

## **Policies more stringent than law can create liability**

by Bradley M. Pinsky

This case should prove to everyone that having policies which impose standards more stringent than the law can create liability. Thus, it is better to rename your policies, "guidelines". In this case, a police officer driving an emergency vehicle was speeding and killed a citizen. The court stated that speeding was permitted under New York law. However, because he may have violated a policy of the town police department, the judge refused to dismiss the case and permitted it to go to a jury. The jury will be permitted to decide whether the officer's violation of the policies of the police department made the officer "reckless". In order to find the officer liable, a jury must find that police, just as fire and EMS, while driving emergency vehicles, acted in reckless disregard for the safety of others, and not simply negligently. The reckless standard is a protection given to us as drivers of emergency vehicles. However, according to this court (one of the state's higher courts), violating a policy can be evidence of recklessness.

Therefore, be careful imposing standards upon your company which are more stringent than the law. If you refer to NFPA driving standards in your policies, you are taking on this risk.

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JAMES F. ALLEN AND DANIEL T. ALLEN, INDIVIDUALLY AND AS CO-EXECUTORS OF THE ESTATE OF DELIA H. ALLEN, DECEASED, PLAINTIFFS-APPELLANTS, v. TOWN OF AMHERST AND BRIAN G. MILLER, DEFENDANTS-RESPONDENTS.

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FOURTH DEPARTMENT

May 3, 2002, Entered

OPINION: MEMORANDUM AND ORDER

It is hereby ORDERED that the order so appealed from be and the same hereby is unanimously modified on the law by denying defendants' motion in part and reinstating the complaint insofar as it seeks to impose liability on defendant Town of Amherst with respect to defendant Brian G. Miller's operation of the police vehicle and as modified the order is affirmed without costs.

Memorandum: On a Saturday afternoon, defendant Brian G. Miller, a police officer for defendant Town of Amherst (Town), received a dispatch of "customer trouble" involving a "white male patron at the bar intoxicated." Miller responded to the call by heading to the location of the bar with his emergency lights and siren activated. Miller's vehicle collided with a vehicle driven by plaintiffs' decedent as she attempted to turn into a shopping plaza in front of Miller's vehicle. Decedent died as the result of the injuries that she sustained in that collision.

We conclude that Supreme Court erred in granting that part of defendants' motion seeking summary judgment dismissing the complaint insofar as it seeks to impose liability on the Town with respect to Miller's operation of the police vehicle. Although defendants met their initial burden on the motion, plaintiffs raised a triable issue of fact whether Miller acted with reckless disregard for the safety of others in his operation of the police vehicle (see Vehicle and Traffic Law § 1104 [e]; see generally Saarinen v Kerr, 84 N.Y.2d 494, 501, 620

N.Y.S.2d 297, 644 N.E.2d 988). Plaintiffs submitted evidence that Miller was traveling at a speed between 62 and 72 miles per hour. Miller's conduct in exceeding the posted speed limit "cannot alone constitute a predicate for liability, since it is expressly privileged under Vehicle and Traffic Law § 1104 (b) (3)"( Saarinen, 84 N.Y.2d at 503). Defendants acknowledged, however, that there was other vehicular traffic in the vicinity, and plaintiffs raised a triable issue of fact whether Miller was in violation of the rules and regulations of the Town of Amherst Police Department (see Criscione v City of New York, 97 N.Y.2d 152, 158, 736 N.Y.S.2d 656, 762 N.E.2d 342; cf. Saarinen, 84 N.Y.2d at 503).

Plaintiffs' expert in the area of police vehicle operations and emergency responses opined that Miller's response and operation of the vehicle was in reckless disregard for the safety of others.

We conclude, however, that the court properly granted that part of defendants' motion seeking summary judgment dismissing the complaint insofar as it seeks to impose liability on the Town based on the actions of the 911 "complaint writer" and the police dispatcher. Defendants established as a matter of law that the determinations of those individuals with respect to how much information to relay "involved the exercise of discretion" and thus the Town may not be held liable for the consequences of their determinations ( Tango v Tulevech, 61 N.Y.2d 34, 40, 471 N.Y.S.2d 73, 459 N.E.2d 182; see Mon v City of New York, 78 N.Y.2d 309, 313, 574 N.Y.S.2d 529, 579 N.E.2d 689, rearg denied 78 N.Y.2d 1124).

We therefore modify the order by denying defendants' motion in part and reinstating the complaint insofar as it seeks to impose liability on the Town with respect to Miller's operation of the police vehicle.