

NORTON, SHEEHY & HIGGINS, P.C.

HARRY D. NORTON, JR. •*
WILLIAM M. SHEEHY
BRIAN T. HIGGINS
LYNDA S. KORFMANN
BOBBI J. VILACHA •Δ
KELLY P. CORRUBIA •*
MICHELLE SURALIK-HORVATH
JESSICA J. CENTAURO •*

Attorneys at Law
PNC Bank Building
One Garret Mountain Plaza (5th Floor)
Woodland Park, New Jersey 07424-3396

(973) 881-1101
FAX (973) 881-1369

RECEIVED
JAN 16 2015

BY:

*ALSO MEMBER OF NEW YORK BAR
ΔALSO MEMBER OF PENNSYLVANIA BAR
•R. 1:40 QUALIFIED MEDIATOR

January 9, 2015

Mr. John E. Markel, CPCU, ARM
Bergen Risk Managers, Inc.
Claims Department
P.O. Box 901
Ramsey, New Jersey 07446

Re: Peter Wilson vs. The East Rutherford Police Department, et al
Your File No.: W83671
Our File No.: H11BR-004-HDN

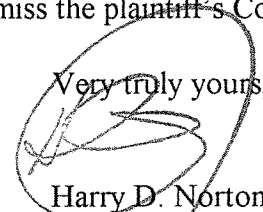
Dear Mr. Markel:

Enclosed please find an Opinion by the Appellate Division in the matter of Wilson vs. The Borough of East Rutherford. You may recall that this matter had been the subject of a Summary Judgment Motion which was granted by Judge Wilson in Bergen County. Thereafter plaintiff appealed and we filed the appropriate Brief in response to this Appeal.

I am happy to report that the dismissal of the Complaint has been upheld and I think that there is extremely good law and rationale within the Opinion that can be used by all Panel Attorneys. I am submitting this also to Mr. Barbire and would suggest that this particular Opinion be circulated amongst those doing work for the Joint Insurance Fund.

Please note that Ms. Corrubia of our office did both the underlying Brief as the Appellate work. Quite frankly, her arguments crystallize the issues and in my opinion permitting both the trial Judge and the Appellate Court to uphold the request to dismiss the plaintiff's Complaint.

Very truly yours,



Harry D. Norton, Jr.
Writer's E-Mail Address
hnorton@nashnj.com

HDN, Jr.:sbp
Enclosure
Cc: Paul S. Barbire, Esq. (w/enc.)

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1228-12T2

PETER WILSON,

Plaintiff-Appellant,

v.

MIKE PODEIA, BOROUGH OF EAST
RUTHERFORD, BOROUGH OF EAST
RUTHERFORD POLICE DEPARTMENT,
NEW JERSEY TRANSIT, and FRANCISCO
LUCERO,

Defendants-Respondents.

Submitted December 11, 2013 - Decided January 6, 2015

Before Judges Fuentes, Fasciale and Haas.

On appeal from Superior Court of New Jersey,
Law Division, Bergen County, Docket No.
L-6541-11.

O'Toole & Couch, attorneys for appellant
(Kevin A. Couch, of counsel and on the
brief).

Norton, Sheehy & Higgins, P.C., attorneys
for respondents Mike Podeia, Borough of East
Rutherford, and Borough of East Rutherford
Police Department (Harry D. Norton, Jr., of
counsel and on the brief; Kelly P. Corrubia,
on the brief).

John J. Hoffman, Acting Attorney General,
attorney for respondents New Jersey Transit
and Francisco Lucero (Lewis A. Scheindlin,

Assistant Attorney General, of counsel;
Peter D. Wint, Assistant Attorney General,
on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

Plaintiff Peter Wilson filed a cause of action seeking compensatory damages for injuries he suffered when a marked police car driven by defendant East Rutherford Police Officer Mike Podeia allegedly struck him as he crossed a street in the Borough of East Rutherford. Plaintiff also named as defendants the Borough of East Rutherford and its police department, New Jersey Transit (NJT), and Francisco Lucero, the driver of NJT Bus No. 76-L.

Although the applicable discovery period had not yet ended,¹ the Law Division granted summary judgment motions filed by Podeia and the Borough of East Rutherford. Based on the evidence presented by the parties, the court found plaintiff's claims against these defendants were barred as a matter of law pursuant to the immunity provided to public entities and their employees in the New Jersey Tort Claims Act (TCA), N.J.S.A.

¹ By order dated August 10, 2012, the Law Division granted plaintiff's motion to extend discovery for ninety days, making November 12, 2012 the discovery-end-date for this case. In granting plaintiff's motion, the trial judge made clear that "no further extensions shall be granted except upon a showing of exceptional circumstances." The court also scheduled the case for arbitration to take place on January 10, 2013.

59:1-1 to 12-3, under the "good faith" doctrine codified in N.J.S.A. 59:2-2 and N.J.S.A. 59:3-3. Three days later, the trial court granted Lucero's and NJT's motions for summary judgment. The motion judge found plaintiff's claims against these defendants were barred by N.J.S.A. 59:4-2 of the TCA, because plaintiff had not alleged or established that NJT's property was in a dangerous condition at the time of the accident. The judge also specifically noted that neither Lucero nor NJT were legally liable for any injuries plaintiff may have suffered as a result of his decision to alight the bus at the location plaintiff specifically requested.

Plaintiff now appeals, arguing the Law Division erred by: (1) improperly granting defendants' summary judgment motions before he had the opportunity to complete discovery; (2) failing to properly consider the legal duty NJT owed to plaintiff as a common carrier; (3) misapplying the immunity provided to public entities under N.J.S.A. 59:4-2 in its grant of NJT's motion for summary judgment because plaintiff's cause of action is not predicated on a dangerous condition in property owned or controlled by NJT; and (4) dismissing his complaint because there are material issues of fact in dispute precluding dismissal as a matter of law.

After considering plaintiff's arguments and reviewing the record developed before the Law Division, we affirm.

I

In deciding whether summary judgment was properly granted, "we apply the same standard governing the trial court – we view the evidence in the light most favorable to the non-moving party." Gormley v. Wood-El, 218 N.J. 72, 86 (2014) (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012)). Under Rule 4:46-2(c), a motion for summary judgment must be granted when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Even if the pleadings raise an issue of material fact, summary judgment is appropriate when all other documents show that there are no genuine issues of material fact in dispute. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

According to plaintiff, at approximately ten o'clock in the evening on May 7, 2010, he was a passenger on an NJT bus driven by Lucero. The bus traveled from Newark to East Rutherford. When the bus reached East Rutherford, plaintiff alerted Lucero that he wanted to get off on Hackensack Street.

That particular section of Hackensack Street was marked as neither an official NJT drop-off location nor a designated pedestrian crossing point. When plaintiff stepped off the bus, he proceeded to cross over Hackensack Street. According to plaintiff, the closest street intersection from the location where he alighted from the bus was approximately twenty feet away.

Instead of crossing at the crosswalk, plaintiff walked in front of the bus between the bus and another car stopped at the intersection. When asked at his deposition why he did not walk to the nearest crosswalk, plaintiff replied: "[because] [i]t [was] just longer in terms of walking." The traffic light was red and there was no oncoming traffic when plaintiff crossed Hackensack Street. Although plaintiff "heard the sound of a siren in the distance" before he crossed Hackensack Street, he did not know from which direction the sound was coming.

Officer Podeia was also deposed in connection with this case. He testified that he was in his patrol vehicle on Paterson Avenue when he received a radio dispatch to respond to a non-responsive juvenile at the New Park Tavern. Podeia was approximately one-quarter of a mile from Hackensack Street at the time he received the dispatch. He responded to the dispatcher that he was en route to the tavern and activated the

marked patrol car's overhead lights and sirens. Podeia testified that as he proceeded to the tavern, vehicles in the lane of traffic "immediately pulled over to the right" and yielded the right of way² in response to the lights and sirens.

As he approached the intersection at Hackensack Street, Podeia drove the patrol car into the left turn lane and stopped to be sure the intersection was clear before proceeding. As reflected in his deposition testimony, Podeia turned left from Paterson Avenue onto Hackensack Street moving at approximately fifteen to twenty miles per hour. He first saw plaintiff as he walked from the behind the bus, approximately fifteen feet away from him. Plaintiff stopped in the middle of the street and stood on the double yellow lines that divide the two lanes of traffic on Hackensack Street. Podeia testified that he took his foot off the accelerator but did not brake because he believed plaintiff had stopped to let the police car go through.

Because the trial court dismissed plaintiff's case on summary judgment, we will describe the details of the accident from plaintiff's perspective. The following description of the accident is taken verbatim from plaintiff's deposition:

Q. Did you realize, and maybe you don't remember, that you came to a stop before you began to stop in front of the bus? [Sic] Was

² See N.J.S.A. 39:4-91.

there any point that you came to a stop before you got to the center line of the roadway?

A. It's possible. I don't remember. I am getting off a bus. It is a routine thing. It is not something that I just remember offhand.

Q. Okay. But you do recall hearing a siren faintly in the background?

A. That is correct.

Q. And that siren that you heard faintly in the background, was that before you began to cross in front of the bus?

A. Possibly.

Q. Well, --

A. I know I heard it. I heard it and it was definitely before I crossed the street.

Q. Did that siren become any louder as opposed to when you first heard it?

A. That I don't recall.

Q. But you could still hear it; is that correct?

A. That is correct.

Q. When you got to that driver's side, I am going to use the word corner of the bus, --

A. Right.

Q. -- did you make any observations at that time about traffic, traffic light, other vehicles, anything?

A. At that point, I know I definitely saw the light was red, and I did not see any oncoming traffic.

Q. Were you stopped or moving when you made that observation?

A. Stopped.

Q. When you stopped, how far were you from the center line?

A. Approximately 10 feet.

Q. From the time you crossed the center line until the impact occurred, did the sound of the siren increase?

A. Honestly, I don't remember because the car was on top of me before I could even think about it.

Q. Okay. So you don't remember if the sound increased; is that the testimony?

A. That is the testimony.

Q. Was that a continuous siren from the time you first heard it until the time you were struck?

A. I guess it was. I was crossing the street. I was crossing the street concentrating on that. I heard the siren in the distance, and before I knew it, he was on top of me.

Q. It is my understanding when you were struck that you were propelled into the air; is that correct?

A. From my knowledge, no, I was not.

Q. What happened?

A. As I was hit?

Q. Um'hum.

A. I caught the lights out of the corner of my right eye and I leaped and then my right leg was hit.

Q. When you say you leaped, where did you leap?

A. I leaped forward.

Q. As a jumping motion or like a head-first slide?

A. I leapt with my right leg.

Q. So it was your left leg that was struck?

A. Lower left leg, approximately.

Q. Then what happened, to the best of your knowledge? I realize that is not the easiest thing.

A. I was knocked a couple feet to the sidewalk.

Q. Did you land at or near the sidewalk?

A. I landed on the sidewalk.

Plaintiff also gave the following description of how the accident occurred in his answers to defendants' interrogatories:

[On] May 7, 2010 at approximately 10:15 p.m. I was coming from a Bears game in Newark and was [a] passenger on a NJ Transit bus 76L. I entered that bus at the Broad Street Station in Newark. When the bus got near

the corner of Hackensack Ave and Paterson Ave in E. Rutherford the bus driver stopped behind a car that was also stopped for the red light at the intersection. This was not a designated bus stop. The bus driver opened the door for passengers to disembark. Since the traffic on Hackensack was stopped for the light, I started to cross the street after looking for oncoming traffic. When I had almost finished crossing the southbound lane I was struck by [a] police car that was proceeding at a high rate of speed. I had little time to react to the police car. The force of the impact threw me onto the sidewalk.

We are compelled to note that plaintiff's description of how the accident occurred in his response to this interrogatory includes two significant deviations from the description he gave in his deposition testimony. First, there is no mention of plaintiff hearing police sirens before he crossed the street. Second, plaintiff indicates that the police car driven by Podeia was "proceeding at a high rate of speed."

In the interest of completeness, we also note a third version of these events that is directly attributable to plaintiff. In an incident report dated May 14, 2010, and prepared by the Bergen County Police Department, Detective Vincent Mayo states that plaintiff indicated to him that

as he crossed the street he heard the oncoming police siren but did not see which direction the police vehicle was coming from and continued to cross. He stated that he was a few feet from the curb when he "saw the cop car flying at 100 mph" down the

street. At that point he lunged forward and was hit in the foot.

(Emphasis added).³

Plaintiff was taken by ambulance from the scene of the accident to the emergency room of the Hackensack University Medical Center. He was diagnosed with a fracture of the third metatarsal.⁴ He was admitted overnight and discharged the following morning, requiring the use of crutches to walk. Plaintiff returned to the Hospital a week later complaining of "intense swelling" in his left foot and leg. According to plaintiff, medical staff told him the fracture was healing and "coming along fine." However, subsequent testing discovered he had suffered from deep vein thrombosis (DVT).⁵ He had five

³ Podeia has steadfastly maintained that he was driving at a speed of less than twenty miles per hour when the front passenger side of the patrol car struck plaintiff. However, the applicable standard of review at this stage of the proceedings requires us to accept plaintiff's version of events.

⁴ The third metatarsal bone is one of the long bones located in our feet, between the tarsal (ankle) bones and the phalanges (the toes). Benjamin Weaver, Metatarsal, FootVitals, <http://footvitals.com/health/anatomy/metatarsal.html> (last visited Dec. 22, 2014).

⁵ DVT "occurs when a blood clot (thrombus) forms in one or more of the deep veins in [the human] body, usually in [the] legs. Deep vein thrombosis can cause leg pain or swelling, but may occur without any symptoms." Deep vein thrombosis (DVT), Mayo Clinic, <http://mayoclinic.org/diseases-conditions/deep-vein-thrombosis/basics/definition/con-20031922> (last visited Dec. 22, 2014).

surgeries following the accident to address both the DVT and the fracture.

II

Against this factual record, the motion judge dismissed plaintiff's complaint against Officer Podeia and the Borough of East Rutherford. Applying the "good faith" doctrine codified under the TCA in N.J.S.A. 59:2-2 and N.J.S.A. 59:3-3, the judge found that at the time of the accident Officer Podeia was "responding to a medical emergency[.]" and had "activated the lights and sirens on the police vehicle[.]" Under these circumstances, his "actions were objectively reasonable" and immune from civil liability under the TCA.

With respect to NJT and Lucero, the motion judge found plaintiff was a passenger when he voluntarily decided to exit the bus and had done so without incident. The motion judge further found:

He then, instead of staying on the sidewalk, he decided that he needed to cross the street. He crossed the street, not within a crosswalk, and was then hit by a police vehicle, based on his own testimony.

~~New Jersey Transit does have tort immunity. It has to be shown that it created this unreasonably dangerous condition or had notice of it. Here, it was the plaintiff's own actions of then crossing the street outside a designated crosswalk which led to this accident; that any duty of New Jersey Transit was extinguished once the~~

passenger had successfully alighted himself from the bus. And there is no longer a duty to take care of the plaintiff once he leaves the charge of New Jersey Transit.

There was an attenuation, and any claim that, well, they should have stopped at a corner where he could have crossed, does not create a duty. It was up to the passenger, once he had left the property of New Jersey Transit to take care of his own safe passage at that point, as there was no longer any duty.

We agree with the Law Division's analysis and ultimate conclusion. The Legislature has determined that

it is . . . the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration.

[N.J.S.A. 59:1-2.]

The Supreme Court has consistently construed the TCA to favor immunity for public entities as the rule and the imposition of liability the exception. Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 490 (2014). The good faith doctrine codified in N.J.S.A. 59:3-3 is intended to preclude a public employee from being held civilly liable if he or she "acts in good faith in the execution or enforcement of any law." Our Supreme Court has construed the good faith immunity as having two alternate components through which immunity attaches.

Fielder v. Stonack, 141 N.J. 101, 131 (1995). In order to reap the immunity protection under N.J.S.A. 59:3-3, the employee can show either objective or subjective good faith. Id. at 131-32. The Court in Fielder found "that police officers engaged in the pursuit of fleeing drivers are acting within the scope of their duty to uphold the motor vehicle laws, and are therefore executing or enforcing the law within the meaning of N.J.S.A. 59:3-3." Id. at 130.

Plaintiff argues Podia, and by extension the Borough of East Rutherford, are not entitled to the immunity provided by the TCA under the good faith doctrine codified in N.J.S.A. 59:3-3 because at the time of the accident he was not responding to a call that involved the execution or enforcement of the law. We disagree. Although Podia was not responding to perform a law enforcement function, he is nevertheless entitled to the immunity protections of the good faith doctrine because he was performing a community-caretaking function, a long recognized essential aspect of a police officer's duties.

Rooted as an exception to the Fourth Amendment warrant requirement, a police officer's community-caretaking responsibilities are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." Cady v. Dombrowski, 413 U.S.

433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706, 714-15 (1973).

Our own Supreme Court has defined a police officer's community-caretaking duties as an "emergency-aid doctrine," enabling a police officer to enter a home without a warrant if he or she has

an objectively reasonable basis to believe that an emergency requires that he [or she] provide immediate assistance to protect or preserve life, or to prevent serious injury'" and there is a "'reasonable nexus between the emergency and the area or places to be searched.

[State v. Vargas, 213 N.J. 301, 323 (2013) (internal citations and quotation marks omitted).]

Here, Officer Podeia is entitled to the immunity protections of the good faith doctrine provided in N.J.S.A. 59:3-3 because at the time of the accident he was responding to an emergency call for medical assistance in his marked patrol car with the overhead lights and sirens activated. Indeed, police officers perform this vital community-caretaking function on a regular basis; they are often the first responders at the scene of an accident or other life threatening emergency.

~~We also affirm the motion judge's decision to dismiss~~ plaintiff's claims against NJT and its employee, Lucero. To prevail on an ordinary negligence claim, plaintiff must prove four elements: (1) duty of care; (2) breach of that duty; (3)

proximate causation; and (4) actual damages. Weinberg v. Dinger, 106 N.J. 469, 484 (1987) (internal citations omitted). New Jersey Civil Jury Instructions define a common carrier as an entity which "undertakes for pay to carry all persons who apply for passage[.]" Model Jury Charge (Civil) 5.73, "Carriers for Hire" (2009) (citing Weehawken Twp. v. Erie R.R. Co., 20 N.J. 572, 581 (1956)).

A common carrier must exercise a high degree of care to protect its passengers from dangers that are known or are reasonably foreseeable. Carriers must use the utmost caution to protect their passengers, the kind of caution that is characteristic of a very careful and prudent person. A carrier must act with the highest possible care consistent with the nature of the undertaking involved.

[Model Jury Charge (Civil) 5.73, "Carriers for Hire" (2009). See Harpell v. Pub. Serv. Coordinated Transp., 20 N.J. 309, 316-17 (1956); Pope v. Veterans Taxi Serv., 97 N.J. Super. 274, 277 (App. Div. 1967).]

Here, the Law Division granted NJT's summary judgment motion on October 26, 2012. The main thrust of plaintiff's arguments in this appeal is focused on the motion judge's decision to grant summary judgment to NJT and Lucero despite their failure to comply with a supplemental discovery order entered by the court on September 20, 2012. This order compelled NJT to provide plaintiff by October 10, 2012:

(1) A proper response to the Request to Admit; (2) Provide any documentation within New Jersey Transit's records pertaining to whether or not the intersection of Hackensack and Paterson is a designated bus stop for operators of buses traveling on Hackensack Avenue, line 76; (3) A copy of the schedule for line 76 covering the date of this loss, namely May 7, 2010; and (4) The name and title of the New Jersey Transit supervisor or dispatcher who signed the New Jersey Transit operator's report provided by defendant, New Jersey Transit.

However, plaintiff's counsel's argument before the Law Division on the return date of NJT's summary judgment motion did not mention this outstanding discovery as a critical issue that should preclude the court from granting NJT's dispositive motion for summary judgment:

Well, Judge, it's our position that they should be held to a larger standard [sic] of care than that of a common carrier because the plaintiff is paying to be on the bus.

The plaintiff was not let off at the corner, but rather -- I know in counsel's brief, he says twenty feet from the crosswalk. It's actually, based on the investigation done by the Bergen County Police Department, it's probably about eighty feet from the corner. And he crosses directly in front of the bus. And had he been let off on the corner, closer to the crosswalk, he would have at least been in the crosswalk when he was struck by the police vehicle, which is now out of the case.

By contrast, in this appeal, plaintiff devoted the bulk of his legal arguments to the alleged central role the missing

discovery items can play in the prosecution of his case against NJT and Lucero. However, accepting plaintiff's position that Lucero allowed him to alight the bus in an area that was not designated for the discharge of passengers, the trial court properly granted NJT's motion for summary judgment.

The record shows that plaintiff was aware of the existence of a designated pedestrian crosswalk located twenty feet from the point he stepped off the bus. As we noted infra, when plaintiff was asked at his deposition why he did not walk to the nearest crosswalk, he replied: "[because] [it] [was] just longer in terms of walking." (Emphasis added). Plaintiff cannot impute liability to NJT and Lucero for injuries he sustained as a proximate cause of his voluntary decision to cross the street at the location he selected, after he had alighted the bus.

Because we are satisfied NJT did not have a legal duty to plaintiff under these circumstances, we need not and specifically do not reach the defenses raised by NJT under the TCA. The remaining arguments raised by plaintiff lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

