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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3082-15T4

GARY W. JACK and MAUREEN JACK,

Plaintiffs-Appellants,

v.

CALVARY CEMETERY AND CHAPEL
MAUSOLEUM, CATHOLIC CEMETERIES,
and THE DIOCESE OF CAMDEN,

Defendants-Respondents.

Argued May 23, 2017 – Decided December 11, 2017

Before Judges Messano and Suter.

On appeal from Superior Court of New Jersey,
Law Division, Camden County, Docket No. L-
3082-14.

Abraham Tran argued the cause for appellants
(Andres & Berger, PC, attorneys; Kenneth G.
Andres, Jr., of counsel and on the brief;
Abraham Tran, on the brief).

David M. Mayfield argued the cause for
respondents (Mayfield, Turner, O'Mara &
Donnelly, PC, attorneys; David M. Mayfield and
Sara K. Saltsman, on the brief).

The opinion of the court was delivered by

SUTER, J.A.D.

Gary W. Jack (plaintiff) and Maureen Jack, his wife, (collectively, plaintiffs) appeal the February 19, 2016 summary judgment order that dismissed their personal injury complaint against defendants Calvary Cemetery and Chapel Mausoleum (Calvary Cemetery), Catholic Cemeteries, and Diocese of Camden (Diocese) under the Charitable Immunity Act (the Act), N.J.S.A. 2A:53A-7 to -11. We affirm.

I.

In August 2013, plaintiff and his wife had just left the mausoleum chapel at Calvary Cemetery after attending a funeral service and were in the driveway area. As she was pushing him in a rolling walker, the front wheels lodged in a crack in the asphalt, causing plaintiff to fall from the walker. He sustained physical injuries, which included a broken wrist that required open reduction. The police officer who inspected the area after the accident noted "there was a crack in the asphalt that extended at least half way across the surface of the parking lot."

Plaintiffs filed a complaint in 2014 alleging negligence and gross negligence by defendants and sought damages for personal injuries.¹ Defendants' answer denied liability, raising the Act as an affirmative defense.

¹ Maureen Jack's claim was per quod.

Calvary Cemetery is owned by the Parish of Cathedral of the Immaculate Conception (Cathedral) and operated by the Diocese. Both Cathedral and Diocese are non-profit corporations formed under N.J.S.A. 16:15-1 to -17. Calvary Cemetery is not a legal entity² and has no existence apart from Cathedral and Diocese.

Plaintiffs do not dispute that "the Diocese . . . is a non-profit corporation established for 'religious, ecclesiastical, charitable and educational purposes.'" Diocese's certificate of incorporation provides as one of its purposes that it may "hold lands" for "religious, ecclesiastical, charitable and educational purposes for the use and benefit of the Roman Catholic Diocese of Camden." The Diocese is authorized "to establish churches, schools and societies." However, the ownership and operation of a cemetery is not one of the purposes expressly listed in Diocese's certificate of incorporation.

The Bylaws of Cathedral set forth that it is a "civil corporation operating in accord with N.J.S.A. 16:15-1."³ It "shall be operated for religious, charitable and educational purposes within the meaning of, and pursuant to, Section 501(c)(3)" of the

² The complaint does not discuss defendant "Catholic Cemeteries." This is not a separate legal entity.

³ N.J.S.A. 16:15-1 provides the procedures by which "any Roman Catholic church or congregation . . . may incorporate."

tax code. The Bylaws do not mention the ownership or operation of a cemetery.

Mark Boyce, an employee of Calvary Cemetery, testified during his deposition that he was aware of the crack, but stated there was never an issue "with people crossing it with walkers, wheelchairs, our church truck, our caskets." William Franchi, the Superintendent of Calvary Cemetery stated that it was important to maintain the cemetery "to make people feel comfortable when they're visiting loved ones." He was aware of minor areas needing repair but nothing "major." There were no complaints made about the area in "front of the mausoleum."

Following discovery, defendants filed a motion for summary judgment, seeking dismissal of the lawsuit based on the Act's immunity provisions. Plaintiffs opposed.

The Law Division judge granted summary judgment, finding there was no dispute the cemetery was owned by Cathedral and operated by Diocese or that the two were formed for "nonprofit purposes and organized exclusively for religious, charitable or educational purposes." The judge found the cemetery was "operated for religious [purposes]" and that "burial rights" were part of "the whole theme of religious practice." Plaintiff was found to be a beneficiary of that practice. "[H]e attended a religious ceremony and was leaving when he fell." The judge found that

defendants' awareness of the crack in the asphalt, was "not sufficient to raise this ordinary negligence case to a gross negligence case."

On appeal, plaintiffs contend the Act does not apply because the operation of Calvary Cemetery is not a charitable or religious work under the Act, and plaintiff was not a beneficiary of any charitable or religious work by defendants. Even if the Act applied, plaintiffs argue defendants' actions were grossly negligent, which precludes immunity under the Act. We disagree, finding no basis to dispute the summary judgment order in this case.

II.

We review a trial court order granting or denying summary judgment under the same standard employed by the motion judge. Globe Motor Co. v. Iqdaley, 225 N.J. 469, 479 (2016). The question is whether the evidence, when viewed in a light most favorable to the non-moving party, raises genuinely disputed issues of fact sufficient to warrant resolution by the trier of fact, or whether the evidence is so one-sided that one party must prevail as a matter of law. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016); see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). However, we review

issues of law de novo and accord no deference to the trial judge's legal conclusions. Nicholas v. Mynster, 213 N.J. 463, 478 (2013).

The Act is "remedial" legislation to be "liberally construed so as to provide immunity for the protection of nonprofit corporations organized for religious, charitable, educational or hospital purposes." Monaghan v. Holy Trinity Church, 275 N.J. Super. 594, 598 (App. Div. 1994). The Act provides in part,

a. No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association.

[N.J.S.A. 2A:53A-7(a).]

An entity qualifies for charitable immunity if it "(1) was formed for non-profit purposes; (2) is organized exclusively for religious, charitable or educational purposes; and (3) was promoting such objectives and purposes at the time of the injury

to plaintiff who was then a beneficiary of the charitable works." Bieker v. Cmty. House of Moorestown, 169 N.J. 167, 175 (2001). "Charitable immunity is an affirmative defense, as to which, like all affirmative defenses, defendants bear the burden of persuasion." Abdallah v. Occupational Ctr. Of Hudson County, Inc., 351 N.J. Super. 280, 288 (App. Div. 2002).

The statute's first two requirements are satisfied. There is no factual dispute that Calvary Cemetery is owned by Cathedral and operated by Diocese or that both entities are not-for-profit, organized for religious, charitable and educational purposes. The third requirement also is satisfied because defendants were engaged in promoting religious purposes when plaintiff, who was a beneficiary of those religious works, was injured.

A.

Plaintiffs contend that defendants' operation of a cemetery was not a religious activity, citing to Lawlor v. Cloverleaf Memorial Park, Inc., 56 N.J. 326 (1970). In Lawlor, the plaintiff was visiting a gravesite in a cemetery owned and maintained by "privately promoted nonreligious cemetery association[,]" when she was injured by falling into a concealed hole. Id. at 329. The Court held that cemetery associations generally were not "equatable" with charitable institutions. Id. at 332. "[T]he Legislature never contemplated the inclusion of privately promoted

nonreligious cemetery associations . . . within the highly special immunity afforded to associations 'organized exclusively for religious, charitable, educational or hospital purposes.'" Id. at 331.

Nor, according to plaintiffs, is the fact that defendants are religious entities determinative of the Act's applicability, where they are engaged in secular, profit making activities. Plaintiffs cite to Book v. Aquth Achim Anchai of Freehold, 101 N.J. Super. 559 (App. Div. 1968), where the plaintiff, a nonmember, attended a synagogue for its weekly bingo night, and was injured after the table she was seated at collapsed. Id. at 561. We held that "the operation of bingo games for profit was not one of purposes for which the defendant synagogue was organized []" even though the net profits of the games were used for religious and charitable purposes. Id. at 563.

Similarly in Kasten v. Y.M.C.A., 173 N.J. Super. 1 (App. Div. 1980), we did not find the Act to apply. "[W]hen an otherwise charitable or educational organization [is] engage[d] in commercial activities bearing no substantial and direct relationship to its general purpose, the organization loses the immunity it would customarily enjoy even though the derived profits are used for charitable purposes." Id. at 9.

Here, however, the facts are different. The cemetery in Lawlor was a private cemetery, not owned by a religious or charitable institution. The cemetery and mausoleum here are owned and operated by religious entities. At the time plaintiff fell from the walker, neither Calvary Cemetery nor the mausoleum were being used for commercial purposes, in contrast to the synagogue in Book that held bingo games or the YMCA in Kasten that operated a ski resort. Those activities had no substantial and direct relationship to the general religious purposes of the synagogue or YMCA. In contrast, the funeral was conducted by a priest in accord with the tenets and protocol of the Catholic faith. Defendants were engaged in an activity that had a substantial and direct relationship to its general religious purposes.

We are not persuaded by plaintiffs' argument that the lack of express reference to cemeteries in Diocese's certificate of incorporation or Cathedral's Bylaws is determinative in excluding cemeteries from their religious purposes. We understand that this funeral was conducted under the Catholic rites bringing it clearly within the religious works of the Catholic Church. We do not separate the operation of Calvary Cemetery from the fact that plaintiffs were leaving the funeral service when the fall occurred in the driveway outside the mausoleum. The Act's immunity does not stop at the church steps. See Monaghan v. Holy Trinity Church,

275 N.J. Super. 594 (App. Div. 2004) (holding the Act applied where the plaintiff fell in the church parking lot after leaving a church service).

B.

We agree with the trial judge that plaintiffs were beneficiaries under the Act of the defendants' religious works. The determination that a party is a "beneficiary" of an entity's charitable works is satisfied through a two-prong test. Ryan v. Holy Trinity Evangelical Lutheran Church, 175 N.J. 333, 350 (2003). First, it must be proven that the entity invoking the immunity "was engaged in the performance of the charitable objectives it was organized to advance." Ibid. (quoting Anasiewicz v. Sacred Heart Church, 74 N.J. Super. 532, 536 (App. Div.), certif. denied, 38 N.J. 305 (1962). Second, it must be established that the injured party is a "direct recipient" of the entity's charitable works. Ibid. (citing DeVries v. Habitat for Humanity, 290 N.J. Super. 479, 487-88 (App. Div. 1996), aff'd o.b., 147 N.J. 619 (1997). "Whenever an individual is a beneficiary, 'to whatever degree,' of the works of the charitable organization, he or she is precluded from maintaining a negligence action against that organization." Monaghan, supra, 275 N.J. Super. at 598.

In Anasiewicz, supra, 74 N.J. Super. at 536, the injured plaintiff, was a non-member of the parish who was attending a

Roman Catholic wedding at the church. Id. at 533. She slipped and fell on icy steps when she was leaving the church and sustained injuries. Id. at 534. We affirmed the trial court decision that held the lawsuit was barred by the immunity granted under the Act, finding that plaintiff was a beneficiary of the church's religious work. Id. 536-38. The plaintiff in Anasiewicz was a beneficiary of the works of the church even though she was not a member of the church or a participant in the wedding. Finding that the "defendant was engaged in the performance of a ritual of deep significance to it," when plaintiffs attended the wedding ceremony, they were "by their volition . . . concerned in, related to, and within the benefactions of the church." Id. at 537. "The 'works' of the institution were, therefore, a 'benevolence' shared in common by plaintiffs and all members of the community, present or absent, and without regard to their religious beliefs or persuasions." Id. at 538.

In Thomas v. Second Baptist Church of Long Branch, 337 N.J. Super. 173, 175 (App. Div. 2001) we held that the Act applied to bar a personal injury lawsuit brought by a member of a church who, upon arriving at church, tripped and fell on a raised metal gate on an abutting public sidewalk. In deciding that the plaintiff in Thomas benefited from the work of the church, we stated that the application of the Act "turn[ed] on the reason for the member's

presence on the property, which in this case was attendance at a church service" and not on who owned the property. Id. at 177.

Here, plaintiffs attended a religious funeral service conducted by a Roman Catholic priest at the mausoleum chapel. Plaintiff was injured in the driveway after leaving the service. Similar to the plaintiff in Anasiewicz, when plaintiffs attended the religious funeral service they were "by their volition . . . concerned in, related to, and within the benefactions of the church." Anasiewicz, 74 N.J. Super. at 536. They were as much a beneficiary of the religious works of the church as was the plaintiff in Anasiewicz.

Plaintiff cites no reason for us to distinguish between applications of the Act in the context of a wedding as opposed to a funeral conducted by a priest. As we said in Anasiewicz, by conducting the service, "the church contributed to the preservation of moral or sociological concepts held by the community generally," id. at 538, and plaintiffs shared in this benevolence.

That the service was conducted in a cemetery's mausoleum chapel was not a basis to distinguish the case. In Bixenmen v. Christ Episcopal Church Parish House, 166 N.J. Super. 148 (App. Div. 1979), where the Act was applied to bar suit, the fall down was in the parish house, not the church. Nonetheless, we found

that plaintiff was the beneficiary of the works of the church because she was there to attend a church service.

C.

Plaintiffs make the final argument that the Act's exclusion for gross negligence applies to bar immunity. The Act provides:

c. Nothing in this section shall be deemed to grant immunity to: (1) any trustee, director, officer, employee, agent, servant or volunteer causing damage by a willful, wanton or grossly negligent act of commission or omission, including sexual assault and other crimes of a sexual nature[.]

[N.J.S.A. 2A:53A-7(c)(1).]

The term "gross negligence" is not defined, but it "is commonly associated with egregious conduct . . . and is used to describe 'the upper reaches of negligent conduct.'" Kain v. Gloucester City, 436 N.J. Super. 466, 482 (App. Div.) (citations omitted), certif. denied, 220 N.J. 207 (2014). See Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 364 (2016) (citing to the Model Jury Charge (Civil) § 5.12 "Gross Negligence" (2009) that "gross negligence is something more than 'inattention' or 'mistaken judgment,'" it does not require willful or wanton misconduct or recklessness).

We are satisfied the record does not support a finding of gross negligence by defendants that would bar application of the

Act's immunity. Although aware of the crack in the asphalt, the area was heavily used by pedestrians and by the mausoleum to load and unload hearses, with no prior reported accidents or injuries.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION