Police Lieutenant Michael Wallace. On October 23, 2009, the Court dismissed Plaintiff's claims relative to those two defendants because Plaintiff had failed to allege facts which would support a claim against those two individuals.

characterizing Plaintiff's claim as a common law negligence action and arguing that because the claim is not statutory, it is barred by RSA 507-B:5 (2010). Unlike the first motion to dismiss, this second motion to dismiss was filed only by the Town: neither Officer Cote nor Sergeant Gallagher joined in the motion.

Plaintiff argues that the Town's second motion to dismiss is essentially the same as the first motion to dismiss (filed by all defendants). The Town argues, and the Court agrees, that that is not the case. The first motion to dismiss was based on official immunity, whereas the second motion to dismiss is based upon statutory immunity. This motion cites RSA chapter 507-B; said statute was not mentioned in the first motion to dismiss, and the Court will therefore render a decision relative to this new issue. Because the Court finds that RSA chapter 173-B does not provide for the Town's liability in a negligence action, the Town's June 2, 2010 motion to dismiss is **GRANTED**.

In its October 23, 2009 Order on the July 23, 2009 motion to dismiss, the Court provided a detailed account of the factual allegations contained in Plaintiff's amended writ (motion to amend granted September 3, 2009), and the Court need not reiterate that account here. Here, as in its October 23, 2009 Order, the Court will view the alleged facts, and any inferences properly drawn therefrom, in the light most favorable to Plaintiff, the non-moving party. See Hobin v. Coldwell Banker Residential Affiliates, Inc., 144 N.H. 626, 628 (2000).

In its second motion to dismiss, the Town argues that Plaintiff's claims are derived from the common law, that the Town's alleged liability is not "provided by" statute, and that Plaintiff's claims are therefore barred by RSA 507-B:5. RSA

507-B:5, titled "Effect on Common Law," limits the liability of "governmental units" such as the Town: "No governmental unit shall be held liable in any action to recover for bodily injury, personal injury or property damage except as provided by this chapter or as is provided or may be provided by other statute." See also RSA 507-B:1 (2010). RSA 507-B:4 (2010) places monetary caps on a governmental unit's liability, RSA 507-B:4, I, and further provides that

[i]f any claim is made or any civil action is commenced against a present or former employee, trustee, or official of a municipality . . . seeking equitable relief or claiming damages, the liability of said employee or official shall be governed by the same principles and provisions of law and shall be subject to the same limits as those which govern municipal liability, so long as said employee or official was acting within the scope of his office and in good faith.

RSA 507-B:4, IV.

Plaintiff does not dispute the applicability of RSA 507-B:5. Rather, Plaintiff argues that the Town's liability in this case is "provided by" statute, see RSA 507-B:5, because RSA 173-B:10 (2002) imposed a duty on the police officers, and thus the Town, to "use all means within reason to prevent further abuse" once they had "probable cause to believe that" Mr. Countie had been abused. As set forth in this Court's October 23, 2009 Order, RSA 173-B:10 provides, in pertinent part,

I. Whenever any peace officer has probable cause to believe that a person has been abused, as defined in RSA 173-B:1, that officer shall use all means within reason to prevent further abuse including, but not limited to:

(a) Confiscating any deadly weapons involved in the alleged domestic abuse and any firearms and ammunition in the defendant's control, ownership, or possession.

(b) Transporting or obtaining transportation for the victim and any child, to a designated place to meet with a domestic violence counselor, local family member, or friend.

(c) Assisting the victim in removing toiletries, medication, clothing, business equipment, and any other items determined by the court.

(d) Giving the victim immediate and written notice of the rights of victims and of the remedies and services available to victims of domestic violence.

In enacting RSA chapter 173-B, the Legislature provided the following statement of purpose:

I. It is the public policy of this state to prevent and deter domestic violence through equal enforcement of the criminal laws and the provision of judicial relief for domestic violence victims.

II. It is the purpose of this act to preserve and protect the safety of the family unit for all family or household members by entitling victims of domestic violence to immediate and effective police protection and judicial relief. This act shall be liberally construed to the end that its purpose may be fulfilled.

Laws 1999, 240:1. While "entitling victims of domestic violence to immediate and effective police protection," RSA chapter 173-B implicitly balances the needs of law enforcement with the needs of the public, limiting the liability of police officers and their employers as follows:

Any act or omission of any peace officer rendering emergency care or assistance to a victim of domestic violence including, but not limited to transportation, shall not impose civil liability upon the peace officer or the peace officer's supervisors or employer if the care or assistance is rendered in good faith, unless the act or omission is a result of gross negligence or willful misconduct.

RSA 173-B:12 (2002).

The issue before the Court is whether, in light of the foregoing, RSA chapter 173-B "provide[s]" for the Town's liability in this case. The Town argues that RSA chapter 173-B does not provide for such liability, but merely sets forth a standard of care, and recognizes that, in some cases, police officers and their employers may face liability in connection with providing aid to victims of

domestic violence. See RSA 173-B:10; 173-B:12. Plaintiff counters that, by establishing a duty to aid victims of domestic violence, RSA chapter 173-B provides for the type of negligence liability asserted in this action.

In light of the clear language of RSA 507-B:5, Plaintiff may not bring a common law claim against the Town, but may only bring a claim where the Town's liability is "provided by" statute. Plaintiff's current claim against the Town alleges negligence by virtue of violating a statutory duty imposed by RSA chapter 173-B. Although the Court has previously held that RSA 173-B:10 amounts to a statutory duty, the Court has not yet determined the precise question currently at issue: whether RSA 173-B:10 merely provides the applicable standard by which to judge a common law negligence claim, or whether it provides a statutory cause of action. See Marquay v. Eno, 139 N.H. 708, 713-15 (1995) (comparing actions for negligence per se, for which a statute provides the applicable standard of care, with statutory actions for which courts are "called upon to, in effect, 'create' or 'recognize' a new tort," and noting that, "in many cases, the common law may fail to recognize liability for failure to perform affirmative duties that are imposed by statute").

If RSA 173-B:10 merely provides a statutory standard of care applicable to a common law negligence claim, Plaintiff's negligence claim against the Town would be barred by RSA 507-B:5 because it would not be "provided by" statute. See Marquay, 139 N.H. at 713-15; see also Levine v. City of Los Angeles, 137 Cal. Rptr. 512, 515 (Cal.App. 1977) (citing Nestle v. City of Santa Monica, 496 P.2d 480 (Cal. 1972) for the proposition that "liability is deemed 'provided by

statute' if a statute defines the tort in general terms," even where the statute is "declaratory of the common law") (emphasis added); Nestle, 496 P.2d at 491 (ruling that nuisance liability was "provided by" statute defining nuisance). Because a recitation of the applicable duty of care does not amount to a definition of the tort of negligence, Plaintiff's negligence claim is barred by RSA 507-B:5 if RSA chapter 173-B merely provides a statutory duty or standard of care applicable to a common law negligence claim.

The remaining issue is whether RSA chapter 173-B provides a statutory cause of action. A ruling on this issue requires consideration of "any explicit or implicit legislative intent that a violation of the statute should give rise to a tort cause of action." Marquay, 139 N.H. at 715. Plaintiff argues that the limitation of liability in RSA 173-B:12 provides for the Town's liability in this case. The Court is not persuaded by this argument. Although the plain language of RSA 173-B:12 recognizes that liability may exist in certain circumstances, it does not provide for a particular cause of action, but rather generally addresses "civil liability." Moreover, the statute does not affirmatively provide for civil liability in any particular circumstance, but simply eliminates civil liability "unless the act or omission is a result of gross negligence or willful misconduct." See RSA 173-B:12. Limiting the scope of potential liability is not equivalent to providing for liability. Thus, even if RSA 173-B:12 applied to the facts of this case, the Court finds that it would not "provide for" the Town's liability. Moreover, as previously noted, RSA 173-B:10's recitation of the applicable duty of care does not "provid[e]" for the Town's liability absent, at least, a definition of the tort of

negligence. See Levine, 137 Cal. Rptr. at 515; Nestle, 496 P.2d at 491.

Having concluded that RSA chapter 173-B does not expressly provide for the Town's liability in this case, the Court now considers any "implicit legislative intent that a violation of the statute should give rise to a tort cause of action." Marguay, 139 N.H. at 715. By limiting the scope of civil liability, RSA 173-B:12 implies that civil liability will exist in some circumstances. See 16 Am. Jur. 2d Constitutional Law § 73 ("Another important canon of construction . . . which is frequently applied to constitutions is that the limitations of a power furnish a strong argument in favor of the existence of that power.") (citing Gibbons v. Ogden, 22 U.S. 1 (1824); Jones v. Williams, 45 S.W.2d 130 (Tex. 1931)); but see id. ("However, where a constitutional provision is prohibitory in nature, it cannot mechanically be inferred that what was not prohibited is thereby affirmatively guaranteed, but the decision to prohibit is simply a decision to foreclose a contrary view as to the area dealt with . . .") (citing Reilly v. Ozzard, 166 A.2d 360 (N.J. 1960)). Moreover, the purpose of RSA chapter 173-B expressly "entitl[es]" victims of domestic violence "to immediate and effective police protection and judicial relief," and provides that "[t]his act shall be liberally construed to the end that its purpose may be fulfilled." Laws 1999, 240:1.

However, nothing in RSA chapter 173-B explicitly provides for a particular form of civil liability. In addition, RSA chapter 173-B contains no references to "duty," "reasonably foreseeable injuries," or other elements or legal concepts associated with a negligence cause of action. See White v. Asplundh Tree Expert Co., 151 N.H. 544, 547 (2004) (discussing the elements of a negligence

tort claim). Rather, the language of RSA chapter 173-B appears to support a due process claim by providing that victims of domestic violence are "entitl[ed] . . . to immediate and effective police protection" such as that outlined in RSA 173-B:10. See Laws 1999, 240:1; In re Union Telephone Co., ___ N.H. ___ (decided May 20, 2010) slip op. at *7 (discussing the requirements of a due process claim, including a "legitimate claim of entitlement" in order to establish "a property interest in a benefit"); see also Town of Castle Rock, Colo. V. Gonzales, 545 U.S. 748, 756-66 (2005) (finding no due process claim because Colorado law had not provided a domestic violence victim with the requisite entitlement to police assistance). Because RSA chapter 173-B provides, at least impliedly, a due process remedy for victims of domestic violence who do not receive "immediate and effective police protection," id., and does not similarly implicate a negligence cause of action, see Union Telephone, slip op. at *7, the Court does not interpret RSA chapter 173-B as "provid[ing]" for the Town's liability with respect to Plaintiff's negligence claim. See RSA 507-B:5; St. Joseph Hosp. of Nashua v. Rizzo, 141 N.H. 9, 11-12 (1996) (reiterating "the familiar axiom of statutory construction *expressio unius est exclusio alterius*: Normally the expression of one thing in a statute implies the exclusion of another") (quotations omitted); Appeal of HCA Parkland Medical Center, 143 N.H. 92, 95 (1998) (noting that, although the workers' compensation statute is construed liberally to give "the broadest reasonable effect to [its] remedial purpose," the New Hampshire Supreme Court will not "interpret the statute in favor of the claimant if such a construction is unreasonable").

In light of the foregoing, the Court finds that RSA chapter 173-B does not "provid[e]" for the Town's liability with respect to the negligence cause of action asserted in this case, see RSA 507-B:5, and the Town's motion to dismiss is therefore **GRANTED**. See Hobin, 144 N.H. at 628. This case shall go forward as to defendants Sergeant Gallagher and Officer Cote only.

So Ordered.

DATE: June 30, 2010


KENNETH R. MCHUGH
PRESIDING JUSTICE