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parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5560-15T4

CAROL LEONARD, Administrator
Ad Prosequendum and General
Administrator of the Estate
of DEVINE I. NICHOLS, Deceased,
and CAROL LEONARD, Individually,

Plaintiff-Appellant,

v.

CITY OF NEW BRUNSWICK,

Defendant-Respondent,

and

COUNTY OF MIDDLESEX, STATE
OF NEW JERSEY,

Defendants.

Argued October 17, 2017 – Decided November 14, 2017

Before Judges Hoffman and Gilson.

On appeal from Superior Court of New Jersey,
Law Division, Middlesex County, Docket No.
L-4433-14.

Alan Roth argued the cause for appellant
(Bendit Weinstock, PA, attorneys; Mr. Roth and
Nikhil S. Agharkar, on the briefs).

Mark D. Mory argued the cause for respondent (Dvorak & Associates, LLC, attorneys; Lori A. Dvorak, of counsel; Christine Klimczuk, on the brief).

PER CURIAM

Plaintiff Carol Leonard, individually and on behalf of the estate of her deceased son, Devine Nichols, appeals from the July 22, 2016 Law Division order granting the summary judgment dismissal of her complaint against defendant, the City of New Brunswick (the City). Plaintiff seeks to hold the City liable for her son's accidental drowning based upon its ownership and operation of Boyd Park, an improved property within the city, under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. Because we agree with the Law Division that under the TCA, the City is entitled to immunity from liability as a matter of law, we affirm.

This case arises out of tragic facts. We consider these facts, and all reasonable inferences from them, in the light most favorable to plaintiff as the responding party on the City's summary judgment motion. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 535 (1995).

On August 5, 2012, eleven-year-old Devine Nichols accompanied his older sister to Harvey Park. At around 2:30 p.m., Devine's sister returned home without him, believing he would remain in Harvey Park to play soccer. Later that evening, a witness

testified that she was at Boyd Park when she saw Devine and his friend walking in the middle of the Raritan River, during low tide. The witness further testified that it began raining heavily about five minutes after she saw the boys.

The following day, the dead bodies of Devine and his friend were found in the river. The medical examiner's officer declared their deaths an accidental drowning.

Thereafter, plaintiff filed this wrongful death action against the City, the County of Middlesex, and the State.¹ The City denied negligence and asserted immunity under the TCA. Plaintiff submitted an expert report in which the expert opined that the park created a dangerous condition in not restricting access to the river. She also faulted the City for failing to post warning signs concerning the dangers created by "tidal changes and resulting strong currents." After the parties conducted discovery, the City moved for, and the trial court granted, summary judgment. This appeal followed.

Public entity liability in New Jersey under the TCA is limited. Polzo v. Cty. of Essex, 209 N.J. 51, 55 (2012). Generally, a public entity is "immune from tort liability unless

¹ In an October 24, 2014 order, the trial court granted the State's motion to dismiss with prejudice. Plaintiff and the County of Middlesex stipulated to a dismissal with prejudice, which the court filed on April 15, 2016.

there is a specific statutory provision imposing liability." Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002).

The central issue presented concerns the scope of the City's immunity under the TCA, which governs damage claims against public entities. Manna v. State, 129 N.J. 341, 346 (1992). Particularly, the parties dispute the application of N.J.S.A. 59:4-8, which immunizes public entities from injuries caused by conditions on their unimproved public properties. Plaintiff argues Devine was last seen at Boyd Park, and the City was negligent in failing to install fences or barricades restricting access from Boyd Park into the river, or warning signs alerting the public to hazardous conditions. In opposition, the City contends they are immune from liability because Devine drowned in the Raritan River, which it maintains is unimproved.

Our review of an order granting summary judgement is de novo, and we must apply the same standards as the trial court under Rule 4:46. See N.J. Div. of Taxation v. Selective Ins. Co., 399 N.J. Super. 315, 322 (App. Div. 2008) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998)).

Typically, a public entity may be liable for injuries caused by a condition on its property if plaintiff establishes:

(1) that the property was in a dangerous condition at the time of the accident, (2) that there was proximate cause between the injury and dangerous condition, (3) that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred[,] and (4) that the public entity had notice in sufficient time to protect against the condition or that the condition had been created by an act or omission of a public employee acting within the scope of his [or her] employment.

[Brown v. Brown, 86 N.J. 565, 575 (1981); See also N.J.S.A. 59:4-2.]

N.J.S.A. 59:4-2 also requires a plaintiff to demonstrate that the public entity's conduct was "palpably unreasonable." See Muhammad v. N.J. Transit, 176 N.J. 185, 195 (2003).

The TCA qualifies these liability-imposing principals with specific immunities, including those set forth in N.J.S.A. 59:4-8 and N.J.S.A. 59:4-9. Both of these immunities cover "unimproved" public property or waterways. Public property remains unimproved unless the property has been substantially, physically modified from its natural state, "and when the physical change creates hazards that did not previously exist and that require management by the public entity." Troth v. State, 117 N.J. 258, 269-70 (1989).

Specifically, N.J.S.A. 59-4:8 mandates that:

Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including

but not limited to any natural condition of any lake, stream, bay, river or beach.

Similarly, N.J.S.A. 59:4-9 provides a related immunity for injuries caused by the condition of unimproved portions of "submerged lands" and the "beds of navigable rivers":

Neither a public entity nor a public employee is liable for any injury caused by a condition of the unimproved and unoccupied portions of the tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits owned by the State.

Our Supreme Court has noted the TCA's unimproved-property immunity serves "the legislature's avowed purpose of encouraging the public to use unimproved recreational property at its own risk." Troth, supra, 117 N.J. at 272. "Underlying these determinations is the New Jersey Legislature's policy judgment that the public should be permitted to use unimproved public property in its natural condition, but under the cloak of immunity." Kowalsky v. Long Beach Twp., 72 F.3d 385, 388 (3d Cir. 1995).

Here it is important to first identify the relevant property in order to determine whether it remains unimproved. Plaintiff argues the relevant property is Boyd Park because circumstantial evidence demonstrates Devine was in the park the day preceding his death, and the park allows "easy access to the Raritan River."

The City counters that the relevant property is the Raritan River, which caused Devine to drown.

We measure the relevant property in terms of the accident's situs. See id. at 389-90. From our review, the record clearly establishes that the Raritan River caused Devine's death, thereby making it the relevant property. To hold otherwise would impermissibly broaden the scope of N.J.S.A. 59:4-8.

We next turn to whether the Raritan River was improved, thereby rendering it outside of the scope of N.J.S.A. 59:4-8. Although plaintiff correctly asserts Boyd Park is an improved property,² she fails to demonstrate improvement to the Raritan River, such that it would qualify as an improved public property. As the motion judge aptly noted, "the fact that Boyd Park is improved land in parts does not make the river an improved part of the property."

To the extent that Devine's drowning might have been produced, in part, by the condition of the river bed below the water itself, N.J.S.A. 59:4-9 separately insulates the City from liability for such a dangerous condition within "submerged lands." N.J.S.A.


² According to the City, "Boyd Park contains a playground, amphitheater, tow path for jogging, walking and riding, and a boat dock operated by the County of Middlesex."

59:4-9 therefore provides an additional basis for immunity here, particularly since no one witnessed the actual drowning.

Therefore, examining the totality of plaintiff's evidence, we conclude "a reasonable jury could not find that [Devine's] accident occurred on property [that] is 'improved' under N.J.S.A. 59:4-8." Kowalsky, supra, 72 F.3d at 390. Plaintiff fails to demonstrate a disputed genuine issue of material fact. Accordingly, we affirm the motion court's grant of summary judgment.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION