People v Town of Tuxedo
2021 NY Slip Op 33732(U)
December 20, 2021
Supreme Court, Orange County
Docket Number: Index No. EF003528-2020
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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VANESSA ROJAS, as Guardian ad Litem of RONNIE A. ROJAS JR., an Adult Incapable of Adequately Prosecuting or Defending his Rights,

Plaintiff,

-against-

TOWN OF TUXEDO, TOWN OF TUXEDO POLICE DEPARTMENT, SERGEANT DAVID W. DECKER, OFFICER MICHAEL EICHENGREEN, LIEUTENANT JOHN P. NORTON et al.,

Defendants.

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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF003528-2020

Motion Date: September 24, 2021

The following papers numbered 1 to 18 were read on Defendants' motion to dismiss the Complaint, converted pursuant to CPLR §3211(c) to a motion for summary judgment:

Notice of Motion - Affirmation / Exhibits - Affidavits (3) - Memorandum 1-6

Notice of Cross Motion - Affirmation / Exhibits - Affidavits (4) 7-12

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Police Investigative File 14

Plaintiffs' Supplemental Affirmation - Affidavit / Exhibits - Certificate of Conformity ... 15-17

Defendants' Reply to Supplemental Affirmation 18

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiff commenced this action to recover for personal injuries sustained by Ronnie A. Rojas, Jr., who is now comatose as the result of a one-vehicle motorcycle accident that occurred on March 24, 2019 in the course of Town of Tuxedo police officers' pursuit of Mr. Rojas for traveling well in excess of posted speed limits. Defendants moved pursuant to CPLR§3211(a) to dismiss the Complaint. Plaintiff cross moved for discovery. Pursuant to a prior order of this Court, the entire Tuxedo police investigation as well as all personal property recovered from Mr. Rojas was turned over to Plaintiff. By further order dated August 19, 2021, the Court pursuant to CPLR §3211(c) converted Defendants' motion to one for summary judgment.

I. FACTUAL BACKGROUND

A. The Affidavit of Officer David W. Decker

Officer David W. Decker was employed on March 24, 2019 as a police officer by the Town of Tuxedo. His affidavit states:

> 3. Route 17 is a four lane road with two lanes of traffic in either direction, separated by a double yellow line. It is a main thoroughfare for the Town of Tuxedo. The speed alternates between 35 and 55 miles per hour depending on the location along Route 17. The Town of Tuxedo Police Department is located on Route 17....
>
> .....
>
> 5. I remember the evening of March 24, 2019 because this accident occurred. Same was an unseasonably warm day and evening, and the weather was clear with no precipitation having fallen and no precipitation, including snow or ice present anywhere, including on the roadway.
>
> 6. As stated in the narrative I authored on March 25, 2019 at 12:10 a.m., i.e., less than 3 hours after the subject accident:
>
> "while performing stationary radar in marked police unit number 969, on state Route 17 and Hillside Avenue, I did observe a white motorcycle traveling in a northerly direction at a radar verified speed of 68 mph in a posted 35 mph speed zone. Afer the motorcycle had passed my location, I proceeded to turn left onto Route 17 heading north. As I continued northbound on Route 17 in an attempt to close the distance between myself and the target

vehicle, the target vehicle continued to accelerate and broaden the distance between myself and it. At this time I did activate my patrol vehicle emergency lights and advise Orange County 911 that the target vehicle was traveling at a high rate of speed and was continuing north on Route 17. I kept Orange 911 apprised of the vehicle's location until losing sight of vehicle in the area fo the old state shed. After losing sight of target vehicle I continue north on Route 17 and observed a large white object near the Woodbine just south of Nolan's Way. I performed a U-turn return to the area of the white object. I stopped and exited my vehicle to inspect the object which turned out to be a large white tarp. It was at this time that I observed the target vehicle off the roadway in the woods. As I approached the vehicle, I observed the operator, who was apparently thrown from his vehicle, laying on the ground near the motorcycle. Notified Orange 911 of the accident. Subject was found to be breathing but unconscious...."

7. Consistent with my prior narrative, after observing Mr. Rojas driving at an excessive speed, I pulled out behind his motorcycle, at which time I observed Mr. Rojas increase his speed and operate his motorcycle in a dangerous manner, accelerating through traffic before taking off and losing sight of him approximately one and a half miles away from where he ultimately went off the road.

8. At the time I pulled out behind Mr. Rojas and he continued to accelerate and broaden the distance between myself and his motorcycle, I activated my patrol vehicle emergency lights and advised Orange County 911 that the target vehicle was traveling at a high rate of speed and was continuing north on Route 17. I kept Orange 911 apprised of the vehicle's location until losing sight of vehicle in the area of the old state shed.

9. In this regard, the last time I was able to see Mr. Rojas on his motorcycle prior to finding him in the woods was right outside the Town of Tuxedo Police Department, when Mr. Rojas was slowed by traffic turning left at the light located on Route 17. I did not actually catch up to Mr. Rojas at that point, nor did my vehicle or anything else come into contact with Mr. Rojas or his motorcycle, but I was able to observe him, and that he was operating the motorcycle at an excessive rate of speed and dangerously given the other vehicles in the area. This location was approximately one and a half miles from the location where Mr. Rojas ultimately went off the road, and after this observation, I was no longer able to see Mr. Rojas in front of me because he was so far ahead. Other than occasionally viewing his taillights in the far distance, I did not see his motorcycle for another one and a half miles, until I later located him in the woods off Route 17 near the Woodbine just south of Nolan's Way.

10. Mr. Rojas's motorcycle, when I was initially able to observe same, posed a clear and present threat to public safety in the way same was being operated.

11. At no time did I come into contact with Mr. Rojas's motorcycle. In fact, at no time for a mile and a half before Mr. Rojas went off the road was he even in a viewing distance of myself or my police car with the exception of his taillights in the far distance.

12. Likewise, no roadblocks or other impediments to the path being traveled by Mr. Rojas's motorcycle were put into place by myself, Sergeant Eichengreen, or any other employee of the Town of Tuxedo, or at all, nor were any other employees involved in the following of Mr. Rojas's motorcycle other than myself and Sergeant Eichengreen, who briefly joined me after Mr. Rojas drove past him in the opposite direction on Route 17.

(Decker Affidavit ¶¶ 3, 5-12)

B. The Affidavit of Sergeant Michael Eichengreen

Sergeant Michael Eichengreen was also employed on March 24, 2019 as a police officer by the Town of Tuxedo. His affidavit states:

6. As stated in the narrative written on March 25, 2019 at 9:08 p.m., i.e., less than 24 hours after the subject accident occurred, I wrote that:

"on March 24, 2019 at 9:44 reporting officer was traveling southbound on state Route 17 in the right lane with the cross of Patterson Hill Road in patrol marked unit 962. Sergeant Decker unit 969 stated over the Orange County 911 channel a white motorcycle traveling at a high rate of speed failure to comply northbound on state Route 17 through the Hamlet. As Sergeant Decker relayed above information reporting officer observed the above described white motorcycle pass reporting officer traveling at a high rate of speed traveling northbound. Reporting officer estimate of the motorcycle speed to be 90 mph in a 55 mph zone. Reporting officer turned northbound on state Route 17 after suspect vehicle passed by initiating his emergency lights and sirens. At approximately Stevens Lane reporting officer moved into the right lane to allow unit 969 to continue following suspect motorcycle. Reporting officer fell back but continued traveling northbound on Route 17. During 969 is calling out of side roads, reporting officer believed 969 stated they turned onto County Route 19, reporting officer made a left onto County Route 19 and was going to canvas Bramertown Road. At this time reporting officer turned off his emergency lights and siren. As reporting officer turned onto County Road 19, Sergeant Decker over the Orange County 911 priority channel "into the woods" State Route 17 with cross of Nolan's Way. Reporting officer initiated his emergency lights and siren and responded to the above location. At this time reporting officer was unsure if vehicle into the woods was patrol unit 969 or suspect vehicle. Upon arrival at scene reporting officer observed subject laying on the ground in the woods not conscious but breathing with pulse. Motorcycle was observed nearby...."

7. Thus, after hearing the radio call by Sergeant Decker, I encountered Mr. Rojas's motorcycle traveling in the opposite direction of my own vehicle on Route 17. At that time, and after the motorcycle passed me traveling in the opposite direction at a high rate of speed, I turned around to travel in the same direction as the motorcycle on Route 17 and engaged my emergency lights and sirens. By the time I completed my U-turn to be facing the same direction as the motorcycle, the motorcycle was several hundred yards in front on my vehicle on Route 17. This was the closest my vehicle ever came to the subject motorcycle while traveling in the same direction, which was traveling at an excessive, dangerous and high rate of speed on Route 17. After following behind the motorcycle at a distance of no less than several hundred yards for under 20 seconds, Sergeant Decker's vehicle appeared behind mine, and I pulled over to the right to allow him to pass. I did not encounter Mr. Rojas again until I went to assist Sergeant Decker in the woods upon his discovery of Mr. Rojas.

8. At no time did I come into contact with Mr. Rojas's motorcycle, or indeed, did I travel in the same direction as Mr. Rojas at a distance of less than several hundred yards. While behind Mr. Rojas at said distance, I had my emergency lights and sirens engaged.

9. Similarly, no roadblocks or other impediments to the path being traveled by Mr. Rojas's motorcycle were put into place by myself, Sergeant Decker, or any other employee of the Town of Tuxedo, or at all, nor were any other employees of the Town of Tuxedo involved in the incident involving Mr. Rojas and his motorcycle other than myself and Sergeant Decker.

(Eichengreen Affidavit ¶¶ 6-9)

C. The Affidavit of Lieutenant John P. Norton

Finally, Lieutenant John P. Norton's affidavit states:

3. On March 24, 2019, I was employed as a Lieutenant with the Town of Tuxedo Police Department, however I did not work on this date. In this regard, I worked a shift which ended at 11:00 p.m. on March 22, 2019, and did not return to work until March 26, 2019 when I was involved in the investigation that took place after the alleged accident.

4. This was my sole involvement relative to Mr. Rojas or the alleged accident....

5. With regard to the police report and associated narratives, I authored the section that states "while traveling north on Route 17 about 2/10 of a mile south of Nolan's Way, motorcyclist, traveling at a very high rate of speed, left 139 feet of skid on the roadway, beginning in the left lane of Route 17 northbound, crossing into right lane, across shoulder and into woods where motorcyclist traveled 161 feet into a tree, still at a high rate of speed causing internal injuries and demolishment of motorcycle."

6. This was based on my investigation and is true, accurate and was made contemporaneously with my investigation....

(Norton Affidavit ¶¶ 3-6)

D. The Police "Incident Detail Report"

According to the Tuxedo Police "Incident Detail Report", this incident commenced at 21:44:42 (i.e., 9:44 and 42 seconds p.m.). The pertinent entries in the Report are as follows:

21:45:18	Northbound coming up to 17A
21:45:36	White Motorcycle
21:45:44	Passing Orange Tpke
21:45:55	Speed 100
21:46:41	Approaching Arden Valley Rd
21:48:18	Into the Woods at Nolans Lane / Req Ambulance

II. LEGAL ANALYSIS

A. *Barker-Manning* Public Policy Preclusion

The threshold question here is whether Plaintiff's claims are precluded altogether by virtue of the doctrine articulated by the Court of Appeals in *Alami v. Volkswagen of America, Inc.*, 97 NY2d 281 (2002), *Manning v. Brown*, 91 NY2d 116 (1997), and *Barker v. Kallash*, 63 NY2d 19 (1984).

In *Saarinen v. Kerr*, 84 NY2d 494 (1994), the Court of Appeals held that "a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others." *Id.*, at 501 (emphasis added). The *Saarinen* Court's holding was grounded in its disquisition

concerning the purpose of Vehicle and Traffic Law §1104, to wit, to balance the needs of police officers and other emergency personnel with "the risk of harm to innocent motorists and pedestrians" (*id.*, at 502 [emphasis added]):

> [VTL §1104] represents a recognition that the duties of police officers and other emergency personnel often bring them into conflict with the rules and laws that are intended to regulate citizens' daily conduct and that, consequently, they should be afforded a qualified privilege to disregard those laws where necessary to carry out their important responsibilities. Where the laws in question involve the regulation of vehicular traffic, the exercise of this privilege will inevitably increase the risk of harm to innocent motorists and pedestrians. Indeed, emergency personnel must routinely make conscious choices that will necessarily escalate the over-all risk to the public at large in the service of an immediate, specific law enforcement or public safety goal.
>
> Measuring the "reasonableness" of these choices against the yardstick of the traditional "due care under the circumstances" standard would undermine the evident legislative purpose of Vehicle and Traffic Law §1104, i.e., affording operators of emergency vehicles the freedom to perform their duties unhampered by the normal rules of the road. ....The "reckless disregard" test, which requires a showing of more than a momentary judgment lapse, is better suited to the legislative goal of encouraging emergency personnel to act swiftly and resolutely while at the same time protecting the public's safety to the extent practicable [cit.om.].

Id., at 501-502 (emphasis added).

In this case, of course, the Decedent was not an innocent "bystander" but the alleged lawbreaker who provoked police pursuit by traveling substantially in excess of posted speed limits and then recklessly accelerating to elude the police, all in violation of the Vehicle and Traffic Law. Query, in such circumstances, whether the lawbreaker is entitled to recover in such circumstances for injuries resulting from the unlawful reckless operation of his vehicle, even under the enhanced "reckless disregard" standard of VTL §1104?

The Third Department has without comment applied *Saarinen's* "reckless disregard" standard in adjudicating the personal injury claims of such lawbreakers. *See, Greenawalt v.*

Village of Cambridge, 67 AD3d 1158, 1159 (3d Dept. 2009); *Rouse v. Dahlem,* 228 AD2d 777 (3d Dept. 1996); *Palella v. State of New York,* 141 AD2d 999 (3d Dept. 1988).[1]

To be sure, the lawbreaker enjoys constitutional protections and could potentially recover under 42 U.S.C. §1983 for injuries resulting from the violation of his constitutional rights to freedom from unreasonable seizure and from the use of excessive force. *See, e.g., Farley v. Town of Hamburg,* 34 AD3d 1294, 1295 (4th Dept. 2006). However, Plaintiff has made no constitutional claims in this action. Barring a constitutional violation, the question arises whether such claims as Plaintiff here interposes are not subject to preclusion as a matter of public policy per *Alami v. Volkswagen of America, Inc., supra, Manning v. Brown, supra,* and *Barker v. Kallash, supra.*

In *Manning v. Brown, supra*, the Court of Appeals wrote:

> In *Barker v. Kallash,* 63 NY2d 19..., we held, as a matter of public policy, that where a plaintiff has engaged in unlawful conduct, the courts will not entertain suit if the plaintiff's conduct constitutes a *serious* violation of the law and the injuries for which the plaintiff seeks recovery are the *direct* result of that violation. The policy derives from the rule that one may not profit from one's own wrongdoing [cit.om.] and precludes recovery "at the very threshold of the plaintiff's application for judicial relief" (*Barker v. Kallash, supra,* 63 NY2d at 26...). "[R]ecovery is denied, not because plaintiff contributed to his injury, but because the public policy of this State generally denies judicial relief to those injured in the course of committing a serious criminal act" (*id.,* at 24...).....
>
> In *Barker* we distinguished between conduct that is regulated by statute and activities that are entirely prohibited by law. Violation of a statute governing the manner in which activities should be conducted merely constitutes negligence and the principles of comparative negligence come into play. Even where the plaintiff engages in prohibited

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[1]In *Palella v. State of New York,* however, the Third Department having concluded that the police defendants were not liable under the VTL §1104 standard, stated that it "need not further determine whether claimant's participation in the car theft would, as a matter of law, preclude his right to recover for the damages sustained (*see, Barker v. Kallash...*)." *Id.,* 141 AD2d at 1001.

> conduct recovery is not always precluded. "A complaint should not be dismissed merely because the plaintiff's injuries were occasioned by a criminal act" (*Barker v. Kallash, supra,* 63 NY2d at 25...). Preclusion is required only where the plaintiff's injuries "were a direct result of a serious violation of the law involving hazardous activities which were not justified under the circumstances" (63 NY2d at 19, 26..., *supra*).

Manning v. Brown, supra, 91 NY2d at 120-121 (emphasis added).

The *Barker-Manning* doctrine of public policy preclusion was further refined by the Court of Appeals in *Alami v. Volkswagen of America, Inc., supra.* The Court wrote:

> The *Barker/Manning* rule is based on the sound premise that a plaintiff cannot rely upon an *illegal act* or *relationship* to define the defendant's duty (*see*, W. Page Keeton et al., Prosser and Keeton, Torts §36, at 232 [5th ed 1984]). We refuse to extend its application beyond claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act.

Alami, supra, 97 NY2d at 287 (underscoring added). In response to the dissenting judge's objections that "the majority offers no theory explaining when a duty 'arises out of' illegal conduct", and that its rule would permit a burglar to recover from a homeowner for injuries caused by a defective staircase (*id.*, at 289-291), the majority clarified:

> Although landowners do have a general duty to the public to maintain their premises in a reasonably safe condition (*see, Basso v. Miller,* 40 NY2d 233...), this duty does not exist in the abstract. It takes form when someone enters the premises and is injured. Thus, the injured burglar is not entitled to benefit from his burglary because he cannot invoke a duty triggered by his unlawful entry.

Id., at 287-288.

Thus, an injured lawbreaker's claim for recovery will be precluded if (1) he engaged in a serious violation of the law involving hazardous activities which were not justified under the circumstances, (2) the injuries for which he seeks recovery are the direct result of that violation, and (3) he seeks to impose on the defendant a duty arising out of or triggered by his illegal act. It appears to the Court that all three elements may be satisfied in the circumstances of this case.

First, the Decedent was allegedly guilty of serious violations of the law, recklessly and dangerously operating his vehicle at breakneck speeds far in excess of established speed limits in an unlawful effort to elude the police. He thereby violated Vehicle and Traffic Law §1180 (speeding).[2] He also violated Penal Law §205.30 (resisting arrest).[3] In *Manning v. Brown, supra,* the Court of Appeals found that reckless and excessively fast driving puts the public at grave risk and constitutes a serious violation of the law. *Id.*, 91 NY2d at 121-122. *See also, Hathaway v. Eastman,* 122 AD3d 964, 966 (3d Dept. 2014); *Wolfe v. Hatch,* 95 AD3d 1394, 1397 (3d Dept. 2012) (issue turns on potential, not actual, harm to public). In *Moore v. County of Suffolk,* 11 AD3d 591 (2d Dept. 2004), the Second Department held:

> [T]he plaintiff's injuries arose directly from his knowing and intentional participation in serious criminal activity; i.e., resisting arrest (*see* Penal Law §205.30). Under the circumstances, the plaintiff should not be permitted to recover compensation for his loss (*see Manning v. Brown,* 91 NY2d 116 [1997]; *Barker v. Kallash,* 63 NY2d 19 [1984]...).

Moore, supra, 11 AD3d at 592.

Second, Mr. Rojas' injuries were the direct result of the alleged serious violations of the law on his part.

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[2]The Court notes in this regard that a traffic violation may serve as a predicate for an arrest without a warrant. *See, People v. Marsh,* 20 NY2d 98, 101 (1967); *People v. Abrams,* 119 AD2d 682, 683 (2d Dept. 1986); *People v. Bulgin,* 29 Misc.3d 286, 296-297 (Sup. Ct. Bronx Co. 2010); VTL §155).

[3]The Court notes in this regard that "resisting arrest' does not require the use of force or violence; it is enough that a person "engage in some conduct with the intent of preventing the officer from effecting an authorized arrest of himself..." *People v. Stevenson,* 31 NY2d 108, 112 (1972). Accordingly, in *People v. Shoulars,* 291 AD2d 238 (1st Dept. 2002), the Court held that the defendant driver's fleeing and leading the police on a high-speed chase supported his conviction for resisting arrest. *Id.,* at 238-239.

Third, it would appear that what Plaintiff seeks to do in this case is impose a duty arising out of or triggered by Mr. Rojas' alleged violations of the law. To paraphrase the Court of Appeals in *Alami v. Volkswagen of America, Inc., supra*, while the police have a general duty to the public to perform emergency services without recklessly disregarding the safety of others (*see,* VTL §1104[e]), that duty does not exist in the abstract, it was here triggered by Mr. Rojas' own serious violation of the law. As the Court of Appeals observed in *Saarinen, supra,*

> Having observed erratic and dangerous driving on the part of defendant Kerr, Officer McGowan was duty-bound to investigate, using all reasonable means, including pursuit, to stop the lawless vehicle's forward progress...Even if Kerr was not impaired, it is clear that his driving posed a threat to the public safety. Under these circumstances, the officer should have the right to use whatever means are necessary, short of the proscribed recklessness, to overtake and stop the offending driver.

Saarinen v. Kerr, supra, 84 NY2d at 502-503. Plaintiff, like the injured burglar, may be precluded from invoking a duty triggered by Mr. Rojas' own serious violation of the law.

The Court concludes that Defendants established *prima facie* that Plaintiff's claims should be precluded altogether by virtue of the doctrine articulated by the Court of Appeals in *Alami v. Volkswagen of America, Inc.*, *Manning v. Brown* and *Barker v. Kallash, supra.*

B. Plaintiff Cannot Recover On A Theory Of Negligence, As Her Claims Are Subject To The Enhanced "Reckless Disregard" Standard Applicable To Emergency Police Operations Under VTL §1104

The Vehicle and Traffic Law ("VTL") defines "emergency operation" as, among other things, "the operation...of an authorized emergency vehicle, when such vehicle is engaged in...pursuing an actual or suspected violator of the law..." VTL §114-b.

VTL §1104(a) provides that "[t]he driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but

subject to the conditions herein stated." Section 1104(b)(3) provides that "[t]he driver of an authorized emergency vehicle may [e]xceed the maximum speed limits so long as he does not endanger life or property." Section 1104(e), finally, provides that

> The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

Applying VTL §1104 in the context presented here, the Court of Appeals held that civil liability for a police officer's conduct in pursuing an actual or suspected lawbreaker may not be imposed unless the officer acted in reckless disregard for the safety of others. *See, Saarinen v. Kerr,* 84 NY2d 494, 501 (1994). The Court wrote:

> [W]e hold that a police officer's conduct in pursuing a suspected lawbreaker may not form the basis of civil liability to an injured bystander unless the officer acted in reckless disregard for the safety of others. This standard demands more than a showing of a lack of "due care under the circumstances" – the showing typically associated with ordinary negligence claims. It 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 [cit.om.].

Id. (emphasis added). *See also, Frezzell v. City of New York,* 24 NY3d 213, 217 (2014).

Relying on *Kabir v. County of Monroe,* 16 NY3d 217 (2011), Plaintiff claims that a police officer's election to pursue a fleeing motorcyclist, and the propriety of the chase, is subject to review under an ordinary negligence standard, and not the heightened standard of "reckless disregard for the safety of others." However, *Kabir* notwithstanding, the Second Department in *Gaudio v. City of New York,* 189 AD3d 1546 (2d Dept. 2020) held:

> "The manner in which an authorized emergency vehicle is operated in an emergency situation may not form the basis for civil liability unless the driver acted in reckless disregard for the safety of others" [cit.om.]. "The '[e]mergency operation' of a police

> vehicle includes 'pursuing an actual or suspected violator of the law'" [cit.om.]. "The reckless disregard standard requires proof that the officer intentionally committed 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" [cit.om.].

Gaudio, supra, 189 AD3d at 1547. *Kabir* notwithstanding, the Second Department in *Wonderly v. City of Poughkeepsie,* 185 AD3d 632 (2d Dept. 2020) held:

> [T]he municipal defendants, in moving for summary judgment, established, prima facie, that the **police officers did not act in reckless disregard for the safety of others in commencing, conducting, or failing to terminate their pursuit** of Floryan's vehicle prior to Floryan's decision to abruptly accelerate his vehicle to an excessive speed and run through a red light (*see Saarinen v. Kerr....*).

Wonderly, supra, 185 AD3d at 634 (emphasis added). *See also, Lawhorn v. City of New York,* 186 AD3d 1509, 1511 (2d Dept. 2020); *Alexander v. New York,* 176 AD3d 659, 660 (2d Dept. 2019); *Quintana v. Wallace,* 131 AD3d 1221, 1223 (2d Dept. 2015); *Lacey v. City of Syracuse,* 144 AD3d 1665, 1666 (4th Dept. 2016); *Harris v. City of Schenectady Police Department,* 124 AD3d 1124, 1125 (3d Dept. 2015).

In view of the foregoing authority, and on the record before the Court, the Court concludes that Plaintiff may recover on her claims herein only upon a showing that Defendants in reckless disregard for the safety of others. Paraphrasing *Saarinen*, the Town of Tuxedo police, having observed reckless and dangerous driving on Mr. Rojas' part, were "duty-bound to investigate, using all reasonable means, including pursuit, to stop the lawless vehicle's forward progress," and had "the right to use whatever means are necessary, short of the proscribed recklessness, to overtake and stop [him]." *Saarinen v. Kerr, supra,* 84 NY2d at 502-503. *See also, Mullane v. City of Amsterdam,* 12 AD2d 848, 850 (3d Dept. 1995). There is no evidence that Town of Tuxedo police officers themselves violated traffic laws in pursuing Mr. Rojas. In

any event, "conduct which violates provisions of the Vehicle and Traffic Law relating to maximum rate of speed, lane-changing procedures, and other rules of the road does not, standing alone, render the operator of an emergency vehicle reckless or provide an independent basis for liability." *Turini v. County of Suffolk,* 8 AD3d 260, 262 (2d Dept.2004) (citing *Szczerbiak v. Pilat,* 90 NY2d 553, 557). *See, Saarinen v. Kerr, supra,* 84 NY2d at 503; VTL §1104(b)(3, 4).

C. Assuming *Arguendo* That The Town of Tuxedo Police Acted With "Reckless Disregard" For The Safety Of Others, Defendants Established *Prima* That Their Actions Did Not Proximately Cause Mr. Rojas' Accident, And That The Sole Proximate Cause Thereof Was His Dangerously Reckless Operation Of His Motorcycle

Assuming *arguendo* that the evidence could give rise to triable issues of fact whether the Town of Tuxedo police commenced, conducted or continued the pursuit of Mr. Rojas' vehicle in reckless disregard of the safety of others, Defendants established *prima facie* that their actions did not proximately cause the accident, and that the sole proximate cause thereof was Mr. Rojas' dangerously reckless operation of his own vehicle.

The evidence demonstrates *prima facie* that the police were nowhere near Mr. Rojas' motorcycle when the accident occurred. In analogous circumstances, where the police did not keep pace with the lawbreaker and/or were not close to his vehicle when the accident occurred, a number of courts have concluded as a matter of law that the lawbreaker's reckless driving, and not the police pursuit, was the sole proximate cause of the accident. *See, e.g., Alexander v. City of New York, supra,* 176 AD3d 659, 660, 661 (2d Dept. 2019) (no proximate cause where police had terminated pursuit and lost sight of vehicle); *Paige v. Rocco,* 214 AD2d 662, 662-663 (2d Dept.), *lv. denied* 86 NY2d 710 (1995); *Greenawalt v. Village of Cambridge,* 67 AD3d 1158 (3d Dept. 2009); *Dibble v. Town of Rotterdam,* 234 AD2d 733 (3d Dept. 1996), *lv. denied*

89 NY2d 811 (1997); *Mullane v. City of Amsterdam, supra,* 212 AD2d 848 (3d Dept. 1995); *Palella v. State of New York, supra,* 141 AD2d 999, 1000-01 (3d Dept. 1988); *Jessup v. City of Niagara Falls,* 247 AD2d 902, 903 (4th Dept. 1998).

In *Paige v. Rocco, supra,* the Second Department wrote:

> [T]he appellant, State Trooper James Marrone, repeatedly directed Rocco to pull over and...Rocco ignored the appellant's directions. In an attempt to get Rocco to pull over, the appellant pulled in front of Rocco's automobile in order to cause Rocco to slow down. Rocco's automobile struck the appellant's car in the rear, causing the appellant to spin off onto the shoulder of the parkway. Rocco then sped from the scene, cutting across the highway, and accelerating to a speed of approximately 90 miles per hour. Shortly thereafter, Rocco's automobile struck the Bethpage State Parkway overpass...
> ....
> Under the circumstances of this case,...we conclude as a matter of law that the appellant's conduct was not a proximate cause of the accident [cit.om.]. Assuming that the appellant was negligent, the accident was caused by Rocco's reckless driving rather than the appellant's conduct (*see, e.g., Mullane v. City of Amsterdam...*; *Palella v. State of New York...*).

Paige, 214 AD2d at 662-663. In *Paige,* as here, the lawbreaker's speeding recklessly away from the initial police pursuit severed any causal link between that pursuit and the ensuing accident and rendered the lawbreaker's own reckless driving the sole proximate cause thereof.

To like effect is the Third Department's decision in *Dibble v. Town of Rotterdam, supra.* The *Dibble* Court rejected claims strikingly similar to those advanced by Plaintiff in the case at bar. In *Dibble*:

> [P]laintiffs maintain that [Officer] Minto unreasonably engaged in a high-speed pursuit of an intoxicated and agitated driver who had only committed minor traffic infractions, thereby goading Lopez into the behavior that resulted in Dibble's injuries. According to plaintiffs, it was reckless, and in violation of the police department's own rules, for Minto to continue the pursuit after he called in Lopez's license plate number and determined that the car was not stolen and that Lopez was not wanted for any crimes.

Dibble, 234 AD2d at 735. Although Officer Minto maintained pursuit over a considerable time

and distance and at speeds in excess of the speed limit, the lawbreaker "conceded that Minto was a distance behind him during the pursuit and, although closer right before the crash, was not 'on [his] tail'." *Id.* The Third Department accordingly held that "'the proximate cause of the accident was [Lopez's] erratic and improper operation of his vehicle, not the manner in which the police officer conducted the pursuit' (*Mullane v. City of Amsterdam...*; *see, Palella v. State of New York...*). *Id.*, at 736. Here, similarly, even if the Town of Tuxedo police pursuit of Mr. Rojas was reckless and unjustified, it appears that Mr. Rojas sped away and put substantial time and distance between himself and the Tuxedo police before the accident occurred, thereby rendering his own reckless operation of his vehicle, and not the police pursuit, the proximate cause of the accident.

To the very same effect is *Mullane v. City of Amsterdam, supra.* In *Mullane,* Officer DiMezza observed two pick-up trucks speeding in violation of the Vehicle and Traffic Law and gave chase.

> [Officer DiMezza] followed Barnes' truck north on State Route 30 through a less-populated area and then east on State Route 29 through a rural area at speeds sometimes approaching 90 miles per hour. DiMezza continued the pursuit on Route 29 but reduced his speed and fell back because of several curves in the road, although he did not lose sight of the truck and he kept his lights and siren on during the entire episode. Barnes, however, continued at a high rate of speed, failed to negotiate a curve, veered into the westbound lane and collided head-on with plaintiffs' vehicle....

Mullane, 212 AD2d at 849. On these facts, the Court held that "the proximate cause of the accident was Barnes' erratic and improper operation of his vehicle, not the manner in which the police officer conducted the pursuit." *Id.*, at 850. *See also, Jessup v. City of Niagara Falls, supra,* 247 AD2d at 903 (where lawbreaker pulled away from active police pursuit such that

officers were 15 to 30 seconds behind his vehicle when accident occurred, the sole proximate cause of the accident was the driver's dangerous operation of his vehicle).

Finallly, in *Greenawalt v. Village of Cambridge*, *supra*, both the operative facts and the nature of the plaintiff's claims are akin to those of the case at bar. The *Greenawalt* Court wrote:

> Sometime after 1:00 a.m. on June 12, 2004, while carrying a passenger on the back of his motorcycle, plaintiff was traveling at 43 miles per hour in a 30 mile-per-hour zone through the Village of Greenwich, Washington County when he passed a Greenwich police officer. When the officer pulled out behind plaintiff's motorcycle, instead of pulling over, plaintiff admittedly opted to attempt to elude the police; he increased his speed and proceeded out of the sight of the Greenwich officer who then radioed ahead to defendant's police department. A police officer from the Village of Cambridge, Washington County then gave chase after the motorcycle sped into and through Cambridge a high rate of speed. After approximately 10 minutes, the chase – which reached speeds nearing 90 miles per hour – ended when plaintiff lost control of the motorcycle. Plaintiff and his passenger were thrown from the motorcycle as it left the road, resulting in injuries to both.
>
> We conclude that plaintiff has failed to allege facts that could support a finding that the conduct of the officers who pursued his motorcycle was a proximate cause of his accident and, therefore, summary judgment was properly granted. The majority of plaintiff's allegations of recklessness – the officers' alleged failure to follow certain departmental protocols, their alleged use of a roadblock, their decision to give chase without considering the severity of plaintiff's initial offense, and their decision to continue to pursue him after obtaining the motorcycle license – even if established, did not cause this accident. Indeed, plaintiff commenced traveling at a high rate of speed immediately upon being sighted by police. Cambridge police did not begin pursuit until police witnessed plaintiff traveling at an excessive rate of speed, ignoring a traffic signal and carrying a passenger who appeared to want to get off the motorcycle. Thereafter, plaintiff successfully passed the alleged roadblock – the existence of which police deny – and continued traveling at a high rate of speed for over 10 minutes, in blatant disregard for the safety of himself, his passenger and others. Thus, as a matter of law, we find that plaintiff's operation of his motorcycle, and not the manner in which defendant's officers conducted their pursuit, was the proximate cause of the accident [cit.om.].

Greenawalt, supra, 67 AD3d at 1159-60.

The *Greenawalt* Court, in affirming an award of summary judgment for the police defendants, held as a matter of law 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." *Id.*, 67 AD3d at 1160. *Cf., Foster v. Suffolk Co. Police Dept.*, 137 AD3d 855, 856 (2d Dept. 2016) (evidence that police officer pursued lawbreaker in a manner that prevented him from stopping for fear of a collision with officer's vehicle gave rise to issue of fact on proximate cause); *Rockhead v. Troche,* 17 AD3d 118, 119 (1st Dept. 2005) (evidence that police chased stolen van at high rate of speed through solid red light gave rise to issue of fact whether reckless conduct by police was proximate cause of van's collision with third vehicle); *Rouse v. Dahlem, supra,* 228 AD2d 777 (3d Dept. 1996) (police officer intentionally crossed into opposite lane of traffic and into immediate path of the plaintiff's motorcycle).

Here, the evidence shows that the Tuxedo police justifiably pursued Mr. Rojas for operating his motorcycle at a speed considerably in excess of the speed limit and then attempting to resist arrest by accelerating recklessly up to a speed approximating 90 miles per hour. The evidence further shows that, regardless of whether Town of Tuxedo police recklessly pursued Mr. Rojas, he speeded so far ahead of the Tuxedo police as to dissolve any temporal or spatial connection between the alleged reckless pursuit and the occurrence of the accident. In these circumstances, the Court concludes that Defendants established *prima facie* that Mr. Rojas' dangerously reckless operation of his own vehicle was the sole proximate cause of the accident.

D. The Foregoing Notwithstanding, the Court Concludes That Summary Judgment Would Be Premature and That Plaintiff Should Be Afforded the Opportunity to Conduct Discovery

In *Village of Dobbs Ferry v. Landing on the Water at Dobbs Ferry Homeowners Assoc., Inc.*, 198 AD3d 838 (2d Dept. 2021), the Second Department wrote:

> "A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment" [cit.om.]. "A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's motion may exist but cannot then be stated" (cit.om.)."

Id. See, Wesolowski v. St. Francis Hospital, 108 AD3d 525, 526 (2d Dept. 2013). This is especially so where the motion for summary judgment is predicated on "self-serving statements of an interested party which refer to matters exclusively within that party's knowledge." *See, Quiroz v. 176 N. Main, LLC,* 125 AD3d 628, 631 (2d Dept. 2015); *Sacher v. Long Island Jewish-Hillside Med. Ctr.,* 142 AD2d 567 (2d Dept. 1988).

There are circumstances here which, despite Defendants' *prima facie* showing of entitlement to judgment as a matter of law, counsel the denial of their motion at this juncture to afford Plaintiff the opportunity to conduct discovery. First, Mr. Rojas has been in a coma since the accident and has therefore been unable to provide his version of his encounter with the Tuxedo police. Second, Defendants' motion is predicated on the affidavits of defendant officers Decker and Eichengreen, each of which constitutes a self-serving statement by an interested party referring to matters exclusively within their knowledge. Finally, there is a curious constellation of circumstances for which Defendants have not fully accounted.:

(1) Officer Decker purports to have lost sight of Mr. Rojas' motorcycle.

(2) Mr. Rojas veered off the highway and crashed into a tree in the woods.

(3) According to the Tuxedo Police "Incident Detail Report", Officer Decker was able to locate Mr. Rojas almost immediately.

(4) Officer Decker avers that he stopped to investigate a white tarp on the side of the road and fortuitously located Mr. Rojas at that location. The alleged tarp has not been accounted for.

Accepting this evidence at face value, Officer Decker's finding Mr. Rojas so quickly was an extraordinary coincidence. Viewed in the light most favorable to Plaintiff, it calls in question

the credibility of Officer Decker's account on a key point – his proximity to Mr. Rojas when the accident occurred – that may implicate issues of recklessness and proximate cause.

E. Remaining Issues

Contrary to Defendants' assertion, Plaintiff's Notice of Claim, which alleged that Defendants acted "wantonly", was sufficient under the circumstances to apprise Defendants of the claim that they acted in reckless disregard of the safety of others. However, it is clear that Plaintiff's claims as against defendant John P. Norton must be dismissed as he was not on duty on March 24, 2019 and had nothing whatsoever to do with Mr. Rojas. Finally, Plaintiff's claims as against the defendant Town of Tuxedo must be dismissed because (1) inasmuch as the Town of Tuxedo police officers were acting within the scope of their employment, rendering the Town vicariously liable for their conduct under a theory of *respondeat superior*, Plaintiff is barred from proceeding with any claims for negligent hiring, supervision, retention, etc. *See, Ashley v. City of New York,* 7 AD3d 742, 743 (2d Dept. 2004); and (2) the municipal defendant is otherwise entitled to governmental immunity. *See, Dorsey v. City of Poughkeepsie,* 275 AD2d 386,387 (2d Dept. 2000); *Smelts v. Meloni,* 5 Misc.3d 773, 778-779 (Sup. Ct. Monroe Co. 2004).

It is therefore

ORDERED, that the Plaintiff's claims against defendants Town of Tuxedo and Lieutenant John P. Norton are dismissed, and it is further

ORDERED, that the Defendants' motion is otherwise denied.

The foregoing constitutes the decision and order of the Court.

Dated: December 20, 2021 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.
HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE