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New York County Clerk's Index No. 158309/2017
Appellate Division, First Department Case No. 2021-01180

Court of Appeals

STATE OF NEW YORK

JEFFREY COLT and BETSY TSAI,

Plaintiffs-Respondents,

against

NEW JERSEY TRANSIT CORPORATION,
NJ TRANSIT BUS OPERATIONS, INC. and ANA HERNANDEZ,

Defendants-Appellants.

BRIEF FOR *AMICUS CURIAE* NEW YORK STATE TRIAL LAWYERS ASSOCIATION

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COURT OF APPEALS
STATE OF NEW YORK

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STATEMENT PURSUANT TO RULE 500.1(f) OF THE RULES OF PRACTICE OF THE COURT OF APPEALS

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NY County Index No. 158309/2017

Appellate Division First Department Case No. 2021-01180

BRIEF OF *AMICUS CURIAE* NEW YORK STATE TRIAL LAWYERS' ASSOCIATION

PRELIMINARY STATEMENT

In this action seeking a determination as to whether the defendant, New Jersey Transit Corporation ("NJT") and its motor vehicle operator, Anna Hernandez ("Ms. Hernandez") (collectively the "defendant[s]") are entitled to interstate sovereign immunity pursuant to the Supreme Court's decision in Franchise Tax Bd. v. Hyatt, 139 Sup. Ct. 1485 [2019], the New York State Trial Lawyers Association ("NYSTLA") submits this brief as *amicae curiae* for the plaintiffs-respondents Jeffrey Colt and Betsy Tsai (the "plaintiff(s)"). NYSTLA supports the Appellate Division's decision denying NJT's motion to dismiss based on sovereign immunity. However, NYSTLA goes further and argues, congruent with the position taken by plaintiff's attorneys in this Court, that interstate sovereign immunity should not apply to NJT, and certainly not any of its drivers, with respect to automobile

accidents that occur in this State. Such a rule of law is inconsistent with the case law, inconsistent with accepted precedent and substantively unfair.

As such, NYSTLA submits that this Court should affirmatively rule that interstate sovereign immunity does not apply to the facts of this case as a matter of both law and fact.

In this regard, this issue has already been before this Court recently in Henry v. New Jersey Transit Corp., 39 NY3d 361 [2023]. There, this Court dismissed NJT's appeal for procedural reasons.

STATEMENT OF THE CASE

The underlying accident occurred at the intersection of Dyer Avenue and 40th Street in Manhattan (134, 383-384, 470-474)[1] on February 9, 2017 (242). Plaintiff, Jeffrey Colt, was walking from his office to a Covenant House Homeless Youth Shelter facility on the north side of 40th Street after he reached that street's intersection with Dyer Avenue with the walk signal in his favor (242, 380-383). Mr. Colt "stepped off the curb" and "began to walk across the street" when he "felt some sort of wallop", after which he "(woke) up on the ground, alongside the front of one of defendants' tires" (383-388). Anna Hernandez admitted that she injured plaintiff while turning left onto Dyer Avenue (134-158). As pointed out in plaintiff's brief to this Court (Plaintiffs'

[1] Numbers in parenthesis refer to pertinent pages of the record on appeal.

Brief, pp. 6-8), the evidence was fully inculpatory as was the testimony of Antwone Steel, a NJT bus driver who observed part of the accident (476-499, 525-527).

PROCEEDINGS IN THE LOWER COURTS

Plaintiffs commenced an action for personal injuries in New York in September of 2017. Three years later, defendants moved for summary judgment in July of 2020 (10-18, 42-57). NJT asserted that it was entitled to interstate sovereign immunity pursuant to Hyatt based primarily on the Third Circuit's ruling in Karns v. Shanahan, 879 F.3d 504 [3d Cir. 2018]. Hernandez sought derivative immunity on the ground that same applied to NJT's employees who were acting within the scope of their employment when the accident took place (51).

Plaintiff pointed out that NJT was not a "State" for purposes of applying the doctrine of interstate sovereign immunity because the New Jersey Tort Claims Act specifically provided that public entities with the power to sue and be sued are not classified as the "State" (NJSA §59:1-3), that plaintiffs could not have brought suit in New Jersey even if they had wanted to do so because NJ Rule of Court §4:3-2(a) requires "public agencies" be sued in the county in which the cause of action arose, and that defendants should be estopped from contending that they were immune from suit where they litigated the action forcefully and "vigorously" for 3

years before making the motion to dismiss after the expiration of the statute of limitations (88-93).

At the Supreme Court, Justice Adam Silvera denied defendants' motion to dismiss on the grounds that Hyatt was inapplicable to the facts (7-89). The Appellate Division held that defendants waived their immunity defense by their litigation conduct (206 AD3d 126, 131-132 [1st Dept. 2022]). The court also noted that based on the venue provisions applicable to NJT, New York plaintiffs could be left without a forum in which to litigate their cases, a result that was "absurd" and "an affront to our sense of justice" which "cannot be countenanced."

Two dissenting justices objected to the majority's assumption that the venue provisions applicable to NJT would foreclose suit because same were not "jurisdictional."

While NYSTLA is fully supportive of the majority's holding that summary dismissal is not warranted, NYSTLA believes that NJT is not entitled to interstate sovereign immunity as a matter of both fact and law. Further, NJT's driver is certainly not entitled to derivative interstate sovereign immunity. As such, NYSTLA asks this Court to substantively hold that Hyatt does not apply to NJT or Ms. Hernandez based on the undisputed facts disclosed by this record.

QUESTION PRESENTED

Is NJT, which is, definitionally, not an "arm of the state" under New Jersey statutes and court rules and its drivers entitled to interstate sovereign immunity for an accident that occurs wholly within the State of New York, where New Jersey venue provisions, which NJT and its drivers have affirmatively used to bar suit in the past, could effectively preclude New York domiciled claimants from ever seeking redress for injuries or damages?

This question should be answered in the negative.

DISCUSSION

POINT I

NJT IS NOT AN "ARM OF THE STATE" BASED UPON CASE LAW AND NEW JERSEY STATUTES AND REGULATIONS; AS SUCH, IT IS NOT ENTITLED TO INTERSTATE SOVEREIGN IMMUNITY. FURTHER, THE DOCTRINE DOES NOT APPLY TO NJT'S DRIVERS DERIVATIVELY. THE RESTRICTIVE VENUE PROVISIONS GOVERNING NJT'S AMENABILITY TO SUIT ONLY HIGHLIGHT THE IMPROPRIETY AND UNFAIRNESS OF PROVIDING NJT AND ITS DRIVERS WITH INTERSTATE SOVEREIGN IMMUNITY, ESPECIALLY IN A CASE WHERE THE LATTER SAT ON THEIR RIGHTS FOR YEARS BEFORE MOVING FOR DISMISSAL SUBSEQUENT TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS – ACTS WHICH SHOULD GIVE RISE TO A FINDING OF WAIVER AS A MATTER OF LAW BASED ON THIS RECORD

NYSTLA is aware that this Court already has before its defendants' brief as well as plaintiffs' responsive brief which contain a thorough discussion of the applicable law dealing with the issues presented in this appeal. NYSTLA will not repeat that discussion as same would be superfluous.

However, NYSTLA concurs with the Colt plaintiffs that NJT is not an "arm of the state" within the meaning of United States

Supreme Court and appellate precedent which holds that common carriers and transportation authorities are not generally "arms" of the State as a matter of law (Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30 [1994]). As a general rule, immunity is only available to protect the State treasury from liability that would have essentially the same practical consequences as a judgment against the State. See, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 400-401 [1979]; Lincoln County v. Luning, 133 U.S. 529, 530 [1890]. Significantly, a Pennsylvania Appellate court ruled earlier this year that NJT was (not) an arm of the state for purposes of applying interstate sovereign immunity. See, Galette v. NJ Transit, 293 A3d 649, 657-658 [PA Super. Ct. 2023], rearg. den., 2023 Pa Super. LEXIS 233 [PA Super. Ct. 2023].

Statutorily, the New Jersey Tort Claims Act defines the term "State" to *exclude*, with the single exception of one entity, any "agency of the State" that "is statutorily authorized to sue or be sued" (NJSA, §59:1-3), and even the Palisades Interstate Park Commission, the entity that can be classified as the "State" in accordance with NJSA, §59:1-3, is authorized to call itself the "State" only with respect to PIPC's "employees, property and activities *within the State of New Jersey.*"

Unsurprisingly, NJT posits that the Third Circuit's improper decision in Karns v. Shanahan, 879 F.3d 504 [3d Cir. 2018] supports

its sovereign immunity claim. However, the three factor test for determining whether NJT is an arm of the state articulated by the Third Circuit in Fitchik v. New Jersey Transit Rail Operations, Inc., 873 F.2d 655 [3d Cir. 1989], cert. den., 493 U.S. 850 [1989] refutes NJT's assertion as a matter of both fact and law.

The first Fitchik factor, whether any "judgment would be paid from the State treasury" (873 F.2d at 659), must be answered "no" because NJSA: §27:25-7 unequivocally states: "No debt or liability of the corporation shall be deemed or construed to create or constitute a debt, liability or alone or pledge of the credit of the State."

The second Fitchik factor, "whether the State law treats an agency as independent, or as a surrogate for the State" (873 F.2d at 662), also runs against NJT's position because under NJSA: §59:1-3 the term "State" may not to "include any such entity which is statutorily authorized to sue or be sued."

And, the third Fitchik factor, "the degree of NJT's autonomy from the state" (873 F.2d at 663), also favors plaintiffs because NJSA, §27:25-4(a) states directly that "the corporation shall be independent of any supervision or control by the Department or anybody or officer thereof."

With respect to the issue of transferred immunity to employees of NJT, it has been consistently held that the 11th Amendment and the doctrine of interstate sovereign immunity does "not" extend to

state employees sued in their individual capacity." See, Hafer v. Melo, 502 U.S. 21 [1991]; Ying Jing Gan v. City of New York, 996 F.2d 522 [2d Cir. 1993]; Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508 [1st Cir. 2009]. Ironically, the Karns decision, the lead case relied upon by NJT, specifically did not bar suit against NJT police officers who were sued in their individual capacity for their individual actions, even though the officers prevailed in the suit on the merits.

In this case, Ms. Hernandez is not a "public official"; in fact, she had no "official capacity, in which she could be sued" (Pavelka v. Carter, 996 F.2d 645 [4th Cir. 1993]). That the State of New Jersey is required or has greed to reimburse its individually sued employees does not transform Ms. Hernandez into an "arm of the state" (State Emp. Bargaining Agent Coalition v. Rowland, 718 F.3d 126 [2d Cir. 2013], cert. den., 571 U.S. 1170 [2014]). Interestingly, the State of New Jersey has no obligation to indemnify a driver for liability he or she may incur while driving an NJT vehicle. It is NJT itself that has an indemnity duty (NJSA: §27:25-17).

Procedurally, as the First Department noted in Colt, NJSA, §59:9-1 requires that all claims brought pursuant to the New Jersey Tort Claims Act be heard in accordance with New Jersey Rules of Court. In this regard, NJ Court Rule §4:3-2(a) requires that any action against the public agency be commenced "in the County in

which the cause of action arose." Accordingly, where an accident involving NJT occurs in New York, the venue provisions of the NJSA and Rules of Court require that any action against it or any of its drivers be commenced in New York. This would effectively require an injured plaintiff to sue NJT and its driver in a locale where it has no right to bring an action. While NJT has argued that venue requirements are not generally "jurisdictional", it has, in the past, successfully obtained dismissals on the ground that the venue provisions of the NJSA and Rules of Court *are* jurisdictional. See, Astorino v. N.J. Transit Corp., 912 A2d 308 [PA Super. Ct. 2006]. See generally, Flamer v. N.J. Transit Bus Operations, 607 A2d 260 [PA Super. Ct. 1992].

These principles are adumbrated extensively in plaintiff's brief for this Court and need not be repeated. NYSTLA believes that plaintiff's position is correct on the law, correct on the facts and correct as a matter of procedure.

However, NYSTLA asked this Court to consider the following hypothetical. Assume that two identical twins, both employees of NJT, are driving identical vehicles, one in New York and one in New Jersey. Assume further that both drivers strike identical buildings at the same time causing the exact same damage to both property and persons.

In these circumstances, New Jersey residents would have no impediment to suing NJT and its driver in the State of New Jersey

where they reside. However, New York residents would not fare as well. In fact, they may be precluded from suit even though the United States Supreme Court has held that the right to interstate travel is fundamental, and that restrictions on that right are normally subject to "strict scrutiny." (Memorial Hospital v. Maricopa County, 415 U.S. 250 [1974]; Shapiro v. Thompson, 394 U.S. 618, 634 [1969]). "Freedom to travel throughout the United States has long been recognized as a basic right under the constitution (Dunn v. Blumstein, 405 U.S. 330, 338 [1972]; United States v. Guest, 383 U.S. 745, 758 [1966]).

Prefatorily and in this regard, it is important to note that NJT purposely avails itself of the privilege of conducting business in New York and is a common carrier by definition. Its website states the following: "Covering a service area of 5,325 square miles, NJ TRANSIT is the nation's third largest provider of bus, rail and light rail transit, linking major points in New Jersey, New York and Philadelphia. The agency operates an active fleet of 2,221 buses, 1,231 trains and 93 light rail vehicles. On 251 bus routes and 12 rail lines statewide, NJ TTANSIT provides nearly 270 million passenger trips each year."[2] See, "About Us", NJT Official Website, located at https://www.njtransit.com/about/about-us. NJT requires that its drivers have one of the following licenses: "a

[2] See, "Careers: Bus operators", NJT official website, supra.

non-provisional N.J. Driver's License (for the last 3 years), a "N.J. Commercial Drivers Permit, or a Commercial Driver's License from N.J., N.Y. or PA" (id.).

NYSTLA submits that it is almost perverse to argue that NJT does not at least implicitly consent to abide by New York's Vehicle & Traffic Law ("VTL") provisions or New York's jurisdiction generally when it undertakes millions of trips into New York, derives substantial benefit therefrom,[3] and consents generally to New York's Commercial Driver licensing laws as qualifications for employment.

Turning now directly to the results that would ensue from the stated hypothetical, New Yorkers who brought suit in New York believing that a common carrier that caused damage as a result of a bus operator's negligence in this State could be foreclosed from bringing suit in situations where NJT and its drivers did not immediately move for dismissal. As noted in Henry v. NJT, supra,

[3] An indication of the amount of money NJT derives from its activities is shown by the recent $1.5 billion grant it received from the Second Cares Act, to compensate it for some of its losses sustained as a result of reduced ridership during the COVID-19 pandemic. See, hhtps://www.nj.com/news/2020/12/nj-transit-gets-125b-court-auth.-stuck-out-on-second-federal-covid-19-aid-request.html.

NJT's operating budget for fiscal year 2020 was projected to be $2.39 billion with 1.42 billion in capital improvements. See, "N.J. Transit-adopts-fiscal-year-2020-operating-capital budgets."

In addition, NJT is a federally registered common carrier with the Federal Motor Carrier Safety Administration of the U.S. Department of Transportation (see, Safety Measurement – overview) (U.S. DOT §74293), located at https://ai.fmcsa.gov/SMS/Carrier7293/Overview.aspx) and is bound by Federal Regulation to adhere to state and local laws pursuant to §390.3(a) of the Federal Motor Carrier Safety Regulations ("FMC").

in those situations a waiver should be imposed as a matter of substantive fairness.

But suppose a claimant sought counsel late in the game such that counsel was obligated to immediately bring suit in this State. In those circumstances, allowing even a seasonable claim of immunity unfairly disadvantages New York residents in a way that would not be applicable to similarly situated New Jersey claimants.

In this regard, the Supreme Court has recognized that: "Motor vehicles are dangerous machines; and, even when skillfully and carefully operated, their use is attended by serious dangers to persons and property." (Hess v. Pawloski, 274 U.S. 352, 356 [1927]). Statutes such as VTL §253 and its antecedent incarnations have long upheld as valid the exercise of the police power of the state in this regard which can be applied to foreign corporations and entities. See, Burnham v. Superior Court of Cal., 495 U.S. 604 [1990]; Wuchter v. Pizzutti, 276 U.S. 13, 20 [1928]. As such, providing immunity to NJT which provides over 270 million passenger trips each year in New York and derives billions of dollars in revenue by virtue of the privileges of transacting business in New York is hardly unfair. This result is mandated when one considers that NJT has refused to waive the statute of limitations as a condition of applying securing immunity in the past. See, Fetahu v. New Jersey Tr. Corp., 197 AD3d 1065 [1st Dept. 2021]; Belfand v. Petosa, 196 AD3d 60 [1st Dept. 2021].

At its core, this Court should not treat its citizens in a less favorable manner than New Jersey would in similar circumstances. In this regard, (NJSA, §59:2-2) provides that "a public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." Public employees are liable to the same extent as private persons for injuries and cannot be subject to immunity (NJSA, §59:3-1). Indeed, NJT is held to the heightened common carrier standard of "utmost care" (Maison v. New Jersey Transit Corp., 245 A3d 536 [2021]) and FMC §390.3(a) establishes that, as a common carrier, NJT is subject to another state's enforcement of its own laws. In fact, under federal law, NJT is liable for even personal injuries and must accept the jurisdiction of foreign tribunals. See, 49 USC §13101, §13102, §13501, §14501, §14704, §14901, §14906, §14917.

NYSTLA anticipates that NJT will posit that there is nothing unfair about requiring New York residents to bring tort claims in New Jersey against NJT given its claim that is an arm of the state entitled to assert interstate sovereign immunity. However, there is a real impediment to New York claimants, injured by the negligence of NJT drivers in New York, to litigate cases in a different state, even one that is contiguous with New York. Indeed, in personam jurisdiction case law (see, World-Wide Volkswagen

Corp. v. Woodson, 444 U.S. 286 [1980]) demonstrates, at least implicitly, that adjudicating claims in foreign jurisdictions is problematic for non-residents. And, as noted by the Colt majority as well as NJT's own litigation practices, it is by no means clear that NJT would consent to litigate cases in New Jersey based upon the venue provisions that apply to it. While NJT may now assert that it would in order to prevail in this case, its past actions cast doubt on the propriety of those assertions if made.

One might well wonder the dislocation that would occur if NJT and its bus drivers claimed immunity for traffic citations that were issued by authorized agents of the City or State when operating buses and other vehicles in New York. Plaintiff notes that the State of New Jersey has recently taken steps to prevent neighboring states, including New York, from utilizing its drivers records for the purpose of issuing tickets, specifically as they relate to speed monitoring or redlight cameras, which has caused friction with New York State and City officials and government agencies. See, Bell, New Jersey Wants Immunity From NYC Speed Camera Tickets, Roadtrack, 7/13/2022, located at https://www.roadtrack.com/news/a40602244/new-jersey-wants-immunity-from-nyc-speed-camera-tickets/

And, Law Review articles have noted the unfairness of a paradigm where sovereign immunity is afforded drivers who work for other states for accidents that occur in this state. As Professor

Michael H. Hoffheimer, noted in his Law Review article, The New Sister-State Sovereign Immunity (92 Wash. Law Rev., 1771, 1817 [2017]).

> Finally, there is the hypothetical case when State A sends an agent to State B to negotiate financing of state bonds, and the agent causes personal injuries to a resident while in State B. In such a case, State B should be free to apply its laws and disregard State A's sovereign immunity without regard to limits on sovereign immunity enjoyed by State B – or the limits enjoyed by State A in its own courts. In contrast, full faith and credit would require State B to recognize State A's defense for a personal injury caused by its agents in State B to a resident of State B.

Professor Hoffheimer concludes: "The proposed approach preserves a territorial limit of sovereign immunity as an attribute of state sovereignty. But it also allocates to forum states maximum regulatory control over conduct and consequences of conduct within their jurisdiction. The proposed approach does not, of course, guide states in the exercise of such regulatory control, and states can – and probably should – grant sister states more sovereign immunity than the Constitution requires."

For all these reasons, NYSTLA asks this Court to hold that NJT and its drivers are not entitled to interstate sovereign immunity for tort claims resulting from accidents that occur in this state. Failing that, based on Jones and its progeny, NJT and Hernandez plainly waived the right to assert such immunity based on the facts disclosed by this record.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that the order of the Appellate Division, First Department, should be affirmed with this Court holding, substantively, that neither NJT nor its drivers are entitled to interstate sovereign immunity. Failing that, this Court should find that the immunity was waived.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR § 500.13(c) that the foregoing brief was prepared on a computer.

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Dated: January 16, 2024

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