SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1974-20

ESTATE OF DAVID ERIC YEARBY, and VERONICA YEARBY, individually, and as Administratrix of the ESTATE OF DAVID ERIC YEARBY,

Plaintiffs-Appellants,

v.

MIDDLESEX COUNTY, WARDEN MARK J. CRANSTON, CORRECTION OFFICER MATTHEW FINN, CORRECTION OFFICER DANIEL MARCINKO, CORRECTION OFFICER RAYMOND BOBEL, CORRECTION OFFICER KONSTANTINOS TRAVLOS, SERGEANT BRIAN SZUMOWSKI, LIEUTENANT RAYMOND BASON, CORRECTION OFFICER DANE REEVES; CORRECTION OFFICER KRIS PAZINSKI, CORRECTION OFFICER JOHN BARTLINSKI, CORRECTION OFFICER EUGENE MARA, CORRECTION OFFICER MICHAEL DONLON, CORRECTION OFFICER CASTRO, LIEUTENANT KNIGHT, CORRECTION OFFICER

MCGUIRE, LAUREN THOMA, M.D., MIDDLESEX COUNTY MEDICAL EXAMINER'S OFFICE, JAMES R. VARRELL, M.D., AL CAMPANA, MBA, CCHP; DENISE R. RAHAMAN, RN, MBA, BSN, CCHP-RN; MARI KNIGHT, RN, MSN, and CCHP-RN,

Defendants,

and

TOWNSHIP OF PISCATAWAY and CFG HEALTH SYSTEMS, LLC,

Defendants-Respondents.

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Argued March 16, 2022 – Decided May 27, 2022

Before Judges Hoffman, Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5825-15.

Kenneth S. Thyne argued the cause for appellants (Roper & Thyne, LLC, attorneys; Kenneth S. Thyne, of counsel and on the briefs).

Lori A. Dvorak argued the cause for respondent Township of Piscataway (Dvorak & Associates, LLC, attorneys; Lori A. Dvorak, of counsel and on the brief; Marc D. Mory, on the brief).

Jeffrey S. McClain argued the cause for respondent CFG Health Systems, LLC (Holtzman McClain &

Londar, PC, attorneys; Stephen D. Holtzman and Jeffrey S. McClain, on the brief).

PER CURIAM

Plaintiffs Estate of David Eric Yearby, and Veronica Yearby, individually and as Administratrix of the Estate of David Eric Yearby, appeal from Law Division orders that: (1) granted summary judgment to defendant Township of Piscataway (Piscataway); (2) granted summary judgment to defendant CFG Health Systems, LLC (CFG); and (3) denied plaintiffs' motion for partial summary judgment. We affirm all three orders.

Plaintiffs claim that defendant Piscataway committed violations of the New Jersey Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 to -2. Additionally, plaintiffs claim that they have an actionable negligence claim against Piscataway because the Township is not entitled to any immunities under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. Plaintiffs do not appeal from the dismissal of their other claims against Piscataway.

As to defendant CFG, plaintiffs claim they have standing to sue on their remaining claim for breach of contract because decedent David Eric Yearby (Yearby) was an intended third-party beneficiary of the contract between CFG and Middlesex County Adult Correctional Center (MCACC). While this appeal was pending, plaintiffs voluntarily withdrew their appeal from a November 9,

2018 order dismissing their negligence claims against defendants CFG, James R. Varrell, M.D., Al Campana, MBA, CCHP, Denise Rahaman, RN, MBA, BSN, CCHP-RN, and Mari Knight, RN, MSN, CCHP-RN.

Plaintiffs' claims against Middlesex County, the Warden of MCACC, its correctional employees, the Middlesex County Medical Examiner's Office, and Lauren Thoma, M.D., were dismissed by a separate summary judgment order. Plaintiffs do not appeal from that dismissal.

I.

We take the following facts from the motion record, viewing the facts in the light most favorable to the non-moving parties. Davis v. Brinkman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014); R. 4:46-2(c).

The Underlying Incident and Arrest

On October 31, 2014, at around 2:45 p.m., Piscataway Police Department (PPD) Officers Kimberly Hye and Michael Nols were dispatched to a report of an assault and the burglary of a vehicle. The victim stated he was outside his home decorating when a man approached him and said: "Nice job." The man then punched the victim in the face. The victim ran inside a neighbor's house to avoid the man, later identified as Yearby, who was heard muttering, "you alright with this, you alright with this." Yearby approached the neighbor's house and

knocked on the front door. The neighbor answered the door and Yearby asked where the "the white boy" was and asked if he was "alright with this." Yearby was denied access, and the door was closed. After unsuccessfully attempting to gain entry by ringing the doorbell, Yearby returned toward the victim's home and opened the victim's mother's car door and sat in the driver's seat.

Officer Nols was first on the scene and was advised of the description of the suspect, who Officer Hye observed walking away from the scene, as she was approaching in her vehicle. Nols and Hye attempted to question the suspect.

As the officers went to place Yearby under arrest, Yearby resisted, including refusing to put his hands behind his back for handcuffing. Yearby was taken to the ground, and kept his right hand under his body, near his front pocket, until he was finally secured with two sets of handcuffs. After Yearby was brought to his feet, he then crouched down, moved his handcuffs from his back to his front by stepping over them, and then swung at Hye twice and tried to kick her. He also grabbed and ripped her uniform. During Yearby's arrest sequence, Nols and Hye sustained minor injuries.

Officers Donald Manco and Scott Ullrich arrived and assisted handcuffing Yearby once again. Yearby was placed in a patrol vehicle and transported by Ullrich to PPD Headquarters for booking and processing. During the transport,

Ullrich incorrectly thought he recognized Yearby from a prior incident, but confused him with someone else. Ullrich testified that he and Yearby had a "good rapport with each other" and that he described Yearby as "funny and playing with [him]" but did not find his nonresponse to questions to be "odd."

Plaintiffs allege that while in the patrol car, Ullrich said, "[t]hat doesn't make any sense" when Nols told him what Yearby had done. Ullrich asked Nols: "Is there anything wrong with [Yearby]?" Nols replied: "He's out there," to which Ullrich said: "There's either something wrong with him or (unintelligible)" and Nols replied: "There's probably something wrong with him." Ullrich said to Nols, "Section 8?" and Nols responded: "Possibly."[1]

The Events at PPD Police Station

After Ullrich and Yearby arrived at the police station, at about 3:30 p.m., Yearby was processed by PPD personnel, who prepared a "Booking Report" and a "Record of Booking" documents.

Yearby spent approximately four hours at the police station before being transported to MCACC. While still there, Ullrich and PPD shift commander

[1] Plaintiff did not provide a citation to the record for this alleged conversation. See R. 2:6-2(a)(5) (requiring appellants' brief to contain a statement of facts "supported by references to the appendix and transcript"). Nor is this conversation reflected in the record on appeal.

Lieutenant Edgar Velazquez communicated with Yearby. Additionally, PPD dispatchers documented no less than fifteen separate observations of Yearby by monitoring surveillance cameras.

Ullrich filled out a Detainee Questionnaire Form as part of processing Yearby. In response to the form's questions, Yearby denied taking any medication, using street drugs, attempting suicide, having suicidal thoughts, any then-current serious medical or mental health problems, and any previous mental or emotional problems. Ullrich testified that he and Hye were both "shocked" to learn that Yearby died after leaving Piscataway's custody.

Velazquez was the Patrol Division lieutenant at the time of Yearby's arrest. His duties included overseeing patrol officers on the day shift and answering questions from the public. Velazquez observed Ullrich bring Yearby into the police station for processing after his arrest. Velazquez testified he was "surprised" when he learned that Yearby had died two days after he left the PPD custody, because Yearby was "fine" when he left and "in good health and condition."

Velazquez did not process Yearby, but was in the room with Ullrich when Ullrich booked and fingerprinted him. Velazquez recalled Hye telling him how

she came across Yearby, that he resisted arrest, and that Hye and Nols had sustained minor injuries.

Yearby was charged with obstruction of the administration of law, unlicensed entry of structures, aggravated assault of two officers, and resisting arrest. A warrant check revealed Yearby had an outstanding arrest warrant. Bail was set at $100,000 on the new charges.

Yearby sustained no injuries and never complained of any facial, neck, finger, toe, or other injuries while in PPD custody. Ullrich testified that, while Yearby was in custody, he "seemed like a healthy young man."

During his career, Velazquez, on multiple occasions, made the determination that an individual with whom he had an encounter required mental health services, in which event he would contact the Acute Psychiatric Services Unit (APS Unit) as necessary.[2] From his observations, Velazquez found Yearby generally quiet and dismissive.

While Yearby was still at the PPD headquarters, Velazquez had a telephone conversation with a woman who falsely identified herself as Yearby's mother. The phone call took place shortly before Yearby was transferred to

[2] The APS Unit is the behavioral unit that the PPD can contact for individuals with emergent mental health issues.

MCACC. Upon hearing the woman identify herself, it "immediately raised" Velazquez's "suspicions," because the caller sounded too young to be Yearby's mother.

The caller was, in fact, Tabreeka Yearby, Yearby's younger sister, who called the PPD and spoke with Velazquez. She admitted to lying about her identity, believing that if she identified herself as Yearby's mother, she might get more information. Among other things, Tabreeka advised Velazquez that "her son" was schizophrenic and that she wanted him to be evaluated. She also asked Velazquez if he could relay a message to MCACC about "what went down" because she wanted Yearby "to be seen as soon as he's transferred" to MCACC. Tabreeka did not say that Yearby was prescribed medication related to his mental health. Rather, she advised that he had not taken medication for three to four years.

Tabreeka advised Velazquez that Yearby was in a psychiatric ward in 2010 and was schizophrenic, to which Velazquez replied, "okay, I can see some of that, okay." She further explained that Yearby was on medication in the past and that he had an "episode" that day. Tabreeka described Yearby's behavior, which included putting his cell phone charger and mop bucket in the toilet, and placing a knife on the bed next to a pillow. Tabreeka told Velazquez that she

contacted a hospital in Berkeley Heights that told her she could take Yearby to the emergency room to get him evaluated and asked if it was possible for someone to pick him up and take him to the emergency room. Velazquez stated, "so, he's not doing well. We could tell by the way he was in, something was wrong about him, you know, in this aspect, but unfortunately, he's – we have to charge him . . . ."

During the conversation, Velazquez tried to solicit information from Tabreeka. He believed it was Yearby's girlfriend on the phone in an attempt to secure his release. Velazquez provided Tabreeka with information regarding Yearby's arrest, bail, and the criminal process going forward after Yearby arrived at MCACC. Velazquez advised Tabreeka that police officers were not doctors and that he was not in a position to pass along an "unsubstantiated mental health diagnosis" to MCACC and that mental health providers were available at MCACC to evaluate Yearby. He further advised that Yearby would be transported to MCACC within the hour, and that she should follow up and call MCACC "and explain to them the situation" herself, as there are medical and mental health providers at that facility. Tabreeka denied that Yearby had ever been violent before.

Though he did not find Tabreeka credible, Velazquez approached Yearby to ask him questions concerning his welfare. Velazquez asked Yearby if he was in danger of harming himself and related questions, but Yearby would not answer. Velazquez also asked him if he had any previous mental health issues, to which Yearby responded "f**k off." He also advised Yearby that his family called and was concerned, but Yearby was dismissive and told him "to get out of his face, basically f**k off, get out of my face." Velazquez acknowledged it was common for prisoners to curse at police officers.

After observing Yearby's behavior, Velazquez concluded Yearby was not hallucinating, was not delusional, and was not incoherent. He testified "[t]here was no babbling, no verbal comments that would have raised [his] suspicions into that area, so there was no behavior that would indicate that he had any form of mental illness as well." Velazquez testified he did not observe any behavior or statements by Yearby that would indicate that he had any type of mental illness. He was not concerned that Yearby would cause harm to himself, others, or cause damage to property. Velasquez concluded that Yearby was not in need of a mental health evaluation by the APS Unit at that time, and found he could be transported to MCACC. A Commitment Order issued by the municipal court judge that set bail commanded that Yearby be transferred to the custody of the

Warden of MCACC, who was required to keep him in custody until a video conference was conducted by the Piscataway Municipal Court, which was scheduled for November 6, 2014.

The Events at MCACC

Yearby was transported to MCACC and released to its custody at about 8:00 p.m. on October 31, 2014. At that point, Yearby "had not suffered a cervical fracture or spinal cord injury[,]" still "had full function of his arms and shoulders[,]" and did not have any facial cuts, a black eye, or bruising around his mouth.

Newly admitted MCACC inmates undergo an "upfront screening" by its contracted medical provider, CFG. That screening is not dependent on "outside information that may or may not be passed to (it)" regarding an inmate's mental/medical history. When asked if it would be important for MCACC to know an inmate's prior history of hospitalization for mental health issues, MCACC Warden Mark Cranston testified:

> I would say it's information that wouldn't hurt, but I don't know if it's absolutely necessary, because anybody that comes into the facility sees medical, gets evaluated by a medical professional, gets a comprehensive screening, gets asked questions about do you have any mental health history, have you ever thought about suicide. There's a whole host of questions they are asked, and based upon those determinations,

> they are referred to either the mental health director or the mental health practitioner or to the medical doctors, so there is a screening process in place to find that kind of information out, so I don't know that it's absolutely required that we know every mental health issue or contact that somebody had before they came to the jail.
>
> It's more in the nice to know category, but actually it would be probably a very hard requirement to fulfill anyway, but that would necessitate ever contact point from the police through to ask all the same questions that the person's going to be asked when we initially take them in.

Warden Cranston further testified that he is not aware of any requirement that police departments develop an arrestee's mental health history and then report it to MCACC at the time of transfer.

MCACC houses inmates with mental health conditions and does not release an inmate from custody because that inmate is mentally ill. MCACC and/or its medical staff provide medical and mental health treatment to inmates, or refer them for treatment. MCACC has Standard Operating Procedures to provide mental health care during an inmate's incarceration, including placing an inmate on close observation. Medical staff can also conduct an evaluation in the Receiving and Discharge Unit if an inmate shows signs of a medical or psychological problem during intake.

During his intake at MCACC, Yearby was seen in the Receiving and Discharge Unit. While there, Yearby assaulted another inmate in that unit. After receiving medical attention, Yearby was "placed on a Hi-Vis Psych [watch] due to his unpredictable behavior" at MCACC. According to Warden Cranston, "high vis psych would be something directed by the psychiatrist or even the medical doctor on staff or any of the medical staff actually can direct that . . . ." It is used for inmates that require "high visibility and they have potential psychiatric issues." Though he testified he learned about it after Yearby's death, Cranston was aware that Yearby was "classified as someone who had psychiatric issues at the time he was processed" at MCACC.

On November 1, 2014, CFG psychologist Elizabeth Battinelli, Ph.D. was on-site and attempted to evaluate Yearby. Battinelli was denied access to Yearby by correctional staff for reasons of safety and security. Before leaving for the day, Battinelli made a notation that Yearby would be seen the next day.

Shortly after Battinelli left for the day, correctional staff decided to extract Yearby from his cell. Plaintiffs allege that between 6:25 p.m. and 7:10 p.m., a correction officer "excessively deployed" oleoresin capsicum spray (pepper spray) into Yearby's cell. A five or six-member extraction team entered Yearby's cell to physically subdue and remove him. Yearby was

decontaminated, his head was covered with a spit hood, and he was placed in an "inmate restraint chair" by correctional staff at 7:25 p.m. Yearby continued to resist both during decontamination and while being placed in the restraint chair. He remained confined in the restraint chair for approximately nine hours.

Yearby was periodically checked by correctional and medical staff while he remained in the restraint chair. He was ultimately found unresponsive to verbal commands at 3:23 a.m. on November 2, 2014. A "code blue" was called, and his restraints were removed. Medical staff commenced life-saving efforts that continued until medics arrived. The resuscitation efforts were unsuccessful and Yearby was pronounced dead.

An autopsy was performed later that day. The Medical Examiner found the cause of death was "blunt force trauma of head and neck with cervical fracture and spinal cord injury." The manner of death was labelled "indeterminable."

Plaintiffs claim the extraction team used excessive force, and beat Yearby, fracturing his neck and ribs. They allege that the spit hood, in combination with the effects of the pepper spray and his underlying asthmatic condition, made it difficult for Yearby to breathe. They further allege that although Yearby complained of the loss of feeling in his extremities when placed in the restraint

chair, defendants took no action responsive to his complaint, thereby breaching their duty to monitor Yearby's condition and to provide him with adequate medical care.

Plaintiffs allege that "Yearby's cause of death was neck trauma with neck vertebral fractures, marked neck spinal cord contusions, and the resulting diffuse hypoxic-ischemic encephalopathy and neck spinal cord dysfunction for a prolonged duration." Plaintiffs claim that "Yearby's condition resulted in visible dysfunction in the levels of his consciousness, [and his] sensory, motor and neurological ability."

Plaintiffs contend that "[a] broken vertebrae and related symptoms is a serious medical need" that "is not lethal if detected and treated in a timely manner." They allege that the failure to properly monitor Yearby "was caused by the policies, practices[,] customs, usages, and protocols at MCACC." This included the failure to train and supervise staff. Plaintiffs claim that the failure "to treat Yearby's injuries was negligent, knowing, intentional, reckless, wanton, and deliberately indifferent to the serious medical needs of Yearby."

PPD Practices and Policies

At the time of Yearby's arrest, Velazquez and Ullrich had each been members of the PPD for approximately twenty-five years. They received PPD's

Standard Operating Procedures (SOPs), including updates, regarding the use of force and dealing with emotionally disturbed persons, as well as related training. Velazquez testified to methods of that training, including by outside instructors, policy reviews and testing, and instruction from PPD's training officer.

Effective March 5, 2013, PPD adopted policies and procedures regarding the Arrest, Transportation and Processing of an arrestee. Chapter 6, Volume 3, Article VII provides, in relevant part:

> Special Needs Custody and Transportation
>
> A. There may be instances when normal custody and transportation procedures are impracticable. These reasons include, but are not limited to:
>
> > 1. Arrestee(s) who exhibit signs of mental illness;
> >
> > 2. Arrestee(s) who may be emotionally disturbed;
> >
> > . . .
>
> B. Transportation for arrestees who exhibit special needs may be accomplished by ambulance, if available . . . .
>
> C. The shift sergeant or designee will determine whether the person being arrested should be taken to the booking room or to a medical facility for evaluation and/or treatment first.

Effective April 24, 2013, PPD adopted policies and procedures regarding Emotionally Disturbed Persons "to provide guidance for department personnel in recognizing and dealing with persons with mental illness or emotional disturbances." "It is the policy of the [PPD] to treat emotionally disturbed persons and persons with mental illness with dignity and to divert these persons from the criminal justice system where appropriate." Chapter 21 of the policies and procedures defined mental illness and provided detailed guidance on recognizing signs of mental illness. This included setting forth the changes in thinking and perception, changes in mood, body movements, unusual speech patterns, verbal hostility or excitement, and environmental indicators commonly exhibited as symptoms by person with mental illness.

Plaintiffs' PPD Records and Security Camera Request

On November 20, 2014, plaintiffs' then counsel, sent a notice of tort claim to the Mayor of Piscataway. The next day, counsel sent a fax to Sandra Wiley, a civilian employee in the PPD's Central Records Section advising that the firm represented the Estate of David Yearby regarding his arrest on October 31, 2014. The letter requested "cop[ies] of all reports, records, pictures, and videos that the department has in its possession regarding David Yearby."

Central Records personnel do not have access to security cameras within the Police Station, which can only be accessed by the Chief's Office. Wiley worked two days between the receipt of the request and December 2, 2014, when she provided the responsive documents that were collected from Central Records to the Chief of Police. Thereafter, Central Records responded to counsel's request. However, by then, the videos had been "recycled" pursuant to a PPD policy that discards such security videos after a thirty-day period.

CFG's Contract with MCACC

At the time of Yearby's detention, CFG provided medical care and mental health services to MCACC inmates under a contract authorized and adopted by the Middlesex County Board of Chosen Freeholders on September 1, 2011. The relevant portions of the contract between MCACC and CFG relating to inmate care read as follows:

> D15.0 GENERAL PR[O]GRAM OBJECTIVES
>
> CFG will operate healthcare and rehabilitation services at full staffing and to use only licensed, certified and professionally trained personnel eligible and qualified to practice in New Jersey.
>
> . . . .
>
> To operate the healthcare and rehabilitation services programs in a humane manner respectful of inmates/juvenile rights to basic healthcare standards in

accord with current legal mandates and decisions specific to jail healthcare and Juvenile Facilities healthcare.

The Contractor shall be responsible to provide the specific services to all persons legally committed to the institution.

. . . .

D17.1 PART ONE: THE QUALITY ASSURANCE PROGRAM

CFG will establish a program for assuring that quality health services provided to the inmates and juveniles. The quality assurance program will also monitor facilities, equipment and supplies, effective utilization, inmate/juvenile complaints about services and gather information concerning levels of inmate/juvenile and staff satisfaction with the health services and provide regular infection control reports.

. . . .

D18.0 GENERAL CARE AND TREATMENT REQUIREMENTS

The following services are to be performed for inmates detained at the Department of Corrections . . . .

. . . .

D19.0 ADDITIONAL SERVICE REQUIREMENTS.

CFG acknowledges the following services are to be performed for inmates detained at the Department of Corrections . . . .

. . . .

DOC5.3 MENTAL HEALTH SERVICES

There shall be sufficient mental health staff to provide: Psychiatric services at the minimum sixteen (16) hours per week of on-site patient care around the clock[;]

[O]n call/call back availability for emergencies and for commitments to psychiatric hospitals[; and]

[A]dditional time as needed to meet the psychiatric needs of the inmates

Mental Health Services shall also include provision for seventy[-]four (74) hours per week of Psychological Services by Clinical Psychologists as follows:

One (1) full-time, on-site (forty (40) hrs/week, Mon-Fri) plus one (1) part-time, on-site (20 hrs./week Mon. thru Friday), One (1) on site part time (fourteen (14) hrs/week, Sat & Sun).

Interview all new arrivals to the jail with an identified mental health history within 24 hours

When on-site, respond to requests from R & D officers when a new arrival presents with significant mental health problems in reception

Provide urgent responses to current inmates who are in crisis

Attend daily classification meeting to provide information about new arrivals to the facility and their psychological suitability for general population, as well as current inmates being maintained on special watches in the facility

Plaintiffs contend that CFG breached the contract by failing to provide medical services to Yearby required under the contract and that Yearby was an intended third-party beneficiary of the contract. In response, Denise Rahaman, CFG's Executive Director of Correctional Services, certified that (1) it was never the intention of CFG to make detainees intended beneficiaries with a right to sue for breach under the contract, and (2) there is no language in the contract which expresses any such intent to make detainees intended beneficiaries with a right to sue for breach under the contract.

The Request for Proposals issued by Middlesex County stated: "D 26.0 LITIGATION . . . The Contractor will defend and hold Middlesex County harmless from all claims, demands, or judgments deriving from alleged professional malpractice of any of its employees . . . ." CFG's Proposal contained an identical indemnification clause.

Dispositive Motion Practice

Plaintiffs' original complaint named Angela Ward, RN, Nicole Tuesday, LPN, and Gideon Thuo, RN, as defendants and asserted claims of professional negligence.[3] On July 8, 2016, the trial court granted an unopposed motion to

[3] CFG was not named as a defendant in the original Complaint.

dismiss those claims for failing to serve a timely Affidavit of Merit (AOM) as required by the Affidavit of Merit Statute, N.J.S.A. 2A:53A-26 to -29.[4] On October 24, 2016, the trial court granted plaintiffs' motion to reinstate those claims, finding grounds to warrant relief from the time restrictions imposed by N.J.S.A. 2A:53A-27. The defendant nurses' motion for reconsideration was denied. We granted leave to appeal the order reinstating the claims against the nurses. On February 27, 2018, we reversed the reinstatement order and remanded, finding plaintiffs had not substantially complied with the statutory mandate or established extraordinary circumstances warranting equitable relief from the AOM statute. Estate of David Yearby v. Middlesex Cnty., 453 N.J. Super. 388, 406-07 (App. Div. 2018). On remand, the July 8, 2016 dismissal order was reinstated and all claims were dismissed with prejudice against the defendants Ward, Tuesday, and Thuo.

Following subsequent motion practice, plaintiffs filed a twenty-count first amended complaint that added a third-party complaint against CFG for breach of contract. The amended complaint also pleaded causes of action for: violation

[4] Plaintiffs eventually served an AOM some 227 days after the nurses filed their responsive pleading and 107 days after the maximum period to file an AOM under N.J.S.A. 2A:53A:27.

of the NJCRA and Yearby's right to substantive due process-special relationship under the New Jersey Constitution (count I); violation of the NJCRA and Yearby's right to substantive due process-state created danger under the New Jersey Constitution (count II); violation of the NJCRA and Yearby's right to procedural due process under the New Jersey Constitution (count III); defendants Piscataway and Middlesex County violation of the NJCRA by failing to properly train their employees (count IV); negligence under the TCA (counts V-VIII, XIV); violation of 42 U.S.C. § 1983 (counts IX & XV); violation of 42 U.S.C. § 1985(3) (count X); battery (count XI); assault (count XII); aiding and abetting (count XIII); conspiracy to violate the NJCRA (count XVI); conspiracy to commit tort (count XVII); intentional infliction of emotional distress (count XVIII); recovery of damages under the for Wrongful Death Act, N.J.S.A. 2A:31-1 to -6 (count XIX); and spoliation of evidence (count XX).

CFG moved for reconsideration of the order granting plaintiffs leave to file a third-party complaint against CFG, and in the alternative for dismissal of the third-party complaint. The motion was denied. Following oral argument on the additional ground of dismissal of the third-party complaint, which had not been addressed by the court, the court granted summary judgment to CFG. The court stated:

> The Court finds that the County and CFG did not intend that a third party should receive a benefit which might be enforced in the courts. Any benefits the decedent received were incidental to the contract between the County and [CFG]. As the contracting parties did not specifically confer upon the decedent, or any other inmate, the right to enforce the service agreement.

A subsequent order denied CFG's application to dismiss the third-party complaint for failure to file an affidavit of merit as moot.

In April 2020, Piscataway moved for summary judgment dismissing plaintiffs' first amended complaint in its entirety. Plaintiffs cross-moved for partial summary judgment. On March 5, 2021, the court granted Piscataway summary judgment, dismissing the first amended complaint in its entirety, and denied plaintiffs' cross-motion for partial summary judgment. This appeal followed.

Plaintiffs raise the following points for our consideration:

> POINT I
>
> THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' THIRD[-]PARTY COMPLAINT AGAINST [CFG].
>
> A. Third Party Beneficiary Ground for Dismissal.
>
> B. Affidavit of Merit Ground for Dismissal.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO [PISCATAWAY], AS PLAINTIFFS HAVE DEMONSTRATED A PRIMA FACIE CASE FOR THEIR STATE LAW AND CONSTITUTIONAL CLAIMS AGAINST PISCATAWAY.

A. Count I: Claims Pursuant to the [NJCRA].

POINT III

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON PLAINTIFFS' [TCA] CLAIMS AGAINST PISCATAWAY AS PLAINTIFFS HAVE DEMONSTRATED A PRIMA FACIE CASE UNDER THE [TCA].

A. Statutory Immunities Under the TCA Do Not Apply.

(1) N.J.S.A. 59:2-4 and 3-5: Adoption or Failure to Adopt or Enforce a Law.

(2) N.J.S.A. 59:3-3: Execution or Enforcement of a Law.

(3) N.J.S.A. 59:2-10: Public Employee Conduct-Limitations on Entity Liability.

(4) N.J.S.A. 59:6-4: Failure to Make Physical or Mental Examination to Make Adequate Physical or Mental Examinations.

(5) N.J.S.A. 59:6-6: Determination in Accordance with Applicable Enactments.

B. There Exists a Statutory Basis for Liability under the TCA.

C. Claims under Count VII – Negligence in the Treatment of [Yerby's] Mental Health Condition.

D. Proximate Cause.

POINT IV

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT.

A. Piscataway is Not Entitled to Any Statutory Immunities Under the TCA.

B. The TCA Provides Authority for Liability for Negligent Failure to Follow Policy and Procedure.

C. The State has Created a Substantive Due Process Right for [Yearby] to Receive Adequate Medical Care.

D. On Remand, Plaintiffs are Entitled to an Inference of Spoliation of Evidence for Piscataway's Failure to Preserve the Surveillance Video of [Yearby] while in the Custody of the PPD.

POINT V

ON REMAND, PLAINTIFFS ARE ENTITLED TO RELIEF PURSUANT TO THE WRONGFUL DEATH ACT.

II.

We review a grant of summary judgment using the same standard that governs the trial court's decision. RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018) (citing Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). Under that standard, summary judgment will be granted when "the competent evidential materials submitted by the parties[,]" viewed in the light most favorable to the non-moving party, show that there are no "genuine issues of material fact" and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 24 (2017) (quoting Bhagat, 217 N.J. at 38); accord R. 4:46-2(c). "An issue of material fact is 'genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.'" Ibid. (quoting Bhagat, 217 N.J. at 38). We conduct a de novo review of the trial court's determination of legal issues, Ross v. Lowitz, 222 N.J. 494, 504 (2015), and the court's "application of legal principles to [its] factual findings[.]" Lee v.Brown, 232 N.J. 114, 127 (2018) (quoting State v. Nantambu, 221 N.J. 390, 404 (2015)).

III.

We first address the grant of summary judgment to Piscataway. At the time of Yearby's arrest, Velasquez and Ullrich had been officers in the PPD for approximately twenty-five years and had received the PPD's Standard Operating Procedures (SOPs), including updates, on the use of force and dealing with emotionally disturbed persons, as well as related training.

In 2013, PPD adopted SOPs regarding Arrest, Transportation and Processing of individuals, and dealing with arrestees exhibiting signs of mental illness and emotional disturbance. As we have noted, the SOP pertaining to emotionally disturbed persons states: "It is the policy of the [PPD] to treat emotionally disturbed persons and persons with mental illness with dignity and to divert these persons from the criminal justice system where appropriate." The policy provides that "[t]he shift sergeant or designee will determine" whether an arrestee "exhibit[ing] signs of mental illness" or "who may be emotionally disturbed" "should be taken to the booking room or to a medical facility for evaluation and/or treatment first." PPD policy regarding emotionally disturbed persons notes that the purpose of the policy was "to provide guidance for department personnel in recognizing and dealing with persons with mental illness or emotional disturbances."

Richard Rivera, plaintiffs' expert on law enforcement policies, practices, procedures, and training, opined there were numerous violations of police department policies and procedures, as well as State regulations by PPD officers, that led to the failure to identify Yearby's mental illness and failure to transport Yearby to the hospital as opposed to the MCACC, thereby causing the chain of events that led ultimately to Yearby's death. Rivera further opined that that the harm suffered by Yearby was foreseeable and preventable based upon facts that established that Yearby needed medical attention for his emotionally disturbed behavior, which required a medical/psychological evaluation.

Rivera acknowledged, however, that PPD had "successfully achieved accreditation" prior to Yearby's arrest, and had:

> • "adopted acceptable baseline policies and procedures to hold its officers and supervisors accountable for the subject areas relating to the Yearby incident."
>
> • "adopted an acceptable policy on transporting and processing of arrestees, including persons with special needs."
>
> • "adopted an acceptable policy on providing officers with guidance in recognizing and dealing with persons with mental illness or emotional disturbances [and] transporting and processing of arrestees, including persons with special needs."

Thus, plaintiff's own expert opined that PPD had acceptable policies in place for dealing with arrestees exhibiting signs of mental illness or emotional disturbance. The uncontroverted evidence is that PPD officers received copies of the polices and training on them. Noticeably absent is any evidence of improper hiring, lack of training, or lack of supervision of officers. Also absent is any evidence of a custom or practice of ignoring the PPD policies by failing to have arrestees exhibiting signs of mental illness or emotional disturbance transported to the APS Unit for mental health screening.

Raymond Hayducka, Piscataway's expert on police practices, opined Yearby was uncooperative and resisted arrest, but once he was "under control and in custody he became cooperative and did not display any signs of physical or mental illness." As such, there was no need for a mental health evaluation, and the decision to transport Yearby to the police station for booking and then to the MCACC, "was sound and logical and in line with [PPD] Policy and contemporary police practices."

A.

Plaintiffs argue that the trial court erred in dismissing their negligence claims against Piscataway. They contend that the statutory immunities

enumerated in the TCA do not apply. We are unpersuaded, as certain immunities afforded by the TCA immunize Piscataway from plaintiffs' negligence claims.

"To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) 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) (citing Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008)). With limited exceptions that do not apply to this case, the liability of public entities for negligence is governed by the TCA.

The approach of the TCA is to broadly limit public entity liability. Jones v. Morey's Pier, Inc., 230 N.J. 142, 154 (2017). The TCA is strictly construed to effectuate that purpose. McDade v. Siazon, 208 N.J. 463, 474 (2011). Generally, courts are instructed to find immunity for public entities with liability as the exception. Lee, 232 N.J. at 127.

To that end, a basic tenet of the TCA is that "government should not have the duty to do everything that might be done. Consequently, it is . . . the public policy of this State that public entities shall only be liable for their negligence within the limitations of [the TCA] . . ." N.J.S.A. 59:1-2. Except as otherwise provided [in the TCA], "a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee

or any other person." N.J.S.A. 59:2-1(a). "If the public employee is not liable for an act or omission, the public entity is not liable." Nieves v. Off. of the Pub. Def., 241 N.J. 567, 575 (2020) (citing N.J.S.A. 59:2-2(b)). In addition, "[a]ny liability of a public entity established by [the TCA] is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person." N.J.S.A. 59:2-1(b); accord Malloy v. State, 76 N.J. 515, 519-21 (1978). Therefore, if applicable, the immunities set forth in the TCA must be applied.

1.

"A public entity is not liable for any injury caused by adopting or failing to adopt a law or by failing to enforce any law." N.J.S.A. 59:2-4. "Under this section, an entity is not liable for failure to enforce safety ordinances, regulations or the law generally." Margolis & Novack, Claims Against Public Entities, cmt. on N.J.S.A. 59:2-4 (2022); see also Levin v. Cnty of Salem, 133 N.J. 35, 49-50 (1993) (failure to enforce no diving ordinance on a low bridge over shallow water cannot create liability for diving accident); Perona v. Twp. of Mullica, 270 N.J. Super. 19, 29-30 (App. Div. 1994) (immunity of police officer who failed to enforce statutory requirement to take into custody a potential suicide victim). The immunity provided by N.J.S.A. 59:2-4 extends to

both ministerial and discretionary acts. Garry v. Payne, 224 N.J. Super. 729, 735 (App. Div. 1988). This immunity can be invoked when the "critical causative conduct by government employees consists of non-action or the failure to act with respect to the enforcement of the law." Lee, 232 N.J. at 127 (quoting Bombace v. Newark, 125 N.J. 361, 373 (1991)).

Here, plaintiffs contend that Velazquez failed to enforce the "clear and express guidelines promulgated by the PPD with regard to detainees . . . exhibiting signs of mental illness[.]" Plaintiffs also contend that Velazquez violated N.J.S.A. 30:4-27.6, which requires a law enforcement officer to take a person in custody directly to a screening service if there is reasonable cause to believe that the person requires involuntary commitment. Pursuant to N.J.S.A. 59:2-4, Piscataway is immune from liability for Velazquez's failure to comply with N.J.S.A. 30:4-27.6 and related PPD policies.

2.

N.J.S.A. 59:3-3 provides that "[a] public employee is not liable if he acts in good faith in the "execution or enforcement of any law." In turn, N.J.S.A. 59:3-5 provides that "[a] public employee is not liable for an injury caused by . . . his failure to enforce any law." Good faith is demonstrated where the employee's conduct was objectively reasonable or where the employee acted

with subjective good faith, despite lacking objective reasonableness. Fielder v. Stonack, 141 N.J. 101, 132 (1995).

Here, Yearby was transferred to MCACC pursuant to a lawful commitment order issued by a municipal court judge. Velazquez's actions in adhering to the commitment order were objectively reasonable. While in custody at PPD headquarters, Yearby did not display overt behaviors suggesting that he was suffering from acute mental illness severe enough to warrant sending him for an immediate mental health screening, other than at MCACC, which routinely performed such screenings on newly admitted inmates.[5] Notably absent from Yearby's conduct prior to, during, or after his arrest, or during booking and processing at PPD headquarters, was any evidence that he was suicidal or otherwise intended to hurt himself.

Velazquez also acted with subjective good faith, believing there was no mental health emergency based on Yearby's behavior at PPD headquarters. When he spoke with Yearby's sister, he recommended that she contact MCACC regarding Yearby's mental health history.

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[5] On appeal, plaintiffs proffer no expert report by a psychologist or psychiatrist opining that Yearby's behavior during the arrest sequence or while at the police station showed he was psychotic, suffering from an acute mental illness, or acute emotional disturbance. Nor have plaintiffs produced any competent evidence of Yearby's prior mental health history, diagnosis, or treatment.

Under these circumstances, Velazquez is entitled to immunity under N.J.S.A. 59:3-3. Therefore, Piscataway is also entitled to immunity. See N.J.S.A. 59:2-2(b) ("A public entity is not liable for an injury resulting from an act or omission of a public employee where the public employee is not liable.").

3.

N.J.S.A. 59:6-4, which pertains to failure to make a physical or mental examination, provides in relevant part:

> Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination . . . of any person for the purpose of determining whether such person has a . . . mental condition . . .

Here, plaintiffs do not contend that Velazquez failed to make an adequate examination of Yearby's mental health for the purpose of treatment by Velazquez or the PPD. Neither Velazquez nor the PPD is a mental health care provider. Accordingly, to that extent, we need not address immunity under N.J.S.A. 59:6-4.

Plaintiffs assert that Piscataway is liable for the failure to send Yearby for an immediate mental health screening, rather than to MCACC, contrary to its own policy. According to the 1972 Task Force Comment, N.J.S.A. 59:6-4 "does not apply to examinations for the purpose of treatment such as are ordinarily

made in doctors' offices and public hospitals." Instead, the immunity granted by N.J.S.A. 59:6-4 "pertains to the failure to perform adequate public health examinations, such as public tuberculosis examinations, physical examinations to determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants." Ibid. We conclude that N.J.S.A. 59:6-4 does not immunize Piscataway.

4.

N.J.S.A. 59:6-6 provides immunity to public entities and public employees "for any injury resulting from determining in accordance with any applicable enactment: (1) whether to confine a person for mental illness or drug dependence[.]" Here, Yearby was already in police custody for his new charges and his outstanding arrest warrant. He was neither confined nor released from confinement by the PPD due to a mental illness. Therefore, N.J.S.A. 59:6-6 does not apply.

B.

Summary judgment was correctly granted to Piscataway, dismissing plaintiffs' negligence claims, for an additional, independent reason. With respect to the element of proximate cause, "[i]f an injury is not a foreseeable

consequence of a person's act, then a negligence suit cannot prevail." Komlodi v Picciano, 217 N.J. 387, 417 (2014).

A superseding or intervening act also bars recovery. "A superseding or intervening act is one that breaks the 'chain of causation' linking a defendant's wrongful act and an injury or harm suffered by a plaintiff." Id. at 418 (quoting Cowan v. Doering, 111 N.J. 451, 465 (1988)). An intervening cause must be foreseeable for it to not "break the chain of causation and relieve a defendant of liability." Ibid.

Applying these principles, we conclude that the record establishes that plaintiffs cannot establish proximate cause. It was not foreseeable that CFG would fail to conduct a mental health assessment of Yearby. Nor was it foreseeable that Yearby would experience an asthmatic reaction from being excessively pepper sprayed, which was exacerbated by the use of a spit hood. It was also unforeseeable that Yearby would suffer severe neck and spinal cord injuries when forcefully extracted from his cell by corrections officers, and be placed in a restraint chair for nine hours while wearing a spit hood. These events were an intervening, unforeseeable cause that broke the chain of causation.

Put simply, given the nature of Yearby's conduct while in the custody of the PPD, which did not indicate psychotic or suicidal behavior, it was not

foreseeable that transporting Yearby to MCACC would result in Yearby not being screened for mental health issues as part of the admission process, his subsequent forceful cell extraction, his violent injuries, or his ultimate death from those injuries.

C.

In sum, notwithstanding the inapplicability of N.J.S.A. 59:6-4 and N.J.S.A. 59:6-6, Piscataway is immune from liability under the TCA pursuant to N.J.S.A. 59:2-2(b), N.J.S.A. 59:2-4, and the lack of proximate causation due to an intervening, unforeseeable cause—his treatment by correctional staff and lack of routine mental health assessment and treatment by CFG at MCACC. Accordingly, the trial court correctly granted summary judgment dismissing plaintiffs' negligence claims against Piscataway under the TCA.

IV.

Plaintiffs argue that the trial court erred in dismissing their claims against Piscataway under the NJCRA. Plaintiffs contend that Piscataway deprived Yearby of his right to substantive due process. Specifically, plaintiffs allege that Velazquez failed to provide Yearby medical attention after he exhibited signs of mental illness. They assert that instead of sending Yearby to MCACC, Velazquez should have sent Yearby for a mental health evaluation.

NJCRA provides:

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with, by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [N.J.S.A. 10:6-2(c).]

The Legislature's intent in enacting NJCRA was "to provide New Jersey citizens with a state analogue to Section 1983[6] actions." Perez v. Zagami, LLC, 218 N.J. 202, 215 (2014). "Given their similarity, our courts apply [Section] 1983 immunity doctrines to arising claims under [NJCRA]." Brown v. State, 442 N.J. Super. 406, 425 (App. Div. 2015), rev'd on other grounds, 230 N.J. 84 (2017); see also Gormley v. Wood-El, 218 N.J. 72, 113-15 (2014) (discussing the qualified immunity doctrine). Thus, claims under NJCRA are considered in a manner consistent with Section 1983 jurisprudence.

NJCRA "is intended to provide what Section 1983 does not: a remedy for the violation of substantive rights found in our State Constitution and laws."

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6 42 U.S.C. § 1983.

Tumpson v. Farina, 218 N.J. 450, 474 (2014). Where Section 1983 applies to deprivations of federal rights, NJCRA applies both to federal rights and substantive rights guaranteed by New Jersey's Constitution and laws. Gormley, 218 N.J. at 97. The interpretation of Section 1983's parallel provisions provides guidance to interpreting NJCRA. Ibid.

A substantive due process claim under NJCRA requires plaintiff to: (1) "identify the state actor, 'the person acting under the color of law,' that has caused the alleged deprivation"; and (2) "identify a 'right, privilege or immunity' secured to the claimant by the Constitution or other federal laws of the United States." Rivkin v. Dover Twp. Rent Leveling Bd., 143 N.J. 352, 363 (1996) (quoting Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)).

A governmental unit "may not be sued under [Section] 1983 for an injury inflicted solely by its employees or agents." Monell, 436 U.S. at 694. It cannot be held liable for the actions of its employees solely based on the doctrine of respondeat superior. Id. at 691. Rather, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under [Section] 1983 [and by extension, NJCRA]." Id. at 694; accord Besler v. Bd. of Educ. of W. Windsor-Plainsboro

Reg'l Sch. Dist., 201 N.J. 544, 565 (2010) (stating that a municipality can "be held liable for acts committed by one of its employees . . . pursuant to a government policy or custom . . . that violate[s] the Constitution").

"The legal principles governing the liability of a municipality under the [NJ]CRA and § 1983 are essentially the same." Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165, 190 (2021).

> Under the CRA and § 1983, a municipality can be held liable only if it causes harm through 'the implementation of "official municipal policy."' Lozman v. City of Riviera Beach, 585 U.S. ___, 138 S. Ct. 1945, 1947 (2018) (quoting Monell, 436 U.S. at 691); see also Stomel v. City of Camden, 192 N.J. 137, 145 (2007). A municipality is not legally accountable solely because of the acts of one of its employees -- acts that do not represent official policy -- under the doctrine of respondeat superior. Stomel, 192 N.J. at 145 (citing Monell, 436 U.S. at 690-91); see also Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986) ("The 'official policy' requirement was intended to distinguish acts of the municipality from acts of [its] employees . . . .").
>
> [Id. at 190-91.]

That said, municipalities sometimes

> delegate authority to officials "whose edicts or acts may fairly be said to represent official policy," and in those circumstances municipal liability may attach. Stomel, 192 N.J. at 145 (quoting Monell, 436 U.S. at 694); see also Pembaur, 475 U.S. at 480 ("[I]t is plain that municipal liability may be imposed for a single

> decision by municipal policymakers under appropriate circumstances."). In short, "a municipality may be accountable for the action of an official who 'possesses final authority to establish municipal policy'" and who exercises that authority in violation of a person's rights. [Besler, 201 N.J. at 565] (quoting Stomel, 192 N.J. at 146).
>
> [Id. at 191 (alteration in original).]

In addition, there must be a direct causal link between the municipality's custom, policy, or practice and the alleged constitutional deprivation. Bd. of the Cnty. Cmm'rs v. Brown, 520 U.S. 397, 403-04 (1997); City of Canton v. Harris, 489 U.S. 378, 385 (1989).

An unconstitutional governmental policy may be inferred from a single decision taken by the highest "officials responsible for establishing final policy with respect to the subject matter in question." Pembaur, 475 U.S. at 483-84. Nevertheless, proof of a single incident of unconstitutional activity is insufficient to impose municipal liability "unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." City of Okla. City v. Tuttle, 471 U.S. 808, 823-24 (1985). "The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action

for which the municipality is actually responsible." Pembaur, 475 U.S. at 479 (footnote omitted). Similarly, a single incident of wrongful conduct by an employee does not demonstrate a custom under Monell. Id. at 481-83.

Thus, a plaintiff may establish the existence of a policy or custom by presenting proof that the municipality: (1) adopted an official policy that deprived citizens of their constitutional rights; (2) tolerated or adopted an unofficial custom that deprived citizens of their constitutional rights; or (3) failed to affirmatively act to train or supervise its employees so as to prevent them from unlawfully depriving citizens of their constitutional rights, although the need to do so was obvious. Natale v. Camden Cnty. Corr. Facility, 318 F.3d 575, 584 (3d Cir. 2003). But a municipality is not liable under Section 1983 and NJCRA based on the act or failure to act of employees "that do not represent official policy -- under the doctrine of respondeat superior." Winberry Realty, 247 N.J. at 191 (citing Stomel, 192 N.J. at 145).

Here, plaintiff alleges that Velazquez, while acting under color of law, violated Yearby's right to substantive due process by depriving Yearby of necessary medical attention while in police custody. Namely, plaintiffs contend that Velazquez should have sent Yearby for a mental health screening in accordance with PPD policies, instead of sending him to MCACC. Plaintiffs do

not, and cannot, point to a Township or PPD policy, custom, practice, or failure to train or supervise Velazquez or other PPD members, that resulted in a deprivation of Yearby's right to substantive due process. Nor is there any evidence that Velazquez had "final policymaking authority." Accordingly, Piscataway is not liable for any wrongs committed by Velazquez or the other PPD officers.

Plaintiffs rely on Tumpson in support of their proposition that a plaintiff asserting a NJCRA claim does not need to demonstrate that the employee's actions were the result of a policy, custom or practice adopted and promulgated by the municipality. We disagree. We recognize that in Tumpson, the Court does not expressly address any policy, custom or practice of the municipality that deprived the plaintiff of his substantive rights. However, in Tumpson, the defendant's role as City Clerk provided him with final authority to establish municipal policy with respect to the action ordered, namely, preventing plaintiff from filing a petition for a referendum. 218 N.J. at 456; see also Winberry Realty, 247 N.J. at 191 ("In short, 'a municipality may be accountable for the action of an official who possesses final authority to establish municipal policy[.]'" (citations omitted)). Here, Velazquez had no such final policymaking

authority to establish policies for the treatment of arrestees exhibiting signs of mental illness or emotional disturbance.

Velazquez made the decision to send Yearby to MCACC rather than for a mental health screening. This single, isolated decision does not rise to the level of a policy, custom or practice. Moreover, there is no evidence that Velazquez's decision was based on a Township or PPD policy, custom or practice. The same analysis and result apply even if Velazquez violated N.J.S.A. 30:4-27.6 because he had "reasonable cause to believe that [Yearby was] in need of involuntary commitment to treatment." For these reasons, the trial court correctly granted summary judgment dismissing plaintiffs' claims NJCRA claims against Piscataway.

For sake of completeness, we further note that plaintiffs' substantive due process claim is based on an underlying claim that Yearby's Eighth Amendment rights were violated. Deliberate indifference to an arrestee's or prisoner's serious medical needs constitutes cruel and unusual punishment, violates the Eighth Amendment, and states a cause of action under Section 1983. Estelle v. Gamble, 429 U.S. 97, 104-05 (1976). Mere negligence does not. Id. at 106. Accordingly, "mere disagreement as to the proper medical treatment [does not] support a claim of an eighth amendment violation." Monmouth Cnty. Corr. Institutional

Inmates v. Lanzaro, 834 F.2d 326, 346 (3rd Cir. 1987). Thus, a complaint that a patrol supervisor inadvertently failed to provide adequate medical care does not state a valid claim of medical mistreatment under the Eighth Amendment. Estelle, 429 U.S. at 105-06.

The record shows that medical treatment and mental health screening were normally part of the admission process of every newly admitted inmate at MCACC. Plaintiffs present no expert medical opinion that Yearby was exhibiting overtly psychotic or suicidal behavior while at PPD headquarters. Plaintiffs have not demonstrated that Velazquez's acts or omissions went beyond mere negligence and rose to the level of deliberate indifference to Yearby's serious medical needs. For this additional reason, plaintiffs' NJCRA claims against Piscataway were correctly dismissed.

V.

We next address plaintiffs' breach of contract claim against CFG. Plaintiffs argue that Yearby was an intended third-party beneficiary of the contract between the County and CFG to provide medical care and mental health services to MCACC inmates, and thereby had standing to sue CFG for breach of contract. We are convinced that the trial court correctly ruled that plaintiffs

did not have standing to pursue a breach of contract claim against CFG because Yearby was not an intended third-party beneficiary of the contract.

N.J.S.A. 2A:15-2 provides: "A person for whose benefit a contract is made, either simple or sealed, may sue thereon in any court . . . although the consideration of the contract did not move from him."

A third-party may only enforce a contract if they are an intended, rather than an incidental, beneficiary of the agreement. Broadway Maint. Corp. v. Rutgers, State Univ., 90 N.J. 253, 259 (1982) (citing Standard Gas Power Corp. v. New England Cas. Co., 90 N.J.L. 570, 573-74 (E. & A. 1917)). "The determining factor as to the rights of a third[-]party beneficiary is the intention of the parties who actually made the contract." Ibid. (quoting Brooklawn v. Brooklawn Hous. Corp., 124 N.J.L. 73, 76-77 (E. & A. 1940)). "If that intent does not exist, then the third person is only an incidental beneficiary, having no contractual standing." Ibid. (citing Standard Gas Power, 90 N.J.L. at 573-74); accord Rieder Cmtys. v. N. Brunswick, 227 N.J. Super. 214, 221-22 (App. Div. 1988); Restatement (Second) of Contracts § 302 (Am. Law Inst. 1979); 9 John E. Murray, Jr., Corbin on Contracts § 44.1 (rev. ed. 2007).

"Thus, the real test is whether the contracting parties intended that a third party should receive a benefit which might be enforced in the courts; and the

fact that such a benefit exists, or that the third party is named, is merely evidence of this intention." Ibid. (quoting Brooklawn., 124 N.J.L. at 76-77). The contracting parties "may expressly negate any legally enforceable right in a third party. Likewise they may expressly provide for that right." Id. at 260. If the contract is silent on the issue, the court must "examine the pertinent provisions in the agreement and the surrounding circumstances to ascertain that intent." Ibid. (citing Talcott v. H. Corenzwit & Co., 76 N.J 305, 312 (1978)).

Here, the contract between the County and CFG is silent as to third-party beneficiaries. In the absence of express language either providing the right or negating it, we must ascertain the parties' intent based on the contract's provisions and the surrounding circumstances.

Plaintiffs point to language in the contract that recognizes various benefits inmates are entitled to receeive. For example, the contract reads, "CFG will establish a program for assuring that quality health services provided [sic] to the inmates . . . ." and that "[t]he following services are to be performed for inmates detained at the Department of Corrections." Regarding the contract's objectives, it specifies that the program intends to "operate healthcare and rehabilitations service programs in a humane manner respectful of inmates . . . rights to basic healthcare standards . . . ." Such benefits are insufficient to establish that the

contracting parties intended for inmates to qualify as intended third-party beneficiaries with standing to enforce the contract.

The contract's primary goal is to provide MCACC with medical services to satisfy its constitutional obligation to provide inmates with reasonable health care. See Pryor v. Dep't of Corrections, 395 N.J. Super. 471, 493 (App. Div. 2007) (noting that "inmates are entitled to receive reasonable medical care while incarcerated [under the Eighth Amendment]"). Notably absent from the County's request for proposals, CFG's proposal, and the resulting contract, is any language evidencing an intention that inmates were intended beneficiaries of the contract.

Plaintiffs have cited no published case law recognizing inmates as intended third-party beneficiaries of contracts to provide medical or psychological services to inmates, and we have found none. On the contrary, the courts that have decided this issue held that inmates are not intended third-party beneficiaries of such contracts.[7]

[7] Numerous unpublished opinions have held that inmates are incidental beneficiaries of such contracts, not intended third-party beneficiaries that have standing to sue for breach of contract. Pursuant to Rule 1:36-3, we do not cite or rely on those opinions.

Plaintiffs have not alleged facts to show Yearby was an intended third-party beneficiary of the contract. MCACC inmates, including Yearby, are indirect, incidental beneficiaries of the contract between the County and CFG. Plaintiffs have not established that the County and CFG intended to confer a right to enforce the contract upon Yearby or other MCACC inmates. The trial court correctly dismissed plaintiffs' breach of contract claim.

The trial court did not reach CFG's argument that plaintiffs' claims were barred by failure to comply with the AOM statute. Considering our ruling that Yearby was not an intended beneficiary of the contract, we likewise do not reach plaintiffs' argument in Point IB regarding the dismissal of claims against CFG based on the failure to submit a timely AOM.

VI.

Plaintiffs argue that they are entitled to an adverse spoliation inference. On November 20, 2014, then counsel for plaintiffs sent a notice of tort claim to the Mayor of Piscataway and a letter faxed to PPD, advising that his law firm represented the Estate of David Yearby regarding Yearby's arrest on October 31, 2014. The letter requested "cop[ies] of all reports, records, pictures, and videos that the department has in its possession regarding David Yearby."

Central Records responds to requests for records by collecting the requested materials to which they have access, such as police reports, 911 calls, and photos. Central Records personnel do not have access to security cameras within the Police Station, which can only be accessed by the Chief of Police's Office. On December 2, 2014, Wiley provided the responsive documents that were collected from Central Records to the Chief of Police. Thereafter, Central Records responded to counsel's request. However, by then, the videos had been "recycled" pursuant to a PPD policy that discards such videos after a thirty-day period.

Spoliation typically refers to the destruction or concealment of evidence by a party to impede the ability of another party to litigate a claim. See Rosenblit v. Zimmerman, 166 N.J. 391, 400-01 (2001). Depending on the circumstances, spoliation of evidence can result in a separate tort action for fraudulent concealment, discovery sanctions, or an adverse trial inference against the party that caused the loss of evidence. Id. at 401-06. A spoliation inference permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator. Id. at 401-02. The inference serves the purpose "of evening the playing field where evidence has been hidden or destroyed." Id. at 401. "When the duty to preserve evidence is violated, the party is responsible

regardless of whether the spoliation occurred because of intentional or negligent conduct." Bldg. Materials Corp. of Am. v. Allstate Ins. Co., 424 N.J. Super. 448, 472-73 (App. Div. 2012).

A party asserting a claim of spoliation must establish "[t]hat defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation[.]" Rosenblit v. Zimmerman, 166 N.J. at 407. Plaintiffs have not satisfied that burden. Moreover, we have determined that the claims against Piscataway were correctly dismissed while viewing the facts in a light most favorable to plaintiffs.

VII.

In Point IV of their brief, plaintiffs argue that the trial court erred in denying their cross-motion for partial summary judgment against Piscataway on their negligence claims brought under the TCA. For the reasons we have already stated, this argument lacks sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

VIII.

In Point V of their brief, plaintiffs argue that on remand, they are entitled to recovery under the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 to -6,

and the New Jersey Survivor's Act, N.J.S.A. 2A:15-3.[8] We disagree. Neither the Wrongful Death Act nor the Survivor's Act created any new causes of action; they only provided new statutory paths for recovery of damages in valid underlying causes of action. See Aronberg v. Tolbert, 207 N.J. 587, 602-05 (2011) ("Just as the estate in a survivor's action has no better claim than [the decedent] had in life, so too [the decedent's mother] in a wrongful death action

[8] "At common law, no civil remedy was available for a personal injury resulting in death, either to the decedent's estate or the decedent's dependents." Smith v. Whitaker, 160 N.J. 221, 230 (1999); accord Baker v. Bolton, 170 Eng. Rep. 1033 (1808) (establishing the common law principle denying recovery for wrongful death). "Survival actions . . . were [also] unknown at common law." Id. at 233. The Wrongful Death Act and the Survivor's Act addressed this strict and arbitrary limitation on recoverable damages. Id. at 231. The Acts "serve different purposes and are designed to provide a remedy to different parties." Ibid. The Wrongful Death Act provides a statutory basis for the recovery of limited damages for the loss of the "pecuniary advantage which would have resulted by continuance of the life of the deceased," Green v. Bittner, 85 N.J. 1, 11 (1980) (quoting Cooper v. Shore Electric Co., 63 N.J.L. 558, 567 (E. & A.1899)), suffered by the decedent's intestate heirs, N.J.S.A. 2A:31-5. It also allows recovery of "damages for the parents' loss of their child's companionship as they grow older, . . . as well the advice and guidance that often accompanies it." Green, 85 N.J. at 4. In contrast, the Survival Act "contains no express limitation on the types of damages recoverable under the statute." Smith, 160 N.J. at 234. It provides a statutory vehicle for an action brought by the decedent's estate, to recover damages "in the same manner as if the decedent had been living[,]" id. at 233, "for injury to the decedent's "person or property," N.J.S.A. 2A:15-3, caused by the tortious or otherwise unlawful conduct of the defendant, and for breach of contract, even if the death resulted from natural causes. The damages recoverable under the Survivor's Act include the conscious pain and suffering endured by the decedent. Smith, 160 N.J. at 234.

possesses no better claim than her son had he lived."). Consequently, if the decedent could not have prevailed in an action for damages resulting from an injury or breach of contract, there is no basis for recovery under the Wrongful Death Act or the Survivor's Act. Id. at 603-05. Because we affirm the dismissal of plaintiffs' underlying negligence and NJCRA claims against Piscataway and breach of contract claim against CFG, there is no basis to recover damages under the Wrongful Death Act or the Survivor's Act, and no reason to remand this matter to the trial court.

To the extent we have not specifically addressed any of plaintiffs' remaining arguments, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.