Volume 33
Spring 2013

MORRIS DUFFY ALONSO & FALEY MUNICIPAL LAW UPDATE

First Department Finds that a Police Officer Did Not Act Unreasonably in Using a Stun Gun on the Emotionally-Disturbed Plaintiff Who Resisted Attempts to Hospitalize Him.

Pacheco v. City of N.Y., Index No.: 16368/2007 (March 21, 2013).

Plaintiff in this case sued the City of New York and claimed that he was assaulted and the victim of excessive police force when an officer subdued him with a stun gun during an attempt to hospitalize him. At trial, testimonial evidence was introduced that plaintiff was suffering from multiple seizures when EMS and police responders arrived at his home and attempted to take him to the hospital for medical care. Evidence was also introduced that plaintiff became violent and uncooperative with the emergency responders and police officers, kicking and attacking them, such that he had to be handcuffed and forcefully strapped into an EMS transport chair. After he continued to struggle with the responding officers, bit through an officer's skin and refused to cooperate with verbal requests to subdue him, another officer physically subdued him with a stun gun. Ultimately, he was successfully transported to the hospital.

Upon defendant's appeal, the First Department threw out the jury's two million dollar verdict in favor of the plaintiff, finding that the officer did not act unreasonably given plaintiff's repeated and violent outbursts and the evidence that he was emotionally disturbed. The Court opined that plaintiffs alleging an excessive force claim must prove that an officer acted with objective unreasonableness under the Fourth Amendment and that triers of fact faced with deciding such a claim must consider the split-second judgments that officers have to make in often tense, uncertain and rapidly-evolving encounters, as well as whether the suspect posed any danger to the officer's safety.

Even viewing the evidence in the light most favorable to plaintiff, the Court found that the officer's conduct was within accepted police practice, especially because the NYPD Patrol Guide permits an officer to use a taser to restrain an "emotionally disturbed" person who "threatens injury to himself or others."

First Department Reverses Jury Verdict Finding the City Partially Liable for Bike Rider's Accident in Central Park.

Wittorf v. City of N.Y., 2103 N.Y. Slip Op. 2014.

Plaintiff was cycling with her boyfriend when they reached an entrance to Central Park that a Department of Transportation (DOT) supervisor was in the process of blocking off from vehicular traffic for purposes of repairing a "special condition" in the park traverse. The supervisor was setting up cones in the area, but let the plaintiff and her boyfriend "go ahead" onto the park path. Plaintiff, but not her boyfriend, was injured when her bicycle then traversed over a large pothole in the path.

At trial, the jury found that the accident location was not in a reasonably safe condition and deemed the City to be 60% at fault for the plaintiff's accident. The trial Court then granted the City's motion to set aside the verdict, finding that it was immune from liability because the supervisor's act of waiving the plaintiff through the area was a discretionary act (as opposed to a proprietary one).

The First Department affirmed the trial Court's decision and noted that a Government's discretionary action may *not* form the basis of civil liability, where a proprietary action can. A discretionary function is generally defined as one undertaken for the protection and safety of the public pursuant to general police powers, while proprietary acts are those where the government's activities substitute for or supplemental traditionally, private enterprises. In determining which category a municipality's acts fit into, the Court must examine the specific act or omission out of which the injury is claimed to have arisen from and then the capacity in which the act/failure to act, occurred. The Court cautioned that the inquiry is not whether the agency involved is generally engaged in proprietary activity or is in control of the location where the injury occurred.

Applying these principles, the Court found that the injury arose from the supervisor's specific act of waiving the plaintiff through the area that was about to be repaired, not the actual repair work (which had not yet begun and for which mere preparations were being made). The Court then held that because traffic control is a classic example of a discretionary function undertaken for the public's safety and protection, the City was shielded from liability for the accident.

The Dissent disagreed and opined that the majority's view of the DOT's activity was too narrow. The Dissent found that the DOT's roadway repair work was a proprietary activity and that the supervisor's conduct was integral to the DOT's roadway maintenance duties. The Dissent would not have extended immunity to the City and would have reinstated the jury's verdict.

Court of Claims finds a State Trooper Negligent Per Se for Driving Above the Speed Limit and Failing to Avoid the Eventual Accident with Plaintiff Pedestrian.

Perkins v. State of N.Y., # 2013-009-100 (February 26, 2013).

A State Trooper struck the plaintiff, a pedestrian, during a routine, non emergency run. The testimony at trial from the defendant trooper was that he was traveling about fifteen miles per hour above the posted speed limit of thirty miles per hour and that when he first observed the plaintiff pedestrian crossing the roadway on which he was proceeding, he neither

applied his brakes nor sounded his horn. Plaintiff's expert testified that based upon the post accident roadway marks, the trooper would have been traveling between 57-60 miles per hour and that he would have had sufficient time to stop had he been traveling at 30 miles per hour. Finally, the State's own expert testified that the trooper would have been traveling at about 42.7 miles per hour just before the accident.

Given the undisputed testimony that the trooper was traveling faster than the posted speed limit without justification, he was negligent per se in having violated VTL 1180 (which provides that drivers must operate their vehicle at a reasonably safe rate of speed) and that he was further negligent for failing to take any evasive action to avoid the accident.

Court Appeals *Reverses* Two First Department Decisions that Denied Board of Education Employees a Defense After they Engaged in Corporal Punishment.

Sagal-Cotler v. Bd. of Educ. of City Sch. Dist. of N.Y., 946 N.Y.S.2d 121 (1st Dept. 2012).

Thomas v. N.Y. City Dept. of Educ., 946 N.Y.S.2d 114 (1st Dept. 2012).

Sagal Cotler v. Bd. of Educ. of City Sch. Dist. of N.Y., 2013 N.Y. Slip Op. 2775 (2013).

This 3-2 Court of Appeals decision by Justice Smith reversed two separate First Department decisions and ultimately held that the City *did* owe two Department of Education ("DOE") employees defense and indemnification, despite the fact that their alleged conduct in each suit violated the rules and regulations of their employment.

While the facts in both underlying cases are strikingly similar, their procedural history differs. Both Thomas v. N.Y. City Dept. of Educ. and Sagal-Cotler v. Bd. of Educ. of City Sch. Dist of N.Y.,, involved DOE paraprofessionals who allegedly struck their misbehaving students. In both cases, the City denied a defense to these women based upon their violation of 8 N.Y.C.R.R. 19.5 (a) ["19.5 (a)"], which prohibits corporal punishment within the DOE and General Municipal Law 50-k ("50-K'), which entitles DOE employees to a City- defense only if their alleged conduct does not violate rules and regulations of their employment.

The procedural paths of these cases diverged in the lower Court, with the New York County Supreme Court finding that the City owed defendant employee a defense in Sagal Cotler, while the Bronx County Supreme Court held to the contrary in *Thomas.* On appeal, the First Department reversed one lower Court decision and affirmed the other, finding that the defendants' engagement in prohibited, corporal punishment negated their entitlement to a defense from the City.

The Court of Appeals' consolidated decision disagreed, basing its decision upon Education Law §3028 ("3028"). 3028 mandates that the City defend and indemnify its employees from any civil or criminal suit that arises out of disciplinary action taken against any pupil of the Board of Education's school District, providing that the action was taken "*while in discharge*" of the employee's duties "*within the scope of the employee's* [sic] *employment*."

The City unsuccessfully argued that 50-k trumped 3028 because it was enacted *after* 3028 and only entitled DOE employees to a defense where their conduct complied with DOE rules and regulations. The Court of Appeals held that 3028 *was* controlling and did not conflict with 50-k, because 50-k sets forth that it is not to be construed as impairing or limiting employees' rights to a defense in accordance with other provisions of State Law (such as 3028).

The City next attempted to argue that even if 3028 was controlling, defendants were not acting "in the discharge" of their duties at the time of the alleged incidents, as 3028 requires, because their conduct violated 19.5. The City in essence, attempted to argue that defendants could not have been acting within the discharge of their official duties because their conduct violated the rules governing those very duties. The City argued that 3028 did not obligate it to defend employees who admittedly violated 19.5, because 3028 was enacted *before* 19.5 and when corporal punishment was permissible in the school system.[1]

The Court rejected this argument as well, finding that 3028's "discharge of duty" requirement was not limited to cases where DOE employees acted properly and lawfully. Indeed, the Court opined that 3028's language compels the conclusion that even a DOE employee's highly questionable conduct invokes their right to a defense and indemnity from the City. The Court noted that if the legislature intended for corporal punishment to be an exception to 3028, it would have amended the statute to say so.

Court of Claims Awards 22.5 Million Dollars to Car Accident Victim Injured on an Icy, State-Owned Roadway.

Zouaoui v. State of N.Y., 2011-029-010.

Plaintiff sustained loss-of-use of his left arm after being involved in a nearly head-on collision on an allegedly icy road in Westchester County. After reviewing the evidence, the Court of Claims (in what has been reported as the highest verdict in its Court) issued a 22.5 million dollar verdict to plaintiff, $11 million of which was for pain and suffering.

Some of the pertinent evidence discussed in the Court's decision includes the following:

Claimant and the other vehicle involved in the accident had differing versions of the accident. Claimant testified that he saw the other vehicle coming into his lane from his left in a "funny way" and trying to "catch its balance," leading him to conclude that it was traveling over ice in the roadway. Plaintiff attempted to veer right and avoid the collision, but could not. The opposing vehicle testified that it was plaintiff who came into his lane and that his vehicle maintained control and stayed in the proper lane. Post accident, the operator of this other vehicle noted that it was "pretty icy" at the accident scene.

Emergency responders corroborated the presence of ice in the roadway, with various F.D.N.Y. and N.Y.P.D. personnel testifying, post accident, that they noted icy conditions at the scene, such that some of them even had difficulty walking. Indeed, a responding police officer

[1] Defendant *Sagal-Cotler* admitted to striking her student and while defendant *Thomas* denied doing so, her supervisor found the allegations against her to be substantiated.

noted that the N.Y.P.D. responded to complaints of "icing" in that same area several times prior to the accident.

In pre trial discovery, DOT workers conceded that they received pre-accident phone calls as to the icy condition of the roadway and were generally aware of the problem for 2-3 weeks before the accident. The DOT had to sand and salt the roadway on numerous prior occasions and knew the area to be a "hot spot" that required "extra focus" due to improper drainage and the fact that there was a hill on both sides of the roadway. Indeed, the DOT would "babysit" the area during inclement weather to ensure that it was clear.

Because the accident occurred on a Sunday night (during the winter) and the DOT would only "babysit" the location on weekdays, no one inspected the area on the day of the accident. There was some rain and snow in the area before the accident.

Despite the contentions of defendant's expert that the collision was not head-on and despite the contentions of plaintiff's own expert that the drainage system itself was acceptable as it was on the date of loss, the Court found the State negligent in abandoning its roadway watch on the weekends, without any further justification.

While the Court opined that the mere presence of roadway snow or ice does not per se establish a breach of the State's duty to maintain its roads in a reasonably safe condition, the Court emphasized that it did constitute a breach in this case, where the State has notice of a recurring, hazardous condition and failed to use reasonable care in addressing it.

The Court concluded that the hazardous roadway conditions caused plaintiff to lose control of his vehicle (as supported by the physical evidence and accident dynamics) and that there was "overwhelming" evidence that the DOT was aware of the "recurring" drainage problem in the accident location. While the DOT attempted to repair/keep a close watch on the area prior to the accident, the Court opined that it knew the remedial work they undertook was not complete and failed to employ necessary "babysitting" measures on the date of loss merely because it was a weekend.

The Court denied that the State was entailed to any immunity for its conduct because its duty to maintain a safe roadway was non-delegable.

Third Department Finds that Town's Local Zoning Ordinance Does Not Conflict with State Statute As to Oil, Gas and Mining within the Town's Borders.

Norse Energy Corp. U.S.A. v. Town of Dryden, 2013 N.Y. Slip Op. 3145.

Here, the Third Department had to determine if a State Statute, the Oil, Gas and Solution Mining Law (ECL 23-0301/ "OGSML") pre-empted the local Town of Dryden's ordinance dealing with the use of these very natural resources ("the ordinance").

The ordinance banned all activities related to the exploration, production and storage of natural gas and petroleum, in part, to address a local concern with improper use of these resources, known as "hydrofraking." Specifically, Town residents become concerned that this

process (which involves pumping fresh water and chemical additives into sub surface shales for the purpose of obtaining methane gas) would contaminate local groundwater.

Plaintiffs (various gas and oil drillers and developers within the Town's borders) argued that this local provision conflicted with and was thus, pre empted by OGSML. OGSML sets forth regulations on the use of certain natural resources of oil and gas to prevent waste and promote a greater recovery of oil and gas, overall.

Asking first whether OGSML *expressly* pre empts the ordinance, the Court found that it did not and emphasized that local municipalities, generally, have a wide range of powers that includes fostering productive land use via zoning ordinances. While OGSML expressly pre empts local laws relating to the "regulation" of oil gas and mining, the Court noted that the statute does not define what "regulation" actually means and goes on to say that it shall not supersede the rights of a local government under New York's Real Property Law. Giving "regulation" its ordinary meaning, the Court found that the ordinance did not seek to regulate the oil and gas industry and, thus, did not conflict with OGSML. Rather, the ordinance merely seeks to establish permissible and prohibited uses of land for the purposes of regulating its land, generally. The Court rejected plaintiffs' argument that specific provisions of OGSML that direct where drilling may occur conflicts with the ordinance that prevents drilling in certain locations, finding that OGSML seeks only to specify drilling details and procedures and can harmoniously exist with a local provision limiting where it may take place.

Turning to the question of implied pre-emption, the Court's answer remained the same. The Court opined that OGSML's intent to promote uniformity in the mining of natural resources and increase efficiency in doing so did not conflict with a local ordinance banning the activity to avoid improper use of natural resources. The fact that the Town ordinance might have an incidental effect on the oil, gas and mining industry did not persuade the Court otherwise.

Second Circuit Court of Appeals Grants Qualified Immunity to Police Officer, Despite his Fourth Amendment Violation During a Traffic Stop.

Winfield v. Trotter, 11-44040 cv (March 6, 2013).

During a consensual search of the plaintiff's vehicle as part of a traffic stop, a Police officer found and read a personal letter from plaintiff to the Court concerning criminal proceedings against her husband for possession of contraband. The officer ultimately only issued a traffic violation to plaintiff and found nothing of importance during the vehicular search. Plaintiff then sued the officer under the Fourth Amendment claiming that he unreasonably invaded her privacy by reading the letter during his search.

The Second Circuit agreed with the lower Court that even with consent to search certain portions of the vehicle (including the trunk), the officer violated the plaintiff's Fourth Amendment rights by reading the letter because it was an unreasonable intrusion into her privacy and exceeded the scope of her consent. However, the Court granted the officer qualified

immunity finding that while his search was unconstitutional, it did not violate the plaintiff's clearly established right at the time of his search.

In making this determination, the Court, as required, balanced the vindication of the plaintiff's constitutional rights against that of the public official's interest in performing their duties and opined that the right which is violated must be sufficiently clear and particularized, such that a reasonable officer would understand that his actions would violate that right under these circumstances.

The Court found that the plaintiff's constitutional right was *not* clearly established because there is no Second Circuit case law standing for the proposition that reading a letter (not in plain view) during a consensual search would violate an individual's Fourth Amendment right. As such, the officer's actions were objectively and legally reasonable and he was entitled to qualified immunity.

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