

George Latimer
County Executive

Office of the County Attorney

John M. Nonna
County Attorney

February 11, 2021

Westchester County Board of Legislators
County of Westchester
800 Michaelian Office Building
148 Martine Avenue
White Plains, New York 10601

Re: Request for authorization to settle the lawsuit of Frank P. Vairo v. County of Westchester, et al., in Westchester County Supreme Court, Index No. 50584/2016, in the amount of \$450,000.00 inclusive of attorney's fees.

Dear Honorable Members of the Board:

Attached for your consideration is an Act, which if enacted by your Board, would authorize the settlement of the lawsuit of Frank P. Vairo v. County of Westchester, et al., in the amount of \$450,000.00 inclusive of attorney's fees.

This matter is pending in the Westchester County Supreme Court before the Honorable James Hubert. The matter tentatively settled pending this Board's approval of a settlement in the amount of \$450,000.00, inclusive of attorney's fees.

Jonathan Banks, Esq., Schwartzapfel Lawyers, P.C., 600 Old Country Road, Suite 450, Garden City, New York 11530, is representing the plaintiff.

This matter arises out of a pedestrian knockdown accident which occurred on January 6, 2015, at approximately 9:45 a.m. at the intersection of Nepperhan Avenue and South Broadway, in the City of Yonkers. The plaintiff was crossing Nepperhan Avenue with the pedestrian walk signal in his favor and within the painted crosswalk, walking in a southerly direction. The bus driver was on South Broadway facing south with a green light, waiting within the intersection due to opposing vehicle traffic before making a left turn from South Broadway onto Nepperhan Avenue. While waiting, the driver heard and saw fire trucks approaching the intersection from her right with lights and sirens activated. As a result, the bus driver began making her left turn so as to clear the bus from the intersection and permit the emergency vehicles to pass. In doing so, the driver failed to see the plaintiff to her left within the crosswalk, resulting in the bus hitting the plaintiff. Plaintiff claims he was struck by the front of the bus. The bus had no passengers on it at the time of the accident. Plaintiff was taken by ambulance to St. John's Riverside Hospital

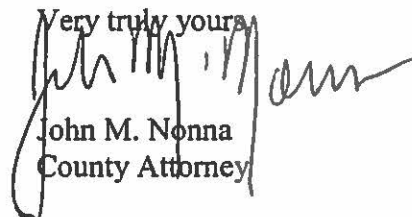


Emergency Room with complaints of pain to his knees, legs and head. He presented with a head wound which was sutured and he was diagnosed with a concussion.

After the accident, Plaintiff sought treatment from his orthopedic physician, and was diagnosed with a meniscus tear to the left knee, as well as a diagnosis of multiple right knee meniscus tears and cartilage injury. On January 13, 2016, Plaintiff underwent surgery on his left knee to repair the meniscus tear. Following the left knee surgery, plaintiff underwent physical therapy and required the use of a walking cane for about 2 months. The plaintiff initially treated conservatively on the right knee receiving cortisone shots on three occasions without relief. On April 18, 2018, Plaintiff underwent ambulatory surgery on his right knee, consisting of partial meniscectomy to the medial and lateral meniscus. Plaintiff claims his right knee continues to give him problems, is painful and unstable and gives out from time to time. Plaintiff was prescribed gel injections to lubricate the right knee joint and claims that he was advised that he will need a total right knee replacement. Plaintiff claims to continue to have difficulty walking for long periods of time and he claims to continue to suffer with headaches.

Liability has been determined against the County and Liberty Lines driver following plaintiff's motion for summary judgment. The court did not attribute any contributory negligence to the plaintiff. The trial issues would be limited to damages.

The settlement takes into consideration the uncertainty of litigation and the potential costs of trial, subsequent proceedings and potential appeal. The accompanying Act will authorize settlement of the lawsuit entitled Frank P. Vairo v. County of Westchester, et al., in the amount of \$450,000.00, Westchester County Supreme Court Index No. 50584/2016, inclusive of attorney's fees.

Very truly yours

John M. Nonna
County Attorney

JMN/jhf

BOARD OF LEGISLATORS
COUNTY OF WESTCHESTER

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Your Committee has carefully considered the subject matter, the settlement proposal, the attached Act and recommends authorizing the County Attorney or his designee to settle the lawsuit entitled Frank P. Vairo v. County of Westchester, et al., Westchester County Supreme Court Index No. 50584/2016, in the amount of \$450,000.00, inclusive of attorney's fees. An affirmative vote of a majority of the Board is required to pass this legislation.

Dated: White Plains, New York

, 2021

COMMITTEE ON

ACT NO. -2021

AN ACT authorizing the County Attorney to settle the lawsuit of Frank P. Vairo v. County of Westchester, et al., Westchester County Supreme Court Index No. 50584/2016, in the amount of \$450,000.00, inclusive of attorney's fees

BE IT ENACTED by the Board of Legislators of the County of Westchester as follows:

Section 1. The County Attorney is authorized to settle the lawsuit of Frank P. Vairo v. County of Westchester, et al., Westchester County Supreme Court Index No. 50584/2016, in the amount of \$450,000.00 inclusive of attorney's fees. The County will pay \$250,000.00 out of the self-insured retention fund, and RLI will pay the remaining \$200,000.00 of the proposed settlement.

Section 2. The County Attorney or his designee is hereby authorized and empowered to execute and deliver all documents and take such actions as the County Attorney deems necessary or desirable to accomplish the purpose of this Act.

Section 3. This Act shall take effect immediately.

FISCAL IMPACT STATEMENT

SUBJECT: Frank P. Vairo v. COW

NO FISCAL IMPACT PROJECTED

OPERATING BUDGET IMPACT

To Be Completed by Submitting Department and Reviewed by Budget

SECTION A - FUND

GENERAL FUND

AIRPORT FUND

SPECIAL DISTRICTS FUND

SECTION B - EXPENSES AND REVENUES

Total Current Year Expense \$ 250,000

Total Current Year Revenue _____

Source of Funds (check one): Current Appropriations Transfer of Existing Appropriations

Additional Appropriations

Other (explain)

Identify Accounts: 101-44-2100-4924

Potential Related Operating Budget Expenses:	Annual Amount
Describe: _____	_____
_____	_____
_____	_____

Potential Related Operating Budget Revenues:	Annual Amount
Describe: _____	_____
_____	_____
_____	_____

Anticipated Savings to County and/or Impact on Department Operations:

Current Year: _____

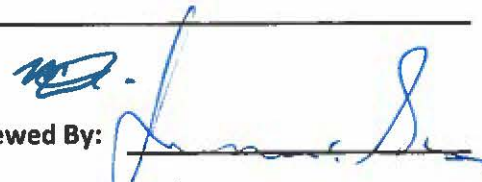
Next Four Years: _____

Prepared by: Michael Dunn

Title: Assistant Budget Analyst

Department: Budget

Date: February 11, 2021

Reviewed By: 

Budget Director

Date: 2/11/21

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

----- X

FRANK P. VAIRO,

Plaintiff,

Index No. 50584/2016

- against -

COUNTY OF WESTCHESTER, WESTCHESTER
COUNTY DEPARTMENT OF TRANSPORTATION,
DEPARTMENT OF PUBLIC WORKS AND
TRANSPORTATION and VIKKI E. CHAFOULEAS,
Defendants.

DECISION & ORDER

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In an action to recover damages for personal injuries, the plaintiff moves for summary judgment, pursuant to CPLR 3212, on the issue of liability:

Papers Considered

1. Notice of Motion/Affirmation of Jonathan F. Banks, Esq./Exhibits A-L;
2. Affirmation of Christopher J. Whitton, Esq. in Opposition;
3. Reply Affirmation of Jonathan F. Banks, Esq./Exhibits A-D.

Factual and Procedural Background

On January 6, 2015, the plaintiff, a pedestrian, was struck by a bus operated by the defendant Vikki E. Chafouleas and owned by the defendants County of Westchester, Westchester County Department of Transportation, and Department of Public Works and Transportation. The accident occurred as plaintiff was crossing Nepperhan Avenue within the crosswalk and the bus was attempting to make a left turn onto South Broadway.

Plaintiff testified that at the corner of Nepperhan Avenue, he waited for the light to turn and for the walk signal. Once the light turned and the walk signal was in his favor, plaintiff proceeded across the street within the crosswalk. He crossed the westbound lanes of Nepperhan Avenue and reached the median. He continued walking across the eastbound lanes of Nepperhan Avenue when he was struck by a Liberty Lines bus. Plaintiff did not hear any sirens as he was crossing the street.

Chafouleas testified that she stopped the bus at a red light on South Broadway with the intention of turning left onto Nepperhan Avenue. The bus was the first vehicle at

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the light. When the light turned green, she waited for traffic to clear and began to make a left turn. As she began to make the left turn, while in the intersection, she heard sirens. Chafouleas testified that she tried to get out of the way of the fire truck by making a wide left turn. Chafouleas then heard contact between the plaintiff and the mirror of the bus. She had observed the plaintiff step off the sidewalk into the crosswalk when the light changed.

Plaintiff now moves for partial summary judgment on the issue of liability. Plaintiff submits video surveillance of the accident obtained from the City of Yonkers. In opposition, defendants argue that Chafouleas was faced with an emergency situation.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (see *Zuckerman v New York*, 49 NY2d at 562).

Vehicle and Traffic Law 1146(a) provides, in pertinent part, that notwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary (see Vehicle and Traffic Law § 1146[a]). Here, the plaintiff established, prima facie, his entitlement to judgment as a matter of law on the issue of liability by presenting proof that he was walking within a crosswalk and that he looked for approaching traffic before he began to cross the street (see *Hamilton v Kong*, 93 AD3d 821 [2d Dept 2012]).

In opposition, defendant failed to raise a triable issue of fact. "The emergency doctrine acknowledges that when an actor is confronted with a sudden and unanticipated situation which leaves little or no time for deliberation and requires him to make a speedy decision without weighing alternative courses of conduct, the actor may not be liable for negligence if the actions taken are reasonable and prudent when evaluated in the context of the emergency conditions" (*Wu Kai Ming v Grossman*, 133 AD3d 742, 742 [2d Dept 2015]; *Aiken v Liotta*, 167 AD3d 826, 827 [2d Dept 2018]). Viewing the evidence in the light most favorable to the defendants, including the video surveillance, defendants failed to raise an issue of fact that the emergency doctrine is applicable or that Chafouleas'

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actions were reasonable and prudent since she observed the plaintiff in the crosswalk prior to making the left-hand turn.

Accordingly, the plaintiff's motion for summary judgment on the issue of liability is GRANTED.

Counsel for the remaining parties are directed to appear in the **Settlement Conference Part, room 1600, on November 19, 2019, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
September 26, 2019



HON. WILLIAM J. GIACOMO, J.S.C.