TIMOTHY SOPKO et al. v. DENISE SOPKO

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-2104-05T52104-05T5

TIMOTHY SOPKO and

DENISE SOPKO,

Plaintiffs-Appellants,

v.

LOGAN TOWNSHIP, COUNTY

OF GLOUCESTER, STATE OF

NEW JERSEY,

Defendants,

and

S.J. KUPSEY, JR.

and COLLEEN KUPSEY,

Third Party Plaintiffs-

Defendants,

or

IN THE ALTERNATIVE, ALAN H.

SCHORR, individually, ALAN H.

SCHORR & ASSOCIATES, P.C.,

ERIC LAVDAS, ESQUIRE and

MICHAEL H. BERG, ESQUIRE,

Defendants-Respondents,

and

NICHOLAS CERICOLA,

Third Party Defendant.

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Submitted: September 27, 2006 - Decided February 14, 2007

Before Judges A. A. Rodr guez and Collester.

On appeal from the Superior Court of New Jersey, Law Division, Gloucester County, L-836-01.

Victoria S. Rand, attorney for appellants.

Fredric J. Gross, attorney for respondents.

PER CURIAM

Timothy Sopko and Denise Sopko (collectively "plaintiffs"), were injured in an automobile accident on May 15, 1999. The accident occurred at the intersection of Route 44 (a State road) and Floodgate Road in Logan Township. Plaintiffs were riding northbound on Route 44 in a Ford pickup truck. Defendant Nicholas Cericola, then age 72, was stopped at a stop sign on Floodgate Road facing east. To his right, the intersection is lined by a tall privet hedge. This hedge grows in an area that is owned by the adjoining landowners, Stanley J. Kupsey and Colleen Kupsey. However, part of the hedge is in the State's right of way of Route 44.

Cericola testified at a hearing in the Municipal Court as follows:

I stopped, but the bushes were so high I couldn't see into the intersection, so I proceeded very slowly out. When I got out where I could see, I saw this truck coming and I had my foot on the brake, but I had the accident.

Plaintiffs' vehicle overturned as a result of the impact, which occurred in the northbound lane.

Plaintiffs retained Edward Berg and Eric Lavdas of the law firm of Alan Schorr and Associates, P.C. (collectively the "Schorr firm") to represent them in a lawsuit against Cericola and the Kupseys. Later, plaintiffs became dissatisfied with the Schorr firm and retained present counsel, who decided that there was a potential claim against the State. However, the Schorr firm had not filed a tort claim notice pursuant to N.J.S.A. 59:8-8, a section of the New Jersey Torts Claim Act, N.J.S.A. 59:1-1 to 9-7 (TCA). Plaintiffs' counsel sought the assistance of the Schorr firm to provide a certification in support of a motion to file a notice of late claim, pursuant to N.J.S.A. 59:8-9. The Schorr firm declined to provide a

certification, asserting that plaintiffs never advised them about a potential claim against a public entity. The motion to file a notice of late claim was denied.

Plaintiffs then added a claim for malpractice against the Schorr firm. This appeal concerns the Law Division's grant of summary judgment dismissing plaintiffs' claim against the Schorr firm for legal malpractice.

The Schorr firm moved for summary judgment, arguing that there was no liability on the part of the public entities and, consequently, no claim for legal malpractice. In opposition, plaintiffs submitted the report of their expert, Nicholas Bellizzi, a safety engineer. Bellizzi visited the scene and reviewed related materials. He opined that: 1) the sight distance, required by the State's Department of Transportation (NJDOT) was deficient at the intersection, 2) the failure to clear the privet hedge resulted in a "dangerous condition," 3) this "dangerous condition" was a proximate cause of the accident, 4) the substandard sight clearance was "open and obvious" to the public entity who was often at the location, and 5) the area had an adverse accident history.

Defendants' expert, Walter P. Kilareski, Ph.D., P.E., agreed that the sight view was impeded from the stop line, but found no dangerous condition. He opined that there was a clear view, if the driver proceeded slowly far enough beyond the stop line and privet hedge. Then a driver would have a clear sight of view of Route 44 towards the right.

Preliminary, the judge directed the parties to discuss three cases: Johnson v. Township of Southampton, 157 N.J. Super. 518 (App. Div. 1978); Morrison v. Township of Lumberton, 319 N.J. Super. 355 (App. Div. 1999); and Wymbs v. Township of Wayne, 163 N.J. 523 (2000). Subsequently, the judge ruled in favor of the Schorr firm as to public entity liability; dismissed them from the case and denied plaintiffs' motion for reconsideration.

Plaintiffs moved for leave to appeal. We denied leave. Plaintiffs settled with Cericola and the Kupseys and then filed this appeal.

On appeal, plaintiffs contend that the judge: (1) "erred in granting summary judgment where there were competing expert reports on the issue of 'dangerous condition' as defined pursuant to the Tort Claims Act;" (2) "erred in concluding that Morrison v. Township of Lumberton, 319 N.J. Super. 355 (App. Div. 1999), controlled this case;" (3) erred by "failing to observe the distinction between artificial and natural conditions when determining public entity liability;" and (4) "erred in finding that the public entity had no notice of the dangerous condition." We are not persuaded by these contentions and affirm.

The flaw in plaintiffs' arguments is to treat the State as an ordinary landowner and ignore the public entity immunity provided by the TCA. Put another way, although an adjoining landowner may be liable when hedges growing on its property impede visibility at an intersection, thereby causing an accident, a public entity has no duty to inspect or trim the hedges when they happen to lie in its right of way.

The TCA grants immunity to a public entity for all claims, except those which are expressly exempted from the grant of immunity. N.J.S.A. 59:2-1(a); Coyne v. DOT, 182 N.J. 481, 488 (2005); Fleuhr v. City of

Cape May, 159 N.J. 532, 539 (1999); Feinberg v. N.J. Dept. of Envtl. Prot., 137 N.J. 126, 133-34 (1994). Thus, "immunity is the rule and liability the exception." Smith v. Fireworks by Girone, Inc., 180 N.J. 199, 207 (2004) (citing Posey ex rel. Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 181-82 (2002)). One of those exceptions concerns the presence of a dangerous condition on public property, imposing liability on a public entity for injury caused by a condition of its property, if it is established that: (a) the property was in a dangerous condition at the time of the injury; (b) the injury was caused by the dangerous condition; (c) the dangerous condition created a reasonably foreseeable risk of injury; and (e) either a negligent or wrongful act of a public employee created the condition, or, if not so created, the public entity had actual or constructive notice of the danger. N.J.S.A. 59:4-2.

Here, upon viewing the facts in the light most favorable to plaintiffs and against the statutory standard, we conclude that they have failed to meet the first prong. We agree with the judge that there was no dangerous condition within the meaning of the TCA. Plaintiffs argue that the sight obstruction created by the privet hedge was a proximate cause of the accident and that it created a dangerous condition of public property. This ignores settled law. In Johnson, supra, 157 N.J. Super. at 525, we held no public entity liability existed in the case of a motorcyclist who lost control of his vehicle, struck a guardrail and suffered injuries. The motorcyclist claimed that a public entity was liable because the grass, trees and underbrush that bordered the road, created a dangerous condition. We held that the public entity was not liable, noting that:

The road in question was unimpeded. Like any road or highway, there were obstructions next to the right-of-way which interfered with compass range visibility but the roadway itself was unobstructed. There was nothing in or on the roads in question which constituted a dangerous condition.

[Id. at 523.]

Thus, the Johnson rule was born, i.e., sight limitations on the side of the road caused by the vegetation are not in and of itself a dangerous condition. Ibid. Rather, such sight limitations notify the driver that due care must be employed. Ibid. Our Supreme Court affirmed this holding and reasoning in Kolitch v. Lindedahl, 100 N.J. 485 (1985). The Court observed that the rule in Johnson was that "the limited ability to make observations on either side of the road caused by trees and vegetation simply served as a warning that due care must be maintained." Id. at 496-97. Hence, the foliage view obstruction did not create a dangerous condition. Ibid. Plaintiffs rely on Shuttleworth v. Conti Const. Co., 193 N.J. Super. 469 (App. Div. 1991). In that case, a motorist went through a stop sign that was partially obscured by foliage. The plaintiff sued the county. The county moved for summary judgment. We reversed the grant of summary judgment as to the county because, viewing the facts in the light most favorable to the plaintiff, there was evidence that the county failed to keep the stop sign clear of vegetation and foliage. Id. at 473-74. Shuttleworth is distinguishable from the facts in this case because here, it is undisputed that the stop sign was not obstructed. In fact, Cericola asserted that he stopped at the sign and then proceeded though the intersection.

In Morrison, supra, 319 N.J. Super. at 355, a motorist ran a stop sign fatally injuring plaintiff's decedent. The motorist testified that the foliage created a tunnel effect, which made the impression that an

intersection was not approaching and she did not see the stop sign until it was too late. This was corroborated by plaintiff's testimony. There were claims against the township and county alleging that they had created and maintained a dangerous condition. Citing Johnson, we affirmed the grant of summary judgment as to the public entities. We distinguished Shuttleworth from Johnson, concluding that Johnson applies because there was no evidence that the stop sign was in any way obscured or blocked by vegetation. Morrison, supra, 319 N.J. Super. at 358.

Affirmed.

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