

STATE OF VERMONT

3430657

SUPERIOR COURT  
Rutland Unit

CIVIL DIVISION  
Docket No. 136-2-10 Rdsc  
33-1-11 Rdev

Peter J. Patterson,  
Appellee/Plaintiff

v.

State of Vermont,  
Appellant/Defendant

ORIGINAL PAPER  
VERMONT SUPERIOR COURT  
APR 19 2011  
RUTLAND

DECISION ON APPEAL

The court heard oral argument on appeal on March 23, 2011. The appellant was represented by Howard A. Kalfus, Esq. The appellee was represented by James G. Levins III, Esq. The court has reviewed the file; listened to the CD of the trial proceedings; and considered the arguments of the parties. The court issues the following decision:

The issues raised by the appellant in its *Notice of Appeal*, filed January 11, 2011, can be summarized as follows:

1. The trial court erred in not finding immunity. Appellant asserts that the facts as alleged by appellee do not rise to the level of "recklessness" which is required under *Rochon v. State*, 177 Vt. 144 (2004); and even if the court considers the facts proven at trial, the facts of the case do not rise to the level of "recklessness" attributable to appellant.
2. The evidence does not support an award of \$5,000 compensatory damages.

On appeal before the superior court, the standard of review is limited. The appellate court will not set aside findings of fact unless they are clearly erroneous. *Bartley-Cruz v. McLeod*, 144 Vt. 263, 264 (1984). The appellate court's review of questions of law, however, is "nondeferential and plenary." *N.A.S. Holdings, Inc. v. Pafundi*, 169 Vt. 437 (1999). On appeal the evidence must be viewed in the light most favorable to the prevailing party and modifying evidence is excluded. *Quechee Lakes Corporation v. Terrosi*, 141 Vt. 547, 552 (1982). It is not

the function of the superior court to substitute its own judgment for that of the small claims court judge. Rather, the role of the superior court is to determine whether or not the evidence presented at the hearing supports the facts that the judge decided were the credible facts, and whether or not the judge correctly applied the proper law and procedure. The weight of the evidence and the credibility of witnesses are questions for the small claims court as the trier of fact. *Brown v. Pilini*, 128 Vt. 324, 328 (1970).

The facts in this case can be fairly summarized as follows:

On 4/22/09 appellee (hereinafter referred to as "Mr. Patterson") was driving south on U.S. Rt. 7 in Rutland Town. He was driving to work at the Rutland Town Elementary School where he is employed as a teacher. His route to work takes him south on Rt. 7 until he reaches the intersection of Rt. 7 and Post Rd. Post Rd. intersects Rt. 7 from the east (or to the left from the perspective of someone driving south on Rt. 7). In order to go to the Rutland Town School, Mr. Patterson would turn left onto the Post Rd. where it intersects Rt. 7. The intersection is controlled by a stoplight. At the intersection with Post Rd., Rt. 7 is 4 lanes wide, with 2 southbound lanes and 2 northbound lanes.

While he was still well north of the Post Rd. intersection, and traveling south on U.S. Rt. 7, Mr. Patterson saw a car come "flying" onto Rt. 7 from an intersecting road (Pinnacle Ridge Rd.) from the right (or the west) and turn south in front of him. He saw a town constable's emergency vehicle following in hot pursuit. This occurred approximately 2 miles north of where Rt. 7 intersects the Post Rd. These two vehicles continued south in front of Mr. Patterson until they turned off Rt. 7 and onto another road (Cedar Ave.) that intersects Rt. 7, also, from the right. A fairly short distance later, Mr. Patterson noticed an unmarked police car, with its blue lights flashing, waiting to enter Rt. 7 from an intersecting road to Mr. Patterson's left. The intersecting road is the East Pittsford Rd. The East Pittsford Rd. intersects U.S. Rt. 7 several hundred yards north of where the Post Rd. intersects it. Mr. Patterson thought this emergency vehicle had its right-hand blinker on, indicating that it was going to turn north onto Rt. 7. However, the evidence fairly demonstrates that this was not the case. In all likelihood, Mr. Patterson mistook one of the emergency flashing lights for a right-hand turn signal. In fact, the unmarked police vehicle, being driven by Sgt. Albert Abdelnour, of the Vermont State Police turned left (south) onto Rt. 7 after the traffic (including Mr. Patterson) cleared.

Mr. Patterson approached the intersection of Post Rd. and turned on his left-hand turn signal. The light was red so he stopped. He was in the center south-bound lane; the appropriate lane for turning left. He was the first car in a line of traffic. He was driving a rather small car, a Subaru Impreza. There were two vehicles behind Mr. Patterson at the light, including a large pick up truck

directly behind him. When the light turned green, Mr. Patterson looked behind him and did not see anything of concern, although he could not see beyond the large pick up which was blocking his view to the rear. Mr. Patterson waited for two cars going straight through the intersection from the opposite direction to clear the intersection and then he started to turn left and started to cross the center north-bound lane. As he entered the intersection he was struck on his left-hand side by the oncoming unmarked police car which was attempting to pass him and the other two vehicles behind him on the left (in the center-most north-bound lane). Although Mr. Patterson did not hear or see them, the officer did have his blue lights flashing and his siren on.

Sgt. Abdelnour was involved in a criminal pursuit. He had been contacted by dispatch to respond to a car jacking/kidnapping of a young woman and her young son. It was an emergency situation. In fact, the vehicles seen further up the road by Mr. Patterson were involved in the same incident. The pursuit led to the officer heading south on Rt. 7. Sgt. Abdelnour had entered Rt. 7 from the East Pittsford Rd. and turned south onto Rt. 7. As he approached the intersection of Post Rd. he had his blue lights and siren turned on. He saw a line of traffic stopped at the intersection facing south, in the center-most southbound lane. He did not see Mr. Patterson's car, as his line of sight was blocked by the pick up truck, but there was a noticeable space between the pick up and the stop light. The officer does not recall if the light was green or red as he approached the intersection. The officer slowed down as he approached the intersection and ascertained (his belief) that the cars were stopped to let him pass. He then rapidly accelerated to 40 m.p.h. (the speed limit) in the north-bound lane; as he was about to enter the intersection, Mr. Patterson started his left turn and Sgt. Abdelnour crashed into him. The Sgt. applied his brakes right before the crash, but he simply slid as the road was slippery from a recent rain. Neither driver was injured in the crash, but Mr. Patterson's vehicle suffered a minimum of \$5,000 damages.

The above fairly represents the trial court's findings with one exception. The trial court found that there was a stop line at the intersection. However, after listening to the CD of the proceedings, this court concludes that there was no evidence of the existence of a stop line. Therefore, this is the only finding which the court finds which was not supported by the evidence. However, there was space enough for another vehicle between the pick up truck and the stop light, as Mr. Patterson was, in fact, in that location.

The trial court concluded that the officer's actions were reckless under the standard established by the Vermont Supreme Court in *Rochon v. State*, 177 Vt. 144 (2004). The court concluded that the officer would have been able to see that there was a space between the pick up truck and the stop line, as he slowed down approaching the intersection. Despite this, when the

light turned green; the officer, without first checking to see if there was another space or vehicle in front of the pick up; and without confirming whether there was another vehicle in that space acknowledging his presence; rapidly accelerated into the intersection at 40 m.p.h. on the wrong side of the road, causing the collision. The trial court concluded that since there was, in fact, a space between the pick up truck and the light which the officer should have observed, there was a substantial likelihood that there was a vehicle there and there was a substantial risk that the vehicle there was poised to make a left-hand turn, as Mr. Patterson, in fact, was. In conclusion, the trial court found that the officer consciously disregarded a substantial and unjustifiable risk that there was another vehicle in the space in front of the pick up truck which could be making a left-hand turn.

The trial court's findings on damages were amply supported by the evidence, including the testimony of Mr. Patterson, Mr. Moran and Mr. Parker. The primary issue on appeal is whether the findings support a finding of liability. The standard that the court must apply to the officer's actions is "recklessness." The relevant statute is 23 V.S.A. § 1015, which states:

(a) The driver of an authorized emergency vehicle, when responding to an emergency call or when responding to, but not returning from, a fire alarm and a law enforcement officer operating an authorized emergency vehicle in fresh pursuit of a suspected violator of the law:

- (1) may park or stand contrary to the provisions of this chapter;
- (2) may proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;
- (3) shall come to a full stop when approaching a school bus which is flashing red lights and may proceed only when the flashing red lights are extinguished;
- (4) may exceed the maximum speed limits;
- (5) may disregard regulations governing direction of movement or turning in specified directions.

(b) The exemptions granted to an authorized emergency vehicle apply only when the vehicle is making use of audible or visual signals meeting the requirements of this title.

(c) 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 or her reckless disregard for the safety of others.

23 V.S.A. § 1015. As the trial court noted, the Vermont Supreme Court has interpreted this statute as "preclud[ing] an action in negligence and requir[ing] a showing of recklessness for

injuries sustained in an accident with an emergency responder. *Rochon, supra*, at 145. The Vermont Supreme Court defined “recklessness” as follows:

... reckless conduct requires a conscious disregard to a substantial and unjustifiable risk. See *State v. Brooks*, 163 Vt. 245, 251, 658 A.2d 22, 26 (1995) (defining recklessness for purposes of criminal penalties); Restatement (Second) of Torts § 500 (1965) (defining recklessness as conduct taken, or not taken when otherwise necessary, despite the actor’s knowledge that conduct presents an unreasonable risk of harm to others); cf. *Mellin v. Flood Brook Union Sch. Dist.*, 173 Vt. 202, 220, 790 A.2d 408, 423 (2001) (explaining that gross negligence is a palpable and heedless disregard of one’s duty to another). Whether conduct rises to the level of recklessness is a matter for the fact finder unless no reasonable minds could differ on the question.


*Id.* at 151. This case presents a close call as to whether “recklessness” was proven by the evidence, or whether negligence, only, was proven. However, as the Supreme Court stated above, “whether conduct rises to the level of recklessness is a matter for the fact finder unless no reasonable minds could differ on the question.” *Id.* On the facts found in this case, reasonable minds could differ. The officer did not recall whether the light was red or green as he approached the intersection. However, the facts found by the court were that the light was red as the officer approached the intersection. Although the officer thought that the vehicles in front of him were stopped because of his emergency signals, the evidence justifies a conclusion that they were stopped because the light was red. When the light turned green, the officer accelerated rapidly into the opposite lane of travel at 40 m.p.h. Although he would have seen that there was a space in front of the pick up truck where a vehicle could have been turning left, he failed to check it out as he approached the intersection, thus causing the crash. Therefore, it was within the purview of the trier of fact to determine that the officer operated his motor vehicle in a reckless manner.

The facts of our case differ in several material ways from the facts of the *Rochon* case. In that case the trooper was proceeding to the scene of a domestic assault at the posted speed limit of 50 m.p.h. The plaintiff’s vehicle was in front of the trooper traveling in the same direction. As the trooper approached the plaintiff’s vehicle he saw its brake lights come on and the car drifted to the right. The trooper assumed the vehicle was pulling over to let him pass. The trooper pulled into the left lane to pass the plaintiff. At the same time the plaintiff turned left intending to pull into his driveway and the vehicles collided. There was no evidence that that plaintiff had his left turn signal on, although plaintiff claimed that it was his practice to turn it on

before entering his driveway. Under the facts of this case, the Vermont Supreme Court determined that the only fair interpretation of the facts was that the trooper's actions, at most, constituted mere negligence.<sup>1</sup> *Rochon, supra* at 151. The facts separating our case from the *Rochon* case include that the trial court found that Mr. Patterson did have his left-turn signal on; Mr. Patterson had not moved to the right (and neither had the other vehicles in the line of traffic), thus acknowledging that he had observed the officer's emergency signals; the officer, while not observing Mr. Patterson's vehicle, would have observed that there was a space there for another vehicle; and the officer rapidly accelerated into the intersection on the wrong side of the road without ascertaining whether there was a vehicle in front of the pick up truck turning left. The facts of our case are sufficiently different from *Rochon* that reasonable minds could, in fact, differ as to whether the officer's actions constituted recklessness.

The decision of the small claims court is *affirmed*.

Dated at Rutland this 18th day of April, 2011.



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Cortland T. Corsones  
Superior Court Judge

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<sup>1</sup> The Supreme Court also noted that the plaintiff did not plead recklessness in his complaint.