# Estate of Lane v. City of W. Haven

Superior Court of Connecticut, Judicial District of Waterbury, Complex Litigation Docket At Waterbury

March 23, 2021, Decided

X06UWYCV186048060

**Reporter**
2021 Conn. Super. LEXIS 480 *

Estate of Thomas Lane v. City of West Haven et al.

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## Opinion

[*1] Short Name:Lane, Estate of v. West Haven

Other Parties:

Opinion No.:146083

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Judge (with first initial, no space for Sullivan, Dorsey, and Walsh):Bellis, Barbara N., J.

Opinion Title:*MEMORANDUM OF DECISION RE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT #162*

The present action arises out of injuries and death suffered by the plaintiff's decedent following a motor vehicle accident, allegedly resulting from the police officers' subsequent use of a Taser when responding to the scene of the accident. The operative second amended and revised complaint was filed by the plaintiff, the estate of Thomas Vincent Lane, Jr., by his administrator, Darnell Crossland,[1] on November 15, 2018, against several defendants,[2] including: the city of West Haven; Justin Lund, a Connecticut State Police trooper; Joseph D'Amato, Sergeant in the West Haven Police Department; William Heffernan, Lieutenant in the West Haven Fire Department; and John Karajanis, Chief of the West Haven Police Department. Presently before the court is the motion for summary judgment filed by [*2] the defendants West Haven, D'Amato, and Karajanis. For the reasons set forth herein, the motion for summary judgment is denied in part and granted in part.

I

BACKGROUND

The second amended complaint alleges the following relevant facts. At 12:58 a.m. on February 22, 2016, Connecticut State Police personnel responded to a motor vehicle accident on Interstate 95 Northbound in West Haven. Lund was the first officer on the scene and observed a motor vehicle, split in two pieces, in the grassy area between the interstate and the on-ramp. The plaintiff's decedent, Thomas Lane, was trapped in the driver's seat of the motor vehicle. The defendants asserted in their written investigation of the accident that they observed Lane to be inflicting self-harm with a shard of mirrored glass. Lund subsequently deployed his Taser and discharged a five-second electric cycle without consent from Lane, without reasonable medical or legal necessity, and not in furtherance of an arrest. Lane then removed the Taser wires from his body and Lund reloaded his Taser and discharged another five-second cycle. Meanwhile, Heffernan ordered Fire and Rescue personnel to ready a sedative for Lane, which was subsequently [*3] prepared and given to a paramedic, Heather Gebhardt,[3] to inject. As Gebhardt

prepared to administer the sedative, D'Amato deployed his Taser against Lane two times. Gebhardt then injected Lane with the sedative. As a result of the Taser strikes, Lane was put in apprehension of imminent serious bodily harm and death and subsequently died.

With respect to the defendant D'Amato, the second amended complaint asserts the following causes of action: assault and battery (count two), reckless and wanton misconduct (count five), negligence (count eight) and intentional infliction of emotional distress (count ten).[4] With respect to the defendant city of West Haven, count seven of the second amended complaint asserts a cause of action for vicarious liability pursuant to General Statutes §52-557n, and count eleven asserts a cause of action for indemnification pursuant to General Statutes §7-645. Count seven includes allegations of negligence against D'Amato and Karajanis, for which the plaintiff claims the city of West Haven is vicariously liable.

On September 18, 2020, the defendants,[5] the city of West Haven, D'Amato, and Karajanis, filed the motion for summary judgment and supporting memorandum of law presently before the court. The plaintiff [*4] filed a memorandum of law in opposition to the motion for summary judgment on October 29, 2020. On November 24, 2020, the defendants filed their reply memorandum. The court heard oral argument regarding the motion and objection thereto on December 11, 2020.

In support of their motion for summary judgment, the defendants submitted the affidavit of D'Amato dated September 16, 2020, and the State's Attorney's report addressing the findings from a police use of force investigation in connection with the incident presently at issue. In support of his opposition, the plaintiff submitted the affidavit of Edward Mamet, a retired police captain of the City of New York Police Department dated October 26, 2020. The defendants further submitted the following evidence with their reply memorandum: the affidavit of Steve James, a law enforcement expert, dated November 23, 2020; the supplemental affidavit of D'Amato dated November 23, 2020;[6] and a witness statement made by D'Amato dated April 27, 2016.

II

DISCUSSION

"Practice Book §17-49 provides that summary judgment shall be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that [*5] the moving party is entitled to judgment as a matter of law. In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party." (Internal quotation marks omitted.) *Graham v. Commissioner of Transportation,* 330 Conn. 400, 414-15, 195 A.3d 664 (2018).

"[T]he party moving for summary judgment . . . is required to support its motion with supporting documentation, including affidavits." (Internal quotation marks omitted.) *Romprey v. Safeco Ins. Co. of America,* 310 Conn. 304, 324 n.12, 77 A.3d 726 (2013). "The existence of the genuine issue of material fact must be demonstrated by counteraffidavits and concrete evidence . . . If the affidavits and the other supporting documents are inadequate, then the court is justified in granting the summary judgment, assuming that the movant has met his burden of proof." (Internal quotation marks omitted.) *Rivera v. CR Summer Hill, Ltd. Partnership,* 170 Conn.App. 70, 74, 154 A.3d 55 (2017). "In ruling on a motion for summary judgment, the court's function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.) *Maltas v. Maltas,* 298 Conn. 354, 365, 2 A.3d 902 (2010). It is appropriate for a party to bring a motion for summary judgment when it has raised governmental immunity as a defense. See *Outlaw v. Meriden,* 43 Conn.App. 387, 395, 682 A.2d 1112, cert. denied, 239 Conn. 946, 686 A.2d 122 (1996).

The defendants are moving for summary judgment as to counts two, five, seven, eight, ten, and eleven [*6] on the grounds that none of the plaintiff's claims are viable because D'Amato acted lawfully pursuant to a Connecticut statutory provision and that the negligence claims are barred by governmental immunity. The plaintiff counters that D'Amato's conduct was reckless because he used the Taser in an irregular manner and against the warnings of the manufacturer.

A

Admissibility of Evidence

The court must first determine whether the evidence submitted by the defendants in support of the motion for summary judgment is admissible. The plaintiff argues that the State's Attorney's report should not be considered because it is replete with hearsay, other foundationless statements, and claims to evidence.[7]

"[O]nly evidence that would be admissible at trial may be used to support or oppose a motion for summary

judgment." *Nash v. Stevens,* 144 Conn.App. 1, 15, 71 A.3d 635, cert. denied, 310 Conn. 915, 76 A.3d 628 (2013). The trial court has discretion in determining whether to consider documentary evidence submitted by a party in support of or in opposition to a motion for summary judgment. See *Bruno v. Whipple,* 138 Conn.App. 496, 506, 54 A.3d 184 (2012) ("[w]hether a trial court should consider documentary evidence submitted by a party in relation to a motion for summary judgment presents an evidentiary issue to which we apply an abuse [*7] of discretion standard").

Section 8-2(a) of the Connecticut Code of Evidence provides in relevant part that "[h]earsay is inadmissible, except as provided in the Code, the General Statutes or any Practice Book rule . . ." "An out-of-court statement that is offered to establish the truth of the matters contained therein is hearsay . . . The business records exception to the hearsay rule is set forth in General Statutes §52-180. [N]ot every statement contained in a document qualifying as a business record is necessarily admissible. To be admissible under §52-180, the contents of a business record must be based on the entrant's own observations or *on information transmitted to him by an observer whose business duty it was to transmit it to him.* Statements obtained from volunteers are not admissible, although included in a business record, because it is the duty to report in a business context that provides the reliability to justify this hearsay exception . . . A police report generally is admissible as a business record under . . . §52-180 . . . To qualify under this statute the report must be based entirely upon the police officer's own observations or upon information provided by an observer with a business duty to transmit such information." (Internal quotation marks [*8] omitted.) *Housing Authority v. DeLeon,* 79 Conn.App. 300, 307, 830 A.2d 298 (2003).

The State's Attorney's report demonstrates that it was developed by reviewing the police use of force investigation, which the Major Crime Squad and the State Police CARS Unit was charged with investigating by the Ansonia-Milford State's Attorney's Office. The facts and statements in the State's Attorney's report were, thus, obtained from information transmitted by officers whose duty it was to investigate and report them. Accordingly, the State's Attorney's report is admissible under the business records exception to the hearsay rule.

B

Count Two: Assault and Battery

Count two of the second amended complaint, sounding in assault and battery, alleges that D'Amato (1) forcefully threatened and Tasered Lane with the intention of placing him in apprehension of imminent serious bodily harm or death and (2) intended to injure and did in fact injure Lane in an offensive and harmful manner without medical necessity or legal cause. In support of their motion for summary judgment, the defendants argue that D'Amato's deployment of his Taser was lawful pursuant to General Statutes §§53a-18 and 53a-22; specifically, the defendants argue that D'Amato was under the reasonable belief that Lane was attempting to commit [*9] suicide or to inflict serious physical injury upon himself, or, in the alternative, that D'Amato reasonably believed his conduct was necessary to effect an arrest. The plaintiff counters that the statutes cited by the defendants in support of their argument that D'Amato's conduct was lawful are inapplicable because they apply to criminal assault and battery, and, even if they are applicable, there is a genuine issue of material fact regarding whether D'Amato's beliefs were reasonable.

"A civil assault is the intentional causing of imminent apprehension of harmful or offensive contact in another . . . [A]ctual, physical contact (technically defined as 'battery') is not necessary to prove civil assault . . . and, thus, [i]t is more technically correct in Connecticut civil tort law to refer to what is commonly called an 'assault' as a 'battery.' However, the cases rarely make that distinction . . .

"An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly [*10] results . . . [A]n actionable assault and battery may be one committed wilfully or voluntarily, and therefore intentionally; one done under circumstances showing a reckless disregard of consequences; or one committed negligently . . . Intentional conduct is, therefore, not always required for assault and battery . . ." (Citations omitted; internal quotation marks omitted.) *Maselli v. Regional School District Number 10,* 198 Conn.App. 643, 659-60, 235 A.3d 599, cert. denied, 335 Conn. 947, 238 A.3d 19 (2020). Nevertheless, on the basis of the allegations in the plaintiff's second amended complaint, count two is properly construed as a claim for intentional assault and battery. The plaintiff specifically alleges that "the [d]efendant [o]fficers forcefully threatened and Tasered Mr. Lane with the intention of placing him in apprehension of imminent serious bodily

harm or death" and "intended to injure and did in face injure Mr. Lane in an offensive and harmful manner and without medical necessity or legal cause." Thus, the defendants' motion for summary judgment will be evaluated against a theory of intentional assault and battery.

"[I]ntent involves (1) . . . a state of mind (2) about consequences of an act (or omission) and not about the act itself, and (3) it extends not only to having in the mind a [*11] purpose (or desire) to bring about given consequences but also to having in mind a belief (or knowledge) that given consequences are substantially certain to result from the act . . . Also, the intentional state of mind must exist when the act occurs . . . Thus, intentional conduct extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does . . . Furthermore, [i]t is not essential that the precise injury which was done be the one intended . . . Rather, it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." (Citations omitted, internal quotation marks omitted.) *American National Fire Ins. Co. v. Schuss,* 221 Conn. 768, 776, 607 A.2d 418 (1992).

"[S]ummary judgment is ordinarily inappropriate where an individual's intent and state of mind are implicated . . . The summary judgment rule would be rendered sterile, however, if the mere incantation of intent or state of mind would operate as a talisman to defeat an otherwise valid motion." (Internal quotation marks omitted.) *Hospital of Central Connecticut v.Neurosurgical Associates, P.C.,* 139 Conn.App. 778, 793, 57 A.3d 794 (2012). "[E]ven with respect to questions of motive, intent and good faith, the party opposing summary judgment must present a factual predicate [*12] for his argument in order to raise a genuine issue of fact." (Internal quotation marks omitted.) *Voris v. Middlesex Mutual Assurance Co.,* 297 Conn. 589, 603, 999 A.2d 741 (2010).

In support of their motion for summary judgment, the defendants submitted the affidavit of D'Amato, in which he attested the following facts. After D'Amato arrived at the scene of the accident, Lund asked D'Amato if he had a Taser because "Lane had a knife or razor blade in his hand and was attempting to cut his wrist and throat with the object." D'Amato observed that Lane's right hand was clenched around an object and that he was swinging his arms around and cutting into his left wrist and the right side of his neck with the unknown object. D'Amato "observed members of the [West Haven Fire Department (WHFD)] standing back from the vehicle unable to attend to Lane's injuries due to the unknown object in Lane's possession. [He] was aware that if Lane did not relinquish the object the WHFD member would not be able to remove Lane from the vehicle safely and treat him, and therefor[e] Lane would continue to lose more blood." Lund informed D'Amato that he had already deployed his Taser on Lane twice and that Lane removed the Taser wires from his body. In response to Lund's request that D'Amato [*13] deploy his Taser, D'Amato stood approximately ten feet from Lane, pointed the Taser at Lane's chest and gave him a warning to drop the object. Lane ignored D'Amato's command and continued cutting his wrist. D'Amato "then activated the Taser; the probes struck Lane in the chest but appeared to have little to no effect on him in that he was still able to move his extremities." When Lane began cutting his neck again, D'Amato activated the laser a second time. D'Amato "then observed that Lane's hand no longer appeared clenched and also that there was no longer an object in his hand." "Based on the totality of the circumstances, [D'Amato] formed the belief that Mr. Lane was attempting to commit suicide or inflict serious physical injury upon himself, and it was on the basis of that belief that [he] deployed [his] Taser to prevent [Lane] from doing so."

According to D'Amato's affidavit, he did not intend to harm Lane, rather, he intended to assist the WHFD in extracting Lane from the vehicle and to prevent Lane from harming himself. The plaintiff has failed to submit any evidence to counter these facts and establish the existence of a genuine issue of material fact regarding whether D'Amato [*14] intended to harm Lane when he deployed his Taser. Accordingly, there is no genuine issue of material fact regarding whether D'Amato committed an intentional assault and battery. The motion for summary judgment is, therefore, granted as to count two.[8]

C

Count Five: Reckless and Wanton Misconduct

Count five of the second amended complaint alleges that D'Amato knew or should have known based upon his training and experience in the appropriate use of Tasers that Tasering an individual in a situation such as Lane's would likely cause serious harm. Count five further alleges that D'Amato's use of a Taser on a person in Lane's situation was reckless and wanton, and not within the norms of the standard governing a police

officer's conduct in responding to a motor vehicle accident. The defendants argue that D'Amato acted lawfully in accordance with a Connecticut statutory provision for the purpose of trying to prevent Lane from inflicting harm upon himself and, thus, his conduct does not amount to reckless and wanton misconduct. The plaintiff counters that there is a genuine issue of material fact regarding whether D'Amato's conduct was wanton, willful, and malicious.

"Recklessness requires a [*15] conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent . . . More recently, we have described recklessness as a state of consciousness with reference to the consequences of one's acts . . . It is more than negligence, more than gross negligence . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them . . . Wanton misconduct is reckless misconduct . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Internal quotation marks omitted.) *Doe v. Boy Scouts of America Corp.*, 323 Conn. 303, 330, 147 A.3d 104 (2016). "[W]illful, wanton, or reckless conduct tends to take on the aspect of highly unreasonable conduct, involving an extreme departure from ordinary care, in a situation [*16] where a high degree of danger is apparent." (Internal quotation marks omitted.) *Craig v. Driscoll*, 262 Conn. 312, 342-43, 813 A.2d 1003 (2003).

In opposition to the motion for summary judgment, the plaintiff submitted the affidavit of Edward Mamet. Mamet attested that "in or about 2009, Taser International, a manufacturer of Tasers, published and circulated industry warnings against delivering Taser shots to a police suspect's chest as such activity may cause cardiac arrest." He further attested that he is "unaware of a police standard of practice that would justify the use of a Taser as a means of sedation in circumstances involving Mr. Lane's motor vehicle accident and rescue" and that "[u]sing Tasers in such circumstances appear to be against Taser International's own published standards and guidelines for use." According to Mamet's affidavit, "[a] Taser is intended for temporary incapacitation by making the target subject incapable of engaging muscle groups during the charge cycle" and, therefore, Mamet "do[es] not know of any benefit derived by Tasering Mr. Lane who was already confined and restrained by the motor vehicle compartment of his vehicle and who had use of his upper extremity."

In response to the plaintiff's submission of the Mamet [*17] affidavit, the defendants submitted the affidavit of Steve Ijames. Ijames attested that "[t]he policies for use of Tasers recognize that they can be an effective way to deal with individuals attempting to inflict self-harm upon themselves . . ." Ijames further attested that "[t]here is no prohibition against deploying a Taser to an individual's chest area. While not a preferred area of target, deploying a Taser to the chest is permissible when justified by the circumstances . . ." In his supplemental affidavit, D'Amato attested: "Based on Mr. Lane's position within the motor vehicle and his behavior at the time, the only viable target I had was Mr. Lane's chest area and I deployed my [T]aser for the purpose of preventing him from attempting to commit suicide or inflict serious injury upon himself."

Based upon the evidence submitted by the parties, there is a genuine issue of material fact regarding whether D'Amato knew that the deployment of his Taser to Lane's chest would cause cardiac arrest or other serious harm to Lane. Thus, there is a genuine issue of material fact as to the recklessness of D'Amato's conduct. The motion for summary judgment is, therefore, denied as to count five. [*18]

D

Counts Seven and Eight: Negligence

The defendants argue that the plaintiff's negligence claims are barred by governmental immunity pursuant to General Statutes §52-557n because the defendants' conduct was discretionary and no exception applies. The plaintiff counters that there is a genuine issue of material fact regarding whether the identifiable person-imminent harm exception to governmental immunity applies.[9]

"The [common-law] doctrines that determine the tort liability of municipal employees are well established . . . Generally, a municipal employee is liable for the misperformance of ministerial acts, but has a qualified immunity in the performance of governmental acts . . . Governmental acts are performed wholly for the direct benefit of the public and are supervisory or discretionary in nature . . . The-hallmark of a discretionary act is that it requires the exercise of judgment . . . In contrast,

[m]inisterial refers to a duty which is to be performed in a prescribed manner without the exercise of judgment or discretion . . .

"The tort liability of a municipality has been codified in [General Statutes] §52-557n. Section 52-557n(a)(1) provides [in relevant part] that '[e]xcept as otherwise provided by law, a political subdivision of the state shall [*19] be liable for damages to person or property caused by: (A) The negligent acts or omissions of such political subdivision or any employee, officer or agent thereof acting within the scope of his employment or official duties . . .' Section 52-557n(a)(2)(B) extends, however, the same discretionary act immunity that applies to municipal officials to the municipalities themselves by providing that they will not be liable for damages caused by 'negligent acts or omissions which require the exercise of judgment or discretion as an official function of the authority expressly or impliedly granted by law.' (Internal quotation marks omitted.) *Northrup v. Witkowski*, 332 Conn. 158, 167-68, 210 A.3d 29 (2019). "It is well settled that municipal employees are immune from liability for negligence arising out of their discretionary acts in part because of the danger that a more expansive exposure to liability would cramp the exercise of official discretion beyond the limits desirable in our society." (Emphasis added; internal quotation marks omitted.) *Strycharz v. Cady*, 323 Conn. 548, 564-65, 148 A.3d 1011 (2016).

"[I]t is firmly established that the operation of a police department is a governmental function, and that acts or omissions in connection therewith ordinarily do not give rise to liability on the party of the municipality . . . Indeed, [*20] [our Supreme Court] has long recognized that it is not in the public's interest to [allow] a jury of laymen with the benefit of 20/20 hindsight to second-guess the exercise of a policeman's discretionary professional duty. Such discretion is no discretion at all . . . Thus, as a general rule, [p]olice officers are protected by discretionary act immunity when they perform the typical functions of a police officer . . . In accordance with these principles, our courts have consistently held that to demonstrate the existence of a ministerial duty on the part of a municipality and its agents, a plaintiff ordinarily must point to some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." (Citations omitted; internal quotation marks omitted.) *Ventura v. East Haven*, 330 Conn. 613, 630-31, 199 A.3d 1 (2019).

"For purposes of determining whether a duty is discretionary or ministerial, [our Supreme Court] has recognized that [t]here is a difference between laws that impose general duties on officials and those that mandate a particular response to specific conditions." (Internal quotation [*21] marks omitted.) *Northrup v. Witkowski, supra*, 332 Conn. 169. "[E]vidence of a policy that merely states general responsibilities without provisions that mandate the time or manner in which those responsibilities are to be executed, leaving such details to the discretion and judgment of the municipal employees is insufficient to show that the act is ministerial." (Internal quotation marks omitted*.) Kusy v. Norwich*, 192 Conn.App. 171, 177, 217 A.3d 31, cert. denied, 333 Conn. 931, 218 A.3d 71 (2019).

"The ultimate determination of whether . . . immunity applies is ordinarily a question of law for the court . . . [unless] there are unresolved factual issues material to the applicability of the defense . . . [in which case] resolution of those factual issues is properly left to the jury." (Internal quotation marks omitted.) *Ventura v. East Haven, supra*, 330 Conn. 632.

In the present case, the defendants submitted the Model Policy on Electronic Control Weapons (ECW) developed by the International Association of Chiefs of Police, which provides that "[t]he ECW is generally authorized to be used in circumstances where grounds to arrest or detain are present and the subject's actions cause a reasonable officer to believe that physical force will be used by the subject to resist the arrest or detention. Such actions may include but are not limited to: a. use of [*22] force against the officer or another person; b. violent, threatening, or potentially violent behavior; c. physically resisting the arrest or detention; d. flight in order to avoid arrest or detention, in circumstances where officers would pursue on foot or physically effect the arrest or detention; e. self-destructive behavior." This policy establishes that an officer's use of a Taser is discretionary. The plaintiff, in turn, has failed to point to "some statute, city charter provision, ordinance, regulation, rule, policy, or other directive that, by its clear language, compels a municipal employee to act in a prescribed manner, without the exercise of judgment or discretion." *Kusy v. Norwich, supra*, 192 Conn.App. 177. Accordingly, D'Amato's conduct was discretionary in nature, and, thus, governmental immunity applies to the negligence claims in counts seven and eight.

1

Governmental Immunity Exceptions

Although there is no genuine issue of material fact that D'Amato's allegedly negligent conduct was discretionary in nature, the court must also consider whether any of the exceptions to governmental immunity apply. The defendants argue that the identifiable person-imminent harm exception to governmental immunity does not apply [*23] because Lane was not an identifiable person, but, rather he was merely a member of the general public. The plaintiff argues that there is a genuine issue of material fact regarding whether Lane was an identifiable person.

The identifiable person, imminent harm exception to discretionary act immunity has been characterized by our Supreme Court as "very limited." *Brooks v. Powers*, 328 Conn. 256, 265, 178 A.3d 366 (2018). This exception "applies when the circumstances make it apparent to the [municipal] officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . By its own terms, this test requires three things: (1) an imminent harm; (2) an identifiable victim; and (3) a public official to whom it is apparent that his or her conduct is likely to subject that victim to that harm." (Internal quotation marks omitted.) *Id.*, 266.

"[T]he criteria of 'identifiable person' and 'imminent harm' must be evaluated with reference to each other. An allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm. Likewise, the alleged imminent harm must be imminent in terms of its impact on a specific identifiable person." *Doe v. Petersen*, 279 Conn. 607, 620-21, 903 A.2d 191 (2006). "[T]he proper standard for determining whether a harm [*24] was imminent is whether it was apparent to the municipal defendant that the dangerous condition was so likely to cause harm that the defendant had a clear and unequivocal duty to act immediately to prevent the harm." (Internal quotation marks omitted.) *Brooks v. Powers, supra*, 328 Conn. 266. "[I]n order to meet the apparentness requirement, the plaintiff must show that the circumstances would have made the government agent aware that his or her acts or omissions would likely have subjected the victim to imminent harm . . . This is an objective test pursuant to which we consider the information available to the government agent at the time of [his or] her discretionary act or omission . . . We do not consider what the government agent could have discovered after engaging in additional inquiry." *Id.*, 267.

"With respect to the identifiable victim element, [our Supreme Court has noted] that this exception applies not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims." (Internal quotation marks omitted.) *Grady v. Somers*, 294 Conn. 324, 350-51, 984 A.2d 684 (2009). "[T]he only identifiable class of foreseeable victims that [our Supreme Court has] recognized for these purposes is that of schoolchildren attending public schools during school [*25] hours . . ." (Internal quotation marks omitted.) *Id.*, 351. "[I]n addition to not recognizing any additional classes of foreseeable victims, the decisions [of our Supreme Court] reveal only one case wherein a specific plaintiff was held potentially to be an identifiable victim subject to imminent harm for purposes of this exception to qualified immunity. See *Sestito v. Groton*, 178 Conn. 520, 522-23, 423 A.2d 165 (1979) (facts presented jury question in case wherein on-duty town police officer watched and witnessed ongoing brawl in bar's parking lot but did not intervene until after participant had shot and killed plaintiff's decedent). *Sestito* appears, however, to be limited to its facts, as the remainder of the case law indicates that this exception has been applied narrowly, because [a]n allegedly identifiable person must be identifiable as a potential victim of a specific imminent harm." (Internal quotation marks omitted.) *Merritt v. Bethel Police Dept.,* 120 Conn.App. 806, 815-16, 993 A.2d 1006 (2010). In the absence of a specific, identifiable person, "Connecticut appellate courts . . . have declined to extend the identifiable person in imminent harm exception to the general public using roads and highways." *Chirieleison v. Lucas*, 144 Conn.App. 430, 442, 72 A.3d 1218 (2013).

In the present case, Lane was a specific, identifiable person. The defendants argue that Lane was not an identifiable [*26] person because he was not a member of a narrowly defined class of foreseeable victims; specifically, they argue that he was part of the general public using roads and highways, to which Connecticut appellate courts have declined to extend the exception. The defendants' argument fails because this exception applies to not only a narrowly defined class of foreseeable victims, but also to specific, identifiable persons. Lane was not merely a member of the general public using the roads and highways. Rather, he was the victim of a motor vehicle accident, which the defendants were called to respond to. He was the only person involved in the motor vehicle accident and D'Amato specifically pointed and deployed his Taser at Lane. Therefore, Lane was a specific, identifiable person.

With respect to the imminent harm element, the defendants have failed to provide evidence demonstrating the absence of a genuine issue of

material fact that it was not apparent to D'Amato that the Taser was likely to cause harm to Lane. Accordingly, there is a genuine issue of material fact regarding whether it was apparent to D'Amato that the Taser was so likely to cause harm that D'Amato had a clear and unequivocal [*27] duty to act immediately to prevent the harm. See *Brooks v. Powers, supra*, 328 Conn. 266. Thus, there is a genuine issue of material fact regarding whether the identifiable person-imminent harm exception to governmental immunity applies. The motion for summary judgment as to counts seven and eight is, therefore, denied.

E

Count Ten: Intentional Infliction of Emotional Distress

The defendants argue that summary judgment should be granted as to count ten, the claim for intentional infliction of emotional distress, because D'Amato's conduct cannot be viewed as "outrageous," "atrocious," and "utterly intolerable in a civilized society." The plaintiff argues that there is a genuine issue of material fact regarding whether D'Amato's conduct constitutes an intentional infliction of emotional distress.

In order to establish a claim for intentional infliction of emotional distress, "[i]t must be shown: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct; (2) that the conduct was extreme and outrageous; (3) that the defendant's conduct was the cause of the plaintiff's distress; and (4) that the emotional distress sustained by the plaintiff [*28] was severe . . . Whether a defendant's conduct is sufficient to satisfy the requirement that it be extreme and outrageous is initially a question for the court to determine . . . Only where reasonable minds disagree does it become an issue for the jury . . .

"Liability for intentional infliction of emotional distress requires conduct that exceeds all bounds usually tolerated by decent society . . . Liability has been found only where the conduct has been 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, Outrageous! . . . Conduct on the part of the defendant that is merely insulting or displays bad manners or results in hurt feelings is insufficient to form the basis for an action based upon intentional infliction of emotional distress." (Citations omitted; internal quotation marks omitted.) *Appleton v. Board of Education*, 254 Conn. 205, 210-11, 757 A.2d 1059 (2000).

In the present case, there is no genuine issue of material fact regarding whether D'Amato's [*29] conduct in Tasering Lane was not so extreme and outrageous as to amount to an intentional infliction of emotional distress. D'Amato attested that Lane had a sharp object in his hand that he was attempting to use to cut his wrist and throat. According to D'Amato's affidavit, the WHFD was unable to remove Lane from the motor vehicle due to Lane's conduct. Therefore, D'Amato attested that Lund requested that D'Amato deploy his Taser, which D'Amato then did on the basis of the belief that it would to prevent Lane from injuring himself. The plaintiffs have failed to submit any evidence to counter the facts that responders could not extract Lane from the vehicle while he was flailing an unknown sharp object around and that D'Amato believed that in order to get Lane out of the vehicle and prevent Lane from injuring himself, he had to deploy his Taser. There is no genuine issue of material fact regarding whether D'Amato's conduct exceeded all bounds usually tolerated by decent society. The motion for summary judgment as to count ten is, therefore, granted.

F

Count Eleven: Indemnification

Section 7-465 provides in relevant part: "Any town, city or borough . . . shall pay on behalf of any employee of such municipality [*30] . . . all sums which such employee becomes obligated to pay by reason of the liability imposed upon such employee by law for damages awarded for infringement of any person's civil rights or for physical damages to person or property . . . if the employee, at the time of the occurrence, accident, physical injury or damages complained of, was acting in the performance of his duties and within the scope of his employment, and if such occurrence, accident, physical injury or damage was not the result of any wilful or wanton act of such employee in the discharge of such duty." "Section 7-465 is an indemnity statute; it does not create liability. Under §7-465, the municipality's duty to indemnify attaches only when the employee is found to be liable and the employee's actions do not fall within the exception for wilful and wanton acts." *Myers v. City of Hartford*, 84 Conn.App. 395, 401, 853 A.2d 621, 625 (2004).

The court has determined that there is a genuine issue

of material fact regarding whether the identifiable person-imminent harm exception to governmental immunity applies in the present case, and, thus, there is a genuine issue of material fact regarding the defendants' liability for negligence. Accordingly, the motion for summary judgment as to count eleven for indemnification [*31] is denied.

III

CONCLUSION

For the foregoing reasons, the motion for summary judgment is denied as to counts five, seven, eight, and eleven, and granted as to counts two and ten.

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BELLIS, J.

[1] On August 3, 2018, the plaintiff filed a motion to substitute the administrator, Darnell Crossland, with the decedent's son, Brandon Michael Lane. The second amended complaint identifies the administrator as Brandon Michael Lane.

[2] Doris B. Schiro, the Commissioner of the Connecticut State Department of Emergency Services and Public Protection, was included as a defendant in the summons, however, Schiro was not mentioned in the complaint and did not file an appearance.

[3] Gebhardt is not a defendant in this action.

[4] The court previously granted the defendants' motion to strike count four sounding in recklessness and maliciousness against D'Amato.

[5] For convenience, all references to the defendants in this memorandum are to the city of West Haven, D'Amato, and Karajanis.

[6] On December 10, 2020, the defendants submitted a second supplemental affidavit of D'Amato dated December 9, 2021. The November 23, 2020 D'Amato affidavit and the December 9, 2021 D'Amato affidavit are substantively identical, [*32] however, the December 9, 2021 D'Amato affidavit is notarized while the November 23, 2020 D'Amato affidavit is not because, according to the affidavit, D'Amato was in quarantine as of November 23, 2020. For convenience, the court cites to only the November 23, 2020 D'Amato affidavit in this memorandum.

[7] The plaintiffs also argue that the D'Amato affidavit is insufficient because the defendants are arguing a legal conclusion through the affidavit and that "[g]enerally, a witness cannot give an opinion on Connecticut law. This is true whether the witness is a lay person or an expert." Objection to Motion for Summary Judgment, pp. 7-8, citing, *Updike, Kelly, & Spellacy, P.C. v. Beckett,* 269 Conn. 613, 652, n.30, 850 A.2d 145 (2004). The court finds that the affidavit itself does not give any opinions on legal matters or assert any legal conclusions and, thus, will be considered.

[8] In regard to the plaintiff's claim for assault and battery, the defendants argue that D'Amato's conduct was lawful under General Statutes §53a-18, in that he reasonably believed Lane was about to commit suicide, and §53a-22, in that he reasonably believed the force was necessary to effect an arrest of Lane. The plaintiff argues that these statutes are inapplicable because the present case involves a claim for civil assault [*33] and battery, and these are criminal statutes. The court finds that there is no genuine issue of material fact regarding whether D'Amato committed an intentional assault and battery and, therefore, it is not necessary for the court to address this argument.

[9] The plaintiff states "that the [d]efendants were in fact engaged in a ministerial act," however, he fails to provide any legal authority or evidence to support this statement.

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