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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0741-10T2

HOWARD WEISS and DONNA WEISS,
as Guardians Ad Litem of SARAH
WEISS, a minor, and HOWARD WEISS
and DONNA WEISS individually,

Plaintiffs-Appellants,

vs.

THE JEWISH FEDERATION OF SOUTHERN
NEW JERSEY, INC., THE BETTY AND
MILTON KATZ JEWISH COMMUNITY CENTER,
JCC CAMPS AT MEDFORD, AARON GREENBERG,
DEENA SHERMAN, MARGIE DANNENBAUM,
SARAH BURD, ALEXIS KAPLAN,
GENERAL RECREATION, INC., and
RUSS HORROCKS,

Defendants-Respondents,

and

LANDSCAPE STRUCTURES, INC.,

Defendants.

Argued: May 18, 2011 - Decided: June 17, 2011

Before Judges Cuff, Sapp-Peterson and Fasciale.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-5310-06.

Carl D. Poplar argued the cause for appellants (Carl D. Poplar, P.A., attorneys;

Mr. Poplar and David E. Poplar, on the brief).

Gerard W. Quinn argued the cause for respondents The Jewish Federation of Southern New Jersey, Inc., The Betty and Milton Katz Jewish Community Center, JCC Camps at Medford, Aaron Greenberg, Deena Sherman, Margie Dannenbaum, Sarah Burd, and Alexis Kaplan (Cooper Levenson April Niedelman & Wagenheim, P.A., attorneys; Mr. Quinn, of counsel and on the brief).

Barbara J. Davis argued the cause for respondent General Recreation, Inc. (Marshall, Dennehey, Warner, Coleman & Goggin, attorneys; Ms. Davis, of counsel and on the brief).

PER CURIAM

Sarah Weiss was injured on playground equipment while attending a summer camp operated by defendant, the Betty and Milton Katz Jewish Community Center (JCC). Her parents, plaintiffs Howard Weiss and Donna Weiss, sued the JCC, the Jewish Federation of Southern New Jersey, Inc. (the Federation), the parent organization, and members of the staff (collectively the JCC defendants), the manufacturer, and the distributor of the playground equipment.

The court granted summary judgment to the JCC defendants. Judge Fox held that charitable immunity barred the action. The court also determined that the distributor of the equipment, defendant General Recreation, Inc. (GRI), and its sales representative, Russ Horrocks, were not negligent and were

exempt from liability under the New Jersey Products Liability Act (PLA), N.J.S.A. 2A:58C-1 to -11. Plaintiffs settled their claim against defendant Landscape Structures, Inc.

On appeal, plaintiffs argue that the JCC defendants are not entitled to invoke charitable immunity and GRI and Horrocks are not entitled to the immunity conferred by the PLA on a distributor. We disagree and affirm.

This court applies the same test as the motion judge to review orders granting summary judgment. Coyne v. N.J. Dep't of Transp., 182 N.J. 481, 491 (2005); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). The facts viewed in the light most favorable to plaintiffs, the non-moving party are as follows.

On July 13, 2004, Sarah Weiss, six years old and attending Camp Hilltop, broke her arm when she fell off of a playground ride known as the "track ride." Camp Hilltop was one of several camps operated by the JCC Camps at Medford (Medford). The ride consisted of a handle that the child held onto while sliding across an elevated ten-foot long track. Medford was administered by the JCC, which was established to supervise the activities of the Federation. Defendants Aaron Greenberg, the camp director; Deena Sherman, the associate director; and Margie

Dannenbaum, Sarah Burd, and Alexis Kaplan were all staff-members of the camp.

The Federation was formed to address concerns of the local Jewish community and to promote Jewish welfare programs nationally and internationally. The JCC mission statement listed its purpose as providing recreational and leisure activities, which enhanced and enriched Jewish identity of community members. Les Cohen was executive director of the JCC. He stated that proceeds from camp tuition were used to fund other programs at the JCC, including Meals on Wheels for the elderly, services for individuals with special needs, and scholarships.

Associate director Sherman certified that the camp conducted Jewish cultural activities, such as: activities centered around themes that promoted Jewish values, like "Love and Friendship, Jewish Successes, Maccabi, Jerusalem and Israel"; cultural activities led by Israeli staff members; recitation of a Hebrew blessing before lunch; Shabbat services, including recitation of blessings over candles, wine and bread, and Shabbat songs; and participation by local rabbis in religious services.

In 1996, the JCC purchased playground equipment manufactured by settling defendant, Landscape Structures, Inc.

(LSI). Its distributor, GRI, was represented by Horrocks, who met with Sherman two or three times to determine what equipment the JCC wanted. Sherman informed Horrocks that the JCC sought equipment for two playgrounds--one for children aged two to five, and one for children aged five to twelve. Horrocks explained how each piece of equipment would be used.

When Horrocks met with Sherman, he showed her a catalog, and received a "wish list" of the equipment the JCC wanted. Sherman had previously consulted with a woman, who had overseen the design and installation of several playgrounds in the area, to determine what equipment children seemed to enjoy. Horrocks sent Sherman's list to LSI, which made a drawing, and forwarded it to Sherman for her consideration. At the time, LSI's catalog stated that the track ride was appropriate for children aged five to twelve. Horrocks communicated the same information to Sherman. A few years after GRI and Horrocks sold the equipment, LSI advised prospective purchasers that the track ride was meant for children at least eight years old.

GRI was also the manufacturer's representative for Zeager Brothers (Zeager), a company that installed an engineered wood surface beneath the playground. Horrocks contacted Zeager on behalf of the JCC and GRI; Horrocks earned commissions for the sale of the wood surface to the JCC. GRI was not responsible

for the installation of the equipment or the surface. Another firm, not a party to this litigation, installed the equipment.

Dr. Howard P. Medoff, of Consulting Engineers & Scientists, Inc., submitted an expert report in which he opined that the ride was not safe for a child Sarah's age. He concluded that LSI and the JCC defendants were jointly liable for Sarah's injury; he rendered no opinion regarding GRI.

Plaintiffs alleged that GRI and Horrocks were strictly liable to them for injuries sustained by their daughter, the infant plaintiff, due to the defective playground equipment. They also allege that GRI and Horrocks negligently recommended a piece of playground equipment unsuitable for a six-year-old child. Judge Fox found that GRI and Horrocks acted solely as a distributor of the equipment. Accordingly, the judge held they are immune from liability for injuries suffered on a defective product. The judge also held that plaintiffs advanced no evidence to allow a reasonable jury to find that GRI and Horrocks acted negligently in the sale of the equipment on which the infant plaintiff was injured.

I

The PLA imposes strict liability on a manufacturer or seller of a product under certain circumstances. N.J.S.A. 2A:58C-2. The goal of the PLA is to impose liability on any

entity that puts the product into the stream of commerce, with the exception of the seller of a finished product to a consumer. Smith v. Alza Corp., 400 N.J. Super. 529, 541 (App. Div. 2008). The purpose of the product seller immunity provision is "to reduce litigation costs borne by innocent retailers in products liability actions," the seller must have no significant responsibility for the defect and the manufacturer may be served and financially responsible. Claypotch v. Heller, Inc., 360 N.J. Super. 472, 485 (App. Div. 2003) (internal citation and quotation marks omitted).

A product seller is one who sells, distributes, leases, installs, prepares or assembles a manufacturer's product, or who blends, packages, labels, markets, repairs, maintains or otherwise is involved in placing a product in the line of commerce. N.J.S.A. 2A:58C-8.[1] Generally, however, when a manufacturer is liable under the PLA, a seller may be relieved of liability if the seller has not exercised any control over the design, manufacture, packaging or labeling of the product.

[1] N.J.S.A. 2A:58C-8 defines "product seller" as "any person, who in the course of a business conducted for that purpose: sells; distributes; leases; installs; prepares or assembles a manufacturer's product according to the manufacturer's plan, intention, design, specifications or formulations; blends; packages; labels; markets; repairs; maintains or otherwise is involved in placing a product in the line of commerce."

N.J.S.A. 2A:58C-9b and d;[2] Claypotch, supra, 360 N.J. Super. at 485. On the other hand, a seller of a product remains subject to liability, if it "exercised some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged defect in the product which caused the injury, death or damage." N.J.S.A. 2A:58C-9(d)(1); Claypotch, supra, 360 N.J. Super. at 485.

In Smith, supra, this court addressed what activities constituted "significant control." 400 N.J. Super. at 541. A

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[2] N.J.S.A. 2A:58C-9a allows a product seller to file an affidavit identifying the manufacturer of a defective product. N.J.S.A. 2A:58C-9b provides that a product seller shall be immune from liability, unless it engages in activities specifically identified by statute. N.J.S.A. 2A:58C-9d sets forth those activities as follows:

> (1) The product seller has exercised some significant control over the design, manufacture, packaging or labeling of the product relative to the alleged defect in the product which caused the injury, death or damage; or
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> (2) The product seller knew or should have known of the defect in the product which caused the injury, death or damage or the plaintiff can affirmatively demonstrate that the product seller was in possession of facts from which a reasonable person would conclude that the product seller had or should have had knowledge of the alleged defect in the product which caused the injury, death or damage; or
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> (3) The product seller created the defect in the product which caused the injury, death or damage.

contract packager of an over-the-counter weight loss preparation invoked the immunity afforded by the PLA to a seller who does not exercise significant control over the packaging and labeling of a product. Id. at 534, 536-37. We held that a contract packager, who packaged the tablets in "blister" packaging, applied a label supplied to it by another, placed the boxed product into cartons, and shipped the cartons to a distribution center, did not meet the definition of a product seller and was not entitled to the immunity afforded by the PLA to product sellers. Id. at 536, 542. In so holding, we stated:

> [D]efendant packaged, labeled and shipped the product in bulk to distribution centers for ultimate sale. While these activities are integrally connected to the manufacturing process, N.J.S.A. 2A:58C-8, and represent the penultimate step in creating a finished product for sale, they nevertheless do not constitute the final act of "sale."
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> [Id. at 542.]

By contrast, an equipment distributor, who was "more than just a conduit of information," but exercised no control over the design of bakery equipment and its integration with conveyer lines and the power switch, was entitled to the immunity afforded by the PLA to a product seller. Torres v. Lucca's Bakery, 487 F. Supp. 2d 507, 516-18 (D.N.J. 2007). The distributor of bakery equipment obtained detailed information

from the buyer of its needs. Id. at 515-16. This information included the type of dough and number of pieces the buyer wanted to produce in a minute, in addition to a schematic drawing of the machine the buyer required. Id. at 516. Then the distributor conveyed the specifications to the manufacturer, who built the product in accordance with the specifications. Ibid. It is in this context that Judge Irenas held that, "[w]hile [the distributor] may well have been more than a mere conduit of information, that alone does not establish the requisite control over the specific design now alleged to be defective." Id. at 517.

Plaintiffs argue that GRI was not just an innocent seller but was inextricably involved in the planning and design of the playground. Plaintiffs claim that Horrocks stated that he met with Sherman to plan the playground, as such Horrocks and GRI engaged in activities in addition to the simple sale of the equipment and cannot enjoy the immunity afforded to a mere salesman by the PLA. Plaintiffs also assert that GRI played a role in installing the equipment because it represented Zeager, the supplier of the surface on which the installer placed the equipment. Therefore, plaintiffs believe that GRI should be held strictly liable for plaintiffs' injury.

To be sure, Horrocks met with Sherman to discuss her needs. He showed her catalogs of playground equipment. The record, however, established that Horrocks conveyed Sherman's request for equipment for two playgrounds: one suitable for children aged two to five, and one appropriate for children aged five to twelve. LSI designed the playground to these specifications. Horrocks played no role in the design or the choice of the equipment, other than to advise Sherman how the equipment was used. Under these circumstances, the PLA affords immunity to Horrocks and GRI because they did not exercise significant control over the design or the manufacture of the equipment on which the infant plaintiff was injured.

Similarly, the record reveals no involvement in the installation of the equipment, other than acting as the representative of the manufacturer of the surface on which the equipment was installed. Moreover, the installation was performed by a different company. Plaintiffs make no claim that the wood surfacing caused Sarah's injury. Therefore, even if Horrocks and GRI assumed a role beyond the mere sale of the surface, that role would not expose them to liability. There is nothing in this record to suggest the surface was defective and contributed to the infant plaintiff's injury.

II

Plaintiffs also allege that, regardless of the PLA, GRI was negligent because it provided equipment that was not safe for a six-year old even though the JCC had specified that the ride should be appropriate for children as young as five; it failed to warn the JCC; and it failed to instruct the JCC how to use the equipment.

Negligence cannot be presumed, it must be proven. Long v. Landy, 35 N.J. 44, 54 (1961). The mere showing of an incident which might give rise to negligence is not enough. Ibid. The burden of proof is on the plaintiff to show negligence and cannot be met based on conjecture. Ibid.

In ruling on a summary judgment motion, the judge must decide whether there is a genuine issue of fact or, instead, whether the moving party is entitled to judgment as a matter of law. R. 4:46-2(c). The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

The court must give the non-moving party the benefit of all favorable inferences. Id. at 536. But "when the evidence 'is so one-sided that one party must prevail as a matter of law,' . . . the trial court should not hesitate to grant summary judgment." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 2512, 91 L. Ed. 2d 202, 214 (1986)). An appellate court reviews a grant of summary judgment de novo, using the same standard as the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003).

The motion judge found no evidence of negligence. The record demonstrates that the LSI catalog in existence at the time of sale identified the equipment sold to the JCC as appropriate for the age of the children that would use the Medford playground. Any representation of the age-appropriate nature of the equipment came from material assembled by LSI. There is nothing in the record to suggest that Horrocks or GRI had any information independent of the information supplied to them by LSI. Plaintiffs did not provide evidence that the equipment was used incorrectly. Moreover, the expert report submitted by plaintiffs did not find GRI negligent for any of the reasons identified by plaintiffs. Plaintiffs' expert specifically stated that LSI and the JCC were directly responsible for the injury, but made no finding regarding GRI.

Accordingly, the motion for summary judgment in favor of Horrocks and GRI was properly granted.

III

Plaintiffs contend that the JCC is not entitled to charitable immunity because the camp did not further any charitable purpose.[3] Judge Fox found that the camp promoted Jewish culture and identity; therefore, the JCC defendants were entitled to charitable immunity. We agree.

N.J.S.A. 2A:53A-7 provides immunity from tort for any organization organized for a religious, educational, charitable or hospital purpose with respect to any person who is a beneficiary of the actions of that organization. However, individuals employed by a charitable organization may be held liable if they have behaved willfully or with gross negligence. N.J.S.A. 2A:53A-7. Plaintiffs do not allege willful or grossly negligent behavior.

The charitable immunity statute is meant to be liberally construed. N.J.S.A. 2A:53A-10; Bloom v. Seton Hall Univ., 307 N.J. Super. 487, 491-92 (App. Div.) (holding that a pub operated by a college catering to students and their guests reasonably related to the college's educational purpose), certif. denied,

[3] Plaintiffs do not contest that the infant plaintiff was a beneficiary of the works of the camp, if it is found to enjoy charitable immunity.

153 N.J. 405 (1998); Pomeroy v. Little League Baseball, 142 N.J. Super. 471, 474 (App. Div. 1976) (holding a Little League baseball league is an educational organization that meets the statutory test for charitable immunity). In order to determine whether an organization's dominant motive is charity, the court must consider the entity's aims, its origins, and its method of operation. Parker v. St. Stephen's Urban Dev. Corp., 243 N.J. Super. 317, 325 (App. Div. 1990). Accord Hamel v. State, 321 N.J. Super. 67, 74 (App. Div. 1999).

Non-profit status does not mean an organization's purpose is charitable. Rather, the source of an organization's funds determines whether its status is charitable. Ryan v. Holy Trinity Evangelical Lutheran Church 175 N.J. 333, 346 (2003). When charitable contributions make up a small part of the revenue of an organization, charitable immunity is not appropriate. Abdallah v. Occupational Ctr. of Hudson Cnty., Inc., 351 N.J. Super. 280, 287-88 (App. Div. 2002). However, income from some non-charitable activity would not be enough to prevent a corporation from obtaining immunity. Bieker v. Cmty. House of Moorestown, 169 N.J. 167, 178-79 (2001). Furthermore, an entity does not lose its immunity merely because it charges money for its services, unless it makes a profit for services totally unrelated to its organizational pursuits. Graber v.

Richard Stockton College, 313 N.J. Super. 476, 482 (App. Div.), certif. denied, 156 N.J. 409 (1998).

In Rupp v. Brookdale Baptist Church, 242 N.J. Super. 457, 459 (App. Div. 1990), a child was injured while attending a church day camp. The court found that the ultimate goal of the camp was to inculcate Biblical teaching. Ibid. The relevant question, according to the court, was whether the institution was engaged in the charitable works for which it was organized when the injury occurred. Id. at 463. In determining that the camp was actively involved in promulgating the religious and cultural purposes of the church, the court examined the camp handbook. Id. at 464-65. It described the religious activities of the camp. Ibid. We observed that daily prayers were indicative of the camp's religious endeavors. Ibid.

In Loder v. St. Thomas Greek Orthodox Church, 295 N.J. Super. 297, 299 (App. Div. 1996), the plaintiff fell as he was leaving the grounds of a church after attending a church function. The church function was a festival celebrating Greek food, music and culture. Id. at 299-300. The court addressed two issues: whether the festival was a "benevolent activity" or "charitable work" of the admittedly charitable association, and whether the plaintiff was a beneficiary of the charity. Id. at

301-02. As to the first question, we held that the church was entitled to immunity. Id. at 302. We said:

> Without doubt, the church here was engaged in the performance of the charitable objectives it was organized to advance, inasmuch as it was attempting to demonstrate to the community the rich traditions of the Greek Orthodox Church and "the importance of the Hellenic culture in [the] Orthodox religion" as expressed through Greek food and dance. The fact that [the plaintiff] paid for the dinner at the festival does not detract from our conclusion that the church was engaged in its charitable works . . . . The festival was not simply a fund raiser . . . .
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> [Id. at 302-03.]

Similarly, in Bloom, we held that a college that clearly qualified as an entity organized for religious and educational purposes did not lose its immunity for injuries occurring at a college-operated pub for students and their guests. 307 N.J. Super. at 491. We noted that "non-profit institutions, whether educational, religious or charitable, [are afforded] substantial latitude in determining the appropriate avenues for achieving their objectives." Ibid.

Plaintiffs concede that the JCC and the Federation were organized for charitable and religious goals.[4] However, they

[4] Pursuant to Article II of the Constitution of the Federation, its objectives are, in part, to coordinate and facilitate the functioning of Jewish communal life in its service area and to (continued)

contend that defendants never established that Medford was conducting camps in furtherance of the charitable goals of the JCC and the Federation. Plaintiffs point to the camp brochure, which made no mention of any religious or charitable purpose and only peripherally alluded to any Jewish cultural content.

In fact, the Camp Hilltop brochure lists Jewish cultural activities as one of fourteen possible recreational activities, including arts and crafts, boating and swimming. In addition, the record reveals that the camp activities focus on a different Jewish value each week. Lunch is preceded by a blessing each day. On Friday, campers participate in Shabbat services tailored to each age group. Finally, the campers participate in a Judeo-cultural activity throughout the summer led by one of the camp staff from Israel.

To be sure, the brochure published by the JCC was not as explicit as the camp literature in Rupp about the religious purpose of the camp. On the other hand, the record reveals and the motion judge found that the campers recited a daily prayer at lunch time, and participated in Shabbat prayers on Friday, and regular prayer was a significant factor in Rupp. Moreover,

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foster and promote cooperation among individuals and groups to implement Jewish welfare programs in and for the community.

like the camper in Rupp, Sarah, by virtue of her attendance at Medford, was a beneficiary of the JCC's charitable purpose.

Our review of the record demonstrates that the JCC defendants made a sufficient showing that they were promoting the charitable goal of furthering Jewish cultural awareness through their summer camp program. Only members of the JCC may enroll their children in the camps. Any excess revenue from the camps is used to fund other JCC and Federation activities. The Jewish cultural content of the camp was at least as significant as the Greek cultural content that the court upheld as a charitable purpose in Loder, supra, 295 N.J. Super. at 301-04. Even if Jewish programming was not the only function of the camp, Jewish themes were present in many camp activities. Moreover, as in Bloom, the JCC has wide latitude to conduct regular activities to further its religious, educational and cultural goals. We, therefore, hold the JCC established that the camp was furthering its charitable purpose even though in the camp brochure, Jewish cultural activities were listed in the camp brochure only as one of many possible programs.

Affirmed.