SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0832-22

EVAN G. SCOTT,

Plaintiff-Appellant,

v.

CITY OF NEWARK,

Defendant-Respondent,

and

DEPARTMENT OF NEIGHBORHOOD SERVICES, and TONY EDWARDS,

Defendants.

———————————————————

Submitted May 29, 2024 – Decided June 5, 2024

Before Judges Natali and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Essex County, Docket No. L-6179-16.

Lord, Kobrin, Alvarez & Fattell, LLC, attorneys for appellant (Michael Alvarez, of counsel and on the briefs; Paula Cristina Nunes, on the briefs.)

Walsh Pizzi O'Reilly Falanga LLP, attorneys for respondent (Marc Denis Haefner and Jessica K. Formichella, on the brief).

PER CURIAM

Plaintiff Evan G. Scott appeals from a Law Division order granting summary judgment to defendant City of Newark (the City) and dismissing his complaint alleging negligence and intentional infliction of emotional distress stemming from injuries sustained in a physical altercation between plaintiff and his then-coworker, defendant Tony Edwards. After considering the parties' arguments against the record and applicable law, we conclude the court properly determined plaintiff's negligence-based claims were barred by the exclusivity provision of the Workers Compensation Act (WCA), N.J.S.A. 34:15-1 to -147, and his intentional tort-based claims were barred by the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -12-3. We accordingly affirm.

I.

We review the facts in the summary judgment record, taken in the light most favorable to plaintiff as the non-moving party. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

At the time of the incident leading to plaintiff's injuries, he and Edwards were sanitation workers employed by the City in its Department of Neighborhood and Recreational Services (the Department). On September 11, 2015, plaintiff and Edwards were assigned to work a shift collecting garbage together.

The dispute between plaintiff and Edwards began over a case of beer a resident gave plaintiff along the garbage collection route. At his deposition, plaintiff testified the crew had accepted gifts about "eight or nine times" although the "director" advised them not to. He explained at the end of the route, Edwards "called [him] to the back of the truck," and stated, "from now on, . . . any liquor that comes on this truck, you don't get it because you don't drink" and "because you was [sic] only there six months." Plaintiff objected, stating he could "give [the beer] to somebody in [his] family."

After the two "talked a little more," plaintiff stated at defendant's criminal trial[1] Edwards threatened him with a "fold up like sheetrock razor" approximately six inches long. During his deposition, plaintiff denied that Edwards had used a razor. At the criminal trial, plaintiff testified Edwards then

[1] As detailed infra, Edwards was tried and acquitted of all criminal charges related to the assault.

went to his car parked nearby and he thought Edwards was going to leave, but instead he "came back with a baseball bat." Plaintiff stated Edwards hit him with the bat on his right side, and attempted to hit him in the head but he was able to block the blow with his left arm. His left hand, which is plaintiff's dominant hand, grew "very, very numb." He estimated at the trial Edwards hit him with the bat "about six or seven times."

Plaintiff also testified at the criminal trial that he and Edwards were "in the street tussling" and fighting over the bat when Edwards "got behind [him]" and "stabbed [him] in the top of [his] head with an ice pick." Plaintiff did not know where Edwards got the ice pick. At that point, plaintiff stated, he "got up and walked away and went to the [nearby] firehouse for some help." He explained he "never got a chance" to hit Edwards because he was "always in a defensive move to protect [him]self and protect [his] head."

Both plaintiff and Edwards faced administrative discipline for their roles in the incident. Edwards was suspended for six months, and criminally charged with aggravated assault and other offenses, of which he was acquitted after a jury trial. Following a hearing at the Office of Administrative Law with respect to plaintiff's discipline, the Administrative Law Judge (ALJ) found plaintiff was guilty of conduct unbecoming a public employee for accepting a gift from a

resident, but concluded he was not guilty for the physical altercation with Edwards, as "[t]he credible testimony makes it plain that Edwards was the aggressor who escalated the dispute to a physical level, and that he left the scene without alerting a supervisor, the police, or medical help." The ALJ reduced plaintiff's original penalty of removal to a thirty-day suspension.

Plaintiff sought and received workers compensation benefits for his injuries, although the details regarding any award are not included in the record. He was evaluated by Albert Johnson, M.D., F.A.C.S., who reported plaintiff's x-ray taken on the date of the incident "revealed a displaced fracture of the [fif]th metacarpal" and the computed tomography or "CT scan of the head did not reveal any internal injuries." He also noted plaintiff's left hand showed "a slight atrophy of the dorsal interosseous region . . . metacarpal bossing," and slightly reduced palmar flexion compared to the right hand, and grip strength testing showed "[forty-six] kg of force strength in the left hand," compared to "[forty-two] kg of force strength in the right hand."

According to Dr. Johnson's report, as of March 24, 2020, plaintiff complained of daily pain and stiffness in his left hand which "waxes and wanes" and is exacerbated by "changes in weather"; "intermittent right rib pain"; and "headaches, blurred vision and difficulty concentrating." Dr. Johnson wrote

plaintiff "note[d] difficulty with his work as a laborer" and with "lifting [fifty] pounds," as well as "grasping objects with the left hand . . . fine dexterity . . . [and] writing."

At his deposition, plaintiff testified there was nothing he could not do that he used to be able to do, or that he could not do as well as he could before. He stated sometimes his hand "gets stiff" or he "may have a headache here or there." Upon further questioning by his counsel, he added he also suffered "blurred vision and difficulty concentrating," as well as "trouble lifting heavy objects," and performing tasks involving his left hand.

Plaintiff also underwent a medical examination at the City's request as part of his workers compensation case with Kevin J. Egan, M.D., F.A.A.O.S., who found "full range of motion of the . . . wrists bilaterally" and "symmetric" muscle strength in the upper extremities. He reported no Phalen's signs or Tinel's signs at the wrists, nor "thenar or hypothenar atrophy." Dr. Egan concluded as of June 5, 2020, plaintiff "maintains excellent mobility and function of the left hand . . . now without residual or permanency referable to the incident of [September 11, 2015]." His examination "fail[ed] to reveal objective findings that would support any subjective complaints of discomfort."

Plaintiff filed a complaint against the City, the Department, Edwards, and fictitious individuals.[2] As best we can discern, plaintiff's claims included negligence, intentional infliction of emotional distress, and negligent retention/supervision. He also alleged the City was responsible for his injuries as it "deliberately, intentionally, wantonly and willfully caused the subject condition to occur" under Laidlow v. Hariton Machinery Co., 170 N.J. 602 (2002). Essentially, plaintiff alleged Edwards' assault constituted intentional infliction of emotional distress, and the City and the Department were responsible on two theories: respondeat superior and negligent retention/supervision.

In support of these claims, plaintiff contended the City was aware of and failed to properly address Edwards' past misconduct and "violent tendencies," and submitted Edwards' disciplinary records from his employment with the City. As to Edwards' employment records, the motion record reflects a "corrective conference" for "failure to follow instructions" in May 2007, a one-day suspension for unknown reasons in November 2007, a "corrective conference" for taking his car for an oil change during work hours in March 2014, and a one-day suspension for "tardiness" in April 2015.

[2] Plaintiff eventually dismissed his claims against all defendants except the City.

Additionally, a December 15, 2014 incident report indicates Edwards was involved in an altercation with another sanitation worker, Tomas Camacho, in which Edwards threatened Camacho to "hurry up" or Edwards would "fuck him up." The report states Edwards pushed Camacho and when Camacho attempted to return to the garbage truck, Edwards stated "if you go on that truck, I will drag you off." Camacho reported "previous contentious history with Mr. Edwards, where he acted out in a very similar manner." The related police report reflects the argument began when Edwards "advised [Camacho] that any gifts received from the residents along the route belonged to him." Edwards received a formal written reprimand for the 2014 incident.

The City moved for summary judgment and requested dismissal of plaintiff's claims on three grounds. First, it argued plaintiff's negligence-based claims were precluded by the WCA's exclusivity provision. Second, the City maintained any claims sounding in intentional conduct were precluded by the TCA, which excludes intentional torts from respondeat superior liability for public entities. Third, it contended plaintiff failed to demonstrate an objective permanent injury or substantial loss of a bodily function to vault the TCA's verbal threshold.

In opposing the City's motion, plaintiff first contended the motion record contained genuine and material questions of fact supporting the legal conclusion his claims were not subject to the WCA bar because the City was aware its continued employment of Edwards after reports of violence toward other coworkers resulted in a substantial certainty of injury of the type excepting those claims from the exclusivity bar of the WCA under Laidlow. Second, plaintiff argued even if he could not maintain his respondeat superior claims, his negligent retention claim should survive. Finally, plaintiff maintained his fracture and substantial loss of the use of his hand was sufficient to vault the TCA's verbal threshold.

After considering the parties' oral arguments, the court granted the City's motion and dismissed the claims against it with prejudice, explaining its rationale in an oral ruling. First, relying upon Bove v. AkPharma Inc., 460 N.J. Super. 123, 139 (App. Div. 2019), the court found, even acknowledging the City's knowledge of earlier incidents involving Edwards, plaintiff had not demonstrated the City had exposed him to a substantial certainty of injury to permit his claims to overcome the WCA bar. Second, it reasoned under N.J.S.A. 59:2-10, the City could not be responsible for Edwards' willful misconduct under a theory of respondeat superior.

Finally, it concluded "plaintiff has not shown a permanent loss of a bodily function" as required by Gilhooley v. County of Union, 164 N.J. 533 (2000), and Brooks v. Odom, 150 N.J. 395 (1997), because "[t]here is nothing in Dr. Johnson's opinion that raises a genuine issue of material fact for a jury to consider as to whether there is an objective, permanent injury and a permanent loss of bodily function that is substantial." Thus, the court found plaintiff's claims were also precluded by the TCA's verbal threshold set forth in N.J.S.A. 59:9-2(d). This appeal followed.

II.

Before us, plaintiff raises the same three arguments raised before and rejected by the court. He first argues the court erred in granting the City summary judgment based on the WCA bar, reprising his argument the City knowingly exposed him to "a risk that is substantially or virtually certain to result in injury or harm." Specifically, he contends the City was aware of Edwards' "history of violating the rules, harassing, and threatening fellow employees and assaulting coworkers" documented in disciplinary proceedings but nevertheless kept him employed.

According to plaintiff, this "created a substantial certainty that . . . Edwards would continue to exhibit the same or even greater levels of

misconduct, knowing his superiors would do nothing to stop him." He asserts the City's "failure of [its] disciplinary and supervisory functions" is analogous to an employer's removal of safety devices, as in Mabee v. Borden, Inc., 316 N.J. Super. 218, 230 (App. Div. 1998). Plaintiff also maintains his injuries were "plainly beyond anything the [L]egislature could have contemplated as entitling the employee to recover only under the [WCA]." We disagree.

We begin by noting we "review decisions granting summary judgment de novo," C.V. v. Waterford Twp. Bd. of Educ., 255 N.J. 289, 305 (2023), applying the same standard as the trial court, Townsend v. Pierre, 221 N.J. 36, 59 (2015). Like the motion judge, we "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." C.V., 255 N.J. at 305 (quoting Samolyk v. Berthe, 251 N.J. 73, 78 (2022)). "Summary judgment is appropriate if 'there is no genuine issue as to any material fact' and the moving party is entitled to judgment 'as a matter of law.'" Ibid. (quoting R. 4:46-2(c)).

With respect to the applicable substantive legal principles, it is well-settled the WCA provides an exclusive remedy for injuries sustained in an "accident arising out of and in the course of employment." N.J.S.A. 34:15-7 and

-8. "We have long recognized that [the WCA] is remedial legislation and should be given liberal construction in order that its beneficent purposes may be accomplished." Kocanowski v. Twp. of Bridgewater, 237 N.J. 3, 10 (2019) (alteration in original) (quoting Est. of Kotsovska v. Liebman, 221 N.J. 568, 584 (2015)).

"For more than a century, the [WCA] has provided employees injured in the workplace medical treatment and limited compensation 'without regard to the negligence of the employer.'" Vitale v. Schering-Plough Corp., 231 N.J. 234, 250 (2017) (quoting Est. of Kotsovska, 221 N.J. at 584). It has been described as a "historic 'trade-off,'" Laidlow, 170 N.J. at 605, where the employer "assumes an absolute liability[,] [but] gains immunity from common-law suit, even though he [may] be negligent, and is left with a limited and determined liability in all cases of work-connected injury," Vitale, 231 N.J. at 250 (first alteration in original).

The WCA bars common law tort claims for injuries arising out of and in the course of employment "except for intentional wrong." N.J.S.A. 34:15-8. To demonstrate an intentional wrong, the employee need not demonstrate "a subjective desire to harm," Laidlow, 170 N.J. at 613, but rather must satisfy a two-prong test involving the employer's conduct and "the context in which that

conduct takes place." Id. at 614 (quoting Millison v. E.I. du Pont de Nemours & Co., 101 N.J. 161, 179 (1985)). Courts have found an employer's intentional wrong "in only rare and extreme factual circumstances." Kibler v. Roxbury Bd. of Educ., 392 N.J. Super. 45, 52-53 (App. Div. 2007).

Under the conduct prong, the employee must "establish the employer knew that its actions were substantially certain to result in injury or death to the employee." Hocutt v. Minda Supply Co., 464 N.J. Super. 361, 375 (App. Div. 2020) (citing Millison, 101 N.J. at 178-79). Notably, "mere knowledge and appreciation of a risk," recklessness, and gross negligence are each insufficient to meet this standard. Van Dunk v. Reckson Assocs. Realty Corp., 210 N.J. 449, 452, 460 (2012). "[E]ven the strong probability of a risk . . . will come up short of the 'substantial certainty' needed to find an intentional wrong resulting in avoidance of the exclusive-remedy bar of the [WCA]." Crippen v. Cent. Jersey Concrete Pipe Co., 176 N.J. 397, 407 (2003) (quoting Millison, 101 N.J. at 179).

As our Supreme Court explained, "the dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the statutory framework of the [WCA] is not circumvented simply because a known risk later blossoms into reality." Hocutt, 464 N.J. Super. at 375 (quoting Millison, 101 N.J. at 178). Accordingly, the

employee must show the employer "knew it was a 'virtual certainty' that plaintiff would be injured in the manner that [they] w[ere]." McGovern v. Resorts Int'l Hotel, Inc., 306 N.J. Super. 174, 181 (App. Div. 1997) (quoting Millison, 101 N.J. at 178).

In addition, to satisfy the context prong, the employee must demonstrate "the resulting injury and the circumstances of its infliction were more than a fact of life of industrial employment and plainly beyond anything the Legislature intended the WCA to immunize." Hocutt, 464 N.J. Super. at 375 (citing Millison, 101 N.J. at 178-79). This inquiry is purely a question of law for the court. Laidlow, 170 N.J. at 623.

The court's consideration involves "the totality of the facts contained in the record." Id. at 623-24. Generally, "the same facts and circumstances" are relevant to both prongs of the test. Mull v. Zeta Consumer Prods., 176 N.J. 385, 390 (2003) (quoting Laidlow, 170 N.J. at 623).

We are persuaded that plaintiff failed to demonstrate in the motion record a genuine and material factual question as to whether the City "knew that its actions were substantially certain to result in injury" to plaintiff. Hocutt, 464 N.J. Super. at 375 (quoting Millison, 101 N.J. at 178-79). Edwards' past disciplinary history, including his altercation with Camacho one year prior, does

not standing alone establish the City was aware continuing to employ Edwards was substantially or virtually certain to cause the injuries plaintiff sustained.

Indeed, in Edwards' ten-year tenure with the City leading up to the events here, the record demonstrates only one incident involving physical conflict with another employee, the previously-noted occasion in which Edwards "shoved" and threatened Camacho. Not only is there nothing else in the record showing any other violent interactions between Edwards and other employees, but we are satisfied his conduct in that prior interaction, however illaudable, was not predictive of an attack with a baseball bat and ice pick, as occurred here.

Further, as noted, Edwards' other disciplinary history involved "tardiness," engaging in personal business during work hours, and "failure to follow instructions." Even assuming the City did not impose sufficiently harsh discipline on Edwards for these relatively minor offenses, it does not follow that such leniency is comparable to the removal of safety mechanisms from industrial machinery, as plaintiff suggests. Violent actions taken by a human being like Edwards, with varying and complex motivations behind them, are just not the same as the dangers presented by a machine, which are entirely preventable by installation and proper use of protective devices.

In sum, we cannot conclude plaintiff has shown the City knew of a virtual certainty that Edwards' continued employment would lead to his attack on plaintiff and the resulting injuries. Even if we were to assume the City had "mere knowledge and appreciation of a risk," Van Dunk, 210 N.J. at 452, posed by Edwards in light of his prior altercation with another employee, which we do not find, that awareness simply would not rise to the level of a substantial or virtual certainty for the reasons explained. Plaintiff has thus failed to meet the conduct prong, and as both prongs are required to avoid the WCA's exclusivity provision, we need not, and do not, address the context prong.

III.

In his second argument, plaintiff contends under N.J.S.A. 59:2-2, the City is "liable for injury proximately caused by an act or omission of a public employee within the scope of his employment," defined as "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." Relying upon De Nardis v. Stevens Construction Co., 72 N.J. Super. 395, 397 (App. Div. 1962), plaintiff contends "assaults that take place at work, while employees are engaged in work functions," like that at issue here, "are considered to arise out

of the course of employment." Specifically, he notes the "employment need not be the sole or proximate cause of the injury" as long as it is "a necessary factor leading to the accident," under Sanders v. Jarka Corp., 1 N.J. 36, 41 (1948). Plaintiff further explains "[s]ince an employee's conduct can be charged to his employer, [and] because the employee is an agent or representative of the employer, during the course of employment, […] the employee's intentional conduct is also the intentional conduct of the employer."

We reject this argument as well. N.J.S.A. 59:2-10, which provides "[a] public entity is not liable for the acts or omissions of a public employee constituting a crime, actual fraud, actual malice, or willful misconduct," unequivocally bars plaintiff's claims alleging intentional torts under a respondeat superior theory.

The TCA provides that public entities may be held liable only within its limitations. N.J.S.A. 59:1-2. "[U]nder the TCA, 'immunity [of public entities] from tort liability is the general rule and liability is the exception.'" Stewart v. N.J. Tpk. Auth., 249 N.J. 642, 655-56 (2022) (second alteration in original) (quoting Coyne v. Dep't. of Transp., 182 N.J. 481, 488 (2005)). Although a public entity may generally be held responsible for acts or omissions of its employees within the scope of their employment under a theory of respondeat

superior, N.J.S.A. 59:2-2, it is not liable where the employee's acts or omissions constitute "a crime, actual fraud, actual malice, or willful misconduct," N.J.S.A. 59:2-10. In other words, "there can be no vicarious liability by a public entity for intentional torts committed by its employees." Hoag v. Brown, 397 N.J. Super. 34, 54 (App. Div. 2007).

"[W]illful misconduct is not immutably defined but takes its meaning from the context and purpose of its use." Fielder v. Stonack, 141 N.J. 101, 123-24 (1995). It "ranges in a number of gradations from slight inadvertence to malicious purpose to inflict injury." Id. at 124 (quoting McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 305 (1970)). "[P]rior decisions have suggested that willful misconduct is the equivalent of reckless disregard for safety [and] more than an absence of 'good faith.'" Alston v. City of Camden, 168 N.J. 170, 185 (2001) (quoting Fielder, 141 N.J. at 124).

Plaintiff's focus on whether Edwards' assault arose from the course of employment is misplaced. The question here, for purposes of vicarious liability under the TCA, is not whether Edwards' conduct was within the course of employment, but whether it constituted "a crime, actual fraud, actual malice, or willful misconduct." N.J.S.A. 59:2-10. If it did, the City cannot be liable for Edwards' actions under the TCA, even if those actions arose from the course of

employment. Ibid; see also Hoag, 397 N.J. Super. at 53-54 (holding "with respect to such intentional torts [committed by a public employee], the theory of respondeat superior does not apply" pursuant to N.J.S.A. 59:2-10).

On this point, we agree with the court and the City that plaintiff's claims asserting vicarious liability for Edwards' intentional conduct are barred by N.J.S.A. 59:2-10, because plaintiff has not established any genuine and material factual question with respect to whether Edwards' actions constituted "willful misconduct." Ibid. By striking plaintiff with a bat and ice pick, Edwards indisputably acted with a "reckless disregard for safety," Alston, 168 N.J. at 185 (quoting Fielder, 141 N.J. at 124), as the use of such weapons to strike another person is extremely likely to result in serious bodily injury.

Accepting as true plaintiff's version of events, as we must under Banco Popular North America v. Gandi, 184 N.J. 161, 166 (2005), Edwards intended to harm plaintiff through his conduct and particularly his use of two separate weapons. Such "malicious purpose to inflict injury" constitutes willful misconduct, Fielder, 141 N.J. at 124 (quoting McLaughlin, 56 N.J. at 305), which vitiates any vicarious liability of the City, N.J.S.A. 59:2-10, and we are satisfied no reasonable jury could reach a contrary conclusion, see Brill, 142 N.J. at 545.

In light of our decision, we need not reach plaintiff's final argument that the court erred in concluding he had not demonstrated an objective permanent injury or substantial loss of bodily function to vault the verbal threshold of N.J.S.A. 59:9-2(d). Simply put, having concluded plaintiff's negligence-based claims are barred by the WCA, and his intentional tort-based claims are precluded by the TCA, even if plaintiff were to prevail as to this damages-related issue, he cannot maintain any of his claims against the City for the reasons discussed. To the extent we have not specifically addressed any of plaintiff's arguments it is because we have concluded they are of insufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(1)(E).

Affirmed.