

**SUPERIOR COURT OF NEW JERSEY  
MERCER VICINAGE**



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**LETTER OPINION**

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**Re: René Pistilli-Leopardi, individually, and in her capacity as Executrix of the Estate of Edward Leopardi v. Medianews Group, Inc. d/b/a Digital First Media and The Trentonian; David Foster; Isaac Avilucea; The City of Trenton; The City of Trenton Police Department; The County of Mercer; Angelo J. Onofri, in his official capacity as Mercer County Prosecutor  
Docket No. MER-L-2066-17**

Dear Counsel:

**INTRODUCTION**

On September 21, 2017, plaintiffs René Pistilli-Leopardi and the Estate of Edward Leopardi filed a seventeen count Complaint naming as defendants: Medianews Group, Inc.;

David Foster; Isaac Avilucea; The City of Trenton; The City of Trenton Police Department; The County of Mercer; and Angelo J. Onofri, in his official capacity as Mercer County Prosecutor.

On November 17, 2017, this Court entered an Order dismissing without prejudice defendant the County of Mercer. Thereafter, defendants the City of Trenton and the City of Trenton Police Department (hereinafter collectively referred to as "Trenton Defendants") filed an Answer to plaintiffs' Complaint on November 23, 2017.

Plaintiffs' seventeen count Complaint alleges ten claims: Defamation (Count 1), False Light Invasion of Privacy (Count 2), Improper Publication of Private Facts (Count 3), Intentional Infliction of Emotional Distress (Count 4), Negligence (Count 5), Negligent Infliction of Emotional Distress (Count 6), Negligent Hiring and Retention (Count 7), Negligent Infliction of Emotional Distress—Bystander (Count 14), Wrongful Death (Count 16), and Loss of Consortium (Count 17) against defendants Medianews Group, Inc., David Foster, and Isaac Avilucea (hereinafter collectively referred to as "Media Defendants").

The Complaint further alleges ten claims: Defamation (Count 8), False Light Invasion of Privacy (Count 9), Improper Publication of Private Facts (Count 10), Intentional Infliction of Emotional Distress (Count 11), Negligence (Count 12), Negligent Infliction of Emotional Distress (Count 13), Negligent Infliction of Emotional Distress—Bystander (Count 14), New Jersey Civil Rights Act Violations (Count 15), Wrongful Death (Count 16), and Loss of Consortium (Count 17) against the Trenton Defendants and Angelo J. Onofri, in his official capacity as Mercer County Prosecutor (hereinafter "Onofri"). The chart below summarizes each of the Complaints' counts.

No.	Claim	Claimant(s)	Defendant(s)
1	Defamation	Estate of Edward Leopardi	Media Defendants
2	False Light	Estate of Edward Leopardi	Media Defendants
3	Improper Publication of Private Facts	Estate of Edward Leopardi	Media Defendants
4	Intentional infliction of emotional distress	Estate of Edward Leopardi René Pistilli-Leopardi	Media Defendants
5	Negligence	Estate of Edward Leopardi René Pistilli-Leopardi	Media Defendants
6	Negligent infliction of emotional distress	Estate of Edward Leopardi René Pistilli-Leopardi	Media Defendants
7	Negligent hiring and retention of Defendant Avilucea	Estate of Edward Leopardi René Pistilli-Leopardi	Media News Group/Trentonian
8	Defamation	Estate of Edward Leopardi	City of Trenton/Trenton Police/Mercer County*/Angelo Onofri
9	False Light	Estate of Edward Leopardi	City of Trenton/Trenton Police/Mercer County*/Angelo Onofri
10	Improper Publication of Private Facts	Estate of Edward Leopardi	City of Trenton/Trenton Police/Mercer County*/Angelo Onofri
11	Intentional Infliction of Emotional Distress	Estate of Edward Leopardi	City of Trenton/Trenton Police/Mercer County*/Angelo Onofri
12	Negligence	Estate of Edward Leopardi René Pistilli-Leopardi	City of Trenton/Trenton Police/Mercer County*/Angelo Onofri
13	Negligent Infliction of Emotional Distress	Estate of Edward Leopardi René Pistilli-Leopardi	City of Trenton/Trenton Police/Mercer County*/Angelo Onofri
14	"Bystander"	René Pistilli-Leopardi	All Defendants
15	NJCRA Violations	Estate of Edward Leopardi	City of Trenton/Trenton Police/Mercer County*/Angelo Onofri
16	Wrongful Death	Estate of Edward Leopardi	All Defendants
17	Loss of Consortium	René Pistilli-Leopardi	All Defendants

\* Defendant Mercer County was dismissed from the Complaint by this Court's November 17, 2017 Order.

On December 1, 2017, Media Defendants moved to dismiss all respective claims. Thereafter, on January 5, 2018, defendant Onofri moved to dismiss all respective claims and on January 30, 2017, the Trenton Defendants likewise moved to dismiss all respective claims. After reviewing counsels' submissions, this Court held oral arguments for each of the aforementioned motions on May 11, 2018. The Court now having reviewed the extensive motion record, and having heard oral argument, grants all three motions in their entirety, each without prejudice. The Court's opinion now follows.

### FACTS

Edward Leopardi was a Police Detective at the City of Trenton Police Department. In or about September 2016, the Police Department and/or the Mercer County Prosecutor's Office began investigating Detective Leopardi for alleged misconduct. Defendant Medianews Group, Inc., owns a print news publication known as the Trentonian, which has circulation in and around the County of Mercer and is further available online. Defendants, David Foster and Isaac Avilucea, are employed and/or contract with defendant Medianews Group, Inc., as news reporters, writers, contributors, editors, and/or in similar capacities.

On September 20, 2016, Mercer County Prosecutor Angelo Onofri, held a press conference informing at least one news agency that an investigation of sexual misconduct at the Trenton Police Department was underway. Prosecutor Onofri did not identify Mr. Leopardi as the subject of the investigation and further advised that details about the investigation could not be disclosed because they were confidential.

On the following day, September 21, 2016, The Trentonian published on its website an article by defendant Foster, with defendant Avilucea credited as a contributor, entitled "Trenton Cop allegedly had anal sex with prostitute while on duty, sources say." The article identified Detective Leopardi as the investigation's subject and that, along with being a police officer, he was a Franklin Township Committee person, former Mayor and had a wife and three children. The article further detailed the Police K9 Unit Headquarters where the alleged act had occurred.

At or about the same time of the article's publication, agents of Medianews Group, Inc., attempted to contact Detective Leopardi by phone seeking comment on the investigation. Shortly after the article's publication, Detective Leopardi took his own life, at his home, by self-inflicted gunshot.

Later that same day, The Trentonian published a second article entitled "Trenton Cop commits suicide amid prostitute sex probe." Defendant David Foster was again credited as the author of the second article. Additionally, in connection with the publishing of the second article, defendant Avilucea attempted to reach plaintiff René Pistilli-Leopardi by telephone at her workplace, to seek comment regarding her husband's death.

## DISCUSSION AND FINDINGS

Media Defendants, defendant Onofri, and the Trenton Defendants, have moved to dismiss all claims against each party respectively, pursuant to Rule 4:6-2(e). The Court considers each moving Defendant *in seriatim*.

In determining whether a Plaintiff has failed to state a claim upon which relief can be granted, the Court must limit its examination to evaluating the legal sufficiency of the facts alleged on the face of the Complaint. Rieder v. Dept. of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). The Court is to “search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.” DiCristoforo v. Laurel Grove Memorial Park, 43 N.J. Super. 244, 252 (App. Div. 1957).

The Court is not concerned with the ability of a plaintiff to prove the allegation contained in the complaint at this preliminary stage of the litigation; therefore, a plaintiff is entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956). In short, “the test for determining the adequacy of a pleading [is] whether a cause of action is ‘suggested’ by the facts.” Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989).

**I. Plaintiff, the Estate of Edward Leopardi, has failed to make a *prima facie* showing of actual malice as to the Media Defendants and therefore cannot prevail on a claim of defamation.**

Under New Jersey law, a statement is defamatory if it is false, communicated to a third person, and tends to lower the subject’s reputation in the estimation of the community. Lynch v. N.J. Educ. Ass’n, 161 N.J. 152, 164 (1999). A defamation plaintiff can prevail on a claim by showing either negligence, if the plaintiff is a private figure, or actual malice, if the plaintiff is a public figure or public official. Costello v. Ocean Cty. Observer, 136 N.J. 594, 612 (1994), citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Furthermore, New Jersey courts have taken an expansive view of who qualifies as a public figure or public official and accordingly regard police officers as public officials. See La Rocca v. New York News, Inc., 156 N.J. Super. 59, 62 (App. Div. 1978) (finding there to be “no doubt” that police officers are public officials).

In determining if a statement is made with actual malice, New Jersey courts look to whether the defendant entertained serious doubts about the truth of the statement, or if the defendant had a subjective awareness of the statement’s probable falsity. Costello v. Ocean Cty. Observer, 136 N.J. 594, 615 (1994). Therefore, what a defendant should have known or should have doubted is irrelevant; instead, a plaintiff must prove that the defendant actually had a “high degree of awareness of its probable falsity” or “entertained serious doubts as to [its] truth.” Durando v. Nutley Sun, 209 N.J. 235, 251-52 (2012). This must be shown through factual assertions in the plaintiff’s complaint. Darakjian v. Hanna, 366 N.J. Super. 238, 247 (App. Div. 2004).

- a. *Plaintiff, the Estate of Edward Leopardi's Complaint pleads actual malice in a conclusory manner, mandating dismissal pursuant to Rule 4:6-2(e).*

Conclusory allegations of actual malice are insufficient to survive a motion to dismiss for failure to state a claim under New Jersey law. See Darakjian v. Hanna, 366 N.J. Super. 238, 247 (App. Div. 2004) (overturning a trial court's denial of a motion to dismiss a defamation claim because the "[p]laintiff's allegation of actual malice, i.e., knowledge of falsity or reckless disregard for truth or falsity, [was] unsupported by any factual contentions offered to substantiate the assertion.").

The Darakjian court overturned the trial court's denial of a motion to dismiss and noted the importance of the fundamental principles of the First Amendment, which ensure that speech of public concern is not chilled, when it held, "[t]o permit a defamation action against press persons or entities to survive on the basis of a mere allegation of knowledge of falsity or reckless disregard affords insufficient breathing space to the critical rights protected, in the public interest, by the First Amendment." Ibid.

Somewhat conversely, in an earlier decision, the Appellate Division in the matter of Standridge v. Ramey, affirmed a trial court's denial of a motion for summary judgment, holding a defamation plaintiff is entitled to conduct full discovery to find factual support for a claim before summary disposition of a matter will be entertained, especially when critical facts are within the knowledge of other parties to the action. 323 N.J. Super. 538, 547 (1999).

The Standridge decision, however, is distinguishable from the Darakjian matter in that a motion for summary judgment provides finality at the trial court level, whereas a motion to dismiss is ordinarily granted without prejudice, thereby permitting a plaintiff to amend the complaint to allege additional facts in an effort to state a cause of action.<sup>1</sup> See e.g. Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) (finding the trial court erred in entering summary judgment without prejudice and further holding "summary judgment dismissing an action without prejudice constitutes a contradiction in terms and a fundamental misconception of the nature and purpose of the practice."); See also Hoffman v. Hampshire Labs, Inc., 405 N.J. Super. 105, 116 (App. Div. 2010) (ordinarily, a dismissal for failure to state a claim is without prejudice).

In the within matter, an in depth review of Plaintiffs' Complaint reveals allegations of actual malice pled in counts one through fourteen. Each allegation of actual malice is pled in an admittedly general manner.<sup>2</sup> Nevertheless, Plaintiffs rely upon Rule 4:5-8(a), which in part states: "[m]alice, intent, knowledge, and other condition of mind of a person may be alleged generally." However, this sentence is preceded by the following language: "[i]n all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable." Rule 4:5-

<sup>1</sup> During oral arguments held before this Court on May 11, 2018, counsel for the Trenton Defendants and defendant Onofri, represented that they would not object to Plaintiff deposing employees of their respective clients as non-parties in the event they were dismissed from the instant action.

<sup>2</sup> Page 13 of Plaintiffs' January 23, 2018 Opposition to the Media Defendants' motion to dismiss argues the alleged allegations alone are enough "to satisfy the 'general' pleading requirement of Rule 4:5-8"

8(a). Plaintiff has failed to cite any authority as to the applicability of this Rule to an action based upon allegedly defamatory speech, and the Court's plain reading of the Rule provides no support for its applicability. Accordingly, the Court finds the general pleading requirements for malice under Rule 4:5-8(a) to be inapplicable to consideration of the instant motions.

The Court further finds that plaintiff, the Estate of Edward Leopardi, has insufficiently pled actual malice with respect to the Media Defendants. Plaintiff cites to paragraphs 52 through 54 of the Complaint in an attempt to bolster the assertion that the Complaint adequately pleads actual malice with respect to the Media Defendants. However, paragraph 52 only generally states that the Media Defendants made statements that were "false and defamatory," and paragraph 53 again generally states that the statements were "defamatory per se." Paragraph 54 deals with actual malice, but alleges such in a conclusory manner, stating: "Defendants acted with actual malice, with knowledge that said statements were false, and/or in reckless disregard of their truth." The Court finds these allegations to be conclusory in nature and accordingly finds plaintiff, the Estate of Edward Leopardi, has insufficiently pled actual malice with respect to the Media Defendants.

- b. *Media Defendants were not required to test the veracity of the published statements and plaintiff, the Estate of Edward Leopardi, has failed to assert facts demonstrating the Media Defendants' subjective knowledge of the statements' alleged falsity, or their entertaining of serious doubts as to their truthfulness.*

As briefly outlined in the preceding paragraphs, a plaintiff must make factual assertions in his or her complaint, alleging the defendant entertained serious doubts as to the truth of the statement, or that the defendant had a subjective awareness of the statement's probable falsity. Costello v. Ocean Cty. Observer, 136 N.J. 594, 615 (1994). Consequently, a defendant's failure to investigate more fully, "merely establishes possible negligence—it does not establish subjective knowledge of falsity or serious doubts about the truth of the story," Id. at 619.

In the matter before the Court, Plaintiff cites to paragraphs 41 through 44 of the Complaint as evidence that the Media Defendants acted, either with a subjective awareness of the statements' probable falsity, or that they entertained serious doubts as to the truth of the statements. A review of these paragraphs, however, fails to demonstrate anything further than portions of the articles' alleged falsity.

For instance, paragraph 41 reads as follows: "Prior to his death, Decedent, EDWARD LEOPARDI, denied he had sex with the woman as alleged by Defendants. Upon information and belief, said denial was true." This paragraph fails to establish anything further than an alleged falsity. It offers nothing to demonstrate that the Media Defendants had any subjective awareness of the statement's falsity, nor does it offer any evidence that the Media Defendants entertained any serious doubts as to the truth of the statement, when they relied upon seemingly trustworthy "police sources" in publishing the subject articles.<sup>3</sup>

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<sup>3</sup> Paragraph 33 of Plaintiffs' Complaint asserts the subject articles cite to "police sources". Additionally, attached to the Complaint as Exhibits A and B are The Trentonian articles of interest that gave rise to the instant action.

Likewise, paragraphs 42 through 44 highlight only statements within the article believed to be false by plaintiff René Pistilli-Leopardi. Paragraph 42 of the Complaint points to an alleged falsity in the stories reporting the existence of curtains at the police K9 training facility. Paragraph 43 simply asserts that there was no DNA evidence collected by the City of Trenton in connection to the subject investigation. Finally, paragraph 44 states that in or about October 2016, well after the subject articles' publication in September 2016, the alleged prostitute recanted her allegations against Decedent Edward Leopardi. These three statements are analogous to the allegations of paragraph 41, analyzed above, in that they offer nothing to establish the Media Defendants' subjective knowledge of falsity or serious doubts about the truth of the story at the time of publishing. Accordingly, Plaintiffs have failed to adequately plead actual malice, in accordance with the aforementioned standard, as to the Media Defendants.

Nevertheless, Plaintiff further asserts the New Jersey Supreme Court decision in Lawrence v. Bauer Publishing & Printing, Ltd., 89 N.J. 451, 461 (1982), to be controlling in the within matter, arguing that a reporter or newspaper must verify that the substance of a statement is true, prior to publishing. This statement of law, however, is seemingly at odds with the actual malice standard discussed in Section I of this opinion, wherein it was stated that what a defendant should have known or should have doubted was irrelevant to the analysis.

A review of the Lawrence decision, however, reveals that the portion to which Plaintiff cites is a discussion of the truth defense, not the actual malice standard. See Ibid. Moreover, a closer review of the Lawrence decision demonstrates the requirement that a plaintiff show that the defendants knew the defamatory publication was false, or that they actually doubted its accuracy, in order to make a showing of actual malice. Id. at 468.

Consequently, as a result of the standard for actual malice, the Lawrence Court ultimately reversed the Appellate Division, and reinstated the trial court's dismissal of the claim, finding the public official defendants to be protected by a qualified First Amendment privilege, requiring a plaintiff to provide clear and convincing evidence that the defendant acted with actual malice. Id. at 469. Accordingly, the Court finds the Media Defendants' alleged failure to test the veracity of the published statements to be inconsequential and, as discussed more fully above, finds plaintiff, the Estate of Edward Leopardi, has failed to offer factual assertions in the Complaint that would establish that the Media Defendants had subjective knowledge of falsity or serious doubts about the truth of the story.

- c. *Plaintiff, the Estate of Edward Leopardi, cannot prevail on a claim of defamation due to an insufficient pleading of actual malice.*

In this matter, it is uncontroverted that decedent, Edward Leopardi, is a public official. See La Rocca v. New York News, Inc., 156 N.J. Super. 59, 62 (App. Div. 1978). Plaintiff, the Estate of Edward Leopardi, therefore must make a showing of actual malice in order to prevail on a claim of defamation. Costello v. Ocean Cty. Observer, 136 N.J. 594, 612 (1994), citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964). Thus, based on the foregoing discussion of actual malice, plaintiff, the Estate of Edward Leopardi, cannot prevail on a claim of defamation against the Media Defendants. Accordingly, the Court dismisses Count 1 of the Complaint, with respect to the Media Defendants, without prejudice.

**II. Plaintiff, the Estate of Edward Leopardi, has failed to make a *prima facie* showing of actual malice as to the Media Defendants and therefore cannot prevail on claims of: False Light Invasion of Privacy; Intentional Infliction of Emotional Distress; Negligence; and Negligent Infliction of Emotional Distress.**

Speech based torts, when made by a public official, based upon the publication of false and defamatory statements, utilize the actual malice standard similar to a defamation claim. See DeAngelis v. Hill, 180 N.J. 1, 19 (2004) (false light invasion of privacy); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress); and Govito v. West Jersey Health System, Inc., 332 N.J. Super. 293, 321-22 (App. Div. 2000) (negligent infliction of emotional distress).<sup>4</sup>

Moreover, under New Jersey law, “a party who claims that its reputation has been damaged by a false statement cannot circumvent the strictures of the law of defamation...by labeling its action as one for negligence.” Dairy Stores, Inc. v. Sentinel Pub. Co., 191 N.J. Super. 202, 217 (Law Div. 1983), *aff’d*, 198 N.J. Super. 19 (App. Div. 1985).

For the reasons cited above, actual malice has not been adequately pled on behalf of plaintiff, the Estate of Edward Leopardi, with respect to the Media Defendants. Additionally, the Court finds plaintiff, the Estate of Edward Leopardi, is precluded from making a claim for negligence, based upon allegedly defamatory statements, pursuant to the Dairy Stores decision. Consequently, Plaintiff cannot prevail on Counts 2, 4, 5 and 6 as pled. Accordingly, the Court dismisses without prejudice Counts 2, 4, 5 and 6, pled by plaintiff, the Estate of Edward Leopardi in the Complaint, with respect to the Media Defendants.

**III. Plaintiff, René Pistilli-Leopardi, a private individual, has failed to make a *prima facie* showing as to her claims of Intentional Infliction of Emotional Distress, Negligence, and Negligent Infliction of Emotional Distress.<sup>5</sup>**

- a. *Plaintiff René Pistilli-Leopardi cannot prevail on a claim for Intentional Infliction of Emotional Distress because the alleged conduct of the Media Defendants does not rise to the requisite level to sustain such a claim.*

To state a claim for intentional infliction of emotional distress, a plaintiff must show that: 1) the defendant acted intentionally; 2) the defendant’s conduct was 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; 3) the defendant’s actions proximately caused her emotional distress; and 4) the emotional distress was so severe that no reasonable person could be expected to endure it. Soliman v. Kushner Companies, Inc., 433 N.J. Super. 153, 177 (App. Div. 2013). A claim for intentional infliction of emotional distress

<sup>4</sup> Plaintiffs have conceded the actual malice standard is applicable to each of the speech based torts. See Pages 18-19 of Plaintiffs’ January 23, 2018, Opposition to Media Defendants’ motion to dismiss.

<sup>5</sup> Plaintiff, René Pistilli-Leopardi alludes to Count 2 (False Light Invasion of Privacy) as pled on her behalf. However, a review of Plaintiffs’ Complaint reveals that this claim was not pled on her behalf. Accordingly, the Court makes no finding as to the viability of this claim.

requires conduct “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.” Buckley v. Trenton Saving Fund Society, 111 N.J. 355, 366 (1988);

In opposing Media Defendants’ motion to dismiss, plaintiff Pistilli-Leopardi cites the conduct of defendant Avilucea, wherein he contacted her within hours of her husband’s tragic death, as sufficiently extreme and outrageous to make a *prima facie* showing for a claim of intentional infliction of emotional distress. Plaintiff argues that this conduct was sufficiently extreme and outrageous because defendant Avilucea allegedly had no legitimate reason to call her at her workplace and that doing so suggests: 1) he believed she was unaware that her husband had died and he wished to inform her; or 2) that he sought to gloat.

As support for this contention, Plaintiff relies upon the New Jersey Supreme Court opinion in Taylor v. Metzger, wherein the Court found that a plaintiff had presented sufficient evidence to survive a motion for summary judgment on her claims of racial discrimination, 152 N.J. 490 (1998). In Taylor, the plaintiff sought to recover for a claim of intentional infliction of emotional distress, after her employer had referred to the plaintiff, an African America as a “jungle bunny,” on a single occasion. Ibid.

Under the Court’s holding in Taylor, “[a] single event, under the right circumstances, may be extreme and outrageous.” Id. at 512. Therefore, frequency of conduct is not the determining issue. Instead, the Taylor Court focused upon the position of authority the employer exercised over the plaintiff, finding that “a jury could reasonably conclude that the power dynamics of the workplace contribute to the extremity and the outrageousness of defendant’s conduct.” Id. at 511. Consequently, the Taylor Court reversed the trial court’s grant of summary judgment with respect to the intentional infliction of emotional distress claim. Id. at 521.

Here, Plaintiff points to defendant Avilucea’s attempt to contact her shortly after her husband’s death as sufficient conduct to satisfy the prongs of a claim for intentional infliction of emotional distress. While the Court is cognizant of the fact that many people would find calling a grieving widow for comment, hours after her husband’s tragic death, to be extremely distasteful, and a gross breach of decorum, the Court finds that the conduct does not rise to the requisite level to state a claim for intentional infliction of emotional distress, as a matter of law.

In arriving at this conclusion, the Court finds significant the fact that defendant Avilucea never spoke with the Plaintiff and instead left a voicemail requesting comment on her husband’s death. Moreover, defendant Avilucea did not exercise a position of power over plaintiff René Pistilli-Leopardi, as did the parties in the Taylor matter. Instead, the relationship between the two parties in the within matter, was much more akin to “a stranger on the street,” an issue not resolved by the Taylor Court, but discussed briefly in dicta.

Furthermore, the conduct of defendant Avilucea in calling an interested party to ask if they would like to comment for a news story is what society expects reporters to typically do and therefore does not strike the Court as conduct that is so extreme and outrageous in character, as to go beyond all possible bounds of decency. Accordingly, the Court grants the Media

Defendants' motion to dismiss with respect to Count 4 of the Complaint, as alleged by plaintiff, René Pistilli-Leopardi, without prejudice.

*b. Defendant Avilucea was under no duty not to call plaintiff René Pistilli-Leopardi requesting comment.*

To sustain a cause of action for negligence, a plaintiff must establish four elements: 1) a duty of care; 2) a breach of that duty; 3) proximate cause; and 4) actual damages. Townsend v. Pierre, 221 N.J. 36, 51 (2015). Whether a duty exists is a matter of law to be decided by the court. Carvalho v. Toll Bros. & Dev., 143 N.J. 565, 572 (1996). That inquiry involves identifying, weighing, and balancing several factors—the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993).

Plaintiff René Pistilli-Leopardi has asserted a claim of negligence against the Media Defendants, claiming defendant Avilucea created a risk of harm to Ms. Pistilli-Leopardi, for which the defendant Avilucea had the ability to foresee, and which resulted in alleged injury and emotional distress, as a proximate result of defendant Avilucea's attempt to reach Plaintiff for comment. Plaintiff further contends that because defendant Avilucea had the control, opportunity and ability to have avoided the risk of harm by simply not telephoning her, it is fair to impose a duty upon defendant Avilucea in this matter. Defendant, on the other hand, reiterates that attempting to reach interested parties for comment, is exactly what reporters typically do.

The Court, after weighing and balancing the relationship of the parties, assessing the nature of the attendant risk, considering the opportunity and ability to exercise care, and evaluating the public interest in the proposed solution of prohibiting reporters from reaching out to grieving loved ones for comment, finds that there is not a basis to impose a duty on a reporter not to call an interested party to ask for comment. Accordingly, defendant Avilucea's motion to dismiss with respect to the negligence claim asserted against the Media Defendants by plaintiff René Pistilli-Leopardi is hereby granted without prejudice.

*c. The Court having found no duty existed in the above subsection, likewise finds plaintiff René Pistilli-Leopardi cannot sustain a claim for negligent infliction of emotional distress.*

A claim for negligent infliction of emotional distress has four elements: 1) a duty of care was owed by the defendant to the plaintiff; 2) that duty was breached; 3) the plaintiff suffered genuine and substantial emotional distress; and 4) the breach was a proximate cause of the injury. Lascurain v. City of Newark, 349 N.J. Super. 251, 277 (App. Div. 2002). Consequently, much like a claim for general negligence, a claim for negligent infliction of emotional distress requires there first to be a duty owed to the plaintiff.

The Court, having found no basis to impose a duty upon defendant Avilucea not to telephone plaintiff René Pistilli-Leopardi, finds that Plaintiff cannot sustain a cause of action for negligent infliction of emotional distress against the Media Defendants. Accordingly, the Court

grants Media Defendants' motion to dismiss with respect to Count 6, as pled against the Media Defendants on plaintiff René Pistilli-Leopardi's behalf, without prejudice.

**IV. The matters published in this case were newsworthy as defined by the New Jersey Supreme Court; therefore, plaintiff, the Estate of Edward Leopardi has failed to make a *prima facie* showing for a claim of improper publication of private facts.<sup>6</sup>**

*a. The correct standard for newsworthiness was set forth by the New Jersey Supreme Court decision of Romaine v. Kallinger*

The tort of improper publication of private facts occurs when it is shown that the matters revealed were actually private, dissemination of such facts would be offensive to a reasonable person, and there is no legitimate interest of the public in being apprised of the facts publicized. Romaine v. Kallinger, 109 N.J. 282, 297 (1988). The third portion of this test, that is, whether there is a legitimate interest of the public in being apprised of the facts publicized, or in other words, whether the facts are "newsworthy," requires the court to determine if the facts publicized "contain an indefinable quality of information that arouses the public's interest and attention." Id. at 302

Notwithstanding this binding Supreme Court precedent, plaintiff René Pistilli-Leopardi directs this Court to a subsequent Appellate Division opinion, Wilson v. Grant, 297 N.J. Super. 128 (App. Div. 1996), wherein the court neglected to apply the above cited test handed down by the Supreme Court and instead applied a three-part balancing test. Id. at 141. Under that three-part balancing test, a court is to consider: 1) the social value of the facts published; 2) the depth of the article's intrusion into ostensibly private affairs; and 3) the extent to which the party voluntarily acceded to a position of public notoriety. Id. at 141.

However, as the Media Defendants point out, the Wilson court cited California case law in applying the aforementioned three-prong test, a test the New Jersey Supreme Court in Romaine was aware of and ultimately declined to adopt in enunciating the standard to be used in New Jersey. See Romaine v. Kallinger, 109 N.J. 282, 303 (1988).

The Court finds Romaine v. Kallinger to be controlling. Therefore, this Court declines to consider the Wilson three-part test and instead considers the newsworthiness of the matters published, in accord with the standard set forth in Romaine.

*b. The matters published in the instant case were newsworthy.*

As set forth above, the third-prong for the tort of improper publication of private facts requires there to be no legitimate interest of the public in being apprised of the facts publicized. Romaine v. Kallinger, 109 N.J. 282, 297 (1988). Therefore, if the matters published are

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<sup>6</sup> Plaintiff, René Pistilli-Leopardi alludes to Count 3 (Improper Publication of Private Facts) as pled on her behalf. However, Plaintiffs' Complaint is bereft of any such claim on her behalf. Accordingly, the Court makes no finding as to the viability as to this claim on behalf of plaintiff, René Pistilli-Leopardi.

newsworthy, a claim for improper publication of private facts cannot stand with respect to plaintiff, the Estate of Edward Leopardi.

Plaintiff contends that the facts in this case were not newsworthy because the subject matter of the article detailed a private sexual encounter. The Media Defendants, conversely, argue the subject matter of the article was a government investigation of a police officer for allegedly having sex with a prostitute at a police facility while on duty.

The Court finds Plaintiff's characterization of the subject material to be too narrow in scope. In arriving at this conclusion, the Court finds it significant that the alleged conduct, which is considered to be true only for purposes of the analysis of this tort theory, was not said to have occurred while decedent Edward Leopardi was off duty and/or in a private setting, such as a hotel or private residence. Instead, the alleged conduct was said to have occurred while decedent Edward Leopardi was on duty and at an official Police K9 Unit Headquarters.

The Court further finds that the public would certainly have a legitimate interest in being apprised of these facts, as their tax dollars are implicated. Accordingly, the Court finds the public would have a legitimate interest in being apprised of the alleged official misconduct, which is considered to be true for the purposes of this tort, and consequently finds the Media Defendants are entitled to dismissal, without prejudice, of Count 3 of Plaintiffs' Complaint as asserted by the Estate of Edward Leopardi.

**V. Plaintiff René Pistilli-Leopardi lacks the requisite contemporaneous sensory awareness required for a bystander claim of negligent infliction of emotional distress.**

The New Jersey Supreme Court in Portee v. Jaffee, 84 N.J. 88 (1980), promulgated the following test that a bystander must satisfy in order to recover for negligent infliction of emotional distress: 1) the death or serious physical injury of another caused by the defendant's negligence; 2) a marital or intimate, familial relationship between plaintiff and the injured person; 3) observation of the death or injury at the scene of the accident; and 4) resulting severe emotional distress. Id. at 101. Since Portee, New Jersey courts have taken a more expansive view of this standard and relaxed the third prong of the test, allowing bystanders who did not actually witness with their own eyes, the actual injuries or death of a loved one, to recover when the plaintiff sensorially and contemporaneously observed the death or injury at the scene. See Jabonowska v. Suther, 195 N.J. 91, 103 (2008). See also Ortiz v. John D. Pittenger Builder, Inc., 382 N.J. Super. 552, 563 (Law. Div. 2004).<sup>7</sup>

The relaxation of the third prong was first adopted by a New Jersey court in the matter of Ortiz v. John D. Pittenger Builder, Inc., 382 N.J. Super. 552 (Law. Div. 2004). In Ortiz, a family was awoken by a fire in their home. Id. at 554. Plaintiffs began to make their escape from the house, when one of the children in the family broke loose from the grip of her grandmother's hand, after being startled by an explosion caused by the fire. Id. at 555. The rest of the family

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<sup>7</sup> The "decision of an inferior court is not binding on a court of coordinate jurisdiction." Manturi v. V.J.V., Inc., 179 N.J. Super. 300, 306 (App. Div. 1981) (citing Wolf v. Home Ins. Co., 100 N.J. Super. 27 (Law Div. 1968), *aff'd*, 103 N.J. Super. 357 (App. Div. 1968)).

made it out of the house safely, but the child remained within the residence as it became engulfed in flames. Ibid.

The Ortiz court found that while the plaintiffs did not view the child's death, the plaintiffs were sensorially aware of the fire and its fatal injury to the child. Id. at 563. Due to the contemporaneous sensory awareness, the Ortiz court denied the defendant landlord's motion for partial summary judgment with respect to the bystander claim for negligent infliction of emotional distress. Id. at 566.

The relaxation of the third prong later became binding precedent upon this Court when the New Jersey Supreme Court issued its opinion in the matter of Jabonowska v. Suther, 195 N.J. 91 (2008). The Court in Jabonowska repeatedly reiterated that a bystander claim now requires only a "sensory and contemporaneous observation of the death or injury at the scene." Compare Ibid. and Vasilik v. Federbush, 327 N.J. Super. 6 (App. Div. 1999) (Appellate Division affirmed dismissal of the bystander claim, where plaintiff came upon his missing suicidal son, minutes after death and viewed paramedics perform CPR and place a blanket over his son's body). This relaxation is what is now known as the "modern view" of a bystander—negligent infliction of emotional distress claim. See Ortiz v. John D. Pittenger Builder, Inc., 382 N.J. Super. 552, 563 (Law. Div. 2004).

In the matter before the Court, plaintiff René Pistilli-Leopardi was called to the scene of her husband's death and viewed her husband's body. While the Court appreciates the horrific emotional toll that this must have taken, the Court finds the facts of the within case to be tantamount to those in the Vasilik matter, cited above. Consequently, the Court finds as a matter of law that Plaintiff lacked the contemporaneous sensory awareness of her husband's death, now required under the "modern view" enunciated by Jabonowska, of a bystander claim for negligent infliction of emotional distress. Accordingly, the Court grants the Media Defendants' motion to dismiss Count 14 of Plaintiffs' Complaint, as asserted by plaintiff René Pistilli-Leopardi, without prejudice.

**VI. The Court having dismissed Counts 1 through 6 and Count 14, likewise dismisses the derivative claims asserted against the Media Defendants in Counts 7, 16 and 17 of Plaintiffs' Complaint.**

- a. A claim for negligent hiring and retention, requires underlying incompetence, unfitness or dangerous characteristics of an employee.*

The tort of negligent hiring and retention has two elements in New Jersey. First, an employer will only be held responsible where it knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons. DiCosala v. Kay, 91 N.J. 159, 173-74 (1982). Second, a plaintiff must show that through the negligence of the employer in hiring the employee, the employee's incompetence, unfitness or dangerous characteristics proximately caused the injury. Ibid. Therefore, under the second prong of this test, there must be an underlying incompetence, unfitness or dangerous characteristic of the employer's employee, in order to state a claim for negligent hiring and retention.

The Court having dismissed Counts 1 through 6 and Count 14 for the reasons stated above, finds that neither plaintiff, the Estate of Edward Leopardi, nor plaintiff René Pistilli-Leopardi have made a *prima facie* showing for the tort of negligent hiring and retention. The Court reaches this finding as a result of its dismissal of the previous counts and there being no additional underlying claims of incompetence, unfitness or dangerous characteristic asserted with respect to defendant, Avilucea. Accordingly, the Court dismisses Count 7 of Plaintiffs' Complaint, in regard to the Media Defendants, without prejudice.

b. *A cause of action for wrongful death is dependent upon an underlying assertion of a wrongful act, neglect or default.*

Count 16 of Plaintiffs' Complaint asserts a claim for wrongful death on behalf of plaintiff, the Estate of Edward Leopardi. A cause of action for wrongful death was not recognized at common law and instead is prescribed by the New Jersey Wrongful Death Act. N.J.S.A. 2A:31-1 et. seq. The fundamental purpose of a claim for wrongful death is to compensate survivors for the pecuniary losses they suffer due to the tortious conduct of others. Alexander v. Whitman, 114 F.3d 1392, 1398 (3d Cir. 1997). Essential to a claim for wrongful death however, is an underlying "wrongful act, neglect or default." N.J.S.A. 2A:31-1.

In light of the dismissal of Counts 1 through 6 and Count 14 of Plaintiffs' Complaint, and there being no additional assertions of a wrongful act, neglect or default against the Media Defendants, plaintiff, the Estate of Edward Leopardi has failed to make a *prima facie* showing for a claim of wrongful death. Accordingly, the Court dismisses Count 16 of Plaintiffs' Complaint, with respect to the Media Defendants, without prejudice.

c. *A claim for loss of consortium requires an underlying wrongful act by a defendant.*

In Count 17, plaintiff, René Pistilli-Leopardi asserts a claim for loss of consortium against the Media Defendants. A claim for loss of consortium is similar to the above two claims in that it is likewise dependent upon an underlying tort. Under New Jersey law, a spouse is entitled to the services of his or her spouse in attending to household duties, companionship and comfort, and to his or her consortium, that is, marital relations. Zalewski v. Gallager, 150 N.J. Super. 360, 372 (App. Div. 1977). The basis for an award of loss of consortium is the total amount of deprivation of a spouse's services proximately caused by defendant's wrongdoing. Ibid. Therefore, a plaintiff is only entitled to damages for the loss of his or her spouse's consortium if the loss was proximately caused by an underlying wrongdoing.

Analogous to the other two derivative claims, a claim for loss of consortium requires an underlying claim in order to survive a dispositive motion. In light of the Court's dismissal of all other claims as to the Media Defendants, the Court finds the Media Defendants are entitled to dismissal of plaintiff, René Pistilli-Leopardi's claim for loss of consortium. Accordingly, the Court dismisses Count 17 of Plaintiffs' Complaint, without prejudice.

The Court having dismissed all claims with respect to the Media Defendants, now considers each claim asserted against defendant, Onofri.

**VII. Plaintiff, the Estate of Edward Leopardi, has failed to make a *prima facie* showing of actual malice as discussed above and therefore the speech-based torts pled against defendant Onofri must be dismissed.**

As detailed more fully above, New Jersey law requires a public official plaintiff alleging a speech-based tort, to plead said tort with actual malice. See Costello v. Ocean Cty. Observer, 136 N.J. 594, 612 (1994), citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964) (defamation); DeAngelis v. Hill, 180 N.J. 1, 19 (2004) (false light invasion of privacy); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (intentional infliction of emotional distress); and Govito v. West Jersey Health System, Inc., 332 N.J. Super. 293, 321-22 (App. Div. 2000) (negligent infliction of emotional distress).

Additionally, as set forth above, under New Jersey law, “a party who claims that its reputation has been damaged by a false statement cannot circumvent the strictures of the law of defamation...by labeling its action as one for negligence.” Dairy Stores, Inc. v. Sentinel Pub. Co., 191 N.J. Super. 202, 217 (Law Div. 1983), *aff'd*, 198 N.J. Super. 19 (App. Div. 1985).

- a. *Plaintiff, the Estate of Edward Leopardi cannot prevail on a claim of defamation against defendant, Onofri, because Plaintiff has failed to sufficiently plead actual malice, and the cause of action is barred by the New Jersey Tort Claims Act.*

As detailed more fully above, New Jersey law requires a plaintiff alleging defamation to show that the statement was false, communicated to a third person, and tends to lower the subject’s reputation in the estimation of the community. Lynch v. N.J. Educ. Ass’n, 161 N.J. 152, 164-65 (1999).

- i. *The Court having found Rule 4:5-8 inapplicable and applying the Darakjian standard finds plaintiff, the Estate of Edward Leopardi to have pled actual malice in a conclusory manner mandating dismissal of Count 8.*

Plaintiff, the Estate of Edward Leopardi, concedes that it has not alleged that Prosecutor Onofri defamed decedent, Edward Leopardi at the September 20, 2016 press conference.<sup>8</sup> Instead, Plaintiff asserts that an alleged defamatory communication was made by an agent of the Mercer County Prosecutor’s Office to the press. The date of the alleged statement, however, is currently unknown to Plaintiff. The Court is nevertheless constrained to draw every reasonable inference of fact in Plaintiff’s favor and therefore makes no finding as to the applicable statute of limitations. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956).

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<sup>8</sup> “Plaintiffs have not alleged that Prosecutor Onofri defamed Mr. Leopardi by slandering him at the September 20, 2016 press conference.” See Page 3 of Plaintiffs’ brief in opposition to defendant Onofri’s motion to dismiss, filed February 8, 2018 (emphasis in original).

Plaintiff again relies upon Rule 4:5-8 in arguing that it has sufficiently pled actual malice. Plaintiff further cites to paragraphs 104, 105 and 108 of Plaintiffs' Complaint to support the contention that it sufficiently pled actual malice. While the Court has found Rule 4:5-8 inapplicable to the within matter, it nevertheless evaluates each of the paragraphs for their conformity with the standard set forth in Darakjian v. Hanna, discussed more fully above.

Paragraph 104 of the Complaint states in a general manner that defendant, Onofri made statements that were defamatory. Similarly, paragraph 105 of the Complaint states in a general manner that the statements made were defamatory *per se*.<sup>9</sup> Actual malice is then again pled in a general manner, using verbatim language as paragraph 54 analyzed above, and stating in relevant part "Defendants acted with actual malice, with knowledge that said statements were false, and/or in reckless disregard of their truth..." The Court having found this exact language to be conclusory in the preceding sections, likewise finds plaintiff, the Estate of Edward Leopardi, to have insufficiently pled actual malice with respect to defendant, Onofri.

- ii. *A claim against defendant, Onofri for the conduct of a public employee constituting a crime, actual fraud, actual malice or willful misconduct is expressly prohibited by the New Jersey Tort Claims Act.*

Pursuant to N.J.S.A. 40A:14-181, every law enforcement agency is required to adopt and implement guidelines consistent with the guidelines governing the Internal Affairs Policy and Procedures. Moreover, New Jersey courts have recognized that the guidelines implemented by the Attorney General have the force of law. See O'Shea v. Twp. Of West Milford, 410 N.J. Super. 371, 382 (App. Div. 2009).

The Attorney General Guidelines that govern Internal Affairs Information specifically state, "[t]he nature and source of internal allegations, the progress of internal affairs investigations, and the resulting materials are confidential information and shall only be released under...limited circumstances." N.J. Att'y Gen. Internal Affairs Policy and Procedures at 11-46 (Nov. 2000). However, pursuant to N.J.S.A. 59:2-10, a cause of action against a public entity for the "acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct" is expressly prohibited.<sup>10</sup>

Plaintiff contends that it has sufficiently alleged evidence that the Mercer County Prosecutor's Office acted with actual malice. Plaintiff cites to paragraphs 40a-e of the Complaint as alleged falsities that would be known to be false by an alleged leaker. Moreover, Plaintiff contends only four individuals knew of the investigation of Decedent in paragraph 45 of the Complaint and that each of the individuals were law enforcement officers, investigators and/or otherwise worked at the Mercer County Prosecutor's Office or City of Trenton Police Department. The Trenton Defendants, in their November 23, 2018, Answer on November 23,

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<sup>9</sup> All allegations of defamation *per se* were abandoned by Plaintiff in briefing and at oral arguments held on May 11, 2018.

<sup>10</sup> The argument of "willful misconduct" was not asserted in any of the Defendants briefs. Instead, the issue was raised during oral arguments held by this Court on May 11, 2018.

2017, denied disclosing information about the investigation to anyone. Plaintiff therefore asserts that the communications came from the Mercer County Prosecutor's Office.

The Court having reviewed the Complaint in full, with close scrutiny accorded to the paragraphs outlined in the preceding paragraph, finds that if an alleged agent of the Mercer County Prosecutor's Office made such disclosures of confidential law enforcement information with actual malice, it would constitute willful misconduct for which the Prosecutor's Office would have no liability under the New Jersey Tort Claims Act. N.J.S.A. 59:2-10.

iii. *Plaintiff, the Estate of Edward Leopardi cannot prevail on a claim of defamation against defendant, Onofri, due to an insufficient pleading of actual malice and the claim being barred by the New Jersey Tort Claims Act.*

The Court finds plaintiff, the Estate of Edward Leopardi has failed to make a *prima facie* showing of defamation against defendant, Onofri. The Court reaches this conclusion upon finding actual malice to have been pled in a conclusory manner and further finding a cause of action against the Mercer County Prosecutor's Office, for the conduct of an alleged agent of the office, which is alleged to have constituted actual malice, to be barred by the New Jersey Tort Claims Act. Accordingly, the Court dismisses Count 8 of Plaintiffs' Complaint without prejudice, with respect to defendant, Onofri.

b. *Defendant Onofri, is entitled to dismissal of each of the remaining speech-based torts, as plaintiff, the Estate of Edward Leopardi, has failed to sufficiently plead actual malice and a cause of action against Defendant for any such conduct of the agents of defendant, Onofri are expressly prohibited by the New Jersey Tort Claims Act.*

For the reasons discussed more fully above, actual malice has not been adequately pled on behalf of plaintiff, the Estate of Edward Leopardi, with respect to defendant, Onofri. Further, any claims based upon the conduct of the agents of defendant, Onofri, constituting actual malice, are barred by the New Jersey Tort Claims Act as they would constitute willful misconduct. In light of these findings, the Court further finds Plaintiff cannot prevail on the remaining speech-based torts asserted against defendant, Onofri in Counts 9 (False Light Invasion of Privacy), 11 (Intentional Infliction of Emotional Distress), and 13 (Negligent Infliction of Emotional Distress). Moreover, Plaintiff is precluded from seeking relief under a theory of negligence, as allowing such, would allow plaintiff to circumvent the constitutional parameters of a claim of defamation. Accordingly, the Court dismisses Counts 9, 11, 12 and 13 of Plaintiffs' Complaint, as asserted by plaintiff, the Estate of Edward Leopardi, without prejudice, with regard to defendant, Onofri.

**VIII. The Court having found that the matters published in this case were newsworthy further finds plaintiff, the Estate of Edward Leopardi cannot prevail on a claim of improper publication of private facts, asserted against defendant, Onofri.**

The Court having concluded the correct standard to be applied to the within matter for a claim of improper publication of private facts, to be the one set forth by the New Jersey Supreme Court in Romaine v. Kallinger, 109 N.J. 282 (1988), and having concluded the matters published to have been newsworthy, likewise concludes for essentially the same reasons set forth above that plaintiff, the Estate of Edward Leopardi cannot prevail on a claim of improper publication of private facts, as asserted against defendant, Onofri. Accordingly, the Court grants defendant, Onofri's motion to dismiss, with respect to Count 10 of Plaintiffs' Complaint, without prejudice.

**IX. Plaintiff René Pistilli-Leopardi cannot prevail on a claim of negligence based upon the theory that an agent of the Mercer County Prosecutor's Office negligently revealed information about the ongoing investigation of decedent, Edward Leopardi.**

Count 12 of Plaintiffs' Complaint, also asserts, on plaintiff René Pistilli-Leopardi's behalf, a claim of negligence against defendant, Onofri. Plaintiff asserts Defendants had "a duty to keep confidential and not disclose the subject and complaint" of the internal affairs and/or criminal investigations in which decedent, Edward Leopardi, was accused. Plaintiff further argues by breaching this duty, Defendants proximately caused harm to her, entitling her to damages.

While plaintiff René Pistilli-Leopardi is a private individual and therefore only needs to assert negligence, rather than actual malice, the Court finds, for essentially the same reasons cited above, that any unauthorized leak from an agent of the Mercer County Prosecutor's office to the press would constitute willful misconduct. Consequently, the Court finds plaintiff, René Pistilli-Leopardi cannot prevail on a claim of negligence against defendant, Onofri and accordingly dismisses Count 12 of Plaintiffs' Complaint, as asserted by plaintiff, René Pistilli-Leopardi against defendant, Onofri, without prejudice.

**X. The Court having found plaintiff, René Pistilli-Leopardi lacked the contemporaneous sensory awareness of her husband's tragic death, likewise finds Plaintiff cannot prevail on a virtually identical bystander claim asserted against defendant, Onofri.**

For the reasons stated more fully above, plaintiff René Pistilli-Leopardi lacked the requisite contemporaneous sensory awareness to assert a claim for bystander—negligent infliction of emotional distress. Accordingly, the Court dismisses Count 14 of Plaintiffs' Complaint as asserted against defendant, Onofri, without prejudice.

**XI. Defendant, Onofri, is not a 'person' amenable to suit and therefore plaintiff, the Estate of Edward Leopardi is not afforded a cause of action under N.J.S.A. 10:6-2.**

The New Jersey Civil Rights Act provides a cause of action to a party who has been deprived of any rights under either the federal or state constitutions by a "person" acting under color of law. N.J.S.A. 10:6-2. The Act is modeled after the Federal Civil Rights Act, 42 U.S.C.A. § 1983 and provides "a remedy for the violation of substantive rights found in our State

Constitution and laws.” Brown v. State, 442 N.J. Super. 406, 425 (App. Div. 2015), *rev’d on other grounds*, 230 N.J. 84 (2017). However, under Brown, “the State is not a ‘person’ under the Civil Rights Act.” Id. at 426.

County prosecutors are hybrid entities for purposes of the Civil Rights Act. See Coleman v. Kaye, 87 F.3d 1491 (3d Cir. 1996). Under Coleman, “when [New Jersey] county prosecutors engage in classic law enforcement and investigative functions, they act as officers of the State.” Id. at 1505. However, when County Prosecutors perform administrative functions, “unrelated to the duties involved in criminal prosecution,” they act as county officials. Id. at 1505-06. Therefore, if a prosecutor’s office was acting in a law enforcement or investigative function, when the alleged harm occurred, the office would be acting as an arm of the state and, consequently, would not be considered a ‘person’ under the New Jersey Civil Rights Act.

In the present matter, plaintiff, the Estate of Edward Leopardi, contends the Mercer County Prosecutor’s office was not acting in a law enforcement or investigative function and instead argues the conduct of an alleged leak of an internal affairs investigation is more of an administrative task. In asserting this contention, Plaintiff argues “[d]efamation has no legitimate law enforcement or investigative purpose.” Defendant, Onofri on the other hand, asserts the alleged offensive conduct is certainly related to a prosecutor’s classic law enforcement and/or investigative function, as the alleged conduct arises from an “investigation.”

The Court finds significant the fact that the alleged conduct arises from an internal affairs investigation, and finds the conduct to be much more akin to the classic law enforcement or investigative function of a prosecutor, rather than that of an administrative task such as hiring or firing someone. Consequently, the Court finds defendant, Onofri not to be a “person” amenable to suit. Accordingly, the Court grants defendant, Onofri’s motion to dismiss Count 15 of Plaintiffs’ Complaint, as asserted by plaintiff, the Estate of Edward Leopardi, against defendant, Onofri, without prejudice.

**XII. The Court having dismissed Counts 8 through 15, with respect to defendant, Onofri, likewise dismisses the derivative claims asserted against defendant, Onofri in Counts 16 and 17 of Plaintiffs’ Complaint.**

*a. A claim of wrongful death as asserted by an estate, requires an underlying assertion of a wrongful act, neglect or default by the defendant.*

As discussed above, a claim for wrongful death requires an underlying “wrongful act, neglect or default.” N.J.S.A. 2A:31-1. The Court having dismissed Counts 8 through 15 of Plaintiffs’ Complaint, with regard to defendant, Onofri finds plaintiff, the Estate of Edward Leopardi, cannot prevail on a claim of wrongful death pursuant to the New Jersey Wrongful Death Act set forth at N.J.S.A. 2A:31-1 *et. seq.* Accordingly, the Court dismisses Count 16 of Plaintiffs’ Complaint, as to defendant, Onofri without prejudice.

*b. A cause of action for loss of consortium requires an underlying tort asserted by the claimant’s spouse.*

For the reasons set forth more fully in Section VI, Subsection c, above, the Court likewise dismisses the loss of consortium claim against defendant, Onofri, without prejudice.

The Court having dismissed all claims with respect to defendant, Onofri, now considers each claim asserted against the Trenton Defendants.

**XIII. Trenton Defendants', 51<sup>st</sup> Separate Defense of their Answer asserts Plaintiffs' Complaint fails to state a cause of action and preserved the right to file the instant motion. Moreover, at oral arguments held on May 11, 2018, Trenton Defendants adopted the arguments of defendant, Onofri.**

Rule 4:6-2 proscribes that if a motion is to be made for failure to state a claim upon which relief can be granted, it shall be made before pleading. Notwithstanding, this Court is also entrusted with Rule 1:1-2(a), which permits the Court to relax any court rule if adherence to it would result in an injustice.

The Court finds that in the interest of justice to consider the Trenton Defendants' motion, finding the Trenton Defendants to be similarly situated to defendant, Onofri. Further, even if the Court were to exalt form over substance and deny the Trenton Defendants' motion on a technical basis, the same pleading deficiencies would exist. Accordingly, the Court shall relax Rule 4:6-2 and consider the Trenton Defendants' motion on the merits.<sup>11</sup>

**XIV. Plaintiff, the Estate of Edward Leopardi, has insufficiently pled actual malice mandating dismissal of all speech-based torts pled against the Trenton Defendants.**

In accordance with the reasoning set forth in Section VII, above, the Court likewise dismisses Counts 8 (Defamation), 9 (False Light Invasion of Privacy), 11 (Intentional Infliction of Emotional Distress), 12 (Negligence), and 13 (Negligent Infliction of Emotional Distress) against the Trenton Defendants, without prejudice.

**XV. The Court having found the matters published in this matter to be newsworthy, further finds plaintiff, the Estate of Edward Leopardi to have failed to make a *prima facie* showing for a claim of improper publication of private facts, as asserted against the Trenton Defendants.**

The Court having already found that the correct standard to be applied to the within matter for a claim of improper publication of private facts was set forth by the New Jersey Supreme Court in the matter of Romaine v. Kallinger, 109 N.J. 282 (1988), and having concluded that the matters published were newsworthy, likewise concludes for the reasons stated above, that plaintiff, the Estate of Edward Leopardi cannot prevail on a claim of improper publication of private facts, as asserted against the Trenton Defendants. Accordingly, the Court dismisses Count 10 of Plaintiffs' Complaint, without prejudice, as to the Trenton Defendants.

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<sup>11</sup> At Oral Arguments held before this Court on May 11, 2018, the Trenton Defendants adopted the motion to dismiss of defendant, Onofri, as a supplement to their own motion.

**XVI. Plaintiff René Pistilli-Leopardi cannot prevail on a claim of negligence based upon the theory that an agent of the Trenton Defendants negligently revealed information about the ongoing investigation of decedent, Edward Leopardi.**

Plaintiff, René Pistilli-Leopardi also asserts on her own behalf a claim of negligence against the Trenton Defendants. Plaintiff asserts Defendants had "a duty to keep confidential and not disclose the subject and complaint" of the internal affairs and/or criminal investigations in which decedent, Edward Leopardi, was accused. Plaintiff further argues that by breaching this alleged duty, the Trenton Defendants proximately caused harm to her, entitling her to damages.

While plaintiff, René Pistilli-Leopardi is a private individual and therefore only needs to assert negligence, rather than actual malice, the Court finds, for the same reasons cited above, that any leak from an agent of the Trenton Defendants to the press would constitute willful misconduct for which the public entity would not be liable. Consequently, the Court finds plaintiff, René Pistilli-Leopardi cannot prevail on a claim of negligence against the Trenton Defendants and accordingly dismisses Count 12 of Plaintiffs' Complaint, without prejudice.

**XVII. The Court having found plaintiff, René Pistilli-Leopardi lacked the contemporaneous sensory awareness of her husband's tragic death, likewise finds Plaintiff cannot prevail on a bystander claim asserted against the Trenton Defendants.**

For the reasons stated above and the Court having found plaintiff, René Pistilli-Leopardi lacked the requisite contemporaneous sensory awareness to assert a claim for bystander—negligent infliction of emotional distress claim, the Court dismisses Count 14 of Plaintiffs' Complaint as asserted against the Trenton Defendants, without prejudice.

**XVIII. The City of Trenton Police Department is not an independent stand-alone entity, which can sue or be sued, and plaintiff, the Estate of Edward Leopardi cannot prevail on the claim of Civil Rights Act violations as alleged against defendant, the City of Trenton.**

- a. *Defendant, City of Trenton Police Department is not a separate entity, but a department within the City of Trenton.*

Plaintiffs' Complaint names the City of Trenton Police Department and the City of Trenton as party defendants. The City of Trenton Police Department, however, is not an independent entity that may sue or be sued in its own name. *See Trenton, New Jersey, Municipal Code art. XII, § 2-56 et. seq.* (Establishing the Police Department and subjecting the department to the supervision of the Mayor). Since the City of Trenton is already named as a Defendant there is no legal basis to also name its Police Department. Accordingly, the Court only considers liability with respect to defendant, City of Trenton, since naming the Police Department as a separate defendant is superfluous.

- b. *While the City of Trenton is a "person" for purposes of the New Jersey Civil Rights Act, it cannot be held liable for the acts of employees*

*pursuant to a theory of respondeat superior under the alleged circumstances.*

As discussed more fully above, the New Jersey Civil Rights Act provides a cause of action to a party who has been deprived of any rights under either the federal or state constitutions by a “person” acting under color of law. N.J.S.A. 10:6-2. Moreover, the Act is largely modeled after its federal counterpart, 42 U.S.C.A. § 1983, and has similarly been interpreted not to consider the State a “person” amenable to suit. Brown v. State, 442 N.J. Super. 406, 425-26 (App. Div. 2015), *rev'd on other grounds*, 230 N.J. 84 (2017). However, local governments are considered “persons” for purposes of § 1983 and accordingly may be sued. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-691 (1978); Loigman v. Twp. Comm. of Middletown, 185 N.J. 566, 590 (2006). Consequently, this Court finds defendant, the City of Trenton to be a “person” for purposes of N.J.S.A. 10:6-2.

While defendant, City of Trenton is a “person” for purposes of N.J.S.A. 10:6-2, a municipality generally cannot be held liable in a civil rights action for the acts of employees under the principle of *respondeat superior*. See Stomel v. City of Camden, 192 N.J. 137, 145 (2007); See also Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690-91 (1978) (applying an analogous § 1983 analysis). Nevertheless, an exception exists when an official municipal policy or custom is the cause of the constitutional deprivation. See Stomel, *supra*. The requirement of an official policy exists in order to distinguish between acts of the municipality and acts of employees, thereby limiting liability to the municipality only in the instance where the municipality is actually responsible for the action. *Ibid*. Therefore, only if the official municipal policy or custom is the cause of the deprivation can a municipality be held liable.

In the within matter, the alleged violations of the New Jersey Civil Rights Act, as asserted by plaintiff, the Estate of Edward Leopardi against defendant, City of Trenton, arise out of the alleged conduct of unnamed rogue City employees, wherein confidential information regarding the internal affairs investigation was disseminated. This conduct is alleged to have violated not only the decedent’s right to privacy derived from Article I, Paragraph I of the New Jersey Constitution but also the Attorney General Guidelines, which specifically prohibits dissemination of internal affairs information by law enforcement.

Here, the motion record is bereft of any official City policy or custom that allegedly deprived decedent, Edward Leopardi, of his civil rights. In fact, the only policy discussed is the City’s adoption of the Attorney General Guidelines, which expressly prohibit the alleged disclosure of confidential information by unnamed City employees. Plaintiff has thus articulated no basis for the City’s liability under the New Jersey Civil Rights Act. Accordingly, the Court dismisses Count 15 of the Complaint, without prejudice, as to the Trenton Defendants.

**XIX. The Court having dismissed Counts 8 through 15, with respect to the Trenton Defendants, likewise dismisses the derivative claims asserted against the Trenton Defendants in Counts 16 and 17 of Plaintiffs’ Complaint.**

- a. *A claim of wrongful death as asserted by an estate, requires an underlying assertion of a wrongful act, neglect or default by the defendant.*

As discussed above, a claim for wrongful death requires an underlying “wrongful act, neglect or default.” N.J.S.A. 2A:31-1. The Court having dismissed Counts 8 through 15 of Plaintiffs’ Complaint, with respect to the Trenton Defendants, finds plaintiff, the Estate of Edward Leopardi, cannot prevail on the derivative claim of wrongful death pursuant to the New Jersey Wrongful Death Act set forth at N.J.S.A. 2A:31-1 *et. seq.* Accordingly, the Court dismisses Count 16 of Plaintiffs’ Complaint, as to the Trenton Defendants, without prejudice.

*b. A cause of action for loss of consortium requires an underlying tort asserted by the claimant’s spouse.*

For the reasons set forth more fully in Section VI, Subsection c, and Section XII, Subsection b, above, the Court likewise dismisses the loss of consortium claim against the Trenton Defendants, without prejudice.

### CONCLUSION

Based on the foregoing the Court grants each of the motions to dismiss in their entirety, each without prejudice.

SO ORDERED,

*R. Brian McLaughlin*

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R. Brian McLaughlin, J.S.C.