SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2431-20

ROBERT ECKERT,

Plaintiff-Appellant,

v.

CITY OF CAMDEN,

Defendant-Respondent.

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Argued October 18, 2022 – Decided January 9, 2023

Before Judges Messano, Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-0064-19.

Gregg L. Zeff argued the cause for appellant (Zeff Law Firm, LLC, attorneys; Gregg L. Zeff, of counsel and on the briefs; Eva C. Zelson and Derek J. Demeri, on the briefs).

Francis X. Donnelly argued the cause for respondent (Turner, O'Mara, Donnelly & Petrycki, PC, attorneys; Francis X. Donnelly, of counsel and on the brief; Robert J. Gillispie, Jr., on the brief).

PER CURIAM

On January 31, 2018, plaintiff Robert Eckert, a captain in the City of Camden's Fire Department (Department), was injured responding to a fire along with two "probationary firefighters," Achabe Quinones and Jose A. Berrios, both recently transferred to plaintiff's fire company. Quinones and Berrios were two of thirty-three probationary firefighters hired in May 2017. In July, the Chief of the Department, Michael Harper, assigned two probationary firefighters to each of eight companies, including plaintiff's company.

Seventeen years earlier, the Deputy Chief of Operations for the Department, Joseph Gforer, sent a memorandum to all battalion chiefs stating, "[a]s a matter of safety . . . [c]hiefs will make every effort to avoid staffing any company with more than one probationary firefighter." Although what exactly occurred at the scene of the January 2018 fire is disputed, plaintiff suffered serious injuries when the metal coupling on a firehose that was connected to a "live" hydrant flew into the air, striking him in the head. Plaintiff contended the incident occurred when Quinones was left alone near a hydrant and improperly activated it as plaintiff carried or was in close proximity to the hose.

Relying largely on Gforer's memorandum as a statement of the Department's policy, plaintiff filed a complaint against the City of Camden (Camden) alleging a violation of the New Jersey Civil Rights Act (CRA), N.J.S.A. 10:6-1 to -2. Plaintiff

named no individual defendant in the complaint.[1] Specifically, plaintiff alleged: 1) Camden violated his substantive due process rights to be free from any "state-created dangers"; and 2) Camden's "policies, practices and/or customs," including a failure to properly train its firefighters, deprived plaintiff of his constitutional rights. Camden filed an answer, including an affirmative defense that the Workers' Compensation Act (WCA), N.J.S.A. 34:15-1 to -146, barred plaintiff's suit. Discovery ensued, and Camden subsequently moved for summary judgment.

The parties argued their positions before the Law Division judge. In an oral opinion that immediately followed, the judge said the case presented nothing "other than a fairly garden[-]variety workers' compensation matter," and the "intentional wrong" exception to the WCA's exclusivity provision that bars negligence suits by employees against their employers did not apply. See N.J.S.A. 34:15-8 (excepting

[1] The CRA is modeled after the Federal Civil Rights Act, 42 U.S.C. § 1983 (FCRA). "In a § 1983 action, a [municipality] is not vicariously liable for the conduct of one of its agents or employees solely through the doctrine of respondeat superior." Besler v. Bd. of Educ. of West Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544, 565 (2010) (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 691 (1978)). But "a municipality . . . can be held liable for acts committed by one of its employees or agents, pursuant to a government policy or custom, that violate the Constitution." Id. at 564–65 (citing Monell, 436 U.S. at 694). Additionally, "a municipality can be held liable for the acts of an official who is 'responsible for establishing final government policy respecting [the questioned] activity.'" Id. at 565 (alteration in original) (quoting Stomel v. City of Camden, 192 N.J. 137, 146 (2007)). It was not disputed that Chief Harper was the official with final authority to approve assignment of two probationary firefighters to certain companies.

an employer's "intentional wrong" from the WCA's exclusive remedy); Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 178–79 (1985) (establishing a "two-step" analysis to determine if employer's conduct amounted to an intentional wrong). Without further explanation, the judge said plaintiff's "constitutional claims [we]re even weaker," and, if permitted to go forward, "would completely swallow up workers' comp[ensation] and everything else." He entered an order granting Camden summary judgment and dismissing plaintiff's complaint.

Before us, plaintiff contends the judge incorrectly applied the WCA's exclusivity provision to dismiss plaintiff's complaint, and, even if the WCA applied to plaintiff's CRA claims, for purposes of defeating summary judgment, plaintiff established that Camden's conduct amounted to an intentional wrong under N.J.S.A. 34:15-8. Plaintiff also argues that he presented a prima facie case of a violation of the CRA, because the evidence supported a cause of action for a violation of his due process rights under the "state-created danger" doctrine.

Having considered the arguments in light of the record and applicable legal principles, we affirm for reasons other than those expressed by the motion judge. See, e.g., Hayes v. Delamotte, 231 N.J. 373, 387 (2018) (where the Court "note[d] that 'it is well-settled that appeals are taken from orders and judgments and not from

opinions, oral decisions, informal written decisions, or reasons given for the ultimate conclusion'" (quoting Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001))).

I.

We review the trial court's grant or denial of a motion for summary judgment de novo applying the same standard as the trial court. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citations omitted). We "must '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.'" Meade v. Twp. of Livingston, 249 N.J. 310, 327 (2021) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

"Summary judgment should be granted, in particular, 'after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)). "The 'trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special

deference.'" Town of Kearny v. Brandt, 214 N.J. 76, 92 (2013) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

II.

We start by accepting arguendo plaintiff's contention that the WCA's exclusivity bar does not apply to constitutional claims brought under the CRA. In Gormley v. Wood-El, which we discuss in greater detail below, the Court noted "that it is questionable whether the workers' compensation bar—a state statutory immunity—can overcome a federal civil-rights claim." 218 N.J. 72, 105 n.10 (2014) (citing Martinez v. Cal., 444 U.S. 277, 284 n. 8 (1980) ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 . . . cannot be immunized by state law.")). Recently, the Court stated more definitively, "[i]t is understood that state workers' compensation exclusivity provisions do not bar claims brought under federal civil rights laws." Richter v. Oakland Bd. of Educ., 246 N.J. 507, 542 n.4 (2021) (citing 9 Larson's Workers' Compensation Law § 100.03[1]).

In Perez v. Zagami, LLC, the Court explained that "the CRA was intended to provide New Jersey citizens with a state analogue to [§] 1983 actions." 218 N.J. 202, 215 (2014). We assume, therefore, for purposes of this opinion only that the WCA exclusivity provision does not bar plaintiff's CRA claims. As a result, we need

not address plaintiff's argument that Camden's conduct amounted to an intentional wrong, and N.J.S.A. 34:15-8 did not foreclose his complaint.[2]

III.

In addition to Gforer's 2000 memorandum, plaintiff marshalled additional evidence in opposition to summary judgment. The president of the fire officers' union and captains other than plaintiff complained to Chief Harper about assigning more than one probationary firefighter to a company.[3] Edward Glassman, a Deputy Chief of the Department who retired in 2020, certified that he was aware of Gforer's memorandum, and Chief Harper knew that captains and other officers in the Department were concerned that assigning two probationary firefighters to a company jeopardized the safety of other firefighters and the public. Glassman also asserted that probationary firefighters did not receive adequate training on "Camden-type hydrants."

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[2] If it were necessary to decide the issue, we would reject plaintiff's argument out of hand. The "intentional wrong" exception "'must be interpreted very narrowly' for the purpose of furthering the 'underlying quid pro quo goals' of the WCA." Vitale v. Schering-Plough Corp., 447 N.J. Super. 98, 114 (App. Div. 2016) (quoting Mabee v. Borden, Inc., 316 N.J. Super. 218, 226–28 (App. Div. 1998)). The cases analyzing the WCA's "intentional wrong" exception require something "as close to 'subjective desire to injure' as the nuances of language will permit." Millison, 101 N.J. at 173.

[3] In his deposition, Harper recounted meeting with plaintiff about the issue, and plaintiff saying his company would "be fine" with having two probationary officers assigned to it.

Herbert Leary, a battalion chief, was Quinones' training officer at the fire academy in 2017. Leary found Quinones' deficiencies "to be a concern," which he voiced to others. After retraining, Leary certified that Quinones remained "deficient in water supply, hydrant operations, hose lines, [wa]s unable to follow simple tasks, and ha[d] no sense of urgency."

Plaintiff argues he presented a prima facie case of a violation of the CRA because the evidence supported a cause of action under the "state-created danger" doctrine. We disagree.

"The legal principles governing the liability of a municipality under the CRA and § 1983 are essentially the same." Winberry Realty P'ship v. Borough of Rutherford, 247 N.J. 165, 190 (2021). "Section 1983 applies only to deprivations of federal rights, whereas [the CRA] applies not only to federal rights but also to substantive rights guaranteed by New Jersey's Constitution and laws." Gormley, 218 N.J. at 97. N.J.S.A. 10:6-2(c) provides a private cause of action for violations of constitutional or statutory rights by state actors.

> Any person who has been deprived of any substantive due process or equal protection rights, privileges or immunities secured by the Constitution or laws of the United States, or any substantive rights, privileges or immunities secured by the Constitution or laws of this State, or whose exercise or enjoyment of those substantive rights, privileges or immunities has been interfered with or attempted to be interfered with,

> by threats, intimidation or coercion by a person acting under color of law, may bring a civil action for damages and for injunctive or other appropriate relief.
>
> [Ibid.]

The statute "provides relief for either the deprivation of a statutory substantive right or the interference with such a right 'by threats, intimidation or coercion.'" Tumpson v. Farina, 218 N.J. 450, 473 (2014) (quoting N.J.S.A. 10:6-2(c)); see also Lapolla v. Cnty. of Union, 449 N.J. Super. 288, 306 (App. Div. 2017) (stating same).

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, state officials may not deprive an individual of life, liberty, or property, without due process of law. U.S. Const. art. XIV. "The Due Process Clause guarantees more than fair process"; it "provides heightened protection against government interference with certain fundamental rights and liberty interests." Gormley, 218 N.J. at 98 (quoting Washington v. Glucksberg, 521 U.S. 702, 719–20, (1997)).

Article 1, paragraph 1 of the New Jersey Constitution contains "a grant of fundamental rights" and "safeguards values like those encompassed by the principles of due process and equal protection." Greenberg v. Kimmelman, 99 N.J. 552, 568 (1985). For constitutional due process claims, New Jersey courts apply the "standards developed by the United States Supreme Court under the federal

Constitution." Roman Check Cashing, Inc. v. N.J. Dep't of Banking and Ins., 169 N.J. 105, 110 (2001) (citations omitted).

In Gormley, the Court adopted the four-factor test for application of the "state-created danger" doctrine that has been developed by the Third Circuit. 218 N.J. at 101. Under that test, a plaintiff must show:

> (1) "the harm ultimately caused was foreseeable and fairly direct"; (2) a state actor acted with a degree of culpability that shocks the conscience; (3) a relationship between the state and the plaintiff existed such that "the plaintiff was a foreseeable victim of the defendant's acts," or "a member of a discrete class of persons subjected to the potential harm brought about by the state's actions," as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all.
>
> [Ibid. (emphasis added) (quoting Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006)).]

The plaintiff in Gormley, an attorney, was assigned to represent a client civilly committed to a state psychiatric hospital. Id. at 83. The hospital required attorneys to meet with clients in the hospital's crowded and chaotic day room. Ibid. During an interview in the day room, the plaintiff's client viciously attacked and injured her. Ibid. The plaintiff filed a civil action against the hospital under both the FCRA and

CRA, alleging the hospital officials violated her constitutional right to be free from state-created danger. Ibid.

The Gormley Court applied the four-factor test to the summary judgment record before it and concluded a rationale jury could find that the plaintiff demonstrated a prima facie case of a substantive due process violation under the state-created danger doctrine. Id. at 106–12. Considering the history of violence at the hospital, the requirement that attorneys meet with clients in unsupervised day rooms, and the hospital's lack of control over the client's physical movements, the Gormley Court concluded a reasonable jury could find that hospital officials knew or should have known the conditions they created violated the plaintiff's "substantive due-process right to be free from state-created dangers." Id. at 110 (citing U.S. Const., amend. XIV).

Plaintiff here contends that it is sufficient to sustain a cause of action under the "state-created danger" doctrine if the state actor acts with "willful disregard" for the safety of another, even if that conduct or inaction does not "shock the conscience." We reject that argument.

In Gonzales v. City of Camden, decided before Gormley, we noted that the United States Supreme Court had yet to recognize a cause of action for a due-process violation based on the state-created danger doctrine, and there was

a lack of consensus among the federal circuits as to the doctrine's precise elements. 357 N.J. Super. 339, 346–47 (App. Div. 2003). We were "satisfied" there was such a viable cause of action and adopted the elements enunciated by the Third Circuit in Kneipp by Cusack v. Tedder, 95 F.3d 1199 (3d. Cir. 1996). Id. at 347. The Kneipp court required proof that the state actor "acted in willful disregard for the safety of the plaintiff." 95 F.3d at 1208.

The Gormley Court, however, did not adopt this precise formulation of the elements of a state-created danger cause of action. Instead, our Court said the Bright court's formulation, which it did adopt, "elaborate[ed] on [the] earlier test in Kneipp." 218 N.J. at 101. The Court's opinion in Gormley twice more reiterated that to sustain a cause of action, the level of the state actor's indifference must be "truly shocking." Id. at 103 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 853 (1998)); id. at 112 ("adopt[ing] the Bright test for conscience-shocking behavior, including its deliberate-indifference component"). In short, to prove a due process violation based on a state-created danger, a plaintiff must demonstrate the state actor's conduct exhibited a level of culpability that "shocks the conscience." Ibid.

Viewing the motion evidence most favorably to plaintiff, a reasonable factfinder could conclude "the harm ultimately caused [to plaintiff] was [a]

foreseeable and fairly direct" result of the decision to assign more than one probationary firefighter to a fire company, that plaintiff was "a member of a discrete class of persons subjected to the potential harm" brought about by that decision, and the Department "affirmatively used" its authority in a way that "rendered [plaintiff] more vulnerable to danger" than had the decision never been made. Id. at 101 (quoting Bright, 443 F.3d at 281).

Nevertheless, plaintiff fails to meet the second prong of Gormley's test because no reasonable factfinder could conclude that when Camden assigned two probationary firefighters to plaintiff's company, it acted with a degree of culpability that shocked the conscience. Conscience-shocking conduct occurs if the state actor intentionally caused unjustifiable harm and never occurs if the harm arose from negligence. Id. at 102 (citing Lewis, 523 U.S. at 849). "[W]hether conduct is conscience-shocking is a fact-sensitive analysis" which depends on "whether the officials' conduct is egregious in light of the particular circumstances." Id. at 103 (citing Lewis, 523 U.S. at 850).

Camden placed probationary firefighters who required more assistance and training with highly competent captains who, as plaintiff acknowledged in his deposition, "enjoyed training" and "would be able to bring them up to par rapidly." Plaintiff acknowledged that the placement of probationary firefighters was based on

"their level of experience" and designed to "help them develop to be better firefighters." Camden did not put probationers in fire companies that could not receive them, such as ladder companies and other specialized companies. Although Chief Harper received complaints about having more than one probationary firefighter in a company, none of the complaints contained specific allegations regarding dangers that were created by or attributed to the placement of more than one probationary firefighter in a company. The complaints merely expressed a belief that it would be safer if only one probationary firefighter were assigned per company.

In sum, the decision to assign more than one probationary firefighter to plaintiff's fire company was not the outrageous, conscience-shocking level of culpable conduct or deliberate indifference required to prove a state-created danger claim under the CRA.

IV.

In a single page in his brief, plaintiff contends the same facts and arguments raised in support of his state-created danger claim also establish a failure to train claim under Monell. Again, we disagree.

"Failure to train can be the basis of Monell liability when the municipality's 'failure to train reflects deliberate indifference to constitutional rights.'" Wood v.

Williams, 568 Fed. Appx. 100, 105 (3d. Cir. 2014) (quoting City of Canton v. Harris, 489 U.S. 378, 388 (1989)). "The scope of failure to train liability is a narrow one." Brown v. Muhlenberg Twp., 269 F.3d 205, 215 (3d. Cir. 2001).

"To survive summary judgment on a failure to train theory, the [plaintiff] must present evidence that the need for more or different training was so obvious and so likely to lead to the violation of constitutional rights that the policymaker's failure to respond amounts to deliberate indifference." Id. at 216 (emphasis added) (citing Harris, 489 U.S. at 390). Relevant considerations include the adequacy of the government's training program; any deficiencies in the program that are the result of mere negligent administration, rather than policy; and whether any deficiency was closely related to the injury. Harris, 489 U.S. at 390.

Most importantly for this case, "[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city, for the officer's shortcomings may have resulted from factors other than a faulty training program." Id. at 390-91; accord Vallejo by Morales v. Rahway Police Dep't, 292 N.J. Super. 333, 347 (App. Div. 1996) ("The fact that the officers committed a mistake, or the fact that they could have been better trained, will not result in liability under § 1983." (citing Harris, 489 U.S. at 391)).

Here, plaintiff offered no proof regarding the insufficiency of Camden's training program. Indeed, Leary's certification offered no criticism of the training he conducted but rather only criticized Quinones' abilities. This proof was clearly insufficient to sustain a CRA cause of action premised on Camden's allegedly inadequate firefighter training program.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION