

ERNEST ZIRKLE v. TOWNSHIP OF FAIRFIELD

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-0

ERNEST ZIRKLE,

Plaintiff-Appellant,

v.

TOWNSHIP OF FAIRFIELD, MICHAEL

MORTON, MICHAEL K. SHARP, DON

TAYLOR, VIOLA THOMAS-HUGHES

and JOANNE SERVAIS,

Defendants-Respondents.

July 1, 2015

Before Judges Lihotz, Espinosa and St. John.

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-907-13.

Matthew W. Ritter argued the cause for appellant (The Ritter Law Office, LLC, attorneys; Theodore H. Ritter, of counsel; Mr. Ritter, on the brief).

Douglas E. Burry argued the cause for respondents (Law Offices of Saponaro & Sitzler, attorneys; Mr. Burry, on the brief).

PER CURIAM

This matter addresses a municipality's obligation to indemnify a public official for legal fees incurred in the defense of litigation for what was termed the official's "discretionary activities." Plaintiff Ernest Zirkle was sued by a resident, who alleged tortious interference with performance of a contract. Plaintiff maintained his actions were taken in his official capacity as Deputy Mayor of defendant Fairfield

Township (Township). Plaintiff successfully defended the litigation, which was dismissed on summary judgment. He requested the Township reimburse counsel fees and costs incurred for his defense. The Township declined plaintiff's request for payment after contacting its insurance provider, who denied coverage under its then-existing policy.

Plaintiff filed this action against the Township and the current individual members of the Township Committee, seeking reimbursement of the fees and costs of his defense. The trial judge rejected plaintiff's claims, finding the Township had no legal obligation to indemnify plaintiff and concluded its decision to deny his request was discretionary. The February 25, 2014 order dismissed plaintiff's complaint with prejudice. Plaintiff appeals. We affirm.

The facts, taken from the summary judgement record, are viewed in a light most favorable to plaintiff. See *388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington*, __ N.J. __, __ (2015) (slip op. at 32). "Accordingly, the summary-judgment record must be viewed 'through the prism of [the plaintiff's] best case.'" *Id.* at 33 (quoting *Gormley v. Wood-El*, 218 N.J. 72, 86 (2014)).

Plaintiff was a member of defendant's Township Committee from 2010 to 2012, and held the title of Deputy Mayor beginning in 2011. On June 12, 2012, plaintiff and another member of the Fairfield Township Planning Board were served with a complaint filed by George Griner, the owner of a local mining operation. The suit against plaintiff and Marc Chiappini, the Chair of the Fairfield Township Planning Board, asserted claims of tortious interference with performance of a contract and product or property disparagement. Griner alleged plaintiff and Chiappini "intentionally and with malice" filed noise complaints with the State Police, and informed the New Jersey Department of Environmental Protection and a neighboring municipality the mining operation used contaminated soil for a fill project. Griner maintained these complaints caused the mining operations to cease until soil testing was completed, resulting in damages.

In his defense to Griner's complaint, plaintiff argued his actions regarding the mining operation were taken as a public official, in furtherance of a resolution adopted by the Township Committee in 2007.

Plaintiff notified the acting Township solicitor of the lawsuit, who, in turn, requested coverage under an insurance policy the Township obtained through the Gloucester, Salem and Cumberland Counties Municipal Joint Insurance Fund. Coverage was denied and the Township declined to indemnify plaintiff. Plaintiff retained private counsel, who notified the Township in an August 12, 2012 correspondence plaintiff would seek reimbursement for attorney's fees and litigation expenses upon successful defense of the lawsuit. The Township did not respond.

Following discovery, plaintiff moved for the summary judgment dismissal of Griner's complaint, which was granted. In its dismissal order, the court stated "the actions of Zirkle . . . [we]re discretionary activities of a Township Committee Member for which there is statutory immunity." Plaintiff sent a copy of the final judgement to the Township and again requested reimbursement of legal fees he incurred.

The Township did not respond and plaintiff initiated this action, alleging he, as a public official, was entitled to indemnification for attorney's fees and costs "incurred in the performance of his official

duties." Briefs were submitted and by agreement of the parties, the court considered the matter as if presented on cross-motions for summary judgment.

Following review, the judge granted the Township's motion for summary judgment and dismissed plaintiff's complaint with prejudice. The judge concluded the Township was not legally obligated to reimburse plaintiff, finding neither statutory authority nor common law compelled a municipality to indemnify its officials for expenses incurred in defense of litigation. The appeal from the February 25, 2014 order followed.

Although plaintiff's complaint alleged other theories of liability, we limit our review solely to the issues raised on appeal.¹ Specifically, plaintiff argues the dismissal of his complaint was erroneous, asserting he met all legal requirements for common law indemnification of legal fees incurred by a public official exercising the powers and duties of his or her office, as set forth in *Golaine v. Cardinale*, 142 N.J. Super. 385, 404 (Law Div. 1976), *aff'd*, 163 N.J. Super. 453 (App. Div. 1978), *certif. denied*, 79 N.J. 497 (1979). Alternatively, plaintiff maintains, as a matter of public policy, reimbursement should be mandatory when litigation is filed against an innocent public official for conduct taken in his or her official capacity. For the first time on appeal, plaintiff asserts principles of estoppel preclude the Township from denying reimbursement.

Arguing reimbursement is not mandated, the Township relies on a provision found in the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, which it argues supersedes any common law remedies. Under the TCA, a municipality is not mandated to indemnify its public officials, but rather has the discretion to do so. See N.J.S.A. 59:10-4.

These issues require legal determinations, subject to our *de novo* review. In doing so, we do not defer to "a trial court's interpretation of the law and the legal consequences that flow from established facts." *Estate of Hanges v. Metro. Prop. & Cas. Ins. Co.*, 202 N.J. 369, 382 (2010) (brackets omitted) (quoting *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)).

We initially conclude plaintiff's claimed application of estoppel is legally unsupported. R. 2:11-3(e)(1)(E). We turn our review to the remaining arguments.

Plaintiff asserts he met each of the three factors for common law indemnification set forth in *Golaine*. Accordingly, his attorney fee expense must be satisfied.

In *Golaine*, this court affirmed and adopted the opinion of the Law Division without further comment. The question examined was "whether in view of the undisputed circumstances [the] plaintiff's 11-month nonattendance [at meetings] constitute[d] a neglect of duty within the statutory intendment," permitting the mayor to remove him from the municipal planning board. *Golaine*, *supra*, 142 N.J. Super. at 393. Determining the removal of the plaintiff for neglect of duty "was unjustified" under the circumstances of the case, *id.* at 400, the court next considered the plaintiff's request for "reimbursement from [the] defendant[-]borough of the counsel fees and other litigation expenses incurred by him in challenging his removal" *Id.* at 401. Addressing the claimed entitlement "to reimbursement as a matter of a common law right to indemnification," *id.* at 404, the Law Division

noted counsel fees were allowed to municipal officials only if "three necessary preconditions" were met, "namely, that the officer was acting in a matter in which the municipality has an interest, that he was acting in the discharge of a duty imposed or authorized by law, and that he was acting in good faith." *Ibid.* (citing 3 *McQuillin Municipal Corporations* (3 ed. 1968), 12.137 at 575-577).

Here, the Township refutes the proposition that *Golaine* guides determination of plaintiff's indemnification claim. If found to apply, however, it argues the conduct complained of in Griner's complaint was not determined to be a matter undertaken in the Township's interest or in the discharge of plaintiff's official duties, as no ordinance or resolution for said actions was adopted. More important, the Township maintains it has no legal duty to reimburse plaintiff's defense costs, relying on *McCurrie ex rel. v. Town of Kearny*, 174 N.J. 523 (2002).

In *McCurrie* the Supreme Court made clear under the common law, in the absence of "a statutory compulsion to do so, municipalities nevertheless have a moral obligation, and hence the discretionary authority, to pay expenses incurred in good faith by municipal employees acting in their official status, including the defense of legal actions challenging acts undertaken or performed by them in that status." *Id.* at 531. "All that is necessary to justify the municipality's exercise of discretion to pay its employee's legal expenses is a showing that the employee was acting in good faith in the course of official duties in a matter in which the municipality had an interest." *Ibid.* (citing *Golaine*, *supra*, 142 N.J. Super. at 404). Under the facts presented, the Court concluded the municipal resolution to pay defense costs incurred by the outgoing township clerk in defending a taxpayer's challenge to an approved severance package "constituted a permissible exercise of municipal power." *Id.* at 527.

Although we agree *Golaine* and *McCurrie* support a municipality's decision to reimbursement public officials who incur legal fees to defend public action, we disagree with plaintiff's syllogistic conclusion that the municipality "does not . . . [have] the discretionary authority to deny reimbursement of legal defense costs to an innocent official where there is a moral obligation to do so."² Contrary to plaintiff's arguments, the Court in *McCurrie* did not mandate a municipality shall pay fees claimed due under the common law "moral obligation" for indemnification. Rather, the Court held the municipal entity may do so. *Ibid.* Even under common law indemnification jurisprudence, a municipality cannot be compelled to provide reimbursement as the designated "moral obligation" remains discretionary, not mandatory. *Kress v. La Villa*, 335 N.J. Super. 400, 414 (App. Div. 2000) ("Although a municipality may indemnify a public official for expenses, including legal fees, incurred in the performance of his duties, it is not obligated to do so in the absence of specific legislation."), *certif. denied*, 168 N.J. 289 (2001). See also *Palmentieri v. Atlantic City*, 231 N.J. Super. 422, 429 (Law Div. 1988) (recognizing "a moral obligation of the sovereign to pay expenses honestly incurred in good faith by public officers in furtherance of governmental purposes" (citation and internal quotation marks omitted)).

In certain instances, the Legislature has overridden a municipality's discretionary authority to indemnify its officials by mandating, through legislation, an obligation to pay legal fees incurred to defend suits challenging official conduct. See e.g. N.J.S.A. 40A:14-155 (mandating, with limited exceptions, payment for legal fees incurred by police officers successfully defending "any action or legal proceeding arising out of and directly related to the lawful exercise of police powers in the furtherance of his [or her]

official duties"); N.J.S.A. 40A:9-134.1 (requiring, with limited exceptions, municipalities to defend and indemnify municipal clerk with respect to any legal action "arising out of and directly related to the clerk's lawful exercise of authority in furtherance of official duties"); N.J.S.A. 18A:12-20 (mandating payment of legal fees to members of boards of education for acts or omissions arising out of and in the course of the performance of their duties as board members).

We also cannot ignore the general rule for counsel fee awards limits payment "to special circumstances as defined in R. 4:42-9 or as authorized by contract or statute." *McCurrie v. Town of Kearny*, 344 N.J. Super. 470, 489 (App. Div. 2001), rev'd, 174 N.J. 523 (2002). Here, there is no statutory authority requiring payment and the Township had not adopted an ordinance authorizing indemnification of municipal officials defending suits challenging actions performed in the course of their official duties. See *Kress*, supra, 335 N.J. Super. at 410-11 (recognizing municipal authority is limited to those powers granted by the Legislature and "'may only act by resolution or ordinance'" (quoting *Midtown Props., Inc. v. Twp. of Madison*, 68 N.J. Super. 197, 208 (Law Div. 1961), aff'd, 78 N.J. Super. 471 (App. Div. 1963))). See also *N.J. Div. of Youth & Family Servs. v. D. C.*, 219 N.J. Super. 644, 658-59 n.5 (App. Div. 1987) ("The lack of a specific rule or statutory authority has served many times as the basis for a court to deny compensation to attorneys."), aff'd, 118 N.J. 388 (1990).

Plaintiff next argues that although a municipality's decision is discretionary, the reasoned exercise of that discretionary authority must be free of caprice. He argues, "[t]he 'moral obligation' . . . is no obligation at all if the wronged official has no right to hold the municipality to that obligation." To support his contention, he complains the Township did not respond to his request for reimbursement or consider the issue during council sessions. In a related argument plaintiff urges, as a matter of public policy, municipalities "should be compelled to deal fairly with their own officials" and "ensur[e] that blameless public officials are not burdened with unanticipated costs incurred in the exercise of their sworn duties."

Plaintiff's public policy argument persuasively articulates the benefits of a salutary policy to safeguard public officials from the unexpected or unwarranted expense of defending actions challenging the performance of designated duties on behalf of the citizenry. We agree the failure of a municipality to protect its public officials from such suit may dissuade some who would otherwise consider public service. However, the Legislature has examined this issue and declined to mandate municipal payment of defense fees for municipal officials sued for official acts. As the motion judge pointed out in his opinion, the TCA empowers local public entities to indemnify its employees; however, indemnification for municipal employees was designated as permissive, not mandatory. N.J.S.A. 59:10-4 ("Local public entities are hereby empowered to indemnify local public employees consistent with the provisions of this act. A local public entity may indemnify an employee of the local public entity . . .").

The court's role is to effectuate legislative intent not alter it. See *Morristown Assocs. v. Grant Oil Co.*, 220 N.J. 360, 380 (2015) ("When construing a statutory provision, a court's role is to discern and give effect to the Legislature's intent."). A sea change in policy, as suggested by plaintiff, lies with the legislative body, not the courts.

Similar constraints in the TCA limit a court's review of discretionary decisions by a municipality. Addressing discretionary activities of public entities, the TCA provides

a. A public entity is not liable for an injury resulting from the exercise of judgment or discretion vested in the entity;

b. A public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature;

....

d. A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. . . .

[N.J.S.A. 59:2-3.]

These provisions recognized the vast responsibilities of governments and the corresponding limits of available resources to meet these demands mindful of "the thesis that a public entity's discretionary decisions to act or not to act in the face of competing demands, should generally be free from the second guessing of a coordinate branch of Government." *Garrison v. Twp. of Middletown*, 154 N.J. 282, 310 (1998) (quoting Attorney General's Task Force on Sovereign Immunity 1972, Comment to N.J.S.A. 59:4-2).

Further, we have concluded plaintiff's asserted application of the common law "moral obligation" cannot morph into a mandate for indemnification. Griner's complaint alleged intentionally tortious conduct by plaintiff, not negligence. The Township was not joined as a defendant, suggesting plaintiff's conduct was neither authorized nor directed by the Township. Support for this is found in the summary judgment order dismissing Griner's suit, which describes plaintiff's actions as "discretionary." See *Palmentieri*, supra, 231 N.J. Super. at 431 ("Whether the authority to indemnify originates under the common law, the Tort Claims Act, or a specific statute, . . . the analysis initially focuses on what acts can be characterized as being 'within the scope of employment.'"). See also *McCurrie*, supra, 174 N.J. at 532 ("The question, then, is whether the subject matter of the official's action relates to the public, rather than merely a personal[] interest."). The Township also sought coverage under its insurance policy, but the claim was rejected as not covered; thus payment would have come from municipal funds. The facts support a conclusion the Township exercised reasonable discretion when declining plaintiff's request for indemnification and reimbursement. We cannot conclude from the record, albeit limited, that the Township's decision to refrain from authorizing indemnification was palpably unreasonable. That decision is entitled to judicial deference. Summary judgment was properly ordered.

Affirmed.

1 Plaintiff also sought relief against the Township under the Open Public Records Act, N.J.S.A. 47:1A-1 to -13. The dismissal of this claim is not challenged on appeal.

2 Plaintiff borrows from Justice LaVecchia in *McCurrie*, who wrote: "the fact that the Town was not compelled by the statute to defend Czech in this action does not include the corollary that the Town was without the discretion, as a policy decision and in the proper exercise of its municipal powers, to elect to do so." *Id.* at 530-31.