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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1467-21**

MARTHA GODOY, as
administratrix of the estate
of PRISCILLA GODOY, and as
administratrix ad prosequendum
for the estate of PRISCILLA
GODOY,

Plaintiff-Appellant,

v.

KENNETH WASHINGTON,
PAUL HAMILTON, and
VANESSA LORENZO,

Defendants-Respondents,

and

CITY OF NEWARK POLICE
DEPARTMENT, and CITY OF
NEWARK,

Defendants.

PAUL HAMILTON,

Third-Party Plaintiff,

v.

NAJEEH GREEN,

Third-Party Defendant.

Argued April 19, 2023 – Decided July 13, 2023

Before Judges Currier, Mayer and Enright.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-3659-19.

Corey A. Dietz argued the cause for appellant (Brach Eichler LLC, attorneys; Corey A. Dietz, on the briefs).

Gary S. Lipshutz, First Assistant Corporation Counsel, argued the cause for respondent Paul Hamilton (Kenyatta K. Stewart, Corporation Counsel, attorney; Gary S. Lipshutz and Azeem M. Chaudry, Assistant Corporation Counsel, on the brief).

Victor A. Afanador argued the cause for respondent Vanessa Lorenzo (Ricci & Fava, LLC, attorneys; Ronald J. Ricci, on the brief).

PER CURIAM

Priscilla Godoy (Godoy) was killed when a stolen vehicle, previously involved in a carjacking, crashed into a parked car, causing a domino effect of parked cars to collide and crush her as she stood between two parked vehicles.

Defendants, Newark police officers Paul Hamilton and Vanessa Lorenzo,¹ were pursuing the stolen vehicle prior to the collision. Plaintiff, Martha Godoy, Administratrix of the Estate of Priscilla Godoy and Administratrix Ad Prosequendum for the Estate of Priscilla Godoy (plaintiff) appeals from the December 23, 2021 orders granting defendants summary judgment. We affirm.²

I.

On May 5, 2018 at about 10:44 p.m., defendants were on duty and patrolling in Newark when they "spotted a white Jeep Cherokee" (the Cherokee). Hamilton testified he was aware the vehicle was stolen during an armed carjacking earlier that night in East Orange because Newark Police Department dispatch had issued a Be on the Lookout (BOLO) for the Cherokee.

Defendants attempted to conduct a motor vehicle stop by activating their vehicle's lights and sirens, but the Cherokee did not stop and defendants began a pursuit. Hamilton was driving the police vehicle while Lorenzo was in the passenger seat.

¹ We refer to Hamilton and Lorenzo collectively as "defendants."

² Defendant Kenneth Washington was the owner of the stolen car. He did not answer the complaint and default was entered. Plaintiff voluntarily dismissed defendants City of Newark and City of Newark Police Department. Third-party defendant Najeeh Green, the driver of the stolen vehicle, was convicted of numerous criminal charges including first-degree felony murder and first-degree aggravated manslaughter. The court also entered default against him.

Hamilton said they confirmed the Cherokee's license plate matched the one given in the BOLO. Lorenzo stated they "gave . . . dispatch the full description of the vehicle, plate, [and] direction where the vehicle was heading," and dispatch "confirmed that . . . was the vehicle that committed the carjack." Lorenzo said the "boss" authorized the pursuit of the Cherokee.

The pursuit was monitored both by a Communications Division officer and the field supervisor—a sergeant. During the ninety-five second pursuit, Lorenzo gave continuous information regarding their location. According to Hamilton, after about sixty seconds, the Cherokee veered off the road into "a little park." The speed limit in the area was twenty-five miles per hour. Hamilton did not recall any other cars being on the road in this area.

Hamilton testified during his deposition that he believed the highest speed the police car attained was forty-five miles per hour, and the Cherokee's speed "might have been approximately [fifty] to [fifty-five] miles per hour." In the police report prepared three days after the events, Hamilton stated the approximate maximum speed of the police vehicle was sixty miles per hour. Lorenzo estimated the Cherokee was traveling at fifty miles per hour, and the police vehicle was traveling approximately forty to forty-five miles per hour.

Hamilton said the police vehicle was approximately 100 yards behind the Cherokee when the Cherokee went over a speed bump. He stated the Cherokee's driver then "lost control" of the vehicle and struck a car that was double-parked on the street. That collision started a chain reaction involving three additional vehicles and pinning Godoy between two of the cars as they collided. Godoy's injuries sustained in this tragic event resulted in her death.

The Cherokee's driver got out the vehicle and fled. Hamilton and Lorenzo did not pursue him as they were attending to Godoy.

When their supervisor arrived, Lorenzo informed him she was wearing a body camera throughout the incident. Hamilton had not yet been issued one. The police car had a dashcam which captured a portion of the pursuit.

Defendants stated the pursuit lasted for about ninety-five seconds, from the first radio transmission at 10:40.47 p.m. to the last at 10:42.22 p.m. Although the dashcam footage started when the Cherokee was traveling into the park, Hamilton stated the pursuit began about sixty seconds before that moment.

Lorenzo's radio transmissions to and from Communications during the pursuit were provided during discovery. The recording does not include a BOLO announcement informing the officers to watch for the stolen Cherokee. However, Lorenzo's bodycam captured her conversations and police radio

transmissions and confirmed she knew a BOLO was sent out for the Cherokee. Defendants did not inform Communications of the speed of the Cherokee during the pursuit.

Lorenzo testified she believed the incident was a police pursuit as defined in the Newark Police Division General Order (General Order). She did not believe the danger to the public outweighed the necessity of the pursuit.

The General Order in effect at the time contained a section entitled "PROCEDURES/PURSUING OFFICER" (Newark Policy) that set forth procedures for authorizing a pursuit, pursuit initiation, role of the pursuing officer, vehicular pursuit restrictions, and termination of pursuit. The Newark Policy and the Attorney General's New Jersey Police Vehicular Pursuit Policy (AG Policy) were "intended to guide a police officer's discretion in matters of vehicular pursuit." Both the General Order and AG Policy defined pursuit driving as:

[A]n active attempt by a law enforcement officer operating a motor vehicle and utilizing emergency warning lights and an audible device, to apprehend one or more occupants of another moving vehicle, when the officer reasonably believes that the driver of the fleeing vehicle is aware of the officer's attempt to stop the vehicle, and is resisting apprehension by increasing vehicle speed, ignoring the officer or otherwise attempting to elude the officer.

Both policies authorized a police officer to pursue a vehicle "[w]hen the officer reasonably believes that the violator has committed an offense of the first or second degree, or an offense enumerated in Appendix A of this policy," or "[w]hen a police officer reasonably believes that the violator poses an immediate threat to the safety of the public or other police officers." A pursuit was not authorized under those two categories "unless the violator's vehicle is being operated so as to pose an immediate threat to the safety of another person." Automobile theft, N.J.S.A. 2C:20-2, is an enumerated felony under both policies, and carjacking, N.J.S.A. 2C:15-2(a), is a first-degree offense. N.J.S.A. 2C:15-2(b).

The policies also established criteria for an officer to consider prior to initiating a vehicle pursuit. Plaintiff does not assert defendants erred in initiating the pursuit of the Cherokee but rather contend defendants acted with willful misconduct in not complying with the policies while continuing the pursuit.

Once an officer decided to initiate a pursuit, the Newark Policy stated:

The officer must:

1. Safely close the gap between the motor patrol vehicle and suspect vehicle in order to obtain the license plate and the description of the vehicle.

2. Immediately activate the vehicle's emergency lights, audible device and headlights. The officer must then notify the Communications Division 911 Call Center of pertinent information, such as:

- a. Reason for the pursuit.
- b. Direction of travel.
- c. Identification of the violator's vehicle: year, make, model, color, vehicle registration number and other identifying characteristics.
- d. Number of occupants.
- e. The speed of the pursued vehicle.
- f. Other information that may be helpful in terminating the pursuit or resolving the incident.

[(Emphasis added).]

The AG Policy stated:

Once the pursuit has been initiated, the primary unit must notify communications and a superior officer providing as much of the following information as is known:

1. Reason for the pursuit.
2. Direction of travel, designation, and location of roadway.
3. Identification of the violator's vehicle: year, make, model, color, vehicle

registration number, and other identifying characteristics.

4. Number of occupants.

5. The speed of the pursued vehicle.

6. Other information that may be helpful in terminating the pursuit or resolving the incident.

Both policies required a pursuing officer to terminate a pursuit:

a. If the officer believes that the danger to the pursuing officers or the public outweighs the necessity for the immediate apprehension of the violator.

b. If instructed to do so by a Supervisor.

....

f. If there is a clear and unreasonable danger to the police officer or the public. A clear and unreasonable danger exists when the pursuit requires that the vehicle be driven at excessive speeds, or in any other manner which exceeds the performance capabilities of the pursuing vehicles, or the police officers involved in the pursuit.

In December 2020, after the events at issue here, the Attorney General included a revised Vehicular Pursuit Policy in a modified Use of Force Policy, adding a temporal component. The revised AG Policy, effective December 31, 2021, states: "Once the pursuit has been initiated, the primary unit must immediately notify communications and a supervisor, providing as much of the

following information as is known." (Emphasis added). The list again includes the speed of the pursued vehicle.

Hamilton testified that officers were trained twice a year on both the Newark and AG policies regarding vehicle pursuits. He also testified he knew he had the discretion at any time during a pursuit to terminate the pursuit if he felt it was too dangerous. Lorenzo also testified that she received training on vehicular pursuits and was familiar with the policies.

II.

In the amended complaint, plaintiff alleged in Counts I and II that defendants were negligent and reckless in their pursuit of the Cherokee, violating law enforcement standards and practices and resulting in Godoy's death. In Count III, plaintiff alleged defendants engaged in willful misconduct in the "apprehension" of the Cherokee.

Defendants moved for summary judgment, contending they were immune from liability under the Tort Claims Act (TCA),³ specifically N.J.S.A. 59:5-2(b) and (c) and 59:3-3. In addition to hearing oral argument on the motions, the court reviewed the dash camera footage of the pursuit and the audio recording between defendants and the Communications officer.

³ N.J.S.A. 59:1-1 to -14.4.

In a written decision accompanying the December 23, 2021 orders, Judge Bruce Buechler found there was no genuine dispute of material fact that a BOLO was issued regarding the Cherokee. He stated it was "clear the officers knew of the carjacking of the stolen [Cherokee] before they engaged in the pursuit." Therefore, "the . . . officers were justified in their pursuit."

Noting that defendants were immune from liability unless there was evidence of willful misconduct, the judge dismissed Counts I and II. After considering the applicable case law, Judge Buechler also dismissed Count III, dismissing the complaint⁴ and granting defendants summary judgment.

The judge considered both policies and found the language of the standing orders indicated officers had discretion during a pursuit as to what information should be reported. Judge Buechler noted the Newark Policy stated the officer should notify Communications of information "such as" the speed of the pursued vehicle, and the AG Policy mandated "as much . . . information as known." The judge contrasted these provisions with non-discretionary provisions of the policies, such as the Newark Policy's requirement that: "[T]he officer must . . . [s]afely close the gap between the motor patrol vehicle and suspect vehicle in

⁴ Plaintiff did not pursue the allegations made in Count IV of the amended complaint. The court also dismissed that count in the December 23, 2021 order.

order to obtain the license plate and the description of the vehicle," and "[i]mmediately activate the vehicle's emergency lights, audible device and headlights." (Emphasis added).

The judge found the policies did not mandate a pursuing officer to "immediately" communicate the speed of the pursued vehicle. He stated, "[I]t cannot be willful misconduct if an officer violated a portion of a standing order that was discretionary."

Judge Buechler further found no evidence that defendants "knowingly violated and intended to violate" the policies. Therefore, defendants were entitled to summary judgment under N.J.S.A. 59:5-2(b) and (c).

The judge also determined N.J.S.A. 59:3-3 was applicable to grant defendants summary judgment. He stated:

[Defendants'] . . . conduct at the time of the pursuit of [the Cherokee] was objectively reasonable. Defendants were aware of a BOLO for the [Cherokee]. The [c]ourt reviewed the dashcam footage of the pursuit. The pursuit occurred at night and there were few other vehicles on the road. The dashcam footage put the [c]ourt in the position of the officers and it is clear that the pursuit was objectively reasonable given the circumstances. [Defendants] pursued the [Cherokee] for approximately [ninety-five] seconds before the [Cherokee] crashed into a parked car

causing the chain reaction of one car hitting another that resulted in [Godoy] being pinned between two parked cars. [Defendants] were never instructed by the communications officer to cease the pursuit. . . . Plaintiff provided no evidence that [defendants] operated in any capacity during the vehicle pursuit other than in good faith.

III.

On appeal, plaintiff asserts the trial court erred in granting summary judgment to defendants on Count III of the complaint because plaintiff presented sufficient evidence of willful misconduct on defendants' part. Specifically, that defendants violated both the Newark Policy and the AG Policy when they did not relay the speed of the vehicle they were pursuing that was traveling up to fifty to fifty-five miles per hour in a residential neighborhood. Plaintiff further contends the trial court erred in determining defendants were entitled to summary judgment on the alternative grounds of the good faith immunity under N.J.S.A. 59:3-3.

We review the trial court's decision on a motion for summary judgment de novo, applying the same standard as the trial court. Samolyk v. Berthe, 251 N.J. 73, 78 (2022).

Under Rule 4:46-2(c), a motion for summary judgment must be granted "if 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." "To decide whether a genuine issue of material fact exists, [we] must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alteration in original) (quoting Globe Motor Co. v. Igdaley, 225 N.J. 469, 480 (2016)).

We begin with a consideration of N.J.S.A. 59:5-2(b) and (c), that provide immunity to a public employee for any injury "caused by . . . an escaping . . . person" or "a person resisting arrest or evading arrest" and for an "injury resulting from or caused by a law enforcement officer's pursuit of a person."

In Tice v. Kramer, 133 N.J. 347, 367 (1993), our Supreme Court declared that N.J.S.A. 59:5-2(b) "immunizes absolutely all negligence of . . . the public employee that when combined with the conduct of an escaping or escaped . . . person leads to an injury." The Tice Court found that the use of "escaping person" in N.J.S.A. 59:5-2(b)(2) encompassed a person fleeing from a vehicular police pursuit. Id. at 363. The Court concluded that police officers were

absolutely immunized from liability "even [for injuries] that would not have occurred but for the negligence of the pursuing officer." Id. at 380.

However, the Legislature has "carv[ed] out narrow exceptions [in the TCA] for which it determined liability should attach and in connection with which citizens should be entitled to file a claim." Marcinczyk v. N.J. Police Training Comm'n, 203 N.J. 586, 596 (2010). One such exception to immunity, willful misconduct, is established in N.J.S.A. 59:3-14(a), which provides:

Nothing in [the TCA] shall exonerate a public employee from liability if it is established that [their] conduct was outside the scope of [their] employment or constituted a crime, actual fraud, actual malice or willful misconduct.

In Fielder v. Stonack, 141 N.J. 101, 123-30 (1995), the Court defined willful misconduct in the context of a police pursuit. There, several police vehicles were pursuing a motorcycle that had fled a traffic stop. Id. at 106-07. The officer in the last vehicle joined the pursuit even though "the motorcycle was not fleeing through his zone of patrol, and department policy apparently provided that officers not leave their zone unless instructed to do so by a commanding officer." Id. at 107. The sergeant on duty communicated to all pursuing officers that they must terminate the pursuit if it posed a risk of danger to themselves or others. Ibid. The vehicles sped through "one of the most

heavily traveled" intersections in the area, and the light at the intersection turned red before the last police vehicle in the pursuit drove through it. Id. at 107-08. As the last officer drove into the intersection through the red light, their vehicle collided with another, injuring the plaintiff. Id. at 108.

The trial court granted the defendant police officer's motion for summary judgment, holding he was immune from liability under the TCA. Ibid. We reversed. Ibid.

In its review, the Supreme Court was "satisfied that [the officer was] entitled to immunity under N.J.S.A. 59:5-2(b)(2) as a matter of law, [but] in order to justify summary judgment, he [had to] establish that there [was] no genuine issue of material fact of whether his conduct constituted willful misconduct." Id. at 128. To do so, the officer had to prove whether there was a direct order not to engage in or continue the pursuit, whether he knew of such an order, and whether he did not knowingly and willfully violate that order. Ibid.

The Fielder Court found there was a disputed issue of material fact whether the officer violated internal department policy by leaving his assigned zone of patrol to join the vehicle pursuit. Ibid. In addition, it was not clear whether that policy was a standing order or whether the policy granted officers

discretion to assess the situation and decide whether to leave their assigned zone of patrol. Ibid. The Court also determined a fact finder could conclude the officer committed willful misconduct because he heard the sergeant's order to terminate the pursuit if it became too dangerous. Id. at 128-29. However, the officer had discretion to determine whether the situation posed a risk of danger, so the fact finder could also conclude the officer believed there was no such danger and that he was not violating the command. Id. at 129. Therefore, there would be no willful misconduct. Ibid. The Court reversed the trial court's grant of summary judgment to the police officer. Ibid.

In defining willful misconduct in the context of vehicle pursuits, the Court considered that vehicle pursuits "involve the risk of harm, not only to those involved in the pursuit but . . . to innocent bystanders as well." Id. at 125. The Court stated that willful misconduct requires "something more than mere negligence." Id. at 123.

The Court concluded that in the context of law enforcement activity, willful misconduct by a police officer "is ordinarily limited to a knowing violation of a specific command by a superior, or a standing order, that would subject that officer to discipline." Id. at 125. The Court delineated two elements: "disobeying either a specific lawful command of a superior or a

specific lawful standing order and . . . knowing of the command or standing order, knowing that it is being violated[,] and[] intending to violate it." Id. at 126.

Thereafter, the Legislature amended N.J.S.A. 59:5-2 in 1997, adding section (2)(c), to clarify that public employees are immune from liability for injuries caused as a result of a police pursuit. Alston v. City of Camden, 168 N.J. 170, 178-79 (2001).

Plaintiff contends because defendants did not report to the Communications officer the speed of both their car and the Cherokee, that defendants acted with willful misconduct, thus stripping them of the protection of N.J.S.A. 59:5-2(b) and (c). We disagree.

Under Felder, to establish willful misconduct, plaintiff must demonstrate defendants (1) disobeyed a standing order that required them to report the speed of the Cherokee to Communications; and (2) knew of the standing order, and they were violating it, and intended to violate it. 141 N.J. at 125-26.

At the time of these events, neither policy included a temporal requirement. Furthermore, although the Newark policy required officers to do two mandatory tasks upon initiating a pursuit—activate the vehicle's emergency lights and sirens, and notify Communications of pertinent information—the

specific information to be transmitted was discretionary and lacked a timeframe. The policy uses the language "such as," then lists types of information to impart to Communications including the speed of the pursued vehicle. "Such as" is not mandatory language. The policy gives examples of information helpful to the consideration of the nature of the pursuit. Upon the initiation of a pursuit, an officer was not mandated to provide each listed item of information in a specific timeframe; they were instead trained to give Communications the information listed in the policy without an assigned timeframe.

Under these circumstances, there was no evidence defendants violated a standing order. As there was no order to terminate the pursuit, defendants did not violate a command. Nor did plaintiff present any evidence that the Cherokee's speed played any part in the determination to permit the continuation of the pursuit. Neither the Communications officer nor the field supervising sergeant ever inquired about the speed during the ninety-five second event.

In addition, plaintiff did not establish that defendants knew they were violating the policies and intended to do so.

Because we conclude defendants were entitled to immunity from liability under N.J.S.A. 59:5-2(b) and (c) we need not consider the applicability of N.J.S.A. 59:3-3.

Affirmed.

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

A handwritten signature in black ink, appearing to be 'JWA', written over the printed text.

CLERK OF THE APPELLATE DIVISION