

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1966-21

Y.H. and K.W.C.,¹

Plaintiffs-Appellants,

v.

T.C., UBER TECHNOLOGIES,
INC., and RASIER, LLC,

Defendants-Respondents.

<p>APPROVED FOR PUBLICATION March 16, 2023 APPELLATE DIVISION</p>

Argued February 14, 2023 – Decided March 16, 2023

Before Judges Whipple, Smith and Marczyk.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2488-20.

John F. Golden argued the cause for appellants (Albert Buzzetti & Associates, LLC, attorneys; John F. Golden, on the briefs).

Matthew P. Kessler argued the cause for respondent T.C. (Zarwin Baum DeVito Kaplan Schaer & Toddy, PC, attorneys; Matthew P. Kessler, on the briefs).

Teagan S. Allen argued the cause for respondents Uber Technologies, Inc. and Rasier, LLC (Goldberg

¹ We use initials to preserve confidentiality per Rule 1:38-3(c)(7).

Segalla LLP, attorneys; Richard J. Halmo, of counsel; John W. Meyer and Teagan S. Allen, on the briefs).

Amy Chung, Deputy Attorney General, argued the cause for amicus curiae State of New Jersey (Matthew J. Platkin, Attorney General, attorney; Alec Schierenbeck, Assistant Attorney General, of counsel; Amy Chung, on the brief).

Michael R. Noveck, Assistant Deputy Public Defender, argued the cause for amicus curiae New Jersey Office of the Public Defender (Joseph E. Krakora, Public Defender, attorney; Michael R. Noveck, of counsel and on the brief).

Derek J. Demeri argued the cause for amici curiae The National Association For The Advancement Of Colored People and The NAACP New Jersey State Conference (Zeff Law Firm, LLC, attorneys; Gregg L. Zeff, of counsel and on the brief; Derek J. Demeri, on the brief).

The opinion of the court was delivered by

WHIPPLE, J.A.D.

In this interlocutory appeal filed with leave granted, we have been asked to consider the protective breadth of the Expungement of Records statute, N.J.S.A. 2C:52-1 to -31.1 (the expungement statute), against the statutory provisions regulating Transportation Network Companies (TNC), N.J.S.A. 39:5H-1 to -27 (the TNC statute), wherein a conviction for aggravated assault bars employment as a rideshare driver. The purpose of the former is to permit a once-convicted person greater access to work opportunities, and thus second

chances in life. The purpose of the latter is to protect the public from potential danger when using digital rideshare services. Worlds collide.

The TNC Statute.

Mobile technology and innovation develop at a rapid speed. TNC's—essentially, ridesharing apps—such as Uber, became ubiquitous in what seemed like the mere moments following their inception. The two specific legislative provisions we consider—N.J.S.A. 39:5H-20 and N.J.S.A. 39:5H-17—were designed to regulate such business, and became effective as of May 1, 2017, after the apps had been operating for years.

Reduced to their essence, these laws prohibit a TNC from "onboarding" someone with a conviction for aggravated assault as a rideshare driver, and a TNC must run criminal background checks as approved by the New Jersey Attorney General in order to operate in New Jersey.

However, the statute does provide "if an applicant or driver who has been convicted of [aggravated assault] . . . produces a valid certificate of rehabilitation issued pursuant to [N.J.S.A. 2A:168A-8] . . . the criminal offense shall not disqualify the applicant" N.J.S.A. 39:5H-20. On the record before us, we find no evidence defendant T.C. produced a certificate of rehabilitation. The TNC statute is silent about the effect of expungements.

The Expungement Statute.

The purpose of New Jersey's expungement statute is "to eliminate 'the collateral consequences imposed upon otherwise law-abiding citizens who have had a minor brush with the criminal justice system.'" In re J.S., 223 N.J. 54, 66 (2015) (quoting In re Kollman, 210 N.J. 557, 568 (2012)). That legislative intent is reflected in the plain language of the statute, which:

shall be construed with the primary objective of providing relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity, but not to create a system whereby persistent violators of the law or those who associate themselves with continuing criminal activity have a regular means of expunging their police and criminal records.

[N.J.S.A. 2C:52-32.]

The statute goes on to define an expungement as:

- a. [T]he extraction, sealing, impounding, or isolation of all records on file within any court, detention or correctional facility, law enforcement or criminal justice agency concerning a person's detection, apprehension, arrest, detention, trial or disposition of an offense within the criminal justice system.
- b. Expunged records shall include complaints, warrants, arrests, commitments, processing records, fingerprints, photographs, index cards, "rap sheets" and judicial docket records.

[N.J.S.A. 2C:52-1.]

When a court grants an expungement, "the arrest, conviction, and any other proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly[.]" N.J.S.A. 2C:52-27 (emphasis added).

N.J.S.A. 2C:52-27, titled "Effect of Expungement," does, however, include three specific exceptions:

- a. The fact of an expungement . . . requires petitioners seeking the expungement . . . to provide "a statement with affidavit or verification that he has never been granted expungement"
- b. The fact of an expungement of prior charges which were dismissed because of the person's acceptance into and successful completion of a supervisory treatment or other diversion program
- c. Information divulged on expunged records shall be revealed by a petitioner seeking employment within the judicial branch or with a law enforcement or corrections agency and such information shall continue to provide a disability as otherwise provided by law.

Other provisions of the statute regulate third-parties in a way that further protects a successful expungement petitioner. Significantly, N.J.S.A. 2C:52-30, titled "Disclosure of Expungement Order," sanctions "any person" who reveals information they know to be contained in a sealed or expunged record. That said, an expungement is not completely inaccessible. "Inspection of the [expunged] files and records, or release of the information contained therein

. . . may be permitted by the Superior Court upon motion for good cause shown and compelling need based on specific facts." N.J.S.A. 2C:52-19.

The Underlying Incident.

The relevant facts are undisputed. The parties are plaintiffs Y.H. and his spouse, K.W.C., defendants are T.C. as well as Uber Technologies, Inc. and Rasier, LLC² (collectively, Uber). On October 27, 2018, T.C. was working as an Uber driver. He was picking up a passenger at a supermarket in Elizabeth when Y.H., an employee of the supermarket, confronted him for parking in a no-parking zone. The dispute escalated; T.C. exited his vehicle. The resulting physical encounter left Y.H. with a severed cervical spinal cord, paralyzing him from the neck down. Y.H. is now a quadriplegic.

Our inquiry on this appeal concerns Uber's potential culpability under a theory of negligent hiring or employment. In October 1991, T.C. was convicted of simple assault. Then, in March of 1996, T.C. was arrested (but not convicted) for aggravated assault and resisting arrest. Finally, and most significantly, on April 6, 2006, T.C. was convicted of aggravated assault of a law enforcement officer.

On May 1, 2017, Uber authorized T.C. to drive for their platform. He used his own approved vehicle, along with Uber's digital network, to provide

² Rasier, LLC is a wholly owned subsidiary of Uber Technologies, Inc.

prearranged rideshares to public passengers in return for a fee. Coincidentally, on that same day—May 1—certain provisions of the TNC Act implicated in this appeal went into effect, such as N.J.S.A. 39:5H-17, which requires criminal background checks for TNC drivers, and N.J.S.A. 39:5H-20, which specifically bars those with a conviction for aggravated assault from employment as a TNC driver.

On July 7, 2017, Uber ran its first background check on T.C., which revealed his 2006 conviction. The company ran a second check on November 29, 2017, which again listed the 2006 conviction. On December 12, 2017, an amended expungement order was filed in the Criminal Part for T.C.'s convictions.

What is not part of the record is when and how Uber became aware of this expungement. There is no indication in the record T.C.'s authorization as an Uber driver was paused for any period from May 1, 2017 through the date of the altercation with Y.H. Given this timeline, it is clear Uber had knowledge of T.C.'s prior conviction for aggravated assault—in the form of the two background checks—for some period of time prior to the expungement.

Plaintiffs sued T.C. for his own actions, as well as Uber, under theories of respondeat superior, and negligent hiring, training, and supervision.³ To sustain the claim, plaintiffs sought to admit T.C.'s expunged conviction for aggravated assault.

T.C., in turn, moved to delete from the public record all references related to any expunged documentation regarding his criminal history contained in plaintiffs' filed documents and briefing. Plaintiffs cross-moved to admit the same expunged information for the purposes of their surviving negligent hiring claim against Uber and sought to compel those documents from T.C.

The viability of using T.C.'s expunged record was rejected by the court at an in limine motion argued on January 20, 2022. The trial court emphasized under N.J.S.A. 2C:52-27, an expunged record is deemed not to have existed. Turning to N.J.S.A. 2C:52-30, the trial court noted any person who reveals to another the existence of arrest, conviction or related proceeding with knowledge that such a record has been expunged is a disorderly person, foreclosing its use in civil litigation. The court accordingly denied plaintiffs' motion and ordered "evidence of or relating to T.C.'s criminal history subject

³ Uber has successfully moved to dismiss the complaint as to the respondeat superior and punitive damages claims. The only claim pending against Uber is negligent hiring.

to an order of expungement could not be disclosed or otherwise used for any purpose." (emphasis added).

After granting leave to appeal, we invited the Attorney General and Office of the Public Defender to file as amici, and also permitted the NAACP to participate.

On appeal, plaintiffs argue the trial court's interpretation of the expungement statute unlawfully extends the reach of the statute's plain meaning, and of binding precedent interpreting it. Citing G.D. v. Kenny, plaintiffs first argue our Supreme Court has interpreted the expungement statute as permitting a litigant access to expunged records to satisfy discovery obligations in a civil suit. 205 N.J. 275, 321 (2019).

Second, again primarily citing Kenny, plaintiffs contend the expungement statute "applies only to the person whose conviction has been expunged by permitting such person to deny the conviction." They further posit the expungement statute does not prevent plaintiffs or any other person or entity outside of those government agencies enumerated in the statute at N.J.S.A. 2C:52-10 from disclosing information relating to an expunged conviction.

I.

We review a trial court's evidentiary rulings for clear error in judgment. State v. Medina, 242 N.J. 397, 412 (2020) (citing State v. Scott, 229 N.J. 469, 479 (2017)). However, the trial court's interpretation of the law is not entitled to special deference. Kollman, 210 N.J. at 577-78 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). The trial court's order striking T.C.'s expunged criminal history from the record hinged on such a legal interpretation, specifically of the expungement statute and the TNC statute. We review those legal conclusions, and the trial court's view of "the consequences that flow from established facts," de novo. State v. Goldsmith, 251 N.J. 384, 398 (2022) (quoting State v. Hubbard, 222 N.J. 249, 263 (2015)).

II.

Plaintiffs argue that Uber's knowledge of T.C.'s conviction for aggravated assault—obtained prior to that record being expunged—is vital proof of Uber's negligence in permitting T.C. to work as a driver on their platform. New Jersey courts recognize the tort of negligent hiring "where the employer either knew or should have known that the employee was violent or aggressive, or that the employee might engage in injurious conduct toward third persons." DiCosala v. Kay, 91 N.J. 159, 175 (1982); Davis v. Devereux

Found., 209 N.J. 269, 292 (2012). Thus, foreseeability is an essential element of their claim.

Citing the TNC statute's provisions, plaintiffs argue their negligent hiring claim is founded upon Uber's knowledge of T.C.'s criminal history, and the trial court's order barring them from relying upon such evidence effectively prevents them from proving negligent hiring by Uber.

Our primary inquiry is whether plaintiff should be able to introduce information contained within an expunged record for the purposes of their tort claim. The TNC statute offers little help to address this question. Instead, we consider the breadth of an expungement order's effect in the context of civil litigation, necessitating a thorough ventilation of the expungement statute itself.

N.J.S.A. 2C:52-1, defining "expungement," provides for the "extraction" and "isolation" of certain records, but not their destruction. In re T.O., 244 N.J. 514, 525 (2021) (citing N.J.S.A. 2C:52-1 -15). Pursuant to certain provisions of the statute, expunged records remain available to courts, county prosecutors, probation and pretrial services, and the Attorney General for use in connection with bail hearings, decisions on pretrial release, presentence reports, and sentencing. N.J.S.A. 2C:52-21. Under N.J.S.A. 2C:52-22, records remain available to the Parole Board to assess parole requests; under

N.J.S.A. 2C:52-23, they remain available to the Department of Corrections to classify and assign inmates. State v. Gomes, ___ N.J. ___ (2023) (slip op. at *7).

Nevertheless, when a court grants expungement, "the arrest, conviction, and any proceedings related thereto shall be deemed not to have occurred, and the petitioner may answer any questions relating to their occurrence accordingly[.]" N.J.S.A. 2C:52-27. Thus, the expungement statute creates two rights. First, a previously convicted person who obtains an expungement may act as if the conviction never occurred. Second, to the extent described via statute, the State agrees to accept that fiction. E.g. A.A. ex rel. B.A. v. Att'y Gen. of New Jersey, 384 N.J. Super. 67, 105 (App. Div. 2006), aff'd, 189 N.J. 128 (2007) ("Even after an . . . offender qualifies for expungement or sealing of a juvenile record, fingerprints and other records remain accessible in the event of recidivism."). Both of these rights are explicitly for the benefit of the expungement petitioner. N.J.S.A. 2C:52-32 ("This chapter shall be construed with the primary objective of providing relief to the reformed offender who has led a life of rectitude and disassociated himself with unlawful activity . . .").

No one contends the December 12, 2017 expungement order pertaining to T.C.'s record was not validly entered and enforceable. It is clear to us, as

applied to T.C., the expungement statute is firm. T.C. need not discuss the conviction, and the present case—against him—may not force him to do so. After December 12, 2017, T.C. may rely on the court's previous assurance he need not disclose the events of his previous conviction except in the narrow circumstances prescribed by our statutes. As to that part of the court's order, we affirm.

This is not the end of our inquiry, because the question before us is not so much about T.C. as it is about Uber. As such, Uber's argument is necessarily different from T.C.'s. Uber seeks retroactive application of the expungement statute to bar evidence crucial to an otherwise facially plausible claim of negligent hiring. Following its logic, all evidence of Uber's prior knowledge of T.C.'s 2006 aggravated assault conviction is now barred because T.C. has, subsequent to Uber's hiring him, expunged that record. In other words, Uber asks us to read the expungement statute to create a third right, distinct from the two clearly delineated in the statute: One that allows third parties to ignore what they already know about a defendant, prior to the entry of an expungement order, for the purposes of extinguishing liability.

It is at this point we must observe that the expungement statute is naturally in a state of tension with the truth. An expungement is a legal fiction, designed so a previously convicted person may participate in society

on a more even playing field—a laudable goal. It does not mean the underlying reality has changed: those with expunged records were indeed convicted of an underlying offense. In all likelihood, there will be victims, news reports, and other accounts of that offense long after an expungement order has been entered. Friends and family members will retain knowledge of previous convictions, as may future confidants, or more likely, web searchers. Our Supreme Court has previously addressed this tension in G.D. v. Kenny, which held "the expungement statute does not transmute a once-true fact into a falsehood" and observed an expungement "cannot banish memories," much less require excision from newspapers or other archives. 205 N.J. at 302.

We emphasize the precise issue before us is whether the expungement gives T.C.'s employer the ability to assert T.C.'s rights so as to imply ignorance of the assault conviction, when in fact the opposite is true. The expungement statute directs courts to permit the consideration of expunged records "upon motion for good cause shown and compelling need based on specific facts." N.J.S.A. 2C:52-19.⁴ Here, there is no way plaintiffs can prove

⁴ The existence of this clause, which allows for consideration based on judicial discretion, indicates to us that 2C:52-30—which makes it a disorderly persons offense to knowingly divulge an expunged record—does not extend to judicially sanctioned uses.

Uber's prior knowledge without disclosing evidence which implicates T.C.'s expunged conviction. They have demonstrated a compelling need.

N.J.S.A. 2C:52-19 continues: "Leave to inspect shall be granted by the court only in those instances where the subject matter of the records . . . is the object of litigation or judicial proceedings." Here, the bar is again met. The nature of T.C.'s prior conviction is the object of this litigation because the precise offense—aggravated assault—is specifically contemplated by the TNC statute as a bar to employment as a rideshare driver.⁵ Furthermore, it is Uber's knowledge of the underlying assault, not the facts of the conviction itself, that is at issue here.

Finally, the expungement statute also directs courts that expunged records "may not be inspected or utilized in any subsequent civil or criminal proceeding for the purposes of impeachment or otherwise but may be used for purposes of sentencing on a subsequent offense after guilt has been established." Ibid. We do not make light of the Legislature's firm prohibition

⁵ Initially employing T.C. as a driver violated N.J.S.A. 39:5H-20(a)(1), which was intended to protect rideshare passengers from potential dangers inherent in riding inside of a stranger's vehicle. We discern this intent because the statute prohibits employing a driver who has been convicted of aggravated assault, arson, burglary, escape, extortion, homicide, kidnapping, robbery, aggravated sexual assault, sexual assault, endangering the welfare of a child, or human trafficking. N.J.S.A. 39:5H-20(a)(1).

on using expunged convictions to the detriment of a person with an expunged record in any subsequent legal proceedings.

However, G.D. tells us this bar must be read with an acceptance that an objective historical fact does not become untrue by virtue of expungement alone. 205 N.J. at 297. We have said as much previously in the substantially similar context of gubernatorial pardons. Storcella v. State Dep't of Treasury, Div. of State Lottery, 296 N.J. Super. 238, 243-44 (App. Div. 1997). "A pardon relieves the guilty person from the burden of crimes forgiven so that the legal disabilities attendant upon the convictions are removed. A pardoned person is restored to all rights of citizenship . . . but not all consequences of the conviction are erased by the pardon." Ibid. (citations omitted).

Therefore, we read N.J.S.A. 2C:52-19 to prevent the evidence of an expunged record to be used against the person for whom the expungement is meant to benefit: the recipient of the expungement. However, when it comes to third parties, the expungement statute is less clear—but it cannot unilaterally undo reality. If a cause of action requires proving a third-party's prior knowledge of information contained within a subsequent expungement order, and refusal to admit the expunged evidence would gratuitously bar that cause of action, the expungement statute does not automatically extend that far. So long as the party seeking to introduce the evidence demonstrates good

cause and a compelling need, courts cannot categorically bar admission of this evidence when offered to prove a third-party's knowledge of the underlying facts.

Here, the motion judge ruled "evidence of or relating to [T.C.'s criminal history] that is the subject of an order of expungement [could not be disclosed or otherwise used for any purpose.]" (emphasis added). The legal effect of that rather preliminary evidence ruling eviscerated plaintiffs' viable claim of negligent hiring. Indeed, the entry of an expungement prior to the confrontation between Y.H. and T.C., makes a showing of knowledge (the first element of a negligent hiring claim) impossible.

We find this problematic, because during argument before the motion judge, Uber's counsel conceded the record is far from clear as to what Uber knew about T.C.'s expungement, when they knew it, or whether they knew of it at all. We do not read N.J.S.A. 2C:52-19 to give instant cover to third parties without further examination of that third-party's conduct, duty and responsibility in a negligent hiring claim. A more robust record on this subject is necessary before Uber can assert it is entitled to rely on T.C.'s expungement. If the record demonstrates Uber was informed of the expungement prior to the events involving Y.H., it may be entitled to rely on that information as evidence of T.C.'s rehabilitation or lack of a propensity towards violence.

The January 21, 2022 order is affirmed as to T.C. The order is vacated and remanded as to Uber for further proceedings consistent with this opinion.

We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION