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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3386-13T2

MELISSA GUERRA,

Plaintiff-Appellant,

v.

TOWNSHIP OF LYNDHURST,

Defendant-Respondent.

Argued June 3, 2015 – Decided July 29, 2015

Before Judges Fuentes, Ashrafi, and O'Connor.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-7702-12.

Monique D. Moreira argued the cause for appellant (Jose B. Moreira, P.C., attorney; Ms. Moriera, on the brief).

Natalia R. Angeli argued the cause for respondent (Botta & Associates, L.L.C., attorney; Christopher C. Botta and Ms. Angeli, of counsel and on the brief).

PER CURIAM

Plaintiff Melissa Guerra was twenty years old when she broke her forearm in a snow tubing accident in a public park that was owned and maintained by defendant Township of Lyndhurst. She sued the township seeking monetary compensation

for her injury. She alleged the township breached its duty of care to prevent the accident because it allowed sleigh riding and similar winter recreational activities to take place in an area where playground equipment at the bottom of the hill posed a danger to persons such as her.

Applying the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 14-4, the trial court granted summary judgment to the township and dismissed plaintiff's complaint. It determined that plaintiff did not demonstrate the park contained a "dangerous condition" of the property as required in N.J.S.A. 59:4-2. Plaintiff appeals from that order, arguing that a jury should be permitted to decide whether the township is liable for causing her injury. We affirm the trial court's order dismissing the lawsuit.

We view the record in the light most favorable to plaintiff as the party who opposed summary judgment. See R. 4:46-2(c); Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

On January 21, 2012, plaintiff and some friends went to Lewandowski Park in Lyndhurst to ride sleds and rubber tubes down a snowy slope. Lyndhurst is a densely-populated suburb of New York City within a few miles of the Lincoln Tunnel. Lewandowski Park is small in area, nestled among closely-spaced detached dwellings. It contains a basketball court, a walkway,

benches, and children's playground equipment such as slides and a jungle gym.

One side of the park has a sloped surface that the public used for sledding and similar winter recreation. Township officials were aware of that use and had not taken any action to prohibit it. There were no warning signs in the park about the sledding activity. Rather, township employees placed bales of hay at certain locations at the bottom of the hill to protect sled and snow tube riders from colliding with objects at the bottom of the hill. Plaintiff had been to the park in the past to enjoy sledding and snow tubing.

Plaintiff was aware that the playground equipment was located at the bottom of the hill. As she rode on a snow tube for the first time on the day of the accident, she could see bales of hay against a rock-climbing wall. She decided to avoid sliding into the hay and instead steered her tube to one side. That maneuver caused her to hit her arm against a plastic children's slide. She soon realized her arm was broken. Her boyfriend helped plaintiff off the snow and drove her home, after which she sought treatment for the injury.

Surgery was performed to insert permanent screws and rods in plaintiff's forearm to align her broken bone. The surgery

left two scars on plaintiff's forearm, the larger one about three inches in length.

In October 2012, plaintiff filed a lawsuit against the township alleging it was negligent because it allowed a dangerous condition to exist at Lewandowski Park and failed to ban sledding and snow tubing or to warn the public about the dangerous condition. She obtained the report of an engineering expert, who concluded that the township should not have placed playground equipment at the bottom of a hill used for that type of recreational activity, or the township should have warned the public about the danger. She also gathered reports from the records of the township police and emergency responders about several prior sledding accidents at Lewandowski Park.

After discovery was conducted in the lawsuit, the township moved for summary judgment on three grounds: that plaintiff's evidence did not establish a dangerous condition of the property as required by her claim under the TCA; that plaintiff could not prove the actions or omissions of the township were palpably unreasonable as further required by the TCA; and that the township is also immune from liability pursuant to the Landowner's Liability Act, N.J.S.A. 2A:42A-2 to -10.

The trial court granted summary judgment to the township on the first ground, relying primarily on Levin v. County of Salem,

133 N.J. 35 (1993). Rejecting the township's other grounds for summary judgment, the court held that whether the township's acts or omissions could be deemed palpably unreasonable is a question of fact for a jury to decide, see Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 130 (2001), and that the Landowner's Liability Act does not apply to Lewandowski Park because it is not open land in a rural setting, see Harrison v. Middlesex Water Co., 80 N.J. 391, 400-02 (1979). Plaintiff's appeal, therefore, pertains only to the TCA's provision regarding a dangerous condition of public property.

N.J.S.A. 59:4-2 provides:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
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> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
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> b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

To hold a public entity liable under this statute, plaintiff must prove: 1) that a dangerous condition existed; 2) that the condition created a foreseeable risk of the kind of injury that occurred; and 3) that the dangerous condition proximately caused the injury. Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998). In addition, plaintiff must prove either that township employees created the dangerous condition or that the township had actual knowledge or constructive notice of the dangerous condition within sufficient time to eliminate the danger. N.J.S.A. 59:4-2(a), (b); Carroll v. N.J. Transit, 366 N.J. Super. 380, 386-87 (App. Div. 2004).[1] Lastly, plaintiff must prove the township's action or inaction with respect to the

[1] The township argues it did not have knowledge or constructive notice of a dangerous condition of the property. Plaintiff refers to the police and emergency responder records of prior sledding accidents. Most of the reports describe sledding accidents and injuries but do not indicate collision with the playground equipment. Only one or two of the reports seem to include a reference to a child striking the playground equipment. We need not determine whether the township was on notice of foreseeable injury from the location of the playground equipment because the trial court did not base its summary judgment decision on that element of the statute.

dangerous condition was palpably unreasonable. N.J.S.A. 59:4-2; Garrison, supra, 154 N.J. at 286.

A "dangerous condition" is defined in the TCA as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." N.J.S.A. 59:4-1(a). "[W]hether a dangerous condition is present depends on a combination of factors relating to physical condition, permitted conduct, and objectively foreseeable behavior." Burroughs v. City of Atl. City, 234 N.J. Super. 208, 218-19 (App. Div.), certif. denied, 117 N.J. 747 (1989). "The term 'dangerous condition' as defined in N.J.S.A. 59:4-1(a) refers to the physical condition of the property itself and not to activities on the property." Sharra v. City of Atl. City, 199 N.J. Super. 535, 540 (App. Div. 1985). "If a public entity's property is dangerous only when used without due care, the property is not in a 'dangerous condition.'" Garrison, supra, 154 N.J. at 287.

In granting summary judgment, the trial court found the facts of this case analogous to those of Levin, supra, 133 N.J. at 35, a case in which the Supreme Court focused its analysis on the actual cause of the plaintiff's injuries and held there was no liability under the TCA when the plaintiff's activity rather

than a defective condition of the public property caused the accident. Id. at 43-50.

In Levin, the plaintiff was injured when he dove seven feet off a bridge into a "swimming hole" that was used "for decades" by local residents. Id. at 38-39. The plaintiff hit his head on the bottom of the river and became paralyzed. Id. at 38. The area under the bridge was subject to submerged "shifting sandbars" that had resulted from the widening of the river channel when the bridge was constructed sixteen years before the plaintiff's accident. Id. at 39.

Nine years earlier, a teenage girl had sustained a similar injury, but the defendant counties on opposite sides of the bridge had not altered the structure or design of the bridge, had not restricted access from the bridge, had not posted effective signs prohibiting diving from the bridge, and had not arranged for police supervision of recreational activities at the site. Ibid. Only one of the government entities had passed an ordinance prohibiting diving from the bridge. Id. at 40. There was a dispute in the record about whether warning signs had been erected, and the plaintiff claimed that the warning signs, if any, were not effective. Ibid.

The Court's analysis in Levin followed the reasoning of a line of cases from California, including Campbell v. City of

Santa Monica, 125 P.2d 561 (Cal. Ct. App. 1942); Sykes v. County of Marin, 117 Cal. Rptr. 466 (Ct. App. 1974); Bartell v. Palos Verdes Peninsula School District, 147 Cal. Rptr. 898 (Ct. App. 1978); and Fredette v. City of Long Beach, 231 Cal. Rptr. 598 (Ct. App. 1986). Levin, supra, 133 N.J. at 46-48. In particular, our Supreme Court found similarity between the diving accident in Levin and a skateboarding accident in Bartell, supra, 147 Cal. Rptr. at 898. As explained by the Levin Court:

> Even though the school district allegedly knew that children used its playground for skateboarding and took no measures to prevent the activity, the court found that plaintiffs failed to state a cause of action for a "dangerous condition of public property" because the injury was the direct result of the children's dangerous conduct, not a defect in the physical condition of the property.
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> [Levin, supra, 133 N.J. at 47].

Applying that reasoning, the Levin Court held that the counties responsible for maintenance of the bridge were entitled to summary judgment. It noted "there was no missing plate, no broken bolt, no defect in the bridge itself that caused or contributed to cause the tragic accident." Id. at 49. The dissenting opinion in Levin summarized the Court's holding to be that the bridge "did not constitute a dangerous condition at the

time of [the] accident because the [b]ridge was not physically flawed." Id. at 50 (Stein, J., dissenting).

The Levin decision explained further the distinction between a dangerous condition of the property and an activity that results in an accident. It posited that if the "effects" — which we understand to mean the accident itself — were "to determine whether a dangerous condition of property exists . . . [then] whenever a danger exists, so does a dangerous condition of property." Id. at 49. Where the nature of the activity rather than the condition of the property was dangerous and caused the injury, the public entity was not liable.

Here, the trial court applied this analysis from Levin to conclude that it was plaintiff's snow tubing activity rather than a dangerous condition of Lewandowski Park that caused her accident and resultant injury.

Plaintiff argues that Levin has been superseded by subsequent decisions of our Supreme Court in which the public entity was held to have potential liability. She cites Posey v. Bordentown Sewerage Authority, 171 N.J. 172, 176-77 (2002), where a child nearly drowned in a pond and subsequently died after he walked through a town-installed drainage culvert to a privately-owned pond that was unexpectedly deep. The boy fell into the water as he emerged from the culvert, and he could not

get himself out. Id. at 177. The flow from the drainage pipe had deepened the pond. Ibid.

The public entity defendants in Posey argued that they did not control the alleged dangerous condition because the accident occurred in the privately-owned pond. Id. at 182-83. The Court held the public entities could nevertheless be held responsible for creating a dangerous condition on another's property as a result of the water flow from the culvert built or maintained by them. Id. at 185-88. The Posey case did not address directly the primary issue that is in dispute here – whether it was the dangerous condition of the property or the plaintiff's activity that caused the accident.

Nor do we find much similarity between this case and the facts of Smith v. Fireworks by Girone, Inc., 180 N.J. 199 (2004), upon which plaintiff also relies. In Smith, the ten-year-old plaintiff found an unexploded firework in a public park after a fireworks display. He took the firework home. A month later, the firework exploded and injured the boy. Id. at 203-04. The primary issue before the Court was whether a dangerous condition of the public park caused the boy's injuries in factual circumstances where the accident occurred elsewhere and much later.

The Court held there was a "dangerous condition" of the public property within the meaning of the TCA. Id. at 217. The fact that the injury occurred later and in a different location did not take the case outside the language of N.J.S.A. 59:4-2. Smith, supra, 180 N.J. at 213-17. The focus of Smith was on the timing and the location of the accident rather than its causes.

Here, the township's argument and the trial court's reasoning were that the playground equipment was not a dangerous condition of the public park because it was not defective. Rather, plaintiff's snow tubing was the activity that injured her. Like Levin, the court focused on what actually caused the injury.

Also relevant and partially helpful to plaintiff's argument is Garrison, supra, 154 N.J. at 285, where the seventeen-year-old plaintiff injured his knee while playing touch football at night in a public parking lot when he fell on uneven pavement. The Court described the issue before it as "the extent to which the reasonableness of a claimant's use of property is relevant to the determination whether the condition of the public entity's property was dangerous." Id. at 284. The Court stated it must "ascertain whether the plaintiff had engaged in an activity that is so objectively unreasonable that liability for the resulting injuries may not be attributed to the condition of

the property." Id. at 292. In this case, plaintiff argues she engaged in reasonable recreational activity that was silently approved by the township and that it was the location of the playground equipment rather than the unreasonableness of her snow tubing activity that was the cause of her broken arm.

As in this case, municipal officials in Garrison were aware that the parking lot was used for nighttime touch football games and had done nothing to prohibit that use or to warn against it. Id. at 285. However, the Court in Garrison noted that the condition of the parking lot was not "dangerous to all foreseeable users" and did not pose a risk to others who used the lot appropriately for its intended uses. Id. at 293. The Court concluded that playing touch football at night on a poorly lit property "constitutes a use of public property that is as a matter of law 'without due care,'" and "[t]he fact that plaintiff was injured does not prove that the condition of the property posed a risk of harm to anyone who exercised due care in the use of the property." Ibid.

Plaintiff argues reasonably that her snow tubing activity was not an improper use of Lewandowski Park. But, like the parking lot in Garrison and the bridge in Levin, the park was not constructed for snow tubing. It was constructed to provide, among other uses, a playground with slides and a jungle gym for

young children. There was no defect in the construction of the park or the playground equipment for its intended uses. It was plaintiff's decision to use the sloped area of the park for her snow tubing activity rather than the condition of the property itself that caused plaintiff's accident and injury.

Furthermore, as the Court stated in Levin, supra, 133 N.J. at 43, plaintiff's alternative claims that the location of the play-ground equipment constituted a poor design decision might be immune from liability under another provision of the TCA, N.J.S.A. 59:4-6. Similarly, a claim that the township did not enact ordinances to prohibit sledding and snow tubing at the park and failed to supervise the activity would also be immune from liability pursuant to provisions of the TCA, N.J.S.A. 59:2-4 and -7.

The trial court correctly concluded that plaintiff could not prove all the required elements of N.J.S.A. 59:4-2, specifically, a dangerous condition of the property. The clearly visible location of the playground equipment at the bottom of a slope that plaintiff chose to use for snow tubing did not render the park dangerous property within the meaning of the statute.

Affirmed.