JOSEPH STAIR v. NEW JERSEY TRANSIT INC.

NOT FOR PUBLICATION WITHOUT THE

APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

DOCKET NO. A-0

JOSEPH STAIR,

Plaintiff-Appellant,

v.

NEW JERSEY TRANSIT INC., and/or

STATE OF NEW JERSEY and/or

STATE OF NEW JERSEY DEPARTMENT

OF TRANSPORTATION,

Defendants-Respondents.

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April 24, 2015

Submitted March 10, 2015 Decided

Before Judges Fisher and Manahan.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-2744-12.

Aiello, Harris, Marth, Tunnero, Pastor & Schiffman, P.C., attorneys for appellant (James R. Pastor, of counsel; Michael Fernandes, on the brief).

John J. Hoffman, Acting Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Jessica M. Anderson, Deputy Attorney General, on the brief).

PER CURIAM

Joseph Stair appeals from the grant of summary judgment in favor of defendant New Jersey Transit (NJT). Stair sought damages for injuries he sustained after a slip and fall at the Woodbridge train station. We affirm.

We recite the essential facts from the summary judgment record, viewed in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

On January 30, 2011, Stair slipped and fell on black ice while walking on the Woodbridge train station platform. Stair commuted to work on a regular basis utilizing the train station. Prior to the incident Stair did not notice icy conditions. The day prior to Stair's fall, as a result of weather conditions, the platform was salted by NJT. On the date of the accident, four NJT employees inspected the platform for ice.1

NJT moved for summary judgment arguing that common law snow and ice removal immunity barred Stair s claims and that he failed to establish the requisite elements for liability under the Torts Claims Act (TCA). NJT additionally argued Stair failed to obtain an expert s opinion substantiating alleged gross negligent conduct on its part.2 Stair opposed the motion.

After oral argument, Judge Heidi Willis Currier, in an opinion from the bench, determined NJT was immune from liability for snow and ice removal. Stair appealed.

In reviewing a ruling on a summary judgment motion, we apply the same standard as that governing the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); Antheunisse v. Tiffany & Co., 229 N.J. Super. 399, 402 (App. Div. 1988), certif. denied, 115 N.J. 59 (1989). Summary judgment is designed to provide a prompt, businesslike and inexpensive method of resolving cases. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Summary judgment is only appropriate if there is no genuine issue as to any material fact in the record

The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law.

[R. 4:46-2(c).]

The Brill Court outlined the standard for deciding a summary judgment motion

[A] determination whether there exists a "genuine issue" of material fact that precludes summary judgmentrequires the motion judge to 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 fact-finder to resolve the alleged disputed issue in favor of the non-moving party.

[Brill, supra, 142 N.J. at 540.]

The judge must not decide issues of fact in considering a summary judgment motion. Ibid.;Judson, supra, 17 N.J.at 75. Therefore, the motion must be considered on the basis that the nonmoving parties' assertions of fact are true and "grant all the favorable inferences to the non-movant." Brill, supra, 142 N.J.at 536. The determination is whether "the evidence 'is so one-sided that one party must prevail as a matter of law.'" Id. at 540(quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct.2505, 2512, 91 L. Ed.2d 202, 214 (1986)). "If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule4:46-2." Ibid.(citations omitted).

The common-law doctrine of sovereign immunity has been replaced by the Torts Claims Act, which governs tort claims against public entities. See Rochinsky, supra, 110 N.J.at 404 ("In 1972, the Legislature enacted the [TCA] in response to mounting judicial disfavor with the doctrine of sovereign immunity."). Accordingly,

"[t]he public policy of this State is that public entities shall be liable for their negligence only as set forth in the [TCA]." Pico v. State, 116 N.J. 55, 59 (1989). "[T]he dominant theme of the [TCA] is immunity, with liability as the exception." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 495 (App. Div. 2007); Fleuhr v. City of Cape May, 159 N.J. 532, 539 (1999). "As the Comment to N.J.S.A. 59:2-1 . . . states, courts should employ an analysis that first asks 'whether an immunity applies and if not, should liability attach.'" Bligen v. Jersey City Housing Authority, 131 N.J.124, 128 (1993) (quoting Attorney General's Task Force Report on Sovereign Immunity, comment to N.J.S.A. 59:2-1 (1972)); Pico, supra, 116 N.J. at 59; Saldana v. DiMedio, 275 N.J. Super. 488, 496 (App. Div. 1994). When both liability and immunity exist, immunity prevails. N.J.S.A. 59:2-1; Tice v. Cramer, 133 N.J. 347, 356 (1993); Macaluso v. Knowles, 341 N.J. Super. 112, 117 (App. Div. 2001).

[Dickson v. Twp. of Hamilton, 400 N.J. Super. 189, 195 (App. Div.), certif. denied, 196 N.J. 461 (2008).]

Unless "otherwise provided by this act, a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entityor a public employee or any other person." N.J.S.A.59:2-1(a).

Applicable as well is the common-law immunity for the snow- removal activities of public entities, seeMiehl v. Darpino, 53 N.J. 49, 53-54 (1968) (holding public entities are immune from liability for negligent snow removal), which "exists even though [TCA] statutory immunities may not apply." O'Connell v. N.J. Sports & Expo. Auth., 337 N.J. Super.122, 132 (App. Div.) (citing Rochinsky, supra, 110 N.J.at 402, 405, 414), certif. denied, 168 N.J. 293 (2001); see alsoN.J.S.A.59:2-1(b) (insuring that any immunity provisions provided at common law will prevail over the liability provisions of the TCA).

In Rochinsky, the Court noted the policy behind affording governmental entities immunity for injuries occurring due to ice and snow

By their very nature, however, snow-removal activities leave behind "dangerous conditions." No matter how effective an entity's snow-removal activities may be, a multitude of claims could be filed after every

snowstorm. We can conceive of no other government function that would expose public entities to more litigation if this immunity were to be abrogated.

Moreover, irrespective of the outcome of such litigation, the cost of defending claims would be substantial. Damage awards and settlement costs would inevitably drive up public entityinsurance costs. It was precisely such a situation that the Legislature sought to avoid by enacting the [TCA][.]

[Rochinsky, supra, 110 N.J.at 413-14.]

The Court explicitly rejected the argument that immunity results "only for injuries caused by weather conditions as they exist in their natural state, before snow-removal operations begin." Id. at 412. Rather, immunity applies when snow or ice is an alleged cause of an accident. Miehl, supra, 53 N.J.at 53. Shoveling, snow-blowing and salting fall "under the umbrella of snow removal activities." Lathers v. Twp. of W. Windsor, 308 N.J. Super. 301, 305 (App. Div.) (citation and internal quotation marks omitted), certif. denied, 154 N.J.609 (1998). Despite challenges, this legal precept has not been altered. See e.g., Luchejko v. City of Hoboken, 414 N.J. Super.302, 317-18 (App. Div. 2010) (concluding city was immune where its snow-removal activities created a snow bank, which led to icy conditions causing the plaintiff's fall), aff'd on other grounds, 207 N.J.191 (2011); Lathers, supra, 308 N.J. Super. at 304-05 (holding a township was immune where snow pile left next to sidewalk melted and then refroze, causing conditions which caused plaintiff's fall); Davenport v. Borough of Closter, 294 N.J. Super.635, 641-42 (App. Div. 1996) (Borough immune where inadequate snow removal on a sidewalk and street forced plaintiff to walk through a vacant lot, where she fell).

The MiehlCourt held

Frequently, the area contiguous to plowed streets, including private driveways and sidewalks, is encumbered by additional snow through street plowing. To accede to plaintiff's thesis would be to require a municipality to completely remove all snow and ice -- to in effect "broom sweep" all the traveled portion of the streets, driveways and sidewalks where natural snowfall has been disturbed by any removal of street snow. Only in this manner could a municipality be certain that no accident could occur from the creation of a "new element of danger." Such a requirement would impose upon the municipalities of this state a duty not only impractical but also well-nigh impossible of fulfillment. The high cost of such an undertaking could make the expense of any extensive program of snow removal prohibitive and could result in no program or in an inadequate partial program. Patently, some cleaning of snow is better than none. The public is greatly benefited even by snow removal which does not attain the acme of perfection of "broom swept" streets. Relief from fallen snow which does not eliminate all danger of accident is better than none.

The unusual traveling conditions following a snowfall are obvious to the public. Individuals can and should proceed to ambulate on a restricted basis, and if travel is necessary, accept the risks inherent at such a time. To require the individual members of the public to assume the relatively mild additional danger presented by accumulated piles of snow resulting from street snow removal is a minor sacrifice to exact when the alternative could be municipal failure to eliminate the far greater danger caused by

permitting snow to remain as deposited by natural forces. The public benefit arising from snow removal far outweighs any slight, private detriment which could accompany such a municipal act.

[Miehl, supra, 53 N.J. at 53-54.]

Here, snow or ice on the station's platform was the cause of Stair's injury. Notwithstanding, in accord with Miehl, we find NJT was not legally required to "attain the acme of perfection of 'broom swept'" platforms. As such, we conclude, as did Judge Willis Currier, that NJT was immune from liability.

Affirmed.

1 The incident was captured on video. NJT does not dispute the incident's occurrence nor the resultant injury.

2 A public entity's liability could be predicated upon "palpably unreasonable conduct" separate and apart from its snow-removal function. Rochinsky v. State, Dep't of Transp., 110 N.J. 399, 415-17 (1988). This claim was not raised or briefed on appeal. We consider it abandoned. R. 2:6-2; River Vale Planning Bd. v. E & R Office Interiors, Inc., 241 N.J. Super. 391, 402 (App. Div. 1990); see also Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").