IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

MORGAN MCCAFFREY,	)	
	)	
Plaintiff,	)	C.A. No. N12C-01-138 EMD
	)	
v.	)	
	)	
CITY OF WILMINGTON, PATROLMAN MICHAEL SPENCER, individually and in his capacity as an officer, WILMINGTON SERGEANT DONALD BLUESTEIN, individually and in his capacity as an officer, SERGEANT GERALD MURRAY, individually and in his capacity as an officer, CORPORAL RALPH SCHIFANO, individually and in his capacity as an officer, MASTER SERGEANT SHERRI TULL, individually and in her capacity as an officer, and CHIEF MICHAEL J. SZCZERBA, individually and in his capacity as an officer,	)	JURY OF 12 DEMANDED
	)	
Defendants.	)	

Submitted: October 4, 2013
Decided: January 31, 2014

Upon Motion for Reargument, or in the Alternative, Motion to Certify Interlocutory Appeal[1]

DENIED in part and GRANTED in part

Laura J. Simon, Esquire, Dalton & Associates, P.A., Wilmington, Delaware, *Attorney for Plaintiff Morgan McCaffrey*.

Louis B. Ferrara, Esquire, Ferrara & Haley, Wilmington, Delaware, *Attorney for Defendant Michael Spencer*.

Daniel F. McAllister, Esquire, City of Wilmington Law Department, Wilmington, Delaware, *Attorney for Defendants City of Wilmington, Donald Bluestein, Gerald Murray, Ralph Schifano, Sherri Tull and Michael J. Szczerba*.

DAVIS, J.

[1] The Court, for the reasons set forth at the hearing held on October 4, 2013, denied the motion to certify interlocutory appeal. This memorandum opinion and order will not readdress the decision to deny the request for certification of an interlocutory appeal.

INTRODUCTION

This is a personal injury and civil rights action brought by Plaintiff Morgan McCaffrey. Ms. McCaffrey seeks damages against Defendants City of Wilmington (the "City"), Patrolman Michael Spencer, Sergeant Donald Bluestein, Sergeant Gerald Murray, Corporal Ralph Schifano, Master Sergeant Sherri Tull, and Chief Michael Szczerba (collectively, "Defendants") arising from events surrounding a June 5, 2010 traffic accident. In addition to claims of negligence and recklessness against Officer Spencer, Ms. McCaffrey alleges that her constitutional rights to due process and equal protection were violated by Defendants as government actors on June 5, 2010, following a car accident she incurred with Officer Spencer while he was off-duty.

On June 26, 2013, after extensive briefing and a hearing, the Court granted in part and denied in part a motion for summary judgment filed by Defendants Sergeant Bluestein, Sergeant Murray, Corporal Schifano, Master Sergeant Tull, Chief Szczerba and the City (the "Decision"). Through the Decision, the Court entered judgment in favor of the City of Wilmington, Sergeant Donald Bluestein, Sergeant Gerald Murray, Corporal Ralph Schifano, Master Sergeant Sherri Tull, and Chief Michael Szczerba on all claims asserted against these parties Counts II, III and IV of the Second Amended Complaint. On July 3, 2013, Ms. McCaffrey filed a motion (the "Motion") for reargument.

For the reasons stated herein, the Motion is **DENIED in part and GRANTED in part**.

PARTIES' CONTENTIONS

A. Ms. McCaffrey

Ms. McCaffrey makes three arguments in the Motion. First, Ms. McCaffrey contends that Defendants did not seek to dismiss, and the Court did not rule upon Ms. McCaffrey's state

tort *gross* negligence and reckless retention and supervision claims.[2] Second, Ms. McCaffrey claims that the Court overlooked controlling precedent and misapprehended the facts on the Section 1983 claims against Defendants relating to gross negligent and reckless retention and supervision claims as well as the failure to appropriately discipline officers with alcohol-related misconduct. Finally, Ms. McCaffrey argues that the Court misapprehended the law and facts regarding Ms. McCaffrey's equal protection claim against Sergeant Donald Bluestein, Sergeant Gerald Murray, Corporal Ralph Schifano, and Master Sergeant Sherri Tull.

B. Defendants

Defendants respond by arguing that Ms. McCaffrey cannot meet the standards of Rule 59(e) here. As to Ms. McCaffrey's first argument, the City and Chief Szczerba contend that Count IV is exclusively a Section 1983 claim and that the Court addressed that in the Decision. Alternatively, the City and Chief Szczerba claim that if a state law tort claim had been asserted then Ms. McCaffrey's failure to raise the point during the summary judgment proceedings constitutes a waiver of that state law tort claim. As for the remainder of Ms. McCaffrey's Rule 59(e) arguments, Defendants argue that the Court did not misapprehend the facts of the case, and the Court applied the appropriate law and legal standards to those facts.

[2] In Plaintiff's Reply to Defendants' Opposition to Plaintiff's Motion for Reargument, or in the alternative, Motion to Certify Interlocutory Appeal, Ms. McCaffrey states that she is pursuing a "negligent and reckless retention and supervision claim." Reply at ¶ 1, n.1. However, the Second Amended Complaint alleges that the City and Chief Szczerba acted with "*gross* negligence and recklessness in hiring, training and supervising Defendant Spencer." Second Am. Compl. at ¶64 (emphasis added). And, Ms. McCaffrey alleges that the City of Wilmington and Chief Szczerba acted with "*gross* negligence and recklessness in failing to properly train and supervise Officers Tull, Bluestein, Murray and Schifano in enforcing the law against a fellow officer." *Id.* at ¶ 66 (emphasis added). The Court does not recognize that, at this time, Count IV of the Second Amended Complaint is a claim for NEGLIGENT and reckless retention and supervision claim. Count IV clearly pleads GROSS NEGLIGENCE and recklessness. *See also* Motion at ¶2 ("Plaintiff is entitled to reargument because the City did not raise and the Court did not rule on Plaintiff's grossly negligent and reckless hiring, retention and supervision claims under a state tort analysis.").

STANDARD OF REVIEW

Superior Court Civil Rule 59(e) provides that a party may file a motion for reargument "within 5 days after the filing of the Court's opinion or decision."[3] The standard for a Rule 59(e) motion is well defined under Delaware law.[4] A motion for reargument will be denied unless the Court has overlooked precedent or legal principle that would have controlling effect, or misapprehended the law or the facts such as would affect the outcome of the decision.[5] Motions for reargument should not be used merely to rehash the arguments already decided by the court,[6] or to present new arguments not previously raised.[7] Such tactics frustrate the efficient use of judicial resources, place the opposing party in an unfair position, and stymie "the orderly process of reaching closure on the issues."[8]

DISCUSSION

A. Failure to Address Purported State Law Negligent and Reckless Retention and Supervision Claim.

In the Motion, Ms. McCaffrey takes the position that Defendants did not seek to dismiss, and the Court did not rule upon Ms. McCaffrey's state tort *gross* negligence and reckless retention and supervision claims. It appears for the first time in the Motion that Ms. McCaffrey takes the position that Count IV of the Second Amended Complaint comprises two claims – one under 42 U.S.C. § 1983 and one under state tort law. Moreover, for the first time, Ms. McCaffrey contends that the Defendants and the Court failed to address the state law tort claim

[3] Super. Ct. Civ. R. 59(e).
[4] *Kennedy v. Invacare Corp.*, C.A. No. 04C-06-028, 2006 WL 488590, at *1 (Del.Super . Jan. 31, 2006).
[5] *Woodward v. Farm Family Cas. Ins. Co.*, C.A. No. 00C-08-066, 2001 WL 1456865, at *1 (Del.Super.Aug.24, 2001).
[6] *Id.*
[7] *Plummer v. Sherman*, C.A. No. 99C-08-010, 2004 WL 63414, at *2 (Del.Super.Jan.14, 2004); *see also Bd. of Managers of the Del.Crim. Justice Info. Sys. v. Gannett Co.*, C.A. No. 01C-01-039, 2003 WL 1579170, at *3–4 (Del.Super.Jan.17, 2003) (holding that a motion for reargument is not a device for raising new arguments or stringing out the length of time for making argument), *rev'd on other grounds, Gannett Co. v. Bd. of Managers of the Del.Crim. Justice Info. Sys.*, 840 A.2d 1232 (Del. 2003).
[8] *Plummer*, 2004 WL 63414, at *2.

portion of Count IV. The Court says "for the first time" because upon a review of the entire record relating to the summary judgment proceedings, Ms. McCaffrey never took the position that Count IV included both a Section 1983 claim and a state law tort claim for gross negligence and reckless hiring, retention and supervision. In the Motion and supporting reply, Ms. McCaffrey contends it was never her obligation to appraise the Defendants or the Court of this point.

The Court is troubled by this new argument as it could have easily been disclosed and addressed during the summary judgment process. If it had been disclosed, the Defendants would have had an opportunity to meet it fairly or concede the matter in their briefing. And, if joined, both sides would have been able to brief and argue the matter before the Court. Then, the Court could have handled in an efficient matter, and Ms. McCaffrey would not have had to resort to Rule 59(e) and costly additional briefing in an attempt to preserve the claim. That said, the Court does not hold that Ms. McCaffrey waived this argument for purposes of Rule 59(e).

As Ms. McCaffrey now presents in the Motion, the Second Amended Complaint does not appear to limit Ms. McCaffrey to a cause of action under Section 1983. Count IV contends that the City and Chief Szczerba violated Ms. McCaffrey's equal protection and due process civil rights under the U.S. and Delaware Constitution and Section 1983.[9] Then, Ms. McCaffrey alleges that the City and Chief Szczerba acted with gross negligence and recklessness in hiring, training and supervising Officer Spencer. Moreover, Ms. McCaffrey alleges that the City and Chief Szczerba acted with gross negligence and recklessness in failing to properly train and supervise Sergeant Donald Bluestein, Sergeant Gerald Murray, Corporal Ralph Schifano, and Master Sergeant Sherri Tull in enforcing the law against a fellow officer. Unlike other counts in the Complaint that only assert one cause of action, Ms. McCaffrey now contends that the Second

[9] *See* Second Am. Compl. at ¶ 63.

Amended Complaint pleads two causes of action in Count IV – *i.e.*, Count IV(a) for a Section 1983 claim and Count IV(b) for gross negligence and recklessness. While entirely inconsistent with any other claim asserted in the Second Amended Complaint (all of which only assert one cause of action per count), the Court will attribute this to poor and inconsistent drafting instead of limiting Ms. McCaffrey to a claim under Section 1983.

There is an additional paper in this case that supports Ms. McCaffrey's argument: the Pre-Trial Stipulation – Personal Injury Action filed with the Court on June 17, 2013. There, under the section entitled "Nature of the action (including counterclaims, crossclaims, dates, etc.)," Ms. McCaffrey states the following:

> Plaintiff's claims against Defendants City of Wilmington, Sergeant Bluestein, Sergeant Murray, Corporal Schifano, Master Sergeant Tull and Chief Szczerba are violations of the Delaware and U.S. Constitutions and § 1983 for infringing on Plaintiff's rights to liberty and equality. Further, WPD had a custom and policy of not enforcing the law on its officers and failing to supervise and discipline officers with alcohol-related misconduct, which caused injury to Plaintiff. *Plaintiff's claims also include Defendants' grossly negligent and reckless hiring, retention and supervision of Spencer.*[10]

The last sentence appears to support Ms. McCaffrey's contention that she incorporated two claims in Count IV of the Second Amended Complaint.

The Court did not address a state law tort claim for gross negligence and recklessness in the Decision. The Court did not do this purposely. The Court, based on the papers filed and the arguments made therein and at oral arguments made at a hearing, believed that Count IV was a claim solely under Section 1983. The record is clear that Ms. McCaffrey met Defendants' summary judgment arguments in her papers filed with the court and during oral arguments without alerting anyone that a resolution on Count IV would only partially resolve the claim.[11]

[10] Pre-Trial Stipulation – Personal Injury Action at 2 (emphasis added).
[11] In Ms. McCaffrey's opposition to summary judgment, Ms. McCaffrey acknowledges that the Defendants moved for summary judgment on "all remaining Counts" but does not state that Count IV should survive because it

Ms. McCaffrey should have. The days in which surprise was an acceptable way of proceeding in civil litigation are long over.[12] While the Court disagrees with the manner, or strategy, in which Ms. McCaffrey's gross negligence and recklessness claim was handled, the Court does agree that it "misapprehended the law or the facts such as would affect the outcome of the decision." Accordingly, the Court holds that it will partially vacate judgment in the Decision and will only grant judgment in favor of the City and Chief Szczerba on the Section 1983 portion of Count IV.

In the interests of justice, however, the Court is scheduling a status conference to determine whether the City and Chief Szczerba want to move for summary judgment on the remaining portion of Count IV.[13] If the City and Chief Szczerba choose to move for summary judgment, the Court will allow briefing and argument on the matter. This case will stay off the Court's trial calendar until after that status conference.

B. The Court's Decision to Grant Judgment on the Section 1983 Claims.

In the Motion, Ms. McCaffrey contends that the abundant factual record creates, at a minimum, a factual dispute and summary judgment was not appropriate. The legal standard under Rule 56 is not whether there is an abundant factual record. The Court utilized the following standard when reviewing the factual record on summary judgment:

> The Court may grant a motion for summary judgment made pursuant to Superior Court Civil Rule 56 where the movant can show from the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits,

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contains both a Section 1983 claim and a state law tort claim for gross negligence and recklessness. *See* Plaintiff's Opposition to Defendants' Motion for Summary Judgment at 1 and 15-17.

[12] *See, e.g., Cebenka v. Upjohn Co.*, 559 A.2d 1219, 1222-23 (Del. 1989) (devices like pretrial conferences and alike are to familiarize the litigants with the issues in the case and to reduce surprise at trial); *Digiacobbe v. Sestak*, No. 14525, 1998 WL 684149, at *6 (Del. Ch. July 7, 1998) (stating in opinion addressing a discovery dispute, "The days in which surprise was an acceptable way of proceeding in litigation are long over."). *See also Hoey v. Hawkins*, 332 A.2d 403, 406 (Del. 1975)(repudiated the notion of litigation by surprise and stated that "[d]iscovery and pretrial practices usually result in the narrowing and clarifying of issues so as to shorten trials and to bring about a greater degree of clarity and justice in the presentation of facts to juries.")

[13] In their opposition to the Motion, Defendants do make an argument that the Court should grant summary judgment on the state law tort claim portion of Count IV. Under the circumstances, the Court would rather have the matter fully presented under Rule 56 instead of Rule 59 and Rule 61.

> that no material issues of fact exist so that the movant is entitled judgment as a matter of law. In considering a motion for summary judgment, the Court views the evidence in the light most favorable to the non-moving party. The Court should deny summary judgment where, "a plaintiff may recover under any reasonably conceivable set of circumstances susceptible of proof under the complaint."[14]

The amount of facts is not the relevant inquiry. Rather, the Court needs to determine whether there is a genuine issue as to a material fact, and whether the moving party is entitled to judgment as a matter of law.

Ms. McCaffrey recites and restates a list of facts in this case. Admittedly, the Court did not list each and every fact present in this case in the Decision. Instead, the Court went through the facts relevant to the claims asserted by Ms. McCaffrey and the law governing Section 1983 claims. For example, the Court is aware that Officer Spencer has been cited for prior alcohol misconduct as well as other policy violations. The Court discussed these in the Decision.[15] The effect of those facts under the law is then discussed with respect to Ms. McCaffrey's Section 1983 claims. Also, the Court did consider Ms. McCaffrey's gender and the facts surrounding the incident on June 5, 2010 in deciding to grant summary judgment on Count II and III.[16] To contend the Court misapprehended the facts or was unaware of them when applying the facts to the applicable law is not supported by the record or upon review of the Decision.

As for the misapprehension of the law argument, the Court does not see anything new in the Motion that was not already addressed during the summary judgment process. The cases and analysis relied upon by Ms. McCaffrey in the Motion were raised and addressed by the Court in the Decision. For example, the Court has already addressed Ms. McCaffrey's Section 1983 claims for negligent and reckless retention and supervision (new Count IVa), the question of

[14] *See* Decision at 11-12 (citations omitted).
[15] *See, e.g., id*. at 20-21 and 23-24
[16] *See, e.g., id*. at 18-19. Moreover, the Court even discussed the applicability of *Anela v. City of Wildwood*, 790 F.2d 1063 (3d. Cir. 1986) in this case. *See id.* at 17, n. 47.

whether Chief Szczerba is a final policy maker under Section 1983, and the Section 1983 discrimination. The Court and the parties already addressed all of the cases cited by Ms. McCaffrey in the Motion.

The Court does not see an argument or legal authority in the Motion that the Court or the parties did not address prior to or in the Decision. Instead, Ms. McCaffrey takes issue with how the Court applied the facts to the applicable law and the conclusion reached by the Court. Motions for reargument should not be used merely to rehash the arguments already decided by the court.[17] Under Delaware law, a Rule 59(e) motion may not be used to relitigate matters or to raise arguments that "could" have been raised prior to the Court's opinion or decision.[18] In this instance, Ms. McCaffrey is doing exactly that. For that reason, the Court denies the Motion with respect to its arguments relating to Section 1983 and Counts II, III and IV of the Second Amended Complaint.

CONCLUSION

For the reasons stated above, the Motion is **GRANTED** in part and **DENIED** in part, and **JUDGMENT IS VACATED** as to Ms. McCaffrey's Count IV claim for gross negligence and recklessness as to the City of Wilmington and Chief Michael Szczerba.

Dated: January 31, 2014
Wilmington, Delaware

/s/ Eric M. Davis
Eric M. Davis
Judge, Superior Court

[17] *Woodward.,* 2001 WL 1456865, at *1.
[18] *Plummer v. Sherman*, C.A. No. 99C-08-010, 2004 WL 63414 (Del. Super. Jan. 14, 2004).