

FILED

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Washington Superior Court

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Docket No. 340-6-03 Wincy SUPERIOR COURT
WASHINGTON COUNTY

**BARRE SUPERVISORY UNION #61,
and BARRE CITY,
Defendants.**

Barre City's Motion for Summary Judgment

In its summary judgment motion, the City argues that Plaintiff cannot support her case with evidence of actual causation, or cause-in-fact.² In other words, the City argues that even assuming that the police breached the duties the Missing Persons statute imposes on them, the evidence does not support a jury finding that any action or failure to act of theirs caused DeAndrea's murder. The City presents this argument in two forms. It presents what it argues is the only timeline of the events leading up to the murder that it believes can be supported by admissible evidence. That timeline suggests that the murder occurred several hours earlier than the time when the police first received notice that DeAndrea was missing. According to that timeline, it would have been impossible for the police to intervene and, thus, nothing that the police did or did not do could have caused the murder. The City also argues that, even under the sequence of events that Plaintiff seeks to prove, Plaintiff's evidence is not sufficient on the issue of causation to warrant submitting this case to a jury.

Plaintiff argues that she is entitled to prove the element of actual causation with circumstantial evidence, and that there is sufficient circumstantial evidence to support an inference that the police failure to act as required by statute caused DeAndrea's death. In

¹ Plaintiff also asserted claims against the school district, which have since been dismissed in *Edson v. Barre Supervisory Union #61*, 2007 VT 62.

² The City's summary judgment motion is limited to the element of actual causation, or cause-in-fact. The "quite different" element of proximate cause is not at issue. See generally D. Dobbs, *The Law of Torts* § 168 (2001) (distinguishing between cause-in-fact and proximate cause); W. Keeton, et al., *Prosser and Keeton on the Law of Torts* § 42 (5th ed. 1984) (same).

analyzing the case, the court looks only at the evidence in the light most favorable to Plaintiff, giving the Plaintiff the benefit of all reasonable inferences that the evidence, including circumstantial evidence, supports.

“Summary judgment is mandated . . . where, after an adequate time for discovery, a party ‘fails to make a showing sufficient to establish the existence of an element’ essential to his case and on which he has the burden of proof at trial.” *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). The dispositive legal issue is whether Plaintiff has made a sufficient showing of evidence to support a jury determination, based upon a preponderance-of-the-evidence standard, of actual causation.

The question Plaintiff wishes to present to a jury is: would DeAndra have been murdered if the police had complied with the Missing Persons Act? To avoid summary judgment, Plaintiff does not need to prove to the court that the answer to this question is “no.” Plaintiff is only required to demonstrate that she possesses evidence that, if believed by the jury, is sufficient to support a jury determination that the answer to this question is “probably no.”

The Missing Persons Act requires the police to prepare a missing person report containing particular information upon receipt of a complaint that a disabled person or unemancipated minor, such as DeAndra, is missing. 20 V.S.A. §§ 1820–1822. Once the report is completed, it must be disseminated, and a search must be commenced “as soon as a report is received.” *Id.* § 1824(a).³ “Any rule specifying an automatic time limitation before commencing a missing person investigation shall be invalid.” *Id.* § 1824(b). The Act contains no explicit requirements regarding what the search and investigation must or should consist of. Plaintiff alleges generally that the police violated the Act by failing to commence a search or investigation for DeAndra immediately upon receiving the report that she was missing.

There is no dispute that DeAndra left school voluntarily on October 25, 2000 to go to Dana Martin’s house. Donald Baumgardner asked her to go there and accompanied her to Martin’s house at around 12:30 p.m. By around 1:00 or 1:30 p.m., DeAndra unexpectedly had failed to meet back up with a friend, who was waiting for her with Baumgardner. At about 5:00 p.m. at the earliest, according to Plaintiff’s evidence, two of DeAndra’s friends appeared at the Barre City police station to report her missing. The police did not proceed directly to Martin’s residence at that time.

The following day, the police went to Martin’s house in the morning, and by evening, Martin had led police to DeAndra’s body, which had been thrown over the side of a bridge in Plainfield. The autopsy revealed sexual activity and that DeAndra had been strangled to death. The medical evidence was insufficient to fix the time of death.⁴

³ The Vermont Amber alert program is specifically designed to “aid in the identification and location of abducted children.” 20 V.S.A. § 1828. It became a part of Vermont law three years after DeAndra’s death.

⁴ Plaintiff argues in her written materials that the death certificate indicates that DeAndra died on May 26. The only reasonable interpretation of the death certificate is that DeAndra was found on the 26th, not that she died on the 26th. “Found” was written next to the date and time on the death certificate, consistent with the final autopsy report. Neither the death certificate nor the autopsy report purports to fix the date or time of death.

Plaintiff's showing of causation appears principally in a portion of her Response to Barre City's Statement of Undisputed Facts at pages 20–25 (filed June 19, 2006) entitled "Plaintiff's Theory of the Case and Statement of Sufficient Facts in the Record to Support It." Plaintiff essentially argues that there is sufficient evidence from which the jury could reasonably infer that: 1) DeAndra was first reported missing at around 5:00 pm, and was last known to be with Martin; 2) the murder did not occur until after 6:00 p.m.; 3) DeAndra remained at Martin's residence until she was murdered; and 4) the police knew where Martin lived and could have gone to his house between 5:00 and 6:00 pm, thereby preventing the murder.⁵

The causation issue presented by this case must be evaluated by comparing "what happened with a hypothetical alternative." D. Dobbs, *The Law of Torts* § 169, at 411 (2001); accord *Wilkins v. Lamoille County Mental Health Services*, 2005 VT 121, ¶ 10, 179 Vt. 107 (citing *Smith v. Parrott*, 2003 VT 64, ¶ 12, 175 Vt. 375) (describing cause-in-fact element as whether injury would have occurred if the defendant had not breached its duty). The hypothetical alternative is police conduct that would have complied with the statutory duty alleged to have been breached. That is, the comparison is between what the police did, assuming a breach of the Missing Persons Act, and what the police would have done differently to satisfy the Act. If what the police would have done differently would have prevented the murder, then the evidence is sufficient to support a finding of actual causation, meaning that the City would not be entitled to judgment as a matter of law.

The evidence Plaintiff offers, even looking at it in its best light and discounting all modifying evidence, is insufficient. Assuming that Plaintiff possesses sufficient evidence, whether direct or circumstantial, to present at trial to show the facts described above, and assuming further that the jury could therefore find those to be the facts, the most these facts might prove is that the police *could* have intervened while DeAndra was alive, not that a police response complying with the Missing Persons Act *would* have saved DeAndra's life. It is Plaintiff's burden to show that *but for* the police failure to do its duty, the murder would not have happened.

The Missing Persons Act required the police to initiate a "search" and investigation upon receipt of the report that DeAndra was missing. The Act does not indicate, however, what such a search was required to include at its earliest moments. Plaintiff has presented no expert or other testimony to show what the duty to search actually required the police to do in the hour after receiving the report that DeAndra was missing, evidently leaving the matter entirely to the jury's speculation. Plaintiff appears to assume that such a search necessarily means that the police, at the moment of receiving the first complaint, were required to proceed directly to Martin's residence and make a warrantless entry in an urgent effort to reduce any chance of harm to DeAndra. The record is not clear that the police could have done that at the moment of the first report. However, even if they could have, Plaintiff has not shown that the duty of the police

⁵ The evidence that the friends arrived at the police station right at 5:00 p.m. is questionable at best. Bridget Gardner stated in her deposition that the friends arrived at about 5:00 p.m., Deposition of Bridget Gardner at 37 (June 9, 2004), but later clarified that all she really knew was that it was light out when they arrived, and dark out when they left, *id.* at 65. Kelly Smith stated only that it was "[s]till daylight out" when they arrived. Deposition of Kelly Smith at 68 (May 4, 2004). On October 25, 2000, sunset began at 5:49 p.m. and twilight ended at 6:19 p.m. The City's Ex. SS.

under the statute, under these circumstances, was to do so, and to do so prior to 6:00 pm.

Even assuming that DeAndrea's friends arrived at the police station to make their missing person report at about 5:00 p.m., see fn.5 at 3, it would have required some time to make the report. Furthermore, even Plaintiff's evidence, when viewed in the light most favorable to Plaintiff, is not clear that the police should have known that DeAndrea was then at Martin's house. Information initially reported to the police allegedly indicated that DeAndrea had gone to Martin's house several hours earlier, may have been seen in a red car subsequently, failed to meet back up with a friend, and could, several hours later, still be with Martin, somewhere. That is, the information provided to the police did not uniformly point to Martin's residence as the scene of an impending or ongoing crime or the certain place where DeAndrea would be located.

The issue of timing and the immediate warrantless entry into a residence presumably would be grounded in specialized police protocols. An ordinary jury would be highly unlikely to have enough familiarity with reasonable police procedures, and their likely effects, to evaluate what the police were required to do, and when they were required to do it, without the benefit of expert testimony. See *Egbert v. Book Press*, 144 Vt. 367, 369 (1984) (explaining that "where the causal connection is obscure, expert testimony is required"). The failure to come forward with such testimony renders Plaintiff's showing of causation speculative: there is no evidence to support what the police would have done when the missing person report was first made, if acting in compliance with the duty to search, and what effect it would have had.

Even assuming that the police should have gone straight to Martin's residence shortly after 5:00 p.m., and that DeAndrea was alive at that time, the evidence suggests no more than the mere possibility that doing so could have prevented the murder. Plaintiff hypothesizes that the police would have been able to surround Martin's home and thereby apprehend him. Even if true, apprehending Martin does not go far enough; the issue is whether arriving at the residence in time would have prevented the murder. Plaintiff has not come forward with evidence to support a finding by the jury that an ability to apprehend Martin at the residence before 6:00 pm would have prevented the murder. The jury could as easily speculate that Martin would have murdered DeAndrea in response to the arrival of the police in an effort to conceal her abduction. There simply is no meaningful evidence offered in support of what the police would have done if acting in full compliance with the Missing Persons statute, and what effect that conduct may have had.

Plaintiff's showing that the police had notice of the abduction in time to arrive at Martin's residence while DeAndrea was both there and still alive itself is highly conjectural. It is predicated on a chronology and narrative of the events on October 25 that find only scant record support. For instance, according to Plaintiff's timeline, to sequence the murder after the first missing person complaint, Baumgardner had to be involved in the event, and at least much of the crime had to occur after Baumgardner returned to Martin's residence from running some errands in town for Martin. Baumgardner at all times has insisted that he had no knowledge or involvement with the murder or disposal of DeAndrea's body. In the course of their investigation, the police concluded that Baumgardner was not involved and that he had cooperated fully with the investigation; he was never charged with a crime. In his deposition, Martin squarely insists that the murder and disposal of the body were complete before Baumgardner ever arrived at his

residence in the first place, and long before Baumgardner subsequently left and then returned from running errands. Martin plainly maintains that Baumgardner had no involvement.

To determine that the crime occurred after Baumgardner's return from running errands, as Plaintiff contends, the jury would need to reject all of that evidence, and rely on one of Martin's first statements to the police, at a time when he was still trying to implicate Baumgardner—before his confession—for the proposition that Baumgardner was involved. The jury also would have to rely on a statement made by Martin at one point that the murder preceded Baumgardner's errands. However, Martin has maintained that the murder occurred at about 2:30 p.m., or early afternoon, on October 25.

For the proposition that the murder occurred much later, the jury would need to rely on, not only the two isolated statements described above, which are inconsistent with Martin's other statements, but on an unsupported inference that Martin and Baumgardner would be unlikely to dispose of a body in broad daylight. The early Martin statements that Plaintiff relies on, to the extent admissible, squarely conflict with Martin's deposition testimony, taken for the purpose of this case.⁶ Confronted with the prior inconsistent statements, Martin specifically disavowed their substance. This is a shaky foundation at best. Plaintiff essentially relies on a timeline that requires the jury to pick and choose isolated facts from different narratives, including some later disavowed or discredited, in order to fashion a narrative that fits the theory of the case, but does not appear in the evidence with any coherence.

Though the evidence in support of the position that the murder of DeAndra did not occur until after 6:00 pm is speculative at best, even if there were evidence sufficient to support the narrative alleged by Plaintiff, at most the jury would have evidence that the murder occurred at about the same time as or shortly after the moment when DeAndra's friends first walked into the police station to report her missing. As stated above, there is no meaningful evidentiary showing of what the police should have done at that moment and how doing it would have prevented the murder.

Plaintiff's chronology relies heavily on the jury selectively according little to no credibility to Baumgardner's and Martin's versions of the events of October 25. Plaintiff is aware of the inherent problem that doing so presents:

The only account(s) of (i) Martin's activities from the time Baumgardner brought DeAndra to him, and (ii) of Baumgardner's activities from the time Emily Brown dropped him off at Lincoln House around 5:00 on the 25th, to (iii) the time when Martin and Baumgardner were taken into custody around 9:00 AM on October 26th are those of Martin and Baumgardner for each other. In other words, a rouge's (sic) gallery.

Plaintiff's Response to Barre City's Statement of Undisputed Facts ¶ 145, at 12 (filed June 19, 2006).

⁶ The City objects that prior inconsistent statements should not be admissible to support an affirmative showing of fact. Because their admission would not change the court's analysis, the court does not need to explore this issue.

Disregarding what Baumgardner and Martin say, however, is not itself affirmative support for alternative facts, just as disputing the City's timeline is not itself support for an alternative timeline.

The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.

W. Keeton, et al., Prosser and Keeton on the Law of Torts § 41, at 269 (5th ed. 1984). As a matter of timing, the ability of the police, following notice of DeAndra's status as missing and possibly with Martin, to intervene at Martin's residence prior to her murder is highly conjectural. Even if the court liberally makes all reasonable inferences in favor of Plaintiff, there was at best a mere possibility of an intervention at the Martin residence. There is no reasonable basis in the evidence for a finding that the police would have arrived at the Martin residence prior to the murder, or that even if they had so arrived, they would have been able to enter the residence and prevent DeAndra's murder.

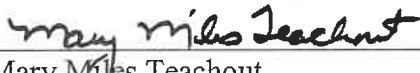
At oral argument, Plaintiff stressed that the evidence in this case is largely circumstantial and that the jury is permitted to base its findings exclusively on circumstantial evidence. This is true. In addition, causation is ordinarily an issue for determination by the fact-finder. Nonetheless, the lack of material evidence in support of certain facts does not free up the jury to fill in the narrative with conjecture or speculation. Even if Plaintiff had come forward with sufficient evidence of a short window of opportunity for the police to arrive at the Martin residence while DeAndra was alive, proof only of a window of opportunity is insufficient to support causation.

Plaintiff has failed to present evidence sufficient to support a finding by the jury that it is more likely than not that DeAndra would not have been murdered if the police had complied with the Missing Persons Act. Plaintiff has not presented evidence sufficient for a jury to determine what the police would have done to comply with the Missing Persons Act as an immediate response to the first missing person report. Plaintiff also has not presented evidence sufficient for a jury to find that an immediate police intervention at the Martin residence would have occurred, and that it probably would have prevented DeAndra's murder. The mere possibility of an intervention, as a matter of timing, is not sufficient to support legal liability. The requirements of the Missing Persons Act are mandatory, but the Act does not make the police the guarantor of the safety of a missing person.

ORDER

For the foregoing reasons, the City's motion for summary judgment is *granted*.

Dated at Montpelier, Vermont this 26th day of September 2007.



Mary Miles Teachout
Superior Court Judge