NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: DIANE AUPPERLE AND JOSEPH AUPPERLE, HER HUSBAND V. ZACHARY PALOMBO, NORTH WILDWOOD BEACH PATROL, CITY OF NORTH WILDWOOD, ET AL.

DOCKET NO.: CPM-L-360-17

NATURE OF APPLICATION: DEFENDANTS' – ZACHARY PALOMBO, NORTH WILDWOOD BEACH PATROL, AND CITY OF NORTH WILDWOOD - MOTION FOR SUMMARY JUDGMENT

MEMORANDUM OF DECISION ON MOTION

BACKGROUND AND NATURE OF MOTION

The Complaint in this matter was filed on August 2, 2017. Discovery ended on October 25, 2018. There are four hundred twenty (420) days of discovery. There have been two (2) discovery extensions. Arbitration is not scheduled. Trial is scheduled for August 19, 2019.

Defendants – Zachary Palombo, North Wildwood Beach Patrol, and City of North Wildwood - now moves for summary judgment.

This Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case

> the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v.

Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

However, the non-moving party must show that the nature of the discovery and its materiality are issues at hand. See Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). It is well-settled that bare conclusions in a Complaint without factual support

will not defeat a motion for summary judgment. Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015), certif. denied, 221 N.J. 567 (2015); see also Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (holding that a party opposing summary judgment must do more than simply show that there is some "metaphysical doubt" as to the material facts).

Similarly, self-serving assertions, unsupported by documentary proof, are "insufficient to create a genuine issue of material fact." Globe Motor Co. v. Igdalev, 436 N.J. Super. 594, 603 (App. Div. 2014); Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013); Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002); Blair v. Scott Specialty Gases, 283 F.3d 595, 607 (3d Cir. 2002). Furthermore, a party may not "create" an issue of fact for trial by creating illusory or fanciful arguments or sham facts and then rely on such facts or arguments. See Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002) ("Sham facts should not subject a defendant to the burden of a trial.").

MOVANT'S POSITION

Defendants – Zachary Palombo, North Wildwood Beach Patrol, and City of North Wildwood ("Defendants") – now moves for summary judgment.

Defendants submit the following: "N.J. Ct. R. 4:46-2 provides that a court should grant summary judgment when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a

matter of law." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 528-29 (1995) quoting R. 4:46-2(c).

Defendants submit that Defendant Palombo, as an employee of the North Wildwood Beach Patrol, is a public employee; thus, his actions are governed by the New Jersey Tort Claims Act. Plaintiff's Complaint only alleges that Defendant PaloMbo was negligent while acting in the scope of his employment without referencing the applicable provision: N.J.S.A. Section 59:3-11.

Next, Defendants submit that it is undisputed that the subject event took place during Labor Day Weekend when the beach was very crowded with beach patrons. It is also undisputed that Palombo was responding to an emergency. Palombo explained that he could not take the truck because it was too crowded and could not run in the water because doing so is slower and could present hidden hazards. Palombo also explained that he did not blow whistles while he was running because doing so would create additional confusion during the emergency response for the subject event.

Defendants argue that determining whether Palombo's actions while responding to an emergency were outside the appropriate standard of care is not within the ken of the average juror and requires an expert to establish whether Palombo's actions were in accord with the appropriate standard of care. Plaintiff's failure to provide competent expert witness testimony is fatal to Plaintiff's claims. Plaintiff needs to establish what the appropriate standard of care is with reference to source material. Defendants argue that

Plaintiff has not presented sufficient evidence from which a factfinder could conclude that Palombo was negligent.

Next, Defendants argue that Defendant Palombo is immune from liability by virtue of the Good Samaritan Act. N.J.S.A. Section 2A:62A-1. Defendants argue that immunity should be granted to any individual who, in good faith, renders aid in an emergency, unless damages are caused by gross negligence or intentional misconduct. Public policy is best served by both, 1) encouraging individuals, without a pre-existing duty, to render aid without the threat of civil liability; and 2) to allow first responders, with a pre-existing duty, to render aid unimpeded by the threat of civil liability. Defendants then submit that a ruling holding Defendant Palombo liable for an accidental injury while responding to an emergency will likely have a chilling effect on any lifeguard or first responder who becomes knowledgeable of such a ruling. Defendants argue that using the gross negligence standard as the threshold to such an immunity is a reasonable approach to balancing the public's interests in having first responders do what they are trained to do while protecting innocent bystanders from unnecessary harms. Here, there is no evidence whatsoever that Defendant Palombo was grossly negligent in running through the crowd and, as such, should be entitled to immunity.

Next, Defendants argue that N.J.S.A. 59:2-2(b) allows a public entity to not be liable for an injury resulting from an act or omission of a public employee where the public employee is not liable. There are no provisions

under the NJTCA that impart direct liability upon a public entity for negligent supervision. Thus, under this statute, there must be a finding that Palombo was liable and that his purported negligence was not subject to an immunity *before* any vicarious liability may attach to the City of North Wildwood. Defendants contend that here, there is no evidence that Palombo was negligent; and, if there is some evidence to establish negligence, Palombo is nevertheless immune from liability pursuant to the Good Samaritan Act.

As for Plaintiff's separate claim of negligent training, Plaintiff has provided no evidence to support such a claim. Notwithstanding the fact there can be no separate claim of negligent training without first finding a public employee liable, the record reflects that Palombo had received training throughout his twenty (20) year career and Plaintiff has not presented any evidence that the training received by Palombo was inadequate.

Defendants next argue that Plaintiffs' loss of consortium claim should be dismissed because Plaintiffs have not established any underlying actionable claim against any of the Defendants. Moreover, the extent of Plaintiffs' loss of consortium claim is based on Joseph Aupperle's allegation that Plaintiffs have had less sex since the incident. Even if this allegation is true, Plaintiffs have no competent evidence which could establish that Diane Aupperle's nose injury is a proximate cause of diminished sexual intercourse.

Finally, Defendants submit that North Wildwood Beach Patrol should be dismissed as duplicative of the City of North Wildwood. The Beach patrol

is not a separate legal entity from the City and, as such, cannot be sued independently from the City.

Therefore, Plaintiffs' claims against all defendants should be dismissed with prejudice.

OPPOSITION

In opposition, Plaintiffs submit that Defendants are not entitled to summary judgment as there are genuine issues of material fact that require submission to a jury or judge. Plaintiffs argue "it seems uncontested" that the Defendant was "sprinting" through a crowded beach, pumping his arms, and swinging a four (4) pound plastic rescue torpedo, and that it seemed likely he would collide with a bather or lose balance. Further, a jury could conclude that because the Defendant struck the Plaintiff in her face, he was "particularly out of control" and was negligent.

Next, Plaintiffs argue that a fact-finder could find the Defendant was negligent. First, Defendant cites N.J.S.A. 59:3-11 as a red herring because Plaintiff is not alleging that she was injured because Defendant Palombo failed to supervise the beach. She is claiming she was injured because Defendant Palombo was sprinting through a crowded beach, swinging his arms, carrying a hard rescue torpedo. Plaintiffs argue that there was an obvious duty for Defendant to exercise a degree of care to avoid harm to Plaintiff. Defendant was not running to rescue but was running to cover another lifeguard stand. Negligence is tested by whether the reasonably prudent person at that time and place should recognize and foresee an

unreasonable risk or likelihood of harm to others. Giantonnio v. Taccard, 291 N.J. Super. 31 (App. Div. 1996). Plaintiffs submit that there is evidence Defendant was not proceeding carefully because his co-lifeguard, Jim O'Connor, managed to navigate the crowd without running into anyone. As there are genuine issues of material fact, Plaintiffs submit summary judgment should be denied.

Plaintiffs then contend that the Good Samaritan Act is inapplicable because it applies to individuals "rendering ... aid to injured persons" and "at the scene of an accident or emergency" but neither of these apply. N.J.S.A. 2A:62A-1. At no point was Palombo rendering aid to injured persons. He was sprinting through a crowded beach to cover another lifeguard stand and only rendered aid after he broke the Plaintiff's nose. Next, he was not at the scene of an accident or emergency because there was no emergency in the area where Defendant was.

Further, the claim against the other Defendants and the Plaintiff's consortium claim survive if Palombo is found to be negligent. The Defendant correctly argues that according to N.J.S.A. 59:2-2a, the City cannot be held liable if Palombo is not liable. However, since issues of material fact exist as to the liability of Palombo, it follows that issues of material fact exist as to the liability of North Wildwood.

Finally, Plaintiffs argue that the claims against the Beach Patrol have not been demonstrated to be duplicative because Defendants offer no facts – testimony or documentation – that would support this claim. Defendant

Palombo was under the authority of the North Wildwood Beach patrol. See Defendant's Exhibit "A", and "B" at T12-13. There is also evidence that the Beach property was under the control of the City of North Wildwood. Plaintiffs argue that if the two entities are not separate legal entities as Defendant claims, this is a fact that must be demonstrated.

Therefore, Plaintiffs request this Court deny this motion for summary judgment.

REPLY

In reply to Plaintiffs' opposition, Defendants submit the following.

Defendants first submit that there are no genuine disputes of material fact. Plaintiff does not dispute Palombo was acting in an emergency situation to cover a lifeguard stand left unattended as other lifeguards were undertaking efforts to rescue a swimmer in distress on a very busy Memorial Day weekend. Additionally, Plaintiffs have no expert testimony to establish liability, nor any evidence on applicable lifeguard standards. Defendants argue that Plaintiffs have failed to present any evidence Palombo breached any standard of care by which a jury could determine Palombo was negligent.

Additionally, Defendants submit that Plaintiffs' opposition to Defendants' Good Samaritan Immunity is dependent on an overly narrow interpretation of the Good Samaritan Act. Plaintiffs do not cite to an authority supporting such a narrow interpretation.

Next, Defendants argue that Plaintiff cannot establish that Palombo acted negligently. Defendants agree that, in most negligence cases, it would

be left to the jury to determine the standard of care owed to the Plaintiff. However, Defendants argue this case is different because here, "the plaintiff must instead establish the requisite standard of care and [the defendant's] deviation from that standard by present[ing] reliable expert testimony on the subject." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406-08 (2014) (internal citations and quotations omitted).

Here, Palombo was one of a team of first responders trained to react in accord with ocean lifeguard standards. As such, the question is what standard of care is owed to a beachgoer walking long the beach by a lifeguard responding as part of a team to rescue a person in distress in the ocean water. Defendants submit that Plaintiff did not submit any authority, policies, or nationally accepted lifeguard standards to which Palombo failed to adhere.

Defendants next argue that the Good Samaritan Act should be applicable. Defendants submit it is noteworthy that Plaintiff does not oppose Defendants' argument that the Good Samaritan Act no longer applies only to individuals who did not have a pre-existing duty to render aid. Rather, Plaintiff argues: "The Statute [sic] plain language states that it applies to individuals 'rendering ... aid to injured persons' and 'at the scene of an accident or emergency.' Neither of these apply." See Plaintiff's Opposition Brief at p. 7. However, Plaintiffs misquote the statute in that the statute does not mention injured persons, it refers to victims. Defendants submit it appears Plaintiff submits that the statute only applies to the individual who

directly provides care to the victim and at the victim's precise location, without citing to authority to support such a narrow interpretation of the statute.

Here, Palombo was part of an emergency response. If Palombo does not play his part in the emergency response, then the victim may not get the emergency care needed. If responders in the number two or three position do not fulfill their role, then CPR may not be timely rendered or the victim many not get some other emergency care needed. Defendants highlight that N.J.S.A. 2A:62A-9 provides that the Good Samaritan Act "shall not preclude liability for civil damages as the result of gross negligence or intentional misconduct." Here, there is no evidence Palombo's conduct was grossly negligent or intentional. Defendants argue that the legislative intent and public policy considerations weigh in favor of providing first responders acting in good faith, such as Palombo, with immunity from suit.

Next, Defendants submit that Plaintiff agrees North Wildwood and the North Wildwood Beach Patrol cannot be found vicariously liable unless there is a finding of liability on the part of Palombo. Since Plaintiff has not established a duty and breach of duty on the part of Palombo, the claims against North Wildwood should be dismissed. In addition, Plaintiff does not oppose Defendants' argument that Plaintiff has no evidence to support a negligent training claim. Accordingly, Plaintiff's negligent training claims against these defendants should be dismissed.

As for Plaintiff Joseph Aupperle's loss of consortium claim, Defendants submit that Plaintiffs present no evidence to support a loss of consortium claim. If the liability claims against Palombo survive summary judgment, Plaintiffs have no competent evidence to support the claim that a breach of duty by Palombo proximately caused Joseph and Diane Aupperle to have less frequent sexual relations after the date of the subject event. Plaintiff Joseph Aupperle has no competent evidence that Diane Aupperle's nose injury caused diminished sexual relations.

Finally, Defendants argue that Plaintiff is incorrect in arguing that Defendants must prove the North Wildwood Beach Patrol is a separate legal entity from the City of North Wildwood. Plaintiff has the burden of proof and, as such, Plaintiff must prove the North Wildwood Beach Patrol is a separate legal entity from the City of North Wildwood. It is recognized by New Jersey Courts that agencies and departments of municipalities are not separate from the municipalities. See Defendants' Reply Brief, p. 6. Thus, the North Wildwood Beach Patrol should be dismissed as a defendant.

Therefore, Defendants requests this Court grant summary judgment.

DISCUSSION

Defendants – Zachary Palombo, North Wildwood Beach Patrol, and City of North Wildwood – ("Defendants") are entitled to summary judgment.

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case

> the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

A motion for summary judgment should be denied if there exists credibility issues that should be decided by a jury. "Obviously, the motion for summary judgment should be denied when determination of material

disputed facts depends primarily on credibility evaluations or when the existence of a genuine issue of material fact appears from the discovery materials or from the pleadings and affidavits on the motion." R. 4:46-2[2.3.2]; Parks v. Rogers, 176 N.J. 491, 502 (2003); Gilborges v. Wallace, 153 N.J. Super. 121 (App. Div. 1977), aff'd in part and rev'd in part 78 N.J. 342 (1978).

A motion for summary judgment is inappropriate prior to the completion of discovery. See Lederman v. Prudential Life Ins., 358 N.J. Super. 324, 337 (App. Div.), certif. denied, 188 N.J. 353 (2006); Wellington v. Estate of Wellington, 359 N.J. Super. 484, 496 (App. Div.), certif. denied, 177 N.J. 493 (2003); Auster v. Kinoian, 153 N.J. Super. 52, 56 (App. Div. 1977) ("Ordinarily summary judgment dismissing the complaint should not be granted until the plaintiff has had a reasonable opportunity for discovery."). Also, summary judgment is inappropriate when "critical facts are peculiarly within the defendants' knowledge." Valentzas v. Colgate-Palmolive Co., 74 N.J. 189, 193 (1988), citing Martin v. Educ. Testing Serv., Inc., 179 N.J. Super. 317, 326 (Ch. Div. 1981). However, summary judgment may still be granted if, as a matter of law, further discovery will not rescue and maintain the action. The Appellate Division in Auster, 153 N.J. Super. at 56, held:

> Plaintiff has an obligation to demonstrate to some degree of particularity the likelihood that further discovery will supply the missing elements of the cause of action. Here, there was no attempt by plaintiffs to avail themselves of the opportunity to engage in discovery until after the Complaint was in jeopardy of being dismissed and they have failed and continue to fail to demonstrate how further discovery might rescue it.

See also Tisby v. Camden County Corr. Facility, 448 N.J. Super. 241, 247 (App. Div. 2017) (requiring the party objecting to a motion for summary judgment as premature only if the party can "demonstrate with some particularity [that] the likelihood of further discovery will supply the missing elements of the cause of action").

However, the non-moving party must show that the nature of the discovery and its materiality are issues at hand. See Mohamed v. Iglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 498 (App. Div. 2012). It is well-settled that bare conclusions in a Complaint without factual support will not defeat a motion for summary judgment. Miller v. Bank of Am. Home Loan, 439 N.J. Super. 540, 551 (App. Div. 2015), certif. denied, 221 N.J. 567 (2015); see also Triffin v. Am. Int'l Group, Inc., 372 N.J. Super. 517, 523-24 (App. Div. 2004) (holding that a party opposing summary judgment must do more than simply show that there is some "metaphysical doubt" as to the material facts).

Similarly, self-serving assertions, unsupported by documentary proof, are "insufficient to create a genuine issue of material fact." Globe Motor Co. v. Igdalev, 436 N.J. Super. 594, 603 (App. Div. 2014); Heyert v. Taddese, 431 N.J. Super. 388, 414 (App. Div. 2013); Martin v. Rutgers Cas. Ins. Co., 346 N.J. Super. 320, 323 (App. Div. 2002); Blair v. Scott Specialty Gases, 283 F.3d 595, 607 (3d Cir. 2002). Furthermore, a party may not "create" an issue of fact for trial by creating illusory or fanciful arguments or sham facts and then

rely on such facts or arguments. See Shelcusky v. Garjulio, 172 N.J. 185, 201 (2002) ("Sham facts should not subject a defendant to the burden of a trial.").

With respect to Defendant's motion for summary judgment, this Court finds it is proper to grant this motion. There are no genuine issues of material fact and summary judgment is appropriate as a matter of law.

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

R. 4:46-2(c).

This Court finds that Plaintiffs failed to create a genuine issue of material fact through their Opposition. In response to Defendant's Statement of Undisputed Material Facts, Plaintiff admits all but three (3) of Defendants facts. The three contested facts are not genuine issues of material fact that would preclude summary judgment.

Additionally, this Court finds that the Good Samaritan Act provides Defendant Palombo with immunity in this matter. N.J.S.A. Section 2A:62A-1 (also known as the Good Samaritan Act), provides:

> Any individual, including a person licensed to practice any method of treatment of human ailments, disease, pain, injury,

> deformity, mental or physical condition, or licensed to render services ancillary thereto, or any person who is a voluntary member of a duly incorporated first aid and emergency or volunteer ambulance or rescue squad association, who in good faith renders emergency care at the scene of an accident or emergency to the victim or victims thereof, or while transporting the victim or victims thereof to a hospital or other facility where treatment or care is to be rendered, shall not be liable for any civil damages as a result of any acts or omissions by such person in rendering the emergency care.

Here, the Good Samaritan Act protects Defendant Palombo from liability because it is undisputed that Defendant Palombo was running to cover an unoccupied lifeguard stand because another lifeguard was rendering emergency aid. See N.J.S.A. § 2A:62A-1. The language of the Good Samaritan Act is broad and specifically protects an individual, regardless of whether they are a volunteer or are paid, who renders emergency care to a victim, from civil liability. See id.

Further, this Court finds it proper to find it protects lifeguards such as Defendant Palombo for public policy reasons. Specifically, if this Court were to find that this Act did not protect lifeguards in such an emergency situation as the incident in question, lifeguards may be cautious and avoid acting swiftly to cover another lifeguard rendering aid in order to avoid potential liability. Defendant Palombo was in the course of a rescue, bumped into an unidentified beachgoer, and lost his balance when his lifeguard "can" struck Plaintiff's nose. The Court does not take Plaintiff's injury lightly but believes this is the type of scenario that was contemplated by and falls within the Good Samaritan Act. As such, this Court finds it proper to grant summary

judgment as to claims against Defendant Palombo. Additionally, as the remaining Defendants – North Wildwood Beach Patrol and City of North Wildwood – were impleaded for vicarious liability purposes, the remaining counts of Plaintiffs' Complaint are also dismissed through summary judgment. Therefore, Defendants' motion for summary judgment is granted.

CONCLUSION

The motion is opposed.

Defendants – Zachary Palombo, North Wildwood Beach Patrol, and City of North Wildwood – are entitled to summary judgment.

It is hereby Ordered that Plaintiffs' Complaint against all Defendants is hereby dismissed with prejudice.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

June 13, 2019

J. Christopher Gibson, J.S.C.

THE DEWEESE LAW FIRM

David DeWeese <david@deweeselawfirm.com>

Aupperle v. North Wildwood / Order and Decision granting MSJ

A.Michael Barker <ambarker@barkerlawfirm.net> Thu, Jun 13, 2019 at 1:54 PM
To: David DeWeese <david@deweeselawfirm.com>, Krissie Robinson <krobinson@barkerlawfirm.net>
Cc: "Kellerman, Sandra L 675" <skellerman@qual-lynx.com>, "Mooney, Susan L 675" <smooney@qual-lynx.com>, "william.kaufmann@cafierolaw.com" <william.kaufmann@cafierolaw.com>, Zachary Palombo <zpalombo49@yahoo.com>, "tcavalier@northwildwood.com" <tcavalier@northwildwood.com>, "rsimone@northwildwood.com" <rsimone@northwildwood.com>

We thank you Dave for the compliment. Although this decision left unaddressed additional and important arguments we raised, *we are gratified with the decision as it provides the protection of the Good Samaritan Act to beach patrols for the first time.*

Best Regards !

Mike

[Quoted text hidden]

A. Michael Barker, Esquire
Barker, Gelfand, James & Sarvas
A Professional Corporation
210 New Road
Linwood, New Jersey 08221
(609) 601-8677
Attorney for Defendants, Zachary Palombo, North Wildwood Beach Patrol and City of North Wildwood

DIANE AUPPERLE and JOSEPH AUPPERLE, her husband, Plaintiffs, v. ZACHARY PALOMBO, NORTH WILDWOOD BEACH PATROL, CITY OF NORTH WILDWOOD and JOHN DOES #1-10, J/S/A/, Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION CAPE MAY COUNTY DOCKET NO. CPM-L-360-17 Civil Action ORDER

This matter having come before the Court by way of notice on behalf of Defendants Zachary Palombo, North Wildwood Beach Patrol and City of North Wildwood represented by A. Michael Barker, Esquire of Barker, Gelfand, James & Sarvas, P.C.

IT IS, on this 13th day of June 2019; ORDERED and ADJUDGED that:

Summary Judgment be and hereby is GRANTED in favor of the Defendants, Zachary Palombo, North Wildwood Beach Patrol and City of North Wildwood, dismissing all of Plaintiffs' claims against Defendants Zachary Palombo, North Wildwood Beach Patrol and City of North Wildwood with prejudice.

IT IS further ORDERED that a copy of this Order shall be served on all parties of record within seven (7) days of the above date.

J. Christopher Gibson, J.S.C.