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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0187-14T4

NICKOLAS D'ANGELO,

Plaintiff-Appellant,

v.

DAWN MOYLAN, VILLAGE OF
RIDGEFIELD PARK,

Defendants-Respondents.

Argued January 4, 2016 - Decided January 20, 2016

Before Judges Messano and Carroll.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5208-12.

Richard La Barbiera argued the cause for appellant (La Barbiera & Martinez, attorneys; Mr. La Barbiera, of counsel and on the briefs).

Ian C. Doris argued the cause for respondents (Keenan & Doris, LLC, attorneys; Mr. Doris, of counsel; Bernadette M. Peslak, on the brief).

PER CURIAM

Plaintiff Nicholas D'Angelo appeals from the summary judgment dismissal of his personal injury lawsuit against defendants Dawn Moylan and the Village of Ridgefield Park (Village). The motion judge determined that Moylan was entitled

to good-faith immunity under N.J.S.A. 59:3-3, which provides that "[a] public employee is not liable if he acts in good faith in the execution or enforcement of any law." The judge also concluded that plaintiff's proofs were insufficient to establish that he sustained a "permanent loss of a bodily function" that was substantial.[1] Accordingly, plaintiff failed to meet the threshold contained in the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, to maintain a claim for pain and suffering. For the reasons that follow, we affirm the dismissal of plaintiff's pain and suffering claim. However, because we conclude that the TCA does not confer immunity on defendants under the circumstances presented, we reverse and remand for trial on plaintiff's economic damages claim.

I.

Plaintiff alleged that he suffered personal injuries as a result of an automobile accident that occurred on September 26, 2010. Plaintiff was stopped in a line of traffic that was awaiting a red light on Main Street in Ridgefield Park. Moylan, who was responding to a call for medical assistance in an ambulance owned by the Village, attempted to navigate around the stopped vehicles. She passed two of the vehicles without incident before striking plaintiff's car. At the time of the

[1] See N.J.S.A. 59:9-2d.

accident, Moylan had served as a member of the Village's Volunteer Ambulance squad for approximately two months.

Plaintiff testified at his deposition that the impact from the accident broke his taillight and axle, punctured his bumper, and "popped" his tire. In accordance with ambulance protocol, Moylan and the ambulance crew examined plaintiff and his passenger for injuries. Both refused medical assistance at the scene.

The next day, a doctor at Holy Name Hospital examined plaintiff's lower back and prescribed him anti-inflammatory medication. Plaintiff subsequently sought sporadic chiropractic treatment from November 1, 2010 through April 29, 2011, and then again from November 1, 2011 through January 12, 2012. On January 4, 2011, an MRI of plaintiff's lumbar spine revealed a herniated disc. On June 24, August 3, and September 20, 2011, plaintiff received lumbar epidural injections. On January 10, 2012, a CT scan of plaintiff's lumbar spine depicted disc bulging with broad based herniation. Plaintiff underwent a percutaneous discectomy on February 29, 2012. In August 2013, plaintiff was examined by neurologist John R. Cifelli, who reported that plaintiff continued to complain of "severe and intractable low back pain." An August 20, 2013 MRI continued to show that defendant had sustained an L5-S1 disc herniation.

Plaintiff was examined by orthopedic and neurological specialists retained by the defense. In his October 7, 2013 report, orthopedist Mark Berman, M.D., found "no evidence of any injury to the lumbar spine." On November 7, 2013, neurologist David M. Prince, M.D. examined plaintiff and similarly concluded that he suffered no permanent neurological injury as a result of the accident.

Plaintiff continues to work in a deli, as he did prior to the accident. However, his capacity in this employment is now limited in that he can no longer assist with lifting heavy items. Prior to the accident, he used to regularly go to the gym and give his daughter piggy-back rides. Plaintiff alleges that his lower back pain, attributable to the accident, presently prevents him from continuing to enjoy these activities.

Plaintiff's sister owned the vehicle he was driving at the time of the accident. She maintained an automobile insurance policy that contained a $15,000 limit for the payment of Personal Injury Protection (PIP) benefits. Plaintiff far exhausted the policy limit, incurring over $150,000 in unreimbursed medical expenses causally related to the accident.

Defendants filed a motion for summary judgment, claiming that they were immune under N.J.S.A. 59:3-3. Defendants also

argued that plaintiff's injuries did not prevent him from functioning in his daily life and did not otherwise rise to the level of a "permanent loss of a bodily function" within the meaning of N.J.S.A. 59:9-2d. The trial court granted the motion on August 22, 2014. In his written decision, the judge equated a volunteer rescue squad member responding to an emergency call with a law enforcement officer engaged in a similar activity. Hence, the judge found that Moylan was entitled to good-faith immunity under N.J.S.A. 59:3-3. The judge further concluded that plaintiff's injuries and accompanying "minor [lifestyle] limitations" did not satisfy the threshold for recovery for pain and suffering under the TCA. This appeal followed.

II.

We begin our analysis by reaffirming basic principles. We review a grant of summary judgment under the same standard as the motion judge. Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405 (2014). We must determine whether there are any genuine issues of material fact when the evidence is viewed in the light most favorable to the non-moving party. Id. at 38, 41. "The inquiry is whether the evidence presents a sufficient disagreement to require submission to a [finder of fact] or whether it is so one-sided that one party must prevail as a matter of law." Liberty Surplus Ins. Corp. v. Nowell Amoroso,

P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)). "[T]he legal conclusions undergirding the summary judgment motion itself" are reviewed "on a plenary de novo basis." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 385 (2010).

It has been repeatedly recognized that immunity is the "dominant consideration of the [TCA]." Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 408 (1988) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 498 (1985) (O'Hern, J., concurring)). The TCA provides general immunity for all governmental bodies except in circumstances where the Legislature has specifically provided for liability. See N.J.S.A. 59:1-2 and 59:2-1; Bell v. Bell, 83 N.J. 417, 423 (1980). The liability of the public entity must be provided for within the TCA and is subject to any statutory or common law immunity that applies. Tice v. Cramer, 133 N.J. 347, 355 (1993); Rochinsky, supra, 110 N.J. at 408-09. "In determining if a public entity is immune, courts first identify the culpable cause of the accident and . . . ask if that identified cause or condition is one that the Legislature intended to immunize." Caicedo v. Caicedo, 439 N.J. Super. 615, 623 (App. Div. 2015) (quoting Kain v. Gloucester City, 436 N.J. Super. 466, 473 (App. Div.), certif. denied, 220 N.J. 207 (2014)).

Generally, the liability of a public entity under the TCA tracks that of its public employees with some exceptions. "[W]hen the public employee is liable for acts within the scope of that employee's employment so too is the entity; conversely, when the public entity is not liable, neither is the entity." Tice, supra, 133 N.J. at 355; N.J.S.A. 59:2-2. The public entity bears the burden of proof for establishing immunity. Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 128 (1993).

A.

Plaintiff first contends that the court erred in determining that a volunteer ambulance squad member qualifies as a "public employee" within the meaning of N.J.S.A. 59:3-3 because the Legislature instead opted to confer immunity to rescue squad members under N.J.S.A. 2A:53A-13. Plaintiff further argues that the good-faith immunity under N.J.S.A. 59:3-3 does not apply because defendants have failed to identify any law that Moylan was executing or enforcing at the time of the accident. We agree.

Defendants claim immunity under N.J.S.A. 59:3-3, which provides:

> A public employee is not liable if he acts in good faith in the execution or enforcement of any law. Nothing in this section exonerates a public employee from liability for false arrest or false imprisonment.

Defendants analogize Moylan's act of responding to a medical emergency to cases, frequently involving police officers, where courts have concluded that responding to a crime or accident scene constitutes enforcement of the law sufficient to bestow immunity under the statute.

We find the cases relied upon by defendants to be easily distinguishable. For example, in Canico v. Hurtado, 144 N.J. 361 (1996), plaintiff was injured when involved in an accident with a police officer who was responding to a reported bank robbery. The Court concluded that "[b]y responding to a radio call directing him to the scene of a potential crime, [defendant] was enforcing the law." Id. at 365. Thus, defendants' reliance on Canico is misplaced.[2]

We do not intend to restrict the application of N.J.S.A. 59:3-3 immunity only to police officers, to the exclusion of other public employees who act in good faith in the execution or enforcement of any law. However, none of the cases cited by defendants apply this statutory immunity to volunteer ambulance drivers. When police officers respond to an accident, they are tasked with performing a number of corollary law enforcement

[2] Defendants also cite to our unpublished decision in Liburdi v. Township of Toms River, No. A-1362-11 (App. Div. June 22, 2012). However, "[n]o unpublished opinion shall constitute precedent or be binding upon any court." R. 1:36-3.

functions. These include completing an accident report, issuing summonses, and/or making arrests. In contrast, although they are public employees, the function of ambulance drivers responding to medical emergencies is not to execute or enforce the law. Simply stated, defendants have failed to identify any statute, ordinance, or regulation that Moylan was enforcing when the subject accident occurred, thus rendering N.J.S.A. 59:3-3 inapplicable.

More importantly, the Legislature has opted to specifically bestow immunity on ambulance drivers and first aid squads under N.J.S.A. 2A:53A-12, -13, and -13.1. We traced the history of these statutory enactments in Pallister v. Spotswood First Aid Squad, 355 N.J. Super. 278 (App. Div. 2002), as follows:

> Prior to adoption of the TCA, the Legislature adopted N.J.S.A. 2A:53A-12 which, after an immaterial amendment in 1997, now provides:
>
> > No member of a volunteer first aid, rescue or emergency squad, or volunteer member of the National Ski Patrol System, which provides emergency public first aid and rescue services shall be liable in any civil action to respond in damages as a result of his acts of commission or omission arising out of and in the course of his rendering in good faith any such services as such member but such immunity from liability shall not extend to the operation of any

> motor vehicle in connection with such services.
>
> Nothing herein shall be deemed to grant any such immunity to any person causing damage by his willful or wanton act of commission or omission.

In 1963, the Legislature adopted a companion statute, N.J.S.A. 2A:53A-13, which now reads:

> No member of a volunteer fire company, which provides emergency public first aid and rescue services or services for the control and extinguishment of fires, or both, and no authorized volunteer first aid or rescue squad worker who is not a member of the volunteer fire company within which the first aid or rescue squad may have been created, doing public first aid or rescue duty, shall be liable in any civil action to respond in damages as a result of his acts of commission or omission arising out of and in the course of his rendering in good faith any such services, or arising out of and in the course of participation in any authorized drill, but such immunity from liability shall not extend to the operation of any motor vehicle in connection with the rendering of any such services.
>
> Nothing herein shall be deemed to grant any such immunity to any person causing damage by his willful or wanton act of commission or omission.

> After adoption of the TCA in 1972, the Legislature adopted N.J.S.A. 2A:53A-13.1, which gave any "volunteer first aid, rescue or emergency squad" . . . the same immunity as their members.
>
> [Id. at 280 (emphasis added).]

We also cited with approval the holding in D'Eustachio v. City of Beverly, 177 N.J. Super. 566, 574-75 (Law Div. 1979), that "the limited immunity conferred by N.J.S.A. 2A:53[A]-13 and 13.1 is preserved and implemented through the [TCA]." Pallister, supra, 355 N.J. Super. at 281.

We conclude that the specificity of N.J.S.A. 2A:53A-12, -13, and -13.1 as they pertain to volunteer ambulance squads trumps the generality of the good-faith immunity conferred on public employees by N.J.S.A. 59:3-3. This view follows the "well-established rule that where two statutes appear to be in conflict, and one is general in nature and the other specific, the conflict is resolved in favor of the more specific statute as a more precise manifestation of legislative intent." State v. Gerald, 113 N.J. 40, 83 (1988) (quoting In re: Salaries for Probation Officers of Hudson County, 158 N.J. Super. 363, 366 (App. Div. 1978)).

We further conclude that the legislative intent embodied in this statutory framework is to confer immunity on volunteer ambulance squads and their members, so long as at the time of

the incident giving rise to liability, they are providing emergency public first aid and rescue services in good faith. However, the Legislature has expressly provided that this immunity "shall not extend to the operation of any motor vehicle in connection with such services." N.J.S.A. 2A:53A-12, -13, and -13.1. In the present case, since Moylan was driving an ambulance at the time of the accident giving rise to plaintiff's injuries, no immunity attaches.

B.

We next address the issue of plaintiff's damages. In Pallister, supra, 355 N.J. Super. at 283, we held that:

> N.J.S.A. 2A:53A-12, -13 and -13.1 except from their broad immunity injuries which occur "in the operation of any motor vehicle in connection with the enumerated services." However, because these entities and their members are also protected by the TCA, we must conclude that the TCA threshold must be satisfied to bring an action under the exception to N.J.S.A. 2A53A-12, -13 and -13.1 relating to an accident involving a motor vehicle.

Under the TCA,

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $ 3,600.00. For purposes of this

> section medical treatment expenses are defined as the reasonable value of services rendered for necessary surgical, medical and dental treatment of the claimant for such injury, sickness or disease, including prosthetic devices and ambulance, hospital or professional nursing service.
>
> [N.J.S.A. 59:9-2(d) (emphasis added).]

In addition to presenting evidence of "medical treatment expenses" that both exceed $3600 and meet the definition under N.J.S.A. 59:9-2(d), a plaintiff seeking to recover pain and suffering damages against a public entity must also satisfy the two-pronged test established by our Supreme Court by showing: "(1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Toto v. Ensuar, 196 N.J. 134, 145 (2008) (quoting Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (2003)).

Plaintiff argues that the motion judge erred in concluding that he provided insufficient evidence of a permanent loss of a bodily function, thus precluding him from recovering compensatory damages for pain and suffering. We disagree.

In his analysis, the judge correctly referred to the Supreme Court case of Brooks v. Odom, 150 N.J. 395, (1997), in which the Court set forth the test as follows:

> To recover under the Act for pain and suffering, a plaintiff must prove by objective medical evidence that the injury is permanent. Temporary injuries, no matter

> how painful and debilitating, are not recoverable. Further, a plaintiff may not recover under the Tort Claims Act for mere subjective feelings of discomfort.
>
> [Id. at 402-03 (quoting Ayers v. Township of Jackson, 106 N.J. 557, 571 (1987)).]

In Brooks, the Supreme Court reinstated the trial court's dismissal of a plaintiff's claims under N.J.S.A. 59:9-2(d) because the plaintiff could still function in both her employment and as a homemaker. Id. at 406-07. The Court reached that conclusion even though the plaintiff was still experiencing post-accident pain and had permanent restrictions of motion in her neck and back. Id. at 406.

"[T]he Legislature intended that a plaintiff must sustain a permanent loss of the use of a bodily function that is substantial." Ibid.; see also Knowles, supra, 176 N.J. at 332-35 (finding that plaintiff's injury met the permanent loss threshold allowing the question to go before the jury, even though he was still able to teach, but could no longer stand, sit or walk comfortably for substantial amounts of time, engage in athletics or complete household chores); Ponte v. Overeem, 171 N.J. 46 (2002) (concluding that plaintiff's knee injury, which required surgery, did not meet the permanent loss threshold, in part because the record was lacking as to the extent and permanency of his impairments); Heenan v. Greene, 355

N.J. Super. 162 (App. Div. 2002) (holding that plaintiff's cervical disc herniation, which led to a less strenuous teaching job and more breaks in household chores, did not meet the permanent loss threshold).

In Newsham v. Cumberland Reg'l High Sch., 351 N.J. Super. 186, 194 (App. Div. 2002), we reviewed recent cases and "conclude[d] that the underlying principles set forth in Brooks still control." The facts in Newsham are indeed similar to the present case in that the plaintiff continued to experience some pain and discomfort after a vertebra compression fracture while cheerleading, although the permanent limitations on her activities were relatively minor. Id. at 187, 195.

In the present case, the motion judge determined:

> The limitations alleged by [] plaintiff are insufficient to show a loss of function that is permanent and substantial. While plaintiff has some minor limitations, he is able to continue working in the deli making sandwiches, which is the same type of job he was doing prior to the accident. His ability to workout is limited[;] however he was still able to workout at the gym as late as the summer of 2013. Additionally, he has limitations on his ability to play with his kids and perform certain household chores. By comparison, Mrs. Brooks'[s] injuries affected her ability to sit or stand for long and to perform household chores including vacuuming, carrying groceries, or anything involving lifting or bending. She missed eight days of work, remaining at home for two weeks. The Court found that these limitations were not substantial enough to

> amount to a permanent loss of a bodily function. The plaintiff here suffered less intrusive limitations on his normal activities. This case does not present the aggravated circumstances that the Legislature had in mind when it enacted the threshold under the [TCA].

We agree with the motion judge's analysis of the extent of plaintiff's injuries. Consequently we affirm his grant of summary judgment dismissing plaintiff's pain and suffering claims.

Plaintiff also asserts a claim for economic damages in excess of $150,000 for his unreimbursed medical expenses. The trial court did not consider this component of plaintiff's damages claim, no doubt predicated on its ruling that defendants were immune from suit under the TCA. At oral argument, defense counsel conceded that our reversal of the motion judge's immunity ruling would necessitate a remand to the trial court to consider plaintiff's economic damages claim.

Summarizing, we hold that defendants are not entitled to good-faith immunity under N.J.S.A. 59:3-3 since Moylan was not executing or enforcing any law when responding to the call for emergency first aid services. Defendants are also not immune from liability under N.J.S.A. 2A:53A-12, -13, and -13.1 because Moylan was operating a vehicle in connection with those duties when the accident occurred. Consequently, we reverse the trial

court's immunity ruling and remand for trial on plaintiff's economic damages claim. However, since plaintiff failed to establish that he sustained a permanent loss of bodily function that is substantial, we affirm the dismissal of his pain and suffering claim.

Affirmed in part and reversed and remanded in part. We do not retain jurisdiction.