JOSEPH J. RUGGIANO, Plaintiff-Appellant,

v.

CHAD B. TOOMEY, HERMAN LIEDTKA, INC., LARRY ELLISON, COUNTY OF BURLINGTON, Defendants-Respondents, and

CAROLINA HADILAND, Defendant.

No. A-4979-08T3.

Superior Court of New Jersey, Appellate Division.

Submitted May 18, 2010.
Decided August 30, 2010.

Ridgway & Stayton, attorneys for appellant (Herbert J. Stayton, Jr., on the brief).

Methfessel & **Werbel**, attorneys for respondents Chad B. Toomey and Herman Liedtka, Inc. (Martin R. McGowan, on the brief).

Wright & O'Donnell, attorneys for respondent Larry Ellison (David M. Maselli and Marie Aragona Porta, of counsel; Mr. Maselli, on the brief).

Capehart & Scatchard, attorneys for respondent County of Burlington (Michelle L. Corea, on the brief).

Before Judges Wefing, Grall and Messano.

PER CURIAM.

Plaintiff, Joseph J. Ruggiano, was involved in an automobile accident on April 21, 2006, at the intersection of County Road 672 ("CR 672") and County Road 528 ("CR 528") in Burlington, New Jersey. He brought suit for the injuries he received in that collision. He now appeals from trial court orders granting summary judgment to defendants. After reviewing the record in light of the contentions advanced on appeal, we affirm.

I

CR 672 is a north/south road which intersects CR 528, an east/west road, at a "T" intersection. A stop sign controls drivers on CR 672 who wish to turn onto CR 528. Plaintiff is a police officer employed by the Chesterfield Township Police Department. On the morning of April 21, he was heading westbound on CR 528; the flashers on his police vehicle were activated. Defendant Larry Ellison was driving a tractor-trailer eastbound on CR 528; both approached the intersection with CR 672. Defendant Chad B. Toomey was driving a dump truck owned by defendant Liedtka, Inc. ("Liedtka") southbound on CR 672. Toomey brought his dump truck to a stop at the stop bar painted on the road surface. He intended to make a left turn onto CR 528 and head eastbound. Ellison wished to make a left turn from CR 528 onto CR 672. He stopped his tractor trailer preparatory to making the turn, waiting for Toomey to make his turn so that Ellison would have more room to navigate his tractor-trailer.

Toomey did not have a clear line of vision from the stop line to check for traffic on CR 528 to see if it were safe to turn and he began to inch his truck forward. He said that Ellison, waiting to turn onto CR 672, waved him forward, but Ellison denied doing so. Ellison said that he had been talking on his cell phone, and Toomey may have misunderstood that as a gesture signaling him to proceed. Toomey also testified, however, that he did not rely on any signal from Ellison and understood he had to make his own observations before proceeding.

Toomey testified that as he neared the intersection, he saw the lights on plaintiff's approaching police car and brought his truck to a stop. Plaintiff, however, thought that Toomey was entering the intersection to make his turn just as plaintiff was about to cross the intersection. He slammed on his brakes to avoid a collision but skidded into the dump truck, sustaining serious injuries. The force of the collision pushed the dump truck eight to ten feet to the side.

Plaintiff filed suit against Toomey and his employer, and Ellison. He also named the County of Burlington as a defendant,

claiming that it had placed the stop line for traffic on CR 672 too far back from the intersection with CR 528. After discovery, all defendants moved for summary judgment, and the trial court granted all the motions. This appeal followed.

On appeal, plaintiff raises the following contentions for our consideration:

> I THERE ARE GENUINE ISSUES OF MATERIAL FACT TO PRECLUDE GRANT OF SUMMARY JUDGMENT.
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> II BASED UPON HOLDINGS IN THORNE AND PROGENY, AS APPLIED TO THE FACTS OF THIS MATTER, THERE IS ARE [sic] GENUINE ISSUES OF MATERIAL FACT PRECLUDING THE GRANT OF SUMMARY JUDGMENT.
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> III DEFENDANT, TOOMEY'S, ACTIONS RESULTED IN A PER SE VIOLATION OF N.J.S.A. 39:4-144 PRECLUDING A GRANT OF SUMMARY JUDGMENT.
>
> IV THE DEFENDANT, COUNTY OF BURLINGTON, IS NOT ENTITLED [TO] IMMUNITY PURSUANT TO N.J.S.A. 59:4-2 PRECLUDING THE GRANT OF SUMMARY JUDGMENT.
>
> A. THERE WAS CLEARLY A DANGEROUS CONDITION THAT EXISTED ON THE PROPERTY.
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> B. THE INJURIES SUSTAINED BY THE PLAINTIFF WERE PROXIMATELY CAUSED BY THE DANGEROUS CONDITION WHICH CREATED A REASONABLY FORESEEABLE RISK OF THE KIND OF INJURY WHICH WAS INCURRED.
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> C. A JURY QUESTION EXISTS THAT THE DEFENDANT, BURLINGTON COUNTY, HAD EITHER ACTUAL OR CONSTRUCTIVE NOTICE OF A DANGEROUS CONDITION AT THE INTERSECTION IN QUESTION.
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> D. THE ACTIONS OR INACTIONS OF THE DEFENDANT, BURLINGTON COUNTY, WERE PALPABLY UNREASONABLE.
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> V. THE DEFENDANT, BURLINGTON COUNTY, IS NOT ENTITLED TO IMMUNITY PURSUANT TO N.J.S.A. 59:2-3 (b) RELATIVE TO ITS DECISION TO PLACE THE STOP LINE IN ITS 2005, ACCIDENT LOCATION.

II

A grant of summary judgment is contingent upon the absence of a genuine issue of material fact. R. 4:46-2. The Supreme Court articulated the standard which must guide the trial court in its consideration of a motion for summary judgment in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.

Not every factual dispute is sufficient to defeat a motion for summary judgment; rather, the issue must be genuine and the fact material to the issue. Id. at 540-45. The core of the summary judgment inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 533 (quotations omitted). On appeal, the questions presented to the reviewing court are whether, considering the evidence in the light most favorable to the non-moving party, there was any issue of material fact and whether the moving party, here the defendants, were entitled to prevail as a matter of law. Id. at 528-29; Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998).

A

Plaintiff points to the fact that defendants Toomey and Ellison disagree on whether Ellison signaled Toomey to proceed into the intersection to make his turn. That factual dispute, plaintiff contends, precluded the grant of summary judgment. We disagree.

Plaintiff relies on Thorne v. Miller, 317 N.J. Super. 554 (Law Div. 1998), to support his position. In that case, the defendant, Lori Miller, was attempting to exit a parking lot and turn left onto Route 530, which had two lanes of traffic in each direction. Id. at 557. The defendant Donald Cook, driving in the right, or slow, lane, had stopped his car to permit Miller to proceed, and he gestured to her that it was safe to do so. Ibid. When she moved forward into her turn, she collided with another vehicle approaching in the left, or fast, lane. Ibid. The impact of that collision propelled the driver of that car into another vehicle. Ibid. In the resulting litigation, claims were asserted not only against Miller but also against Cook, who had signaled her to proceed. Ibid. Cook moved for summary judgment, arguing that he did not owe Miller a duty of care. Ibid. The court denied his motion, finding that one driver waving on another driver has a duty of care to that driver. Id. at 557-58.

We have no quarrel with that principle, but our review of this record convinces us that the trial court correctly concluded that it is not relevant to this matter. Indeed, the trial court in its oral opinion assumed that Ellison had, in fact, waved to Toomey to make his turn onto CR 528. Toomey, however, was quite clear in his deposition testimony that he did not rely on any signal from Ellison and understood that he was responsible to make his own observations and determination when it was safe to proceed. There is nothing in the record to challenge that testimony. Because Toomey did not rely upon any conduct on the part of Ellison, any gesture Ellison may or may not have made could not be a proximate cause of the accident. The trial court's determination that defendant Ellison was entitled to summary judgment was entirely correct.

B

Plaintiff contends the trial court erred in granting summary judgment to defendant Toomey because his actions constituted a per se violation of N.J.S.A. 39:4-144, which deals with a driver's obligation to obey a stop sign.

> No driver of a vehicle or street car shall enter upon or cross an intersecting street marked with a "stop" sign unless . . . [t]he driver has first brought the vehicle or street car to a complete stop at a point within five feet of the nearest crosswalk or stop line marked upon the pavement at the near side of the intersecting street and shall proceed only after yielding the right of way to all vehicular traffic on the intersecting street which is so close as to constitute an immediate hazard.

The purpose of the statute "is to bring the motorist to a full stop for the very purpose of compelling him to look carefully for oncoming traffic as he enters and crosses the intersecting street." Cresse v. Parsekian, 81 N.J. Super. 536, 545 (App. Div. 1963), aff'd, 43 N.J. 326 (1964). Plaintiff argues that the fact that Toomey moved his truck ahead of the stop line constituted a violation of the statute and that the trial court accordingly should have denied Toomey's motion for summary judgment. We disagree.

The evidence contained in the record before us, which includes photographs taken at the scene of the accident, make clear that no portion of Toomey's truck had entered onto CR 528. That was the conclusion reached by the police who investigated the accident scene as well as by the experts in accident reconstruction retained by Burlington County and Toomey. Ruggiano's deposition testimony that it was his perception as he approached the intersection that the dump truck was in his lane is not sufficient to defeat the undisputed physical evidence. The trial court correctly granted summary judgment to Toomey and his employer, defendant Liedtka.

C

The remaining defendant is Burlington County ("Burlington"). Because Burlington is a public entity, plaintiff's claims against it are measured by the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 59:12-3. There are five required elements to establish liability on the part of a public entity for injury caused by a condition of its property: the existence of a dangerous condition, proximate cause, that the kind of injury which occurred was a reasonably foreseeable risk of that dangerous condition and that the dangerous condition either was created by a public employee acting within the scope of his employment or the public entity had actual or constructive notice of the dangerous condition. N.J.S.A. 59:4-2. The statute concludes with the following overall condition to liability: "Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable." Ibid.

The TCA defines a dangerous condition as "a condition of property that creates a substantial risk of injury when such property is

used with due care in a manner in which it is reasonably foreseeable that it will be used." N.J.S.A. 59:4-1(a). Whether the public entity's property has been "used with due care" is measured by an objective standard of reasonableness.

> "[U]sed with due care" implies a standard of objective reasonableness. A use that is not objectively reasonable from the community perspective is not one "with due care." To this extent, "used with due care" refers not to the conduct of the injured party, but to the objectively reasonable use by the public generally.
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> [Garrison v. Twp. of Middletown, 154 N.J. 282, 291 (1998).]

The question of whether a public entity's property is in a "dangerous condition" is generally one for the finder of fact, either the jury or the trial court in a bench trial. Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 123-24 (2001). Summary judgment may be appropriate, nonetheless, if it could not reasonably be concluded on the basis of the evidence that a dangerous condition existed. Id. at 124.

Plaintiff's claim against Burlington rested upon his contention that the placement of the stop bar painted on CR 672 changed in 2005 when the road surface was repaved. When the repaving was completed, the stop bar was painted on the new road surface thirty-five feet further back from the intersection than it had been prior to the repaving. This, according to plaintiff, created a dangerous condition because no one stopping at the painted stop bar would be able to observe the traffic on CR 528 and determine whether it was safe to proceed. Plaintiff points to the fact that the placement of the stop line so far from the intersection did not comply with The Manual of Uniform Traffic Control Devices, published by the Federal Highway Administration. The manual in effect at the time of the accident provided that such a stop line should be placed no less than four feet from the intersecting street and "should be placed to allow sufficient sight distance to all other approaches to an intersection."

In our judgment, plaintiff's contention with respect to the placement of the stop line is wholly speculative. He asserts, in essence, that if the stop line had remained where it was prior to the repaving in 2005, that is, parallel to the guard rail at the northwest corner of the intersection, Toomey would have brought his dump truck to a stop at that site, and plaintiff would not have thought Toomey was entering the intersection. Toomey, however, as we noted earlier, testified in his deposition that he saw the flashing lights of Ruggiano's approaching police car and stopped his truck before entering the intersection. This testimony is entirely consistent with the physical evidence and the conclusions of those who investigated the accident scene. To impose liability upon the county in such a context would be inconsistent with the underlying principles of the TCA. "Under the TCA, immunity is the rule and liability is the exception." Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 181 (2002).

The orders under review are affirmed.