
STATE OF NEW YORK

SUPREME COURT

COUNTY OF ALBANY

JASON KRZYKOWSKI and LISA FORONDA-SCHMITT
(formerly known as Lisa McCauslin) as Administratrix of
the Estate of DAVID McCAUSLIN, Deceased,

Plaintiffs,

-against-

TOWN OF COEYMANS, TOWN OF COEYMANS POLICE
DEPARTMENT and ERIC MULLER, Individually and as a
Member of the Town of Coeymans Police Department,

Defendants.

Index No. 3988-09
RJI No.: 01-10-100184

Hon. Gerald W. Connolly

**MEMORANDUM OF LAW IN SUPPORT OF THE
TOWN OF COEYMANS, TOWN OF COEYMANS POLICE
DEPARTMENT & ERIC MULLER'S MOTION FOR
SUMMARY JUDGMENT**

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The Town of Coeymans, the Town of Coeymans Police Department¹ and Eric Muller (collectively “Defendants”) submit this Memorandum of Law in support of their Motion for Summary Judgment against plaintiffs Jason Krzykowski and Lisa Foronda Schmitt (formally known as Lisa McCauslin) – Administratrix for the Estate of David McCauslin (collectively “plaintiffs”) pursuant to CPLR § 3212 on the basis that there is no genuine issue to be resolved at trial.

PRELIMINARY STATEMENT

Dismissal of this action is warranted given that the undisputed facts, together with plaintiff Jason Krzykowski’s (“Krzykowski” or “plaintiff”) admissions, establish no basis of liability on the part of Defendants under the law. The sole cause of Krzykowski’s injuries and David McCauslin’s (“McCauslin”) death stems from their decision, in the evening hours of April 8, 2005, to illegally drive their dirt bikes – without headlights or taillights – in a reckless manner and at an excessive rate of speed on a public roadway. A member of the Town of Coeymans Police Department, who was on routine patrol and witnessed plaintiffs’ actions, activated his emergency lights and sought to stop plaintiffs. Plaintiffs refused to stop and instead attempted to elude the officer. Plaintiffs lost control of their respective dirt bikes and sustained the injuries of which they now complain. Plaintiffs have not, and cannot, set forth any facts that would support a finding that the officer’s conduct was the proximate cause of their accident or that the officer in anyway acted with a reckless disregard for the safety of either himself or others.

¹ Defendants note that the Town of Coeymans Police Department is an improper defendant as it is not susceptible to suit and any action against it should be dismissed as a matter of law. See, e.g., Fowler v. Kingston City Police Dept., 2009 WL 3064775 (N.D.N.Y. Sept. 22, 2009) (dismissing police department from action and stating, “[u]nder New York law, departments which are merely administrative arms of a municipality do not have a legal identity separate and apart from the municipality and cannot sue or be sued.” (quotations and citations omitted)).

STATEMENT OF FACTS

Krzykowski was issued a total of seven (7) traffic tickets by then Officer Gregory Darlington² (“Darlington”) of the Town of Coeymans Police Department due to the manner in which he operated his dirt bike on April 8, 2005. In summary form, those tickets are as follows:

- (i) Ticket No. LV516006 – Reckless Driving (misdemeanor);
- (ii) Ticket No. LV516007 – Aggravated Unlicensed Operation 3d (misdemeanor);
- (iii) Ticket No. LV516008 – Operating in Violation of Restrictions (infraction);
- (iv) Ticket No. LV516009 – Operating Without Lights (infraction);
- (v) Ticket No. LV516010 – Unregistered Motor Vehicle (infraction);
- (vi) Ticket No. LV516011 – Uninspected Motor Vehicle (infraction); and
- (vii) Ticket No. LV516012 – Uninsured Motor Vehicle (infraction).

(See Affidavit of Thomas J. Higgs, Exhibit A (hereinafter “Higgs Aff., Ex. __, at p. __”). See also, (Higgs Aff., Ex. B (corresponding Complaints detailing each offense)). On December 3, 2007, Krzykowski pled guilty to Aggravated Unlicensed Operation of a Motor Vehicle in the third degree in full satisfaction of these violations (Higgs Aff., Exs. C & D).

The events that preceded the issuance of these tickets began at approximately 7:35 p.m. on April 8, 2005. At this time, then Coeymans Police Officer Eric Muller³ (“Muller”) – who was on routine patrol – received a dispatch call concerning the use of dirt bikes and/or a motorized scooter traveling along Coons Road. Given the large geographical size of the patrol area, Muller did not arrive at Coons Road until approximately 8:02 p.m. and did not witness anyone operating the aforementioned vehicles; however, he did hear the sound of dirt bikes in the distance (Higgs Aff., Ex. E, pp. 46-48, 50-62). Muller then proceeded to State Route 143 (“Route 143”) whereupon he

² Gregory Darlington is now the Chief of Police for the Town of Coeymans Police Department. He has held this position on a permanent basis since July 23, 2007.

³ Eric Muller left the Coeymans Police department on or about June 17, 2005, and is now with the Saratoga County Sheriff’s Department.

stopped a vehicle for an undisclosed violation at approximately 8:18 p.m. During this traffic stop, Muller again heard the sound of dirt bikes being operated, but he was unable to make any visual contact. After concluding his traffic stop, Muller traveled along Route 143 and pulled over to the side of the road near the Sycamore Golf Course in order to take a call from dispatch about another report of dirt bikes being operated on the roadways in his vicinity. After finishing his call, Muller, with his window down, continued to look and listen for the dirt bikes (Higgs Aff., Ex. E, pp. 75-82).

Meanwhile, plaintiff explained that he and McCauslin had left their house on their dirt bikes and were riding over to McCauslin's girlfriend's – Christie Shields ("Shields") – house on Coons Road in order to partake in a bonfire party. To this end, plaintiff had a backpack containing beer bottles and McCauslin had a "bladder" of beer (Higgs Aff., Ex. F, pp. 17-18, 20; Ex. G, pp. 1-2). Prior to their arrival, however, Shields' sister had called the Coeymans Police Department to complain about a neighbor riding his dirt bike up and down Coons Road. Shields, knowing of the pending arrival of plaintiff and her boyfriend McCauslin, took her car and intercepted them before they reached Coons Road in order to warn them and allow them to avoid being apprehended by the police. Plaintiff and McCauslin heeded Shields' warning and turned around because they were concerned about being ticketed for illegally operating their dirt bikes on public roads (Higgs Aff., Ex. F, pp. 18-23; Ex. G, pp. 1-2).

As they were traveling east on Route 143, plaintiff and McCauslin saw that a patrol car (Muller's) – with its lights flashing – had pulled a vehicle over in the opposite lane (*i.e.*, the patrol car and vehicle were on the shoulder of the west-bound lane of Route 143). Upon seeing the patrol car, plaintiff and McCauslin quickly turned around, stopped, and discussed what roads to take home since it was now too dark to be driving in the woods (Higgs Aff., Ex. F, pp. 32-34). Although

plaintiff admitted that he and McCauslin had hoped to avoid the police on their way home, they ultimately determined that they should try and go by the officer on Route 143 since he was engaged in a traffic stop and would not have enough time to pursue them (Higgs Aff., Ex. F, pp. 35-36; Ex. G, 88). As plaintiff's testimony makes clear, he and McCauslin knew that they were operating their dirt bikes in an illegal manner.

Q: [W]hy did you initially hesitate to pass that police vehicle?

A: Because it's a police vehicle and we are on the dirt bikes illegally on the road.

(Higgs Aff., Ex. H, at p.88)

By the time plaintiff and McCauslin had decided upon their course of action, Muller had already concluded the traffic stop and was now parked along Route 143 near the Sycamore Golf Course in an effort to locate the dirt bikes that he had been advised of by the dispatcher. Muller's efforts were quickly rewarded as plaintiff and McCauslin suddenly drove by him "at a high rate of speed" (Higgs Aff., Ex. E, at p.82-84). Upon witnessing this activity, Muller activated his emergency lights, notified the dispatcher, made a u-turn, and followed plaintiff and McCauslin in an attempt to pull them over and issue them tickets for violations of the Vehicle and Traffic Law (Higgs Aff., Ex. E, at pp. 85-89, 96, 111-12).

Plaintiff and McCauslin, despite seeing the patrol car, decided not to stop. Instead, as plaintiff's testimony again makes clear, they decided to speed up in an attempt to get away from the patrol car and had no intention of pulling over.

Q: And when you saw the police officer turn around, you increased your speed?

A: Correct.

Q: At any time ... from the point where you saw the police officer turn around, did you ever consider stopping?

A: No.

Q: [D]uring this time period where the chase occurred, you never once thought about pulling off the road and stopping?

A: No.

(Higgs Aff., Ex. F, at p. 42; Ex. H, at pp. 77-79)

Plaintiff explained that it was his intent, after seeing the patrol car, to continue traveling east along Route 443 for approximately another mile to mile and a half, and to then take a left onto Starr Road in order to avoid the police en route to his home. McCauslin followed plaintiff's lead (Higgs Aff., Ex. F, at p. 45-46; Ex. H, at pp. 76-77, 110).

Q: Did you make a left turn [off Route 143 onto Starr Road] to get away from the police?

A: I guess you could say that.

(Higgs Aff., Ex. H, at p. 110)

However, while attempting to turn left onto Starr Road from Route 143, plaintiff and McCauslin lost control of their respective dirt bikes and crashed resulting in the injuries of which plaintiffs now complain (Higgs Aff., Ex. E, at pp. 46-50, 53-57). Muller, upon arriving at the scene, noticed one body lying in the roadway (Krzykowski) and another body in the front lawn of a home

at the intersection of Route 143 and Starr Road (McClausin) (Higgs Aff., Ex. E, at pp. 112-13).⁴

On or about July 6, 2006, plaintiffs' attorneys filed an amended complaint against Defendants in the United States District Court for the Northern District of New York alleging claims under 42 U.S.C. §§ 1983 and 1988, as well as state law claims. In a decision and order dated November 25, 2008, Northern District Court Judge G. Sharpe granted Defendants' motion for summary judgement; however, the Court declined to exert supplemental jurisdiction over plaintiffs' state law claims (Higgs Aff., Ex. L). This action was subsequently commenced by plaintiffs on May 20, 2009⁵

⁴ Defendants recognize that there is some question surrounding the proximity of Muller's patrol car to plaintiffs' dirt bikes (Higgs Aff., Ex. E, at pp. 98-99 (testifying that after he – Muller – turned around to pursue, he did not see the dirt bikes again until he came upon one of the riders lying in the roadway at the intersection of Route 143 and Starr Road); Higgs Aff., Ex. I; Ex. J, at p. 17 respectively (Mr. Heilsberg, an eyewitness to the crash, estimating that Muller was approximately 75 to 100 feet behind the dirt bikes and later testifying that after the dirt bikes crashed, "seconds later the police officer's car came flying down the road."); and Higgs Aff., Ex. K (Mr. Snyder, another eyewitness, stating that the police car arrived at the scene after the dirt bikes crashed and noting that it "didn't look like he was trying to catch up to them")); however, the issue of proximity has no bearing on the Court's summary judgment analysis. First, plaintiff admitted that they increased their speed in an effort to outrun the officer rather than pull over. Second, plaintiff admits that he somehow lost control of his dirt bike resulting in his crash. Third, plaintiff did *not* testify that the patrol car ever made contact with his dirt bike or in anyway physically caused his dirt bike to crash. Fourth, Plaintiffs' attorney conceded, during oral argument in the federal action, that Muller did not hit the dirt bikes or operators at any point during his pursuit (Higgs Aff., Ex. L, at *5). The sole proximate cause of plaintiffs' accident was their decision to drive in a reckless manner. As such, the distance between plaintiffs' dirt bikes and Muller's patrol car is irrelevant. See also, Greenawalt v. Village of Cambridge, 67 A.D.3d 1158, 1160, 888 N.Y.S.2d 295, 297 ("Allegations of a police vehicle's speed and proximity to a suspected lawbreaker alone will not establish liability....").

⁵ Defendants note that plaintiffs, instead of focusing on the two-three (2-3) minute window of time pertinent to this case, dedicate an inordinate amount of time and energy focusing on the post-accident investigation and former pursuit practices of the Coeymans Police Department ("CPD") with regard to dirt bikes and all terrain vehicles ("ATVs") (Higgs Aff., Ex. M, at ¶¶ 55-107). These assertions are specious at best as they have absolutely no relevance to this case. Defendants acknowledge that the post-accident investigation was handled in a less than ideal manner; however, the officer in charge of the investigation was reprimanded for this short-coming (Higgs Aff., Ex. N). Plaintiffs appear incapable of comprehending that what happened *after* the accident has absolutely no bearing on what occurred *before* the accident in this action. Plaintiffs previously raised this issue and, given its irrelevancy, it was given the briefest of acknowledgments by the District Court (Higgs Aff., Ex. L, at *2 ("[I]t is simply noted that the [CPD] failed to properly investigate the crash scene after the accident.")).

The history of past pursuits by the CPD of dirt bikes and ATVs, including the former existence of an ATV unit by the CPD, is equally irrelevant. Plaintiffs' assertions that these prior practices and/or interactions between the CPD and riders of dirt bikes somehow has bearing on this matter is a complete non sequitur. As plaintiffs acknowledge in their complaint, "it is common for individuals to ride dirt bikes and [ATVs]" in the Coeyman area (Higgs Aff., Ex. M, at ¶ 21). Logically, it stands to follow that the police will need to handle incidents wherein these riders violate the law as opposed to the inference of a conspiracy or some insidious intent that (fn con't. p. 7)

(Higgs Aff., Ex M).

ARGUMENT

I. Defendants are Immune from Liability Because the Officer Who Pursued Plaintiffs Did Not Act Recklessly

Defendants are entitled to the protections of Vehicle and Traffic Law § 1104. In sum, this section of the Vehicle and Traffic law permits authorized vehicles involved in emergency operations to disregard certain traffic laws. As such, liability will only be imposed if the conduct of the operator of the vehicle rises to a level of recklessness. See Vehicle and Traffic Law § 1104(e) (stating that the provisions of this section will not “protect the driver from the consequences of [the driver’s] reckless disregard for the safety of others”). See also, Saarinen v. Kerr, 84 N.Y.2d 494, 501, 644 N.E.2d 988, 991, 620 N.Y.S.2d 297, 300 (1994) (determining that the recklessness standard under this statute “requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome” (internal citations omitted)); Dibble v. Town of Rotterdam, 234 A.D.2d 733, 735, 650 N.Y.S.2d 897, 899 (3d Dept., 1996) (“It is now well settled that a police officer’s conduct in pursuing a suspected lawbreaker may

plaintiffs seek to elicit. Plaintiffs also raised this argument in the prior action to no avail (Higgs Aff., Ex. L, at *3 (noting, *inter alia*, that “the existence of the ATV unit is irrelevant to this case ... [since] ... it was dissolved before the accident here occurred, and played no part in the events at issue.”); *id.*, at *5 n.8 (“Similarly, evidence that McCauslin had been pursued in the past by other Coeymans’ police officers is irrelevant to Officer Muller’s intent, as there is no evidence that Officer Muller had pursued either McCauslin or Krzykowski in the past, or know who they were.”)). See also, Higgs Aff., Ex. O, at pp. 24-7; Ex. E, at p. 113; and Ex. H, at 37-38 (establishing, respectively, that the ATV unit had been dissolved prior to this accident and that Muller did not know either McCauslin or Krzykowski prior to this event).

Lastly, Defendants note that plaintiffs’ attorney wishes to depose eleven (11) individuals in connection with this matter (Higgs Aff., Ex. P). The key individuals in this matter have already been deposed. Permitting plaintiffs the opportunity to re-depose these individuals would be an utter waste of time, resources, and, ultimately, an exercise in futility as these individuals would have nothing to add to their prior testimony. Any individual who was not deposed previously is so outside the scope of the event in question that their participation would be nonsensical.

not form the basis of civil liability ... unless the officer acted in reckless disregard for the safety of others.” (citation omitted)); King v. Village of Cobleskill, 237 A.D.2d 689, 690, 654 N.Y.S.2d 439, 440 (3d Dept., 1997) (“Before liability is imposed upon the operator of an emergency vehicle, factual inferences of *reckless disregard* for the safety of others must be raised.” (citations omitted) (emphasis in original)); Schieren v. State of New York, 281 A.D.2d 828, 830, 722 N.Y.S.2d 128, 131 (3d Dept., 2001) (“We note that [the officer’s] conduct in pursuing [claimant] may not form the basis of civil liability unless [the officer] acted in reckless disregard for the safety of others, particularly claimant.” (citation omitted)); Csizmadia v. Town of Webb, 289 A.D.2d 854, 856-57, 735 N.Y.S.2d 222, 224 (3d Dept., 2001) (“[L]iability can be invoked only if the conduct rises to the level of recklessness.” (citation omitted)); and Greenawalt v. Village of Cambridge, 67 A.D.3d 1158, 1159, 888 N.Y.S.2d 295, 296 (3d Dept., 2009) (“Liability ... will not be imposed unless the conduct rises to the level of recklessness.”). The conduct of officer Muller during his pursuit of plaintiffs was objectively reasonable, not reckless, and plaintiffs can proffer no evidence to the contrary.

Plaintiffs, having been witnessed driving in an illegal and unsafe manner by Muller, were subsequently pursued by Muller pursuant to his obligation as an officer of the law. See e.g., Dibble, 234 A.D.2d, at 735, 650 N.Y.S.2d, at 899 (stating that an officer “having observed erratic and dangerous driving ... [is] duty bound to investigate, using all reasonable means, including pursuit, to stop the lawless vehicle’s forward progress”) (citations omitted)). The pursuit of plaintiffs began at approximately 8:30 p.m. with little to no other traffic or pedestrians present and the weather was clear and dry. Muller activated his emergency lights upon witnessing plaintiffs’ conduct (Higgs Aff., Ex. E, at pp. 83-91). The duration of the entire pursuit, from the time Muller first witnessed plaintiffs passing by him to the time that he came upon the scene of the accident, was approximately

two to three (2 – 3) minutes and covered a distance of only one (1) to one-and-a-half (1 ½) miles (Higgs Aff., Ex. E, at p. 120; Ex. H, at pp. 76-77). Furthermore, there was never any contact between plaintiffs’ dirt bikes and Muller’s patrol car.⁶ Nothing about the actions of Muller during his pursuit of plaintiffs could be deemed reckless; either from an objective standpoint or within the meaning of the applicable standards articulated above. Indeed, plaintiffs have not, and cannot, articulate any basis that would lead one to conclude that Muller’s actions were reckless.

While Muller admittedly exceeded the posted speed limit by having traveled at approximately 55 mph along Route 143 (Higgs Aff., Ex. E, at pp. 93, 110; Ex. J, at 14), such conduct is not demonstrative of reckless behavior. See Schieren, 281 A.D.2d, at 831, 722 N.Y.S.2d, at 131 (“[T]he fact that an officer exceeds the speed limit does not by itself constitute a predicate for the imposition of liability.” (citing Powell v. City of Mount Vernon, 228 A.D.2d 572, 644 N.Y.S.2d 766 (2d Dept. 1996), lvs. denied 89 N.Y.2d 806, 807, 654 N.Y.S.2d 716, 677 N.E.2d 288); Greenawalt, 67 A.D.3d, at 1160, 888 N.Y.S.2d, at 297 (“Allegations of a police vehicle’s speed and proximity to a suspected lawbreaker alone will not establish liability, especially where ... no evidence exists that the pursuing officer interfered with plaintiff’s ability to surrender.”) (internal citation omitted). Furthermore, Muller’s conduct must be “viewed at the time and under the circumstances in which he acted and not in retrospect.” King, 237 A.D.2d, at 692, 654 N.Y.S.2d, at 441. Plaintiffs have neither stated, nor alleged, that Muller in any way interfered with their ability to surrender. To the contrary, plaintiff readily admitted that he sped up, as did McCauslin, in an attempt to get away from the patrol car and that he had no intention of pulling over.

Muller’s conduct clearly falls within the ambit of the qualified privilege afforded under

⁶ See supra note 4 and accompanying text.

Vehicle and Traffic Law § 1104 as there is nothing about Muller's conduct demonstrating an intent to commit unreasonable acts or to disregard an obvious risk so great that harm to others was probable. As such, summary judgment should be awarded and plaintiffs' complaint should be dismissed in its entirety.

II. The Sole Proximate Cause of Plaintiffs' Accident was the Manner in Which Plaintiffs Operated Their Dirt Bikes, Not the Actions of the Officer Who Pursued Them

The manner in which plaintiffs' decided to operate their dirt bikes, not the manner in which Defendant Muller conducted his pursuit, is the proximate cause of plaintiffs' accident. Plaintiffs were knowingly operating their dirt bikes illegally on the public roads and, as previously noted, admitted of having no intention of pulling over once they saw the patrol car following them. To the contrary, they opted to increase their speed in an effort to get away (Higgs Aff., Ex. F, at p. 42). Plaintiff further admitted that it was his intent to turn left onto Starr Road as part of his effort to elude capture; however, as he began breaking and downshifting, he somehow lost control of his dirt bike – as did McCauslin – the exact details of which he cannot recall (Higgs Aff., Ex. H, at p. 110; Ex. F, at pp. 48-50). Plaintiff's testimony makes clear that his actions – and his actions alone – are the proximate cause of the accident and his subsequent injuries. As such, Defendants cannot be held liable.

The facts of this case are similar to those in a recent Third Department case – Greenawalt – cited above. Therein a motorcyclist was witnessed by a police officer driving in a reckless manner. The officer pulled out behind the motorcyclist in an attempt to stop him, but, instead of pulling over, the motorcyclist admittedly attempted to elude the officer by increasing his speed. The motorcyclist subsequently lost control of the motorcycle and was injured. Greenawalt, 67 A.D.3d, at 1159, 888

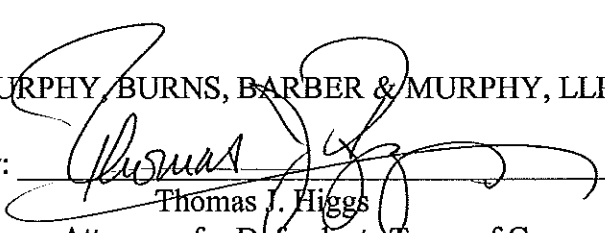
N.Y.S.2d, at 296-97. The Court concluded that “[a]s a matter of law, we find that plaintiff’s operation of his motorcycle, not the manner in which defendant’s officers conducted their pursuit, was the proximate cause of the accident” (citing cases) and thus affirmed Supreme Court’s order granting defendant’s motion for summary judgment dismissing the complaint. Id., 67 A.D.3d, at 1160, 888 N.Y.S.2d, at 297. See also, Schieren, 281 A.D.2d, at 831-32, 722 N.Y.S.2d, at 132 (concluding that plaintiff’s “operation of the dirt bike that evening, not the manner in which [the officer] conducted the pursuit, was the proximate cause of the accident” and affirming dismissal in favor of defendant). Defendants respectfully submit that this Court also grant Defendants’ motion for summary judgment given that plaintiffs decision to ride their dirt bikes in the manner that they did is the sole proximate cause of their accident.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that their motion for summary judgment be granted and plaintiffs’ complaint be dismissed in its entirety.

Dated: December 22, 2010

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