DAVID TIMPANARO, individually and as Executor and Administrator Ad Prosequendum of the ESTATE OF ANTHONY J. TIMPANARO, LIA TIMPANARO, individually and as Guardian of minor, C. T. Plaintiff-Appellants, v. JENKINSON'S PAVILION, INC., a corporation of the State of New Jersey, JENKINSON'S SOUTH, INC., a corporation of the State of New Jersey, JOHN DOES 1-10 (fictitious names), and ABC CORPS. 1-10 (fictitious entities), Defendant-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000183-24 T4 CIVIL ACTION ON APPEAL FROM ORDERS FOR SUMMARY JUDGMENT AND DENYING CROSS-MOTION AND MOTION FOR RECONSIDERATION SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NUMBER: MRS-L-1110-21 Sat Below: HON. STEPHAN C. HANSBURY, JSC

BRIEF ON BEHALF OF PLAINTIFF-APPELLANTS

SARNO DA COSTA
D'ANIELLO MACERI LLC
Cynthia A. Walters, Esq. (#083049)
440 Route 22 East, Suite 170
Bridgewater, New Jersey 08807
(908) 927-0200
cwalters@sarnolawfirm.com
ATTORNEYS FOR PLAINTIFF-APPELLANTS

TABLE OF CONTENTS

JUDGMENTS/ORDERS/RULINGS APPEALED FROM

ALL ITEMS/EXHIBITS SUBMITTED TO COURT ON MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION

PARTIES' STATEMENTS/ COUNTERSTATEMENTS OF MATERIAL FACTS

OTHER ITEMS/EXHIBITS SUBMITTED TO COURT ON MOTIONS

TABLE OF AUTHORITIES

CASES

STATUTES/CODES

MODEL JURY CHARGES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Plaintiffs in this wrongful death, premises liability action, appeal a May 28, 2024 order granting summary judgment to Defendants and August 26, 2024 order denying reconsideration. The court erroneously held Defendants, Jenkinson's South ("JSouth") and Jenkinson's Pavilion ("JPav") (collectively "Jenkinsons or Jenkinson Defendants"), commercial boardwalk business and abutting beach owners, bear no responsibility for monitoring, warning about or protecting business invitees from life-threatening conditions present for more than three days before the death of Anthony Timpanaro, a 69-year-old business patron. He and family members were standing on damp sand near the water's edge, when a swell from an off-shore hurricane caused sudden, powerful and large wave run-up on the beach, knocking him over and dragging him into the surf and rip current. His son, daughter-in-law and 7-year-old grandson, helplessly observed him screaming and drowning before help could arrive.

Decedent and his family, day-trippers with little beach experience, met on what seemed a beautiful September day at JSouth's beach/amusement venue to enjoy its boardwalk amusements, food concessions and beach where the grandson could dig. They were unaware about an off-shore hurricane or government land warnings for large swells, "life-threatening" surf and rip currents which could overtake unwary beach patrons. When they paid to park two cars in JSouth's beach and amusement lot, they observed a sign stating no

swimming when lifeguards off duty. JSouth's attendant informed them the beach was nonetheless open and directed them to enter from the boardwalk through an unlocked, open seawall gate that would otherwise have blocked beach access.

As they entered the beach, Plaintiffs observed a sign stating BEACHES CLOSED NO SWIMMING at the foot of the ramp. They observed others on the beach, sitting, walking and wading confirming the beach was open, except for swimming---just as JSouth's attendant advised. Defendants do not dispute the beach was open, conceding the above sign was intended only as a deterrence and the owners were aware about and expected people to be on the beach. Defendant owners were required to monitor beach and weather conditions but provided no warnings about the dangerous conditions they knew or should have known about. Nor did they close the beach access gate to protect patrons.

The court granted Defendants motion for summary judgment. While agreeing the beach was, in fact, open, the court held Decedent had exceeded the scope of his business invitee status by standing on wet sand near the water's edge which the court equated to "voluntarily" entering the water. It further held the warning sign was adequate as a matter of law and Defendant owed no duty to close its sea wall gates regardless of the dangerous conditions. In this regard the court misinterpreted language of two coastal permits issued to Defendant referencing the Public Trust Doctrine. It erroneously concluded the permits

required public access preventing gate closure. In so doing the court ignored coastal regulations and testimony of DEP witnesses to the contrary as well as testimonial and photographic evidence that JSouth regularly closes its gate both in and off-season. It also ignored applicable regulations allowing curtailment of upland beach access when safety concerns are presented, as here.

The court went on to hold Defendant's negligent conduct was immunized, in any event, by the Landowner Liability Act ("LLA"), N.J.S.A. 2A:42A-2, et seq. which protects rural landowners who consent to recreational uses by licensees or trespassers on their 'premises.' The court overlooked that LLA immunity was improper when conduct endangers business invitees. Further, JSouth's developed beach, part of and abutting its year-round boardwalk businesses in a densely populated suburban coastal borough, is not the type of 'premises' to which the LLA applies. It is neither open nor easily accessed from the boardwalk and its use is capable of easy supervision and control by simply closing and locking gates. Even if immunity were applicable, the court failed to consider whether the alleged failures were grossly negligent, willful or malicious--statutory exceptions to immunity. Finally, the court failed to consider the cross-motion to bar defense expert testimony that no standard of care exists for beach owners in the off-season as "moot."

PROCEDURAL HISTORY[1]

On May 19, 2021, Plaintiffs, the Estate of Anthony Timpanaro ("Decedent") by his son, David Timpanaro, ("David") as administrator and individually, and his daughter-in-law, ("Lia"), individually and as guardian of Decedent's minor grandson ("C.T.") filed suit against Defendants, JSouth and JPav and John Doe defendants seeking compensatory and punitive damages for Decedent's wrongful drowning death, pain and suffering and negligent infliction of emotional distress (observation of death), as a result of Defendants' negligent, grossly negligent, willful, wanton, malicious and/or reckless conduct. (Ja1- 13, ¶¶ 30-34, 37, 40-41). As alleged, Defendant owners and operators of multiple boardwalk businesses, parking lots and abutting beach front as well as the beach access gates (¶¶ 9-12) failed to monitor coastal warnings or have procedures in place to do so, failed to warn business invitees about dangerous conditions presenting safety hazards to beach pedestrians and failed to close a sea wall gate in order to prevent beach access from the boardwalk during this period when its beaches were unguarded, all of which led to the September 23, 2020 drowning. (¶¶30-32) During the days leading up to the drowning, the National Weather Service ("NWS"), part of the National Oceanic and Atmospheric Administration ("NOAA") had issued land advisories warning

[1] Transcript reference, "T" is to the August 23, 24 reconsideration oral argument.

about the "life-threatening" surf and rip currents from an off-shore hurricane affecting the east coast including Point Pleasant Beach which advisories were unknown to Plaintiffs who were aware only of beautiful beach weather. These advisories were, nonetheless, readily available to Defendants (¶¶19-20). Defendants filed their answer on August 31,2021 (Ja24-29) conceding only JSouth's principal place of business was on the boardwalk (¶6) that no lifeguards were on duty on the date of drowning (¶21) and that Decedent had been pulled from the ocean by police officers who responded to calls for help (¶26). They pleaded no affirmative statutory defenses in their answer other than referencing New Jersey's punitive damages, comparative fault and joint tortfeasor statutes (Ja27-28 ¶¶1, 6, 12).

After completing discovery, Defendants filed a motion for summary judgment on Jan. 3, 2024, supported by counsel's certification with exhibits (Ja139) and Statement of Material Facts (Ja110) raising for the first time Plaintiffs' claims were barred by the New Jersey Landowner Liability Act (N.J.S.A. 2A:42A-2 et seq) and claiming they had no off-season duty to monitor or warn about dangerous ocean water conditions "other than with signs," and their only duty was to keep their beach "open" per their New Jersey Department of Environmental Protection ("DEP") coastal permits, thus eliminating any duty, as a matter of law, to protect business patron by closing their gates (Ja35-36).

Plaintiffs' Response and Counterstatement of Material Facts (Ja122) were presented in opposition to the motion and in support of a cross-motion filed on Feb. 20,2024 asking the court to declare Defendant's duty was that owed to business invitees and to bar the defense expert from testifying that no standard of care existed for off-season beach patrons (Ja36). On May 28,2024 the court granted summary judgment, dismissing the Complaint (Ja30) and denying Plaintiffs' cross-motion as "moot" (Ja 32), along with a "Statement of Reasons." ("Op I") (Ja34). Plaintiffs filed a motion for reconsideration on June 17,2024 supported by a certification of counsel (Ja120) with an identical counterstatement of facts as presented in opposition to summary judgment, except for correction of paragraph numbering (Ja122). The court heard argument on August 23,2024, T (Ja71) at which time it orally denied the motion subject to issuing its Order (Ja55) and Statement of Reasons ("Op II") denying reconsideration on Aug. 26,2024 (Ja58). Plaintiffs' notice of appeal from both orders was filed on Sept. 18,2024 (Ja101) with case information statement (Ja107). A Transcript Completion and Delivery Certification was filed on Oct. 21, 2024 (Ja 109).

STATEMENT OF FACTS

On September 23, 2020, Decedent, Anthony Timpanaro, a 69-year-old grandfather, met his adult son (David), daughter-in-law (Lia) and 7-year-old

grandson (C.T.), at JSouth's parking lot on Arnold Avenue, behind its boardwalk arcade (Ja903, 904) in the Borough of Point Pleasant Beach. The parking lot displayed signage for BOARDWALK*BEACH*GAMES*ARCADE. See, photos (Ja 438, 439). From there it was an easy walk to the boardwalk, food, rides and other amusements. Pulitano Dep:18:21-24 (Ja912). The beach is separated from the boardwalk by a wooden sea wall which blocks access except through sliding steel gates and ramps controlled in-season by gate attendants who restrict access to paying patrons (Ja730). These gates can be closed and locked. Pulitano Dep: 54:11-17 (Ja921). See, photos from JSouth's business office (Ja1045, 794-796). Per its 2017 Open Space Plan, the borough is "an important destination for many state residents seeking a day at the beach, a stroll on the boardwalk.... From early spring to late fall" there are "an estimated 13,500 to 32,655 visitors daily." (Ja 716). Defendants' beach/boardwalk venue is located in the heart of this densely populated "suburban coastal" community with a year-round population of 4,544 on 1.4 acres making it among the more densely populated municipalities in the state. See, 2017 data (Ja718-722) and overhead photo view showing proximity of town and beach. (Ja707).

Unlike most New Jersey beach towns, Jenkinson's boardwalk businesses remain open well into October and many remain open year-round. P. J. Storino, part owner along with other family members of both Jenkinson entities, detailed

in a March 26, 2021 certification, in an insurance coverage lawsuit, the nature and profitability of Jenkinson's off-season businesses (Ja697) which include an amusement park, indoor and outdoor arcades, stores, restaurants, food service establishments, bar, nightclub, indoor aquarium, and miniature golf complex (Ja700 ¶15) They claimed joint business losses in excess of $10m over three off-season months in 2020 due to Covid. (Ja701 ¶23).

According to Ken Taylor, Vice President and CFO of JSouth and 21 other related companies, the Arnold Avenue beach and boardwalk businesses are privately owned by JSouth, a long-time Storino family enterprise. The owners of Codefendant, JPav, another Storino family business, own half of JSouth, and also own the beach and businesses along the boardwalk to the north of JSouth. While the companies are separate, there is some overlap such as marketing for "Jenkinson's Boardwalk" a shared brand name, and a graphics department for signage, but each entity has its own year-round security force, lifeguard staff, beach department and boardwalk offices. Dep 12:1-10; 15:2-16:12; 20:19-22; 21:17-23; 22:1-11; 24:23-26:13 (Ja737-41). Taylor testified that JSouth's outdoor boardwalk rides stay open through October but some indoor businesses like the arcades remain open year-round. Dep 23:9-16 (Ja740)

A.S. Storino, Part owner, Manager and President of JSouth, described the economic connection between the boardwalk businesses and their abutting

beach. A 3-person department markets the beach because it is a "draw" to the boardwalk businesses. While patrons "are using the beach they are going to shop in the shops, hangout in the arcades, and park" in their lots. Dep 34:12-35:6 (Ja752). See also, statement of local resident and neighbor, D. Settle, (Ja833) (describing how JSouth leaves beach access gates open in the off-season "when the weather is nice" because "they like to have people frequent the shops on the boardwalk and if the gates are closed that's gonna make people …turn around and go home" and "it does keep the people on their boardwalk to frequent all of the businesses there which are open – most of them anyway." He further stated, JSouth keeps its Arnold Avenue gate "open through mid-October because of the really nice warm days and people like to walk on the beach…like the day-trippers still come down…they wanna walk the boardwalk and maybe look for shells and they'll keep it open. But as the weather turns colder, they do keep that gate closed" (Ja 835).

The economic value of the beach to the boardwalk businesses is so important that the Jenkinsons Defendants filed a lawsuit against the government in 2014, after Hurricane Sandy, to prevent the government from taking an easement via eminent domain in order to build dunes for flood control. See, State v. N. Beach 1003, LLC, 451 N.J. Super. 214, 227 (App. Div. 2017) (describing and upholding requirements for taxpayer funded dune and berm replenishment

to include public access easements from private upland beaches since "federal funding was conditioned on public access and use"). As the Court explained, while "many property owners voluntarily granted easements, other property owners declined" and therefore the DEP initiated actions to "acquire the remaining easements through eminent domain proceedings." Id. at 225. A.S.Storino explained if such an easement had been granted, "a good portion" of JSouth's beachfront would have been replaced with dunes. "Basically, we would have lost all our beach business which...would have been a trickle effect for every other business on the boardwalk." Dep 37:2-5, 37:18-38:2 (Ja752-53).

Jenkinsons settled with the government in 2017. The agreement (Ja501) allowed JSouth to maintain its beaches as private, made condemnation "unnecessary," (Ja530 ¶48) and precluded placement of dunes. It also eliminated the requirement for vertical public access from its upland which would have imposed significant requirements including financial limitations on what JSouth could charge for beach access during the summer months. See discussion, infra. The only easement required as a result of the settlement was to the municipality for a dune tie-in to neighboring beach properties owned by others, at the southernmost tip of JSouth's property, which easement did not establish but specifically "limited public access" through those dunes (Ja509 ¶18, Ja 556). In exchange Jenkinsons would receive no taxpayer aid and the Jenkinsons

Defendants would build, at their own $5.8 million cost, (Ja 505, 564), a beach berm and sea wall ("Bulkhead") (Ja505) with sliding metal gates at beach entrances and would privately replenish their beaches. Jenkinsons was required to obtain a construction permit for the seawall along with regular beach maintenance/seasonal structures permits from the DEP (Ja22). They were also required to prepare Operation and Maintenance ("O & M") manuals for the sea wall and beach berm (Ja511-12 ¶21), to include plans and "criteria for determining the existence of a significant storm event and the appropriate response…with reference to forecasts of the National Weather service and/or National Oceanic and Atmospheric Administration." (Ja 512 ¶ ii).

The O & M sea wall manual (Ja782), in turn, required JSouth to identify a 'key site' manager to implement the plan (Ja788). A.S. Storino testified he was the designated key site person responsible for implementation, including inspections and storm monitoring. Dep 86:11-14 (Ja765). He testified he watches weather reports daily, in any event, and if there is a "tropical storm or hurricane …that is something that would catch [his]attention" and he would monitor to determine if it's "going to come ashore or…stay out and we won't get any damaging winds or flood surge out of it." Dep at 90:2-91:10 (Ja 766).

The seawall manual, prepared by JSouth's engineer consultant (Ja782) requires "deployment" of the sea wall (flood) gates and "clear[ing] the beach of

all people and closing the access of the beach to the public" and "lock[ing]" the gates prior to a "significant storm event" (Ja792) which is defined by any of three criteria (Ja789) including:

> Designation of the… Boardwalk within a National Weather Service Coastal Flood Warning area, provided a surge of at least 3 feet is predicted to occur at the Watson Creek Station of the Stevens Flood Advisory System, https://hudson.dl.stevens-tech.edu.sfas

Importantly, neither the language of the settlement with the State, nor the O& M manual, precluded or prohibited closure of the sea wall gates at any time.

A.S.Storino testified he does look at NOAA advisories "periodically" in the off-season by checking his computer. Dep 92:17-93 (Ja766). Nonetheless he claimed unawareness about Hurricane Teddy or any storm event toward the end of 2020 that would impact the east coast. Dep 111:1-25 (Ja771) ("nothing rings a bell.") If he had checked his computer he would have discovered Hurricane Teddy's storm system had been heading north and expanding since mid-September. NOAA's Hurricane Teddy advisories for "Hazards Affecting Land" during the 3-day period leading up to the drowning stated that "large swells generated by Teddy are affecting… the east coast of the United States…[and are] likely to cause life threatening surf and rip current conditions." (Ja873-881), Indeed, Teddy was the fourth-largest largest Atlantic hurricane by diameter of gale-force winds on record, had already become a Category 2 hurricane by

September 16 and eventually reached up to 850 miles in diameter. See, graphic (Ja584) and "Hurricane Teddy Forecast Advisory number 42 located on the NOAA website (https://www.nhc.noaa.gov/archive/2020/a120/a1202020.fsadv.042 .shtml?). Yet, A.S.Storino testified even when there are dangerous off-shore conditions, if it looks out his window to be a nice day then it is simply "a beautiful day at the beach." Dep 113:17-20 (Ja771). In fact, although not at work during the Sept. 23 drowning, he recalls "it was a beautiful day, people were sitting on the beach getting a suntan. That's not really a dangerous condition." Dep 114:19-24 (Ja772). See also, P.J.Storino Dep74:25-75:17, 94:3-6 (Ja 856, 861)(he was present that day and he did not think it was unusual that people were on the beach since it looked like the kind of day he would expect to see people there even though an off-season sign on the beach said BEACH CLOSED NO SWIMMING. Other JSouth's employees understood the risks to beach goers from dangerous off-shore conditions. Pulitano, a long-time employee, working as an off-season parking attendant, knew from living and working at the shore it was dangerous to walk near the water's edge. Dep34:9-15 (Ja 916) ("God forbid there could be a big wave, anything could happen.") Nonetheless, if she were asked by a patron if the beach was open she would say 'yes,' but "you can go on the beach…there's no lifeguards, so…you should not be going in the water, but yes, you can go on the beach, throw a frisbee, sit on

the beach, read a book." Dep 26:4-9, 27:2-5 (Ja 914). She also testified that she would generally point and explain to patrons how to get to the beach. Dep 59:4-11 (Ja 922) To her the BEACHES CLOSED NO SWIMMING sign on the beach was simply signaling "there's no life-guards and there is no swimming." Dep 38:10-39:18 (Ja 917). In-season Chief lifeguard, Albanese described having experienced people knocked over by waves and dragged out by rip current and explained in order for that to occur, it has to be a very big, high velocity wave and rip current-- the kind of condition caused by strong winds or hurricanes. He therefore, stressed the importance of warning people against even wading. Dep 23:8-25:13, 28:9-17, 31:10-18 (Ja196-198), 61:14-19 (Ja205).

In-Season versus Off-season Safety Precautions

During the regular beach season JSouth's beaches were protected not only by life-guards but by multi-colored flags in the sand with "water condition" signs explaining red flags mean "no swimming or wading" and prohibiting "entering" water. See, photo (Ja 931). These flags and signs were removed in early September leaving a single red flag on a flagpole 20-40 feet from the Arnold Avenue entrance with no explanatory signage. A.S.Storino Dep 69:14-70:16, 71:3-72: 4 (Ja 760-6). Whereas in-season JSouth closes its gates at night when guards go off duty, Storino testified "[t]he Arnold Avenue gate is always open," in the off-season when the beach is unguarded. A.S.Storino Dep 109:3-

10 (Ja770). This testimony was contradicted by witness testimony and photographs showing that gate closed many days in the off-season (Ja794-800). Instead of warning against entering the water or wading, as it does in-season, JSouth placed a sign near the Arnold Avenue entry ramp stating BEACHES CLOSED NO SWIMMING (Ja 932), left its gate open and encouraged use of the unguarded beach, except for swimming.

The September 23 Drowning

Plaintiffs, David and Lia, selected Jenkinsons as the place to meet Decedent because "that particular corner and location had everything, pizza, the arcade and had sand." David dep 34:1-7 (Ja153). At JSouth's parking lot Plaintiffs observed 2 large signs: one advertising parking for "JENKINSON'S BOARDWALK, BEACH, RIDES, GAMES, ARCADE"; and the second stating "NO SWIMMING WHEN LIFEGUARDS ARE OFF-DUTY." See, photo (Ja439). Pulitano, who collected the $5 parking fee per car explained "the beach is closed for swimming but the gate that's open … is right over the walkway is the only gate that's open. Feel free to go on the beach and walk and play…" David Dep 45:23-46:8 (Ja155-56); Lia Dep 53:22-24 (Ja492).

Plaintiffs neither observed a red flag nor would they have understood its meaning. David Dep 62:4-13 (Ja160). Plaintiffs saw the BEACHES CLOSED NO SWIMMING sign (Ja903) which they interpreted to mean the beach "is

closed for swimming,"—just as the parking lot attendant advised. Lia Dep 53:13-25 (Ja492) The open beach was confirmed by the open gate and presence of others on the beach, some even wading (Ja185-186) (photos that day).

As the defense conceded, plaintiffs "came to the beach to sit and enjoy the fall season, the boardwalk, and any stores that may have still been open. They were not dressed for, nor were they planning on going swimming." See, report of defense expert, James Cresbaugh, at 6 (Ja366).

After setting up their chairs, removing their shoes and Decedent rolling up his jean pants to his calf and removing his long sleeve shirt, he (wearing his T-shirt, jeans, camera in hand) joined Lia and C.T. on the wet sand near the water's edge where they were looking for shells and C.T. had been chasing sea gulls. See, Photos (Ja185-188); Lia Dep 24:17-19, 28:22-29:5 (Ja485-486). A sudden powerful wave from an ocean swell knocked Decedent over while his daughter-in-law and C.T. were able to avoid it. Suction from several more rapid waves pulled him quickly out before anyone could rescue him. The family helplessly watched him screaming and drowning before help arrived. See, David Dep 40:7-25 (Ja154); 71:25-75:16 (Ja162-63).

Clearly if JSouth had closed its sea wall gates in the face of the reports about the life-threatening off-shore conditions this tragic death would not have occurred. As a defense in this lawsuit, A.S. Storino testified JSouth is not

permitted to close its sea wall gates because of the Public Trust Doctrine incorporated into JSouth's coastal permits. Dep at 56:8-57:23 (Ja757).

The Public Trust Doctrine, CAFRA Permits and Coastal Zone (CZM) Rules

The Public Trust Doctrine states that no one person can own the "tidal waterways to the mean high water ("MHW") line, (representing an "arithmetic average of the high water heights… over an… 18.6-year… cycle…for the entire New Jersey coastline). Freudenberg, Robert, NJDEP, Coastal Management Office, "Public Access in New Jersey: the Public Trust Doctrine and Practical Steps to Enhance Public Access," www.nj.gov/dep/cmp/access/publicaccess handbook .pdf (2006) ("Freudenberg") at 1. Rather, "the rights of the public are vested in the state as owner and trustee." Id. A landowner may not block or obstruct the ability to horizontally cross private beach on a reasonable amount of dry sand parallel ("lateral') to the MHW line. Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 326, cert. denied, 105 S.Ct. 93 (1984). In addition, Municipalities must allow perpendicular access from upland areas to reach tidal waters. Van Ness v. Borough of Deal, 78 N.J. 174 (1978).

Perpendicular access from private upland beach has been legally contentious, implicating curtailment of private ownership rights. Such access is usually accomplished through the use of a conservation restriction (easement) either voluntarily given or required as a condition in coastal development

permits which must be recorded and dedicated "in perpetuity" pursuant to New Jersey Conservation Restriction Act, N.J.S.A. 13:8B-1et. seq. Freudenberg at 3. In Matthews, supra, the Court established a balancing test for deciding litigated disputes (holding citizens may cross private upland on designated accessways or vertical corridors "only as reasonably necessary to gain access to and enjoy public trust lands" and identified factors for determining 'reasonable necessity' including whether existence of alternate municipal or other access eliminated the need for interference with private ownership interests.

The Coastal Area Facility Review Act ("CAFRA"), N.J.S.A. 13:19-1 et seq, originally enacted in 1973 to regulate coastal development and prevent shore overdevelopment also established coastal permit requirements. In 2012, after years of legislative and legal conflict, the present public access regulations were adopted (and eventually upheld in 2015) which allow the DEP to require public access as a condition of waterfront development in CAFRA permits. See generally, Kennedy, Susan, "A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey," Monmouth University, Urban Coast Institute (Summer 2017). The Coastal Zone Management ("CZM") 'rules,' N.J.A.C. 7:7-1 et seq., serve "as the basis for all state coastal permit decisions" and "clearly defined" and set "strict standards for public access to guide" coastal development. Freudenburg, supra, at 6. The CZM public access rules are

contained in N.J.A.C. 7:7-16.9. Its subsections mandate procedures for establishing vertical public access which is limited to "new" development. The most pertinent CZM subsections do the following: define 'public access' to mean "the ability of the public to pass physically and visually to, from, and along tidal waterways and their shores and to use shores, waterfronts and waters for recreational and other activities" (Subsection (a)); explain public access goals (Subsection (b)); require that all "existing public access to, and along tidal waters …shall be maintained to the maximum extent practicable" (subsection (b)2) (emphasis added); require that all "new" development shall provide "opportunity for public access" (subsection (b)3); and explain the forms any proposed public access may take for "new developments" including "paths, trails, walkways, easements…and other rights-of-way" (Subsection (b)3i).

The CZM make clear that for all coastal permit applications, any "existing" designated public accessways must be maintained, but additional public access may be required only for "new" development: subsection (k)l ("Commercial development shall provide both visual and physical access…); Subsection (k)1i ("For existing commercial development…where the proposed activity consists of maintenance, rehabilitation, renovation, redevelopment, or expansion that remains entirely within the parcel containing the existing development, no public access is required if there is no existing public access

onsite."); subsection (k)lii ("[f]or new commercial development, access shall be provided onsite..."); subsection (o) ("For coastal permit applications that include beach and dune maintenance activities, existing public access shall be maintained...").

A permit application must include a "compliance statement" demonstrating conformity with CZM rules, as follows: public accessways must be "clearly marked," with "DEP approved public access signs at each public accessway...and maintained in perpetuity" (subsection (r)); Fees charged shall be no greater than...required to operate and maintain the facility...including lifeguards, restrooms, etc (subsection (v)); fees shall not be charged for children under the age of 12 years (subsection (v)3); and "areas set aside for public access to tidal waterways and their shores shall be permanently dedicated for public use through the recording of a Department approved conservation restriction under the New Jersey Conservation Restriction and Historic Preservation Restriction Act, N.J.S.A. 13:8B-1 et seq.[2] (subsection (w)).

Subsection (p) addresses circumstances where shore protection projects are conducted "under the guidance of and with the participation by the Army

[2] N.J.S.A. 13:8B-3 defines a "conservation restriction" as an interest "less than fee simple absolute," in the form of a right, restriction, easement, covenant or condition ...executed by or on behalf of the owner of land..."

Corps of Engineers," requiring that such applicants propose and establish public access according to its regulations.

Finally, subsection (b)4 mandates public safety considerations by stating "Public access to tidal waterways and their shores shall be provided in such a way that it shall not create conditions that may be reasonably expected to endanger public health or safety.... To that end, public access may be restricted seasonally, hourly, or in scope."

Jenkinsons 2017 settlement with the government preserved the private nature of their beach and by excluding participation by the Army Corps, eliminated the need for any public access easements. Further, the settlement contained no public access requirements (Ja501). JSouth's 2020 permit application stated JSouth "qualifies as an existing commercial development, where the proposed activity is limited to maintenance and rehabilitation entirely within the parcel containing the existing development. Therefore, no public access is required..." referencing CZM subsections kli and O (Ja944).

A.S. Storino testified there was never any designated public access easement across JSouth's upland beach or anywhere on its property before 2018 and there was no DEP contact about establishing one. Dep 53:1-22 (Ja756); 56:1-5 (Ja 757). His testimony, therefore, was surprising in his insistence that language in JSouth's 2018 and 2020 permits somehow precluded it from closing

beach entryways without its ever having to identify a public accessway or easement and without compliance with a single stringent CZM requirement for same. A.S. Storino Dep 56:20-58:1 (Ja757-58); 63:20-64:1 (Ja759).

The 2018 permit language pointed to was as follows: "The issuance of a permit does not relinquish public rights to access and use of tidal waterways and their shores." Dep at 52:18-25 (Ja756). See, 2018 permit (Ja319 ¶10). The 2020 permit language Storino relied on was as follows: "The permittee cannot limit vertical or horizontal public access to its dry sand beach area nor interfere with the public's right to free use of the dry sand for intermittent recreational purposes connected with the ocean and wet sand…" Dep at 63:20-64:1 (Ja759). See 2020 permit (Ja259 ¶13). The use of that permit language as a defense to closing its gates led to depositions of four DEP representatives responsible for reviewing, preparing and approving the permits. They testified the above language is indeed 'form,' used in every coastal permit issued by the DEP. More importantly those clauses simply mimic the CZM rules preserving any previously designated public access areas established before the 2018 and 2020 permits. As the witnesses testified, neither permit created nor established any new or additional public access beyond what already existed before. Further, because Jenkinsons was an "existing commercial development," per the CZM, there was no "new" development triggering additional access. The fact the 2018

permit was a joint sea wall application for both Jenkinsons entities did not change that. Joanne Davis Dep 30:16-31:6 (Ja346); Vivian Fanelli Dep 38:23-39:1, 54:14-55:9 (Ja632, 636); Eric Virostek Dep 41:19-42:3, 45:25-46:4 (Ja 333-35); Garrett Esler Dep 44:15-19, 53:20-25 (Ja613-15)

Moreover, JSouth's 2020 permit application, containing a beach structures "plan" showing its sandy beach with tourist structures (Ja937) did not reference, much less describe any public accessways or easements as would be necessitated for creation of a new public accessway. Esler Dep 60:14-19 (Ja617); Fanelli Dep 50:19-51:13 (Ja635). Further, if new public access had been created, it would have been referenced in the permit itself. Fanelli Dep 57:13-20 (Ja636); Esler Dep 60:14-19 (Ja 617). Equally important, if any upland public access had been created in either permit, "recording" of an easement would have been required along with review by a "compliance and enforcement officer," as the designated access would become a "permanent condition." Esler Dep 50:17-51:3, (Ja615); Virostek Dep 44:11-19 (Ja 633); Fanelli Dep 65:1-5 (Ja 638).

Expert opinions

Plaintiffs' expert, Bruckner Chase, a beach and coastal hazards consultant to NOAA and its subsidiary NWS, with extensive beach/facility/lifeguard experience, including preventative safety, opined in his February 23, 2023 report (Ja882) that JSouth (and JPav as part owner) were "negligent, grossly negligent

and reckless" in multiple areas: JSouth "failed to adequately monitor weather reports and coastal warnings…and failed to inform patrons of life-threatening conditions." (Ja889). The United States Lifesaving Association's, "Open Water Lifesaving Manual," (3rd ed, 2017) (Ja 927) ("USLA") explained the importance of beach warnings during significant storms:

> Although the storm may be several hundred or thousand miles off the coast, long period swells generated by the storm can arrive on the beach well before any significant weather or rain. These longer period swells will cause dangerous rip currents, powerful surf and high wave run-up on area beaches. This will often surprise beach visitors expecting water conditions to reflect the otherwise tranquil local weather being observed. … Pedestrians may be swept into the water as waves grow in size and run up on the beach.

Chase was sharply critical of JSouth's inadequate warnings. He opined Defendant violated U.S.L.A. recommendations for off-season signage, the primary preventative tool to protect off-season beach goers (Ja892). First, given the significant hazards present, it was improper to post no warnings at all about the hurricane conditions or fail to close gates to prevent beach access. The use of a single red flag without any sign to draw attention to it or explain its meaning, contravened "national and international standards for beach warning flags." (Ja892). Beach users would not understand a red flag's meaning when Jenkinson's personnel themselves had inconsistent understandings: it meant 'water closed' to some; whereas the USLA stated it means 'high hazard,' and Jenkinsons' manual stated it means "no swimming or wading." (Ja723). Chase

opined Defendant was also grossly negligent for violating its own Operating and Training manual requirement that "permanent signs" be posted at each beach entrance explaining the meaning of their colored warning flags. (Ja893) With regard to the BEACHES CLOSED NO SWIMMING sign, Chase opined it failed to provide "clear and consistent messaging on their beach open or closed status." (Ja896) ("The unclear meaning of 'Beach Closed' allowed visitors to unknowingly put themselves at risk by entering an apparently open beach area with dangerous conditions".) Defendants further violated the requirements of its O & M by failing to monitor for dangerous beach and ocean conditions including checking NOAA's land advisories about potentially life-threatening surf and rip currents which should have caused closure of the gates "to clearly indicate the beaches were, in fact, closed and conditions could be unsafe for patrons anywhere near the water" (Ja894). Chase characterized the inactions of Defendant as grossly negligent and reckless given the significant dangers present coupled with Defendant's specific knowledge beach patrons were present without lifeguards:

> Jenkinson's recognizes the inherent dangers of its beaches as indicated by its operational procedures during the season that provide multiple layers of patron protection including a large staff of certified lifeguards and information signs and flags... Jenkinson's boardwalk businesses are open beyond the active lifeguard season and they are aware that Jenkinson's patrons spend time on the beach throughout the year...putting themselves in danger from conditions that they may not know or recognize such

> as dangerous surf or rip currents....In depositions Jenkinson's acknowledges the economic value of their beaches and boardwalk throughout the year. From parking attendants to leadership, Jenkinson's staff directed, encouraged and allowed people to go on to their beaches throughout the year despite the company removing warning signs and posters that would provide a level of protection to beach goers when lifeguards were not on duty....

(Ja896)

Defendants' expert, James Cresbaugh, a long-time seasonal lifeguard/beach manager, has worked for towns and private beaches, but has had no work experience for commercial beach or business operators. Cresbaugh Dep 29:3-12 (Ja991); 31:12-1 (Ja992); 78:4-7(Ja1004); 105:3-11(Ja1010); 120:3-12 (Ja1014) (acknowledging Jenkinson's is different since it owns a whole host of beachfront businesses including boardwalk arcades, restaurants and none of the beaches Cresbaugh worked had gates that could close to prevent access.) Moreover, he has no experience in the "who, what, where, when, why of safety during the off-season" and had no idea that Jenkinsons promotes its combined beach and businesses in the off-season. Cresbaugh Dep, 105:13-21(Ja1010); 106:17-25(Ja1011); 136:9-19 (Ja1018).

Nonetheless Cresbaugh opined there are "no formal legal standards" applicable to off-season beaches "save for the Public Trust Doctrine" and coastal permits requiring "open beach access at all times, including when the ocean water conditions may be considered unsafe to the general public." (Ja372).

During his deposition, Cresbaugh retracted his opinion that JSouth had

designated accessways requiring vertical public access. Dep 64:23-65:25 (Ja1000). ("I would have to speculate on that one. I don't know.") and he also withdrew opinions about what other beaches do as 'speculation.' Dep 114:6-14 (Ja1013). See also, Cresbaugh dep 211:17-212:20 (Ja1037) (withdrawing reference in report to a 2023 survey about off-season procedures as "not great" and "unpublishable.") and stating he could offer no opinion about Defendant's off-season obligations for patron safety. Id. at 151:15-152:5 (Ja 1022). He nonetheless agreed in his report Plaintiffs' perceptions about the meaning of the BEACHES CLOSED NO SWIMMING sign as 'closed for swimming' were reasonable (Ja983) ("yes beaches were open to the public, that you were welcome to come and enjoy the beach, but that swimming was not advisable."). See also, Dep 149:11-150:5 (Ja1021-22). Plaintiffs' expert stated in rebuttal:

> There is no language in the relevant permits or agreements with the State…that state or require Jenkinson's to leave its seawall gates open. There is also no language that states the seawall gates cannot be closed unless there is flooding. The state representatives of the DEP testified there was no public accessway established during the permitting process stipulating unrestricted public access at the seawall gates under Jenkinson's control. The defense expert refers to the Public Trust Doctrine as a reason that Jenkinson's could not close the seawall gate and limit access to the beach at the time of the incident. According to the NJDEP NJAC 7:7 Coastal Zone Management Rules that supposition is not true. Per NJDEP NJAC 7:7-16.9 Public Access, (b) 4: 'Public access to tidal waterways and their shores shall be provided in such a way that it shall not create conditions that may be reasonably expected to endanger public health or safety, or damage to the environment. To that end, public access may be restricted seasonally, hourly, or in scope….' (Ja375).

Chase further testified the boardwalk fell within a NWS coastal flood warning area and because there were greater than 3 foot waves at the designated Watson Creek buoy on each of the 3 days leading up to the drowning, JSouth violated its state imposed duty to deploy its gates on the date of the drowning which would have saved Decedent's life. Chase Dep 145:21-146:11, 146:22-147:10 (Ja415); 154:2-19 (Ja417); 171:20-25 (Ja421).

The Court's Rulings on Summary Judgment and Reconsideration

The court's opinion began with an accurate recitation of relevant facts supported by the evidence: Plaintiffs paid to park in order "to visit the beach and businesses" and "were directed by an employee of Defendant to 'access the beach via an entrance on Arnold Avenue,' and the NWS weather advisories and forecasts "at and around Point Pleasant Beach" including "dangerous ocean water conditions, ...dangerous currents and/or swells and/or a high risk of other dangerous, life-threatening conditions," which advisories were "available" to Defendants and their employees. OpI at1-2 (Ja34).

While conceding the beach was open, T27:19-20 ("no question about it") and Plaintiffs were neither wading nor swimming, the court nonetheless concluded the BEACHES CLOSED NO SWIMMING sign was adequate as a matter of law to inform business patrons of the dangers presented. OpI at 13, (Ja46) ("water is restricted by appropriate warnings [which]...do not explicitly

tell potential swimmers that the waters are dangerous because a reasonable person can recognize that the ocean is dangerous 12 months a year.... warnings ...inform potential swimmers of the dangers of swimming unsupervised").

While further agreeing the incident occurred while Decedent was "standing on the beach at the water's edge," where he was knocked off balance by a wave and pulled into the ocean, OpI at 1-2 (Ja34), the court somehow concluded, without any evidential support, that Decedent "voluntarily entered the ocean either to swim or wade." OpI at 7 (Ja40). This evidentially bare conclusion led to another error, that is, that Decedent, in so doing, had exceeded the scope of his business invitation by voluntarily entering the ocean. OpI at 12 (Ja45) (Decedent "was clearly not invited to go into the ocean, either for wading or swimming. It can be argued, as Plaintiff does, that decedent was a business invitee to the beach itself but, in light of the signs and warning, it cannot be argued that he was invited into the ocean."). See also, OpI at 13 (Ja46). ("Defendants...cannot be expected to prevent people from choosing on their own to enter the inherently dangerous waters of the ocean.") The court then digressed into an analysis about the nature of the ocean without ever addressing the commercial business that the beach was a part of. It also led to the court's misapprehension about the nature of the duty owed to protect business invitees from discoverable dangers to those "on" the beach as opposed to those "in" the

ocean. OpI at 13 (Ja46). ("There is no duty to make the ocean safe, as unfortunately that is a goal that mankind cannot attain. Due to this, people who enter the ocean during a beach's off-season cannot be business invitees by definition.").

The court's erroneously drawn inferences upended the burden for summary judgment. For example, the court acknowledged Defendant did have a "duty to warn invitees of potentially dangerous conditions" especially since the beach looked "relatively normal" with "nothing that would alert a reasonably aware person of dangerous water conditions" OpI at 17 (Ja50) and "even the owner…could not discern…whether the waters were subject to riptides or other conditions." OpI at 21 (Ja54). Nonetheless, instead of defining the duty owed, as requested in Plaintiffs' cross-motion, and leaving the rest to the factfinders at trial, the court denied all reasonable inferences to Plaintiffs.

With respect to Plaintiffs' contention that Defendant should have closed the sea wall gates, the court simply ignored the common law obligations owed to business invitees (presumably because the court found Decedent exceeded the scope of his invitation) to discover latent dangerous conditions and instead, narrowly read the O&M manual as requiring sea wall gate closure only if the beach premises was identified as being subject to a Coastal Flood warning, rather than being "in" a coastal flood warning area with wave heights recorded

as greater than 3 feet at the Watson Creek buoy, nearest to Point Pleasant Beach as Plaintiffs' expert explained. Chase was the sole witness, a consultant to the NWS, who understood the language in the O & M manual. Similarly, the court erroneously concluded that the form language in the 2018 and 2020 permits meant JSouth had established public accessways from its upland beach and was therefore, required to leave its gates open (regardless of the dangers posed) therefore precluding Plaintiffs' claims the gates should have been closed. The court simply failed to appreciate the CZM rules, testimony of four DEP witnesses, photographic evidence Defendants, in fact, close their sea wall gates at will; and the opinions of Plaintiffs' expert, all refuting the court's interpretation. The court did acknowledge the CZM exception to mandatory public access, allowing beach owners to restrict designated public access when conditions exist that "may be reasonably expected to endanger public health or safety" and "[t]o that end, public access may be restricted, seasonably, hourly or in scope." NJAC 7:7-16.9(b)4, but stated this provision was not applicable OpI at 20 (Ja34). It did not or could not explain why. Instead of agreeing neither the CZM rules nor the permits precluded gate closure on the dates in question, the court stated the CZM rules relied on by Defendants did not "decisively show a breach of duty" without explaining why it nonetheless chose to remove the issue from the jury. OpI at 20 (Ja53).

The court ignored, without comment, the briefed dispute about whether LLA immunities precluded claims by business invitees (Ja71-77). Instead, it rejected Plaintiffs' argument this commercial beach and business operation, located in a densely populated coastal suburban community did not constitute the type of 'premises' to which the LLA applied. OpI at 8 (Ja41). Despite the court's recognition it was required to consider "the use for which the land is zoned, the nature of the community, its relative isolation from densely populated neighborhoods as well as its general accessibility to the public at large," along with the landowners' ability to protect users against hazards, OpI at 9 (Ja42) (quoting, Harrison v Middlesex Water Co., 80 N.J. 319, 423 (1979) the court again limited its analysis to the "vast" nature of the ocean itself. OpI at 10-1 (Ja43-44) (agreeing that JSouth's beach and business were year round and "centered along Arnold Avenue in a "suburban town by rational view," but stating "the ocean cannot be rendered safe for 'sport or recreation'…[d]ue to its unique form and untamable nature," and "its nature prevents it from being identified as improved land and is certainly in a natural condition"). It completely overlooked any consideration, as established by the evidence that the beach was improved land, with overlooking year-round business and offices or that it can be made safe and controlled via gate closures.

LEGAL ARGUMENT

POINT I
THE COURT ERRED IN HOLDING DEFENDANT DID NOT VIOLATE ITS DUTY TO PLAINTIFFS AS A MATTER OF LAW

The question of what duty exists must be decided by the court as a matter of law but genuine issues of material fact regarding violation of that duty require submission to a jury. Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 44-45, 48-49 (2012). Once the nature of duty owed is determined, it is "not the court's function to weigh the evidence and determine the outcome, but only to decide if a material dispute of fact exist[s]." Id. at 50 (citing, Gilhooley v County of Union, 163 N.J. 533 (2000) and Brill v Guardian Life Ins. Co. of Am., 142 N.J. 520,540 (1995)).

In premises liability cases the duty owed is based on well-developed common-law categories set forth in the model jury charges. Rowe, supra. In Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993), the Court explained the highest duty is owed a "business invitee because that person has been invited on the premises for purposes of the owner that often are commercial or business related." A lesser duty of care exists for social guests or licensees whose purpose on the land provides no business advantage to the owner but is personal and simply consented to or "tolerated" by the landowner. Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959). See, Model Jury Charge, 5.20F.

There can be little dispute Plaintiffs were business invitees as they went to JSouth's beach/amusement venue for its business purpose, paid to park and planned to eat at its food concession and patronize its amusements/arcade overlooking and some "on" its Arnold Avenue beach. See, photo (Ja1045) Although they paid no specific beach entry fee (due to the off-season), the beach was nonetheless part of the overall business operation and used as an economic draw for JSouth's abutting boardwalk businesses making them economically interdependent. As Plaintiffs testified, they were advised by JSouth's parking attendant the beach was open and she directed them to enter through open and unlocked sea wall gates from the boardwalk. Defendant's duty of care arose not just from its invitation but from its 'allurement', "inducement' and having 'lead' Plaintiffs to the beach. Handleman v Cox, 39 N.J. 95, 107 (1963) (citing, Phillips v Library Co., 55 N.J.L. 307 (E. & A. 1893)).

Even if Plaintiffs had not paid to park, payment is not required to establish "business invitee" status or consideration so long as Plaintiffs' planned activities are of potential economic value to Defendant. Rowe, supra, 209 N.J. at 43 (business visitor not required to make or even intend to make purchase if presence prospectively economically advantages owner); Handelman, supra, 39 N.J at 106-07 ("potential," not just "actual" economic benefit supports business invitee status).

The Error in determining Decedent Exceeded the Scope of His Invitation (OpI at12-13 (Ja45-46), OpII at 10 (Ja 67), T27:11-28:12)

The court agreed Plaintiffs were business invitees but erred in determining Decedent had exceeded the scope of his business invitation by 'voluntarily' entering the ocean, a fact unsupported by evidence and established only by judicial fiat. Whereas the evidence was that Decedent remained on the beach before he was swept away by sudden dangerous hurricane related waves, the court somehow concluded as a matter of law he chose to enter the ocean, OpI at 6 (Ja39) On reconsideration the court clarified it was "cognizant of the fact" Decedent was not "in" the ocean at the time of the incident but he was "within the ocean's influence" which it viewed as equivalent to voluntarily entering the water. T 27:11-28:24. See also, OpII at 5-6 (Ja62-63) (court stating it did "not see a material difference between… standing on the beach at the water's edge in the face of an approaching tide, subsequently having the water hit them, and then being swept away from a wave as opposed to walking into the water and then being swept away"). The opinion further outlined "undisputed" facts it viewed as dispositive: "Decedent rolled up his pants, took off his shoes, and walked into wet sand" and "clearly put himself within reach of the ocean and its waves." Therefore, "[f]or all practical purposes it was Decedent's decision to approach the water that resulted in him being swept into the ocean." OpII at 6 (Ja63). The court recognized that "how it views the chain of events may differ

from Plaintiff," id, but failed to recognize a factfinder might also disagree with the adverse inferences it was improperly drawing against Plaintiffs.

There was zero evidence, for example, that Decedent was aware of an "approaching" versus receding tide. Further, the court omitted from its factual recitation that Decedent was wearing not only jeans but also a T-shirt and carrying his cell phone undercutting Decedent's court-imputed intention to enter the water, wade or swim, but rather to remain on the beach. David Dep 69:1-70:5 (Ja161-162). Further the court ignored the wide swath of damp sand along the water's edge where C.T. was chasing seagulls and they were looking for shells. (Ja183-187) The dampness of sand does not support a conclusive inference that Decedent was "in' the water. Even the defense expert agreed, "walking along or standing on wet sand… is not in the water." Cresbaugh dep 159:2-6 (Ja1024). Further, there was no evidence Plaintiffs understood hurricane related ocean conditions were present or that walking along wet sand near the water's edge presented dangers. This is precisely the point made by the USLA and Plaintiffs' expert about the need for clear preventative signage when lifeguards are off-duty (Ja 927). ("powerful surf and high wave run-up … will often surprise beach visitors expecting water conditions to reflect the otherwise tranquil local weather…[and] Pedestrians may be swept into the water as waves grow in size and run up on the beach"). The court's determination Decedent

was at fault was, in effect, an inappropriate causation analysis, replacing its view for what should have been in the jury's domain when facts leave no room for doubt. Cf, Fluehr v City of Cape May, 159 N.J. 532 (1999) (negating causation as a matter of law in claim by experienced surfer, who knew about dangerous conditions caused by a hurricane and chose to surf for hours before a large wave forced his head into ocean floor).

Unlike the clear facts of Fleuhr, determining whether Decedent exceeded the scope of his invitation requires consideration about the reasonableness of his beliefs since the scope of the invitation "extends to all parts of the premises to which the invitee reasonably may be expected to go in view of the invitation… and to those parts of the premises which … the defendant's conduct has led plaintiff reasonably to believe are open to the plaintiff." Model Jury Charge 5.20F6b. The evidence, viewed most favorably to Plaintiffs, established Decedent reasonably believed he was doing exactly what he was permitted to do and remained within the scope of his invitation until he was swept away.

The Erroneous Holding JSouth's Monitoring and Warnings were Adequate (OpI at 15-20 (Ja48-54), OpII at 10-11 (Ja67-68))

A landowner owes a business guest "a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered …[and] encompasses the duty to conduct a reasonable inspection to discover latent dangerous conditions."

Hopkins, supra, 132 N.J. at 434 (citation omitted). See, Model Jury Charge 5.20F5, 7.

Defendant's violation of its duty to monitor, warn or guard against the dangers was supported by the evidence of JSouth's "actual" or "constructive" notice about the dangers. With respect to actual notice, JSouth's President testified he regularly monitored weather conditions, hurricanes caught his attention and he tracked them. Yet he claimed to be completely unaware about this Hurricane despite the length of time it was forecast and its life-threatening nature. As described, supra, Tropical Storm Teddy formed on September 12, 2020, was tracked by NOAA's National Hurricane Center from its beginning and turned out to be one of the four largest Atlantic Hurricane's on record.

Given his testimony that a hurricane would catch his attention, a jury could reasonably find A.S. Storino was untruthful when he denied knowledge about the hurricane and he took no action because to him it looked like a "nice day" out his window and that was all that mattered to his bottom line.

There was at least constructive notice about the dangers because "the particular condition existed for such period of time that an owner...in the exercise of reasonable care should have discovered its existence." Model Charge 5.20 F 8. Either way (actual or constructive notice), a jury could reasonably conclude JSouth was obligated, but failed to, monitor and adequately warn about

the perilous conditions present that day. Or at the very least, JSouth should have cautioned against going near the water's edge or "wading' as it did in-season.

The court acknowledged that, on the date in question, no one would be able to recognize the dangerous conditions from simply looking at the water. Op I at 17 (Ja50). Its rationale for rejecting the warning claim was its conclusory statement that "the language of the signs, particularly the one stating 'BEACHES CLOSED' do warn persons of the dangers associated with entering the waters of an unstaffed ocean." Id. Not a single witness testified the BEACHES CLOSED NO SWIMMING sign meant the beach was actually closed. The court on reconsideration agreed it was clear the beach was not closed. T27:19-20 ("The beach was open to the public; no question about it."). Nonetheless he persisted in his conclusion that warning was adequate as a matter of law, even though Decedent did not enter the water, intend to swim and did not understand any of the dangers presented. The court improperly granted all favorable inferences to Defendants rather than the required opposite. Brill, supra, 142 N.J. at 536.

The Error in Holding JSouth was not Permitted to Close its Gates
(OpI at 15-21 (Ja48-54), OpII at 11-12 (Ja68-69))

Despite clear photographic and testimonial evidence Defendant closes its Arnold Avenue seawall gates, precluding access during the summer as well as the off-season, (Ja977-980), the court incongruently relieved Defendant of the

duty to do so to protect its business invitee from known or discoverable dangers. It relied on the form language in the 2018 and 2020 Coastal permits which the court improperly read as requiring access from JSouth's private upland, thereby preventing gate closure. The court's interpretation was plainly wrong as described supra. It was contrary to the CZM rules, the testimony of DEP witnesses who prepared the permits and completely missed that Jenkinson's was exempt from upland access requirements because: (1) it was an "existing" commercial development: and (2) it did not accept government monies for beach replenishment or dunes which would have required upland access. It is ironic that JSouth escaped all upland access requirements, protecting its ability to generate larger fees than most New Jersey beaches, but now raises those same requirements as a defense to its duty to close its gates for patron safety. (See e.g., photo (Ja982) showing JSouth charges beach fees for children under age 12 prohibited on beaches with designated public access, N.J.A.C. 7:7-16.9(w)).

The court also overlooked that CZM rules and permit language do not, in any event, eliminate obligations for public safety---even when public access is required. See, N.J.A.C. 7:7-16.9(b)4 ("Public access to tidal waterways and their shores shall be provided in such a way that it shall not create conditions that may be reasonably expected to endanger public health or safety....To that end, public access may be restricted seasonally, hourly or in scope") The court

confusingly agreed the CZM rules "permit an owner of beach premises to restrict public access in the face of conditions that could endanger public health or safety," but found it important that the rule "does not require them to do so." Op I at 20 (Ja53). The absence of a written or statutory requirement to close seawall gates, does not negate Defendant's ability to do so as a matter of compliance with its common law safety obligations. The fact that there is no statutory or other proscription against closing the gates should have ended the discussion, leaving the issue for the jury.

POINT II
THE COURT ERRED IN CONCLUDING THAT NEW JERSEY'S LANDOWNER LIABILITY ACT IMMUNIZES DEFENDANTS

The New Jersey Landowner Liability Act, N.J.S.A. 2A:42A-2, et seq, ("LLA" or "Act") as amended in 1991, provides in pertinent part:

> 2. Except as provided in section 3 of this act
>
> > (a) An owner...of PREMISES,.. whether or not improved or maintained in a natural condition, or used as part of a commercial enterprise, owes no duty to keep the premises safe for entry or use by others for sport and recreational activities, or to give warning of any hazardous condition of the land...or by reason of any activity on such PREMISES to persons entering for such purposes:
> >
> > (b) An owner...of PREMISES who gives permission to another to enter upon such PREMISES for a sport or recreational activity or purpose does not thereby (1) extend any assurance that the PREMISES are safe for

> such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, …

N.J.S.A. 2A:42A-3 (emphasis added)

> Section 3 establishes the following exceptions to immunity:
>
> a. For willful or malicious failure to guard, or to warn against a dangerous condition, use…or activity; or
>
> b. For injury suffered in any case where permission to engage in sport or recreational activity on the PREMISES was granted for consideration…

N.J.S.A. 2A:42A-4 (emphasis added). See also, N.J.S.A. 2A:42A-8a-c (also permitting claims for malicious, wanton or grossly negligent conduct).

The LLA does not Immunize Landowners from their obligations to Invitees (Issue not addressed by court but raised in briefs below (Ja71-77))

LLA immunities were never intended to eliminate duties owed by landowners to business invitees. In fact our courts have recognized the "invitee-like" exception to immunity contained in section 3b when permission for use is granted for consideration. Diodato v. Camden Cty Park Comm'n, 162 N.J. Super 275, 284 (law Div. 1978). See also, Krevics v Ayars, 141 N.J. Super. 511, 515 (App. Div. 1976) (mere permission to use premises, without more, does not change the status of the property user to an 'invitee,' thereby creating liability.)

No state court decision addresses the scope of the LLA's 'consideration' exception. The court did not acknowledge or address the exceptions to immunity

except in a passing reference. Op I at 7 (Ja40). The statute itself does not specify that consideration be in the form of cash payment. Here, Plaintiffs paid ($10 total both cars) to park in JSouth's venue lot which indisputably included the "beach" per its sign. (Ja439). This arguably should have ended the discussion since consideration, albeit nominal, was paid.

Several federal court opinions have addressed the language of New Jersey's LLA, identical to recreational use statutes in other jurisdictions where "consideration" is not limited to cash payment and which have concluded that potential economic benefit as exists with business invitees, eliminates immunity protection. The Third Circuit Court of Appeals in analyzing the nature of consideration required stated: "Strictly construed the LLA does not alter but preserves the duties set by the common law where a business invitee is harmed on the recreational lands of another." Hallacker v. Nat. Bank Tr. Co. of Gloucester, 806 F.2d 488, 490-91 (3d Cir. 1986). This is because an invitee provides either a "direct" or "indirect" source of profit to the landowner. Id. at 491 (citing, Butler v. Acme Markets, 89 N.J. 270, 275 (1982)). Further, since tort immunity "is a special incentive given to landowners to encourage them to open their lands to the public for recreational use" this incentive is unnecessary when a landowner already has an "economic incentive' to do so. 806 F.2d at 491 ("Immunity is a necessary incentive only in the absence of economic self-

interest"). The rejection of immunity therefore is appropriate when consideration consists in actual or "potential for profit" which carry the same motivating force. Id. (quoting, Ducey v United States, 713 F. 2d 504, 511 (9th Cir 1983). The Ducey court analyzed the identical language of Nevada's recreational use statute, including its consideration exception. There, as here, plaintiffs drowned, but as a result of sudden flash flood in a canyon. No direct payment was made for the use of the specific area of the property where the injury occurred. However, because the owner derived an indirect economic benefit from the use of the land (via purchases and potential purchases made on other areas of its parkland) the immunity claim was rejected. The court reasoned "where a landowner derives an economic benefit from allowing others to use his land for recreational purposes, the landowner is in a position to post warnings, supervise activities, and otherwise seek to prevent injuries...[and] also has the ability to purchase insurance...thereby spreading the cost of accidents over all users of the land." 713 F. 2d at 509-11.

This reasoning is consistent with the "economic benefit theory" expressed in Handelman, supra, 39 N.J. at 106, as a basis for the duty owed to business invitees, which "proceeds on the assumption that affirmative obligations are imposed on landowners only in return for some consideration or benefit" and "any obligation to discover latent dangerous conditions of the premises is

regarded as an affirmative one, and the consideration for imposing it is sought in the economic advantage, actual or potential of the plaintiff's visit to the occupier's own interest." (quoting 2 Harper & James, Torts, par 78, p.454 (1955) and citing Prosser, Torts par 78, p454 (1955)).

Therefore, even if Plaintiffs' payment to park did not, alone, qualify as 'consideration,' the fact that Plaintiffs planned to spend money at the boardwalk businesses (of which the beach was a significant business generating part) should nonetheless establish the consideration necessary to preclude an immunity claim under the LLA. This analysis is consistent with that of our Supreme Court in imposing liability on business owners for injuries occurring on abutting non-owned sidewalks which are "beneficially related to the operation of the business." Stewart v. 104 Wallace Street, Inc., 87 N.J. 146, 152, 159 (1981) (holding commercial bar liable for failure to maintain abutting dilapidated sidewalk used for egress); See generally, Padilla v. An, 257 N.J. 540 (2024) (describing evolution of common law duty of commercial owners to maintain abutting property when there is the capacity for economic gain). Here, as conceded, an important motive for allowing off-season use of its beach was the resulting economic benefit to its boardwalk businesses. For the above reasons, the immunity provisions of the LLA are inapplicable.

JSouth's Business is not the type of "Premises" to which LLA Immunity Applies (OpI at 7-11 (Ja40-44), OpII at 7-10 (Ja 64-67))

A further reason the LLA immunities do not apply to JSouth, is because the beach and businesses do not constitute "Premises" within the meaning of the LLA. Although the Act does not define 'premises', our Courts have held the term applies only to protect owners of "large tracts or areas of natural and undeveloped lands located in thinly populated rural or semi-rural lands, particularly as to size, naturalness and remoteness or insulation from populated areas." Harrison v. Middlesex Water Company, 80 N.J. 391, 397- 99 (1979). An important additional factor is whether the land is conducive to supervision or control to guard against foreseeable trespassers or users:

> The land on which the tragic drowning occurred...was on an improved tract situated in a highly populated suburban community. It is unlike lands located in rural or woodland reaches where the activities of people thereon cannot be supervised or controlled and where the burden of guarding against intermittent trespassers may far outweigh any risk to such persons and the presence of such persons may be difficult to foresee and contain. In contrast, the reservoir area here lies in a populous setting where such factors are less substantial.

Id. at 402. See also, Whitney v. Jersey Central Power & Light, 240 N.J. Super. 420, 422 (App. Div.), certif. denied, 122 N.J. 376 (1990) (rejecting immunity when vehicle went over embankment in wildlife preserve after utility removed bridge and placed no barriers or warnings, since adjoining roadway was not like "undeveloped, open and expansive rural [or] semi-rural" land but rather improved and regularly maintained property. As the court stated:

> [I]t would have been quite feasible for JCPL to determine the existence of the dangerous condition and post warnings or take other appropriate action to prevent the occurrence of accidents. JCPL's roadway was significantly different... from large expanses of farmland or forest, where '[o]wners... have difficulty in defending their lands from trespassers or, indeed, even in taking precautions to render them safe for invited persons.' [citation to Harrison omitted]...Additionally, the policy of the Act identified in Harrison, to encourage the owners of undeveloped land "to keep their lands in a natural, open and environmentally wholesome state,..." would not be advanced by extending immunity to a maintained roadway used in the conduct of a commercial enterprise.

Id. at 424-25.

Although the Act was amended in 1991 to add language that its provisions should be "liberally construed," N.J.S.2A:42A-5.1, the amendments did not change the meaning of "premises" and immunity continued to be limited to rural or semi-rural areas where supervision or safety would be difficult. See, Benjamin v. Corcoran, 268 N.J.Super. 517, 529 (App. Div. 1993) ("Act has no application to improved lands located in a populated suburban area."); Accord, Toogood v. St. Andrews Condo. Ass'n, 313 N.J. Super. 418, 420-21, 26 (App. Div. 1998).

Here, the court agreed the beach and businesses are located in a densely populated "suburban town by rational view." OpI at 10 (Ja 43). In fact, the town attracts large numbers of day-trippers, like Plaintiffs, well into October and some businesses remain open year-round. The Borough, itself, classifies its municipal beach season as May 1 to October 15. (Ja314 ¶21-5.6).

Far from open and natural land, JSouth's beach is developed and part of a year-round entertainment complex. Its permits allow tourism structures "in association with a commercial development" through October including chairs, volleyball nets, stage, sheds, gazebos/tiki huts, wooden walkways, temporary decking/seating areas, lighting, flag poles, tents, event sheds, landscaping, amusement related equipment, among others (Ja256). Defendant receives food and arcade revenue year-round but especially into October as it continues to collect parking fees and operate outdoor amusements. The beach is used to draw people to its abutting boardwalk businesses. Unlike the character of "premises" whose owners are unaware of their users presence and cannot supervise or control them, JSouth's offices overlook the beach and its gates can easily be closed and locked. See, photos and video cam taken from A.S.Storino's office. (Ja437,444,1045). JSouth certainly would have no difficulty defending from trespassers or taking precautions to render its beach safe. It can simply close the gates as it does both in (Ja1045) and out of season (Ja794-800, 978-981).

Immunity Does not Preclude Plaintiffs' Claims for Grossly Negligent, Willful or Malicious Conduct (Issue mentioned (OpI at 3, 7 (Ja36, 40)) but merits unaddressed by court, OpII at 10 (Ja67)).

Even if LLA immunity were applicable, the court should have permitted a jury to determine whether Defendants conduct represented grossly negligent, "willful or malicious failure to guard or warn against a dangerous condition,

use...or activity" pursuant N.J.S.A. 2A:42A-4a or N.J.S.A. 2A:42A-8 a or c. The court acknowledged the arguments, OpI at 3, 7 (Ja36, 40) but simply overlooked them. On reconsideration, the court sidestepped the issues by incorrectly stating Plaintiffs had failed to plead such claims. OpII at 10 (Ja67) ("It did not assert a claim for willful malicious conduct or other exceptions to immunity granted by the LLA"). This was clearly incorrect. See, Complaint (Ja1-10). The First Count, ¶¶30-34, Second count, ¶ 37, and Third Count, ¶¶ 40-41, all included claims of "reckless... grossly negligent, willful, wanton and malicious" conduct and asked for both compensatory and punitive damages.

Pursuant to N.J.S.A. 2A: 15-5.12 4a, punitive damages may be awarded if Plaintiff proves by clear and convincing evidence that the harm resulted from acts or omissions "actuated by actual malice or...by a wanton and willful disregard of persons who foreseeably might be harmed" by those acts or omissions. Factors to be considered include "the likelihood of serious harm; and defendant's awareness of or reckless disregard of the likelihood of serious harm" among other factors and the jury may also consider the profitability of the misconduct to the defendant in awarding damages. N.J.S.A. 2A: 42A-8a,c permits consideration of "grossly negligent" conduct as well.

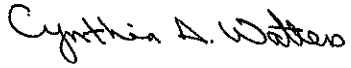
Such claims were not only pleaded but supported by the evidence and expert testimony. It was for a jury to consider whether JSouth's conduct

constituted such extreme carelessness or wanton behavior by failing to have procedures in place for monitoring of weather condition as mandated and spelled out in their O & M manual. A.S. Storino's lackadaisical attitude about off-season safety, ignoring even mandated procedures and almost complete elimination of safety precautions for off-season patrons whom he valued only for his personal economic gain were all factors to be considered by a jury, especially since this did not represent the first drowning at this beach. (Ja896) Further, the evidence supports the conclusion that Defendant placed its monetary interest before the safety of its invitees, ignoring weather warnings while encouraging potential patrons to come to their beaches to patronize their boardwalk businesses.

CONCLUSION

For all of the above reasons this Court should reverse and remand for trial.

Respectfully submitted,
Sarno DaCosta D'Aniello Maceri LLC



Cynthia A. Walters, Esquire
Attorneys for Plaintiffs

Dated: December 19, 2024

1DAVID TIMPANARO, individually and as Executor and Administrator Ad Prosequendum of the ESTATE OF ANTHONY J. TIMPANARO, LIA TIMPANARO, individually and as Guardian of minor, C. T. Plaintiff-Appellants, v. JENKINSON'S PAVILION, INC., a corporation of the State of New Jersey, JENKINSON'S SOUTH, INC., a corporation of the State of New Jersey, JOHN DOES 1-10 (fictitious names), and ABC CORPS. 1-10 (fictitious entities), Defendant-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000183-24 T4 CIVIL ACTION ON APPEAL FROM ORDERS FOR SUMMARY JUDGMENT AND DENYING CROSS-MOTION AND MOTION FOR RECONSIDERATION SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NUMBER: MRS-L-1110-21 Sat Below: HON. STEPHAN C. HANSBURY, JSC

BRIEF ON BEHALF OF DEFENDANT – RESPONDENTS

On the Brief:

MURPHY SANCHEZ, PLLC
Dennis M. Marconi, Esq. (#036241988)
Michael C. Corcoran, Esq. (#024281998
315 Lowell Ave.
Trenton, NJ 08619
(856)209-2033
dmarconi@murphysanchez.com
mcorcoran@murphysanchez.com
Attorney for Defendant – Respondents

TABLE OF CONTENTS

JUDGMENTS/ORDERS/RULINGS APPEALED FROM

ALL ITEMS/EXHIBITS SUBMITTED TO COURT ON MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION

PARTIES' STATEMENT/COUNTERSTATEMENTS OF MATERIAL FACTS

OTHER ITEMS/EXHIBITS SUBMITTED TO COURT ON MOTIONS

*Per Rule 2:6-1(a)(2), briefs submitted to the trial court on the Motion for Summary Judgment are not included in the appendix.

TABLE OF AUTHORITIES

CASES

STATUTES/CODES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This case stems from a drowning incident that occurred during the off-season at the Defendants' beach in Point Pleasant, New Jersey. On September 23, 2020, 69-year-old decedent, Anthony Timpanaro, was standing on the shoreline in the damp/wet sand when he was knocked off balance by a small wave that submerged his feet and lower legs. After losing his balance, Decedent fell to the wet sand and was then slowly carried out to sea by approximately 20 successive waves. Despite acknowledging that the incident occurred during the off-season and that several signs were prominently posted warning the public that the beach was closed, Plaintiffs contend that Defendants were negligent and therefore responsible for the drowning. After completing extensive pre-trial discovery, Defendants moved for summary judgment. After reviewing the extensive briefs submitted by the parties and entertaining oral argument, the Court granted Defendants' motion and dismissed the Plaintiffs' claim in its entirety. Plaintiffs subsequently filed a motion for reconsideration in which they advanced the very same arguments previously rejected by the Court. The Court denied Plaintiffs' motion and stood firm on its decision to dismiss Plaintiffs' complaint with prejudice. Plaintiffs now appeal the Court's decision, arguing that the Court erred in several ways. As argued below, the Court did not err in granting summary judgment for Defendants. In arriving at its decision, the Court considered all

evidence presented by the parties and based its decision on the law. Plaintiffs appeal presents no compelling arguments to overturn the Courts' decision, and accordingly the Court's decision should be affirmed.

STATEMENT OF FACTS

This action stems from a drowning incident that occurred on September 23, 2020, in Point Pleasant Beach, New Jersey (Ja1-13). On said date, David Timpanaro and his family (hereinafter collectively referred to as "Plaintiffs") went to Point Pleasant Beach that day to enjoy the beach and boardwalk. Plaintiffs arrived at Point Pleasant Beach shortly after 11:00 a.m. D. Timpanaro Dep 33:4-8 (Ja152). Upon arrival, Plaintiffs met up with David Timpanaro's father, Anthony J. Timpanaro (hereinafter "Decedent") in a parking lot owned by Jenkinson's South. D. Timpanaro Dep 33:9-20 (Ja152). The aforementioned drowning occurred approximately 10-15 minutes after the Plaintiffs and Decedent arrived. D. Timpanaro Dep 29:6-13 (Ja151).

The weather that morning was "nice" and water conditions appeared "normal" to Timpanaro. D. Timpanaro Dep 34:8 thru 35:3 (Ja153). During the short time that Plaintiffs were on the beach that morning, several photos were taken (Ja183-188). Timpanaro testified that the photos accurately depict the weather and ocean water conditions as they existed during the approximate 10-15

minutes before the drowning occurred. D. Timpanaro Dep 35:9 thru 38:7 (Ja153-154). As to the drowning, Timpanaro testified that approximately 5 minutes after arriving to the beach his father took off his long sleeve shirt and socks/shoes. Decedent then rolled up his pant legs and walked toward the ocean. D. Timpanaro Dep 68:9 thru 69:19 (Ja161). Decedent walked directly from the dry sand area where his beach chair was located and stood on the shoreline with the other members of his family. At the time of the drowning, all four plaintiffs were standing near the shoreline where waves were breaking onto the wet sand. The decedent was standing near Lia and C.T. (Decedent's minor grandson) Timpanaro in the damp/wet sand and David Timpanaro was approximately 8 feet away. While standing in the damp/wet sand talking to Lia Timpanaro, a wave broke onto the shoreline and contacted Decedent and Lia Timpanaro's feet and ankles. They both temporarily lost their balance due to the wet, shifting sand beneath their feet. L. Timpanaro Dep 33:3 thru 35:18 (Ja487-488). Lia Timpanaro took a step backwards and quickly regained her balance; Decedent also took a step backwards but was unable to regain his balance and fell to the wet sand when he encountered a second wave. L. Timpanaro Dep 33:3 thru 35:18 Ja487-488). David Timpanaro testified that Decedent was gradually pulled out to the ocean with each successive wave. D. Timpanaro Dep 72:3 thru 84:6 (Ja163-165). David Timpanaro testified that Decedent was pulled out to the ocean by approximately 20 waves over a

period of 7-15 minutes. D. Timpanaro Dep 84:7-19; and 86:17 thru 87:1 (165-166). David Timpanaro testified that the Point Pleasant Beach police arrived on the scene within minutes and immediately entered the water to save Decedent. Although the heroic officers quickly reached Decedent, their effort to revive him on the seashore was unsuccessful. D. Timpanaro Dep 85:7 thru 86:12 (Ja165-166).

During discovery, several witnesses for Defendants Jenkinson's South, Inc. and Jenkinson's Pavilion, Inc. (hereinafter collectively referred to as "Defendants" or "Jenkinson's") were deposed, including Jenkinson's Lifeguard Chief, Dean Albanese, and Beach Patrol Captain, John Chernosky (Ja189-246; Ja 642-693). Albanese was not present at the time of the drowning because it occurred during the off-season. Albanese, like several other members of Defendants' beach patrol are full-time teachers during the off-season. He testified that like most beaches on the Jersey Shore, Jenkinson's beaches are open from Memorial Day through Labor Day. He further testified that the beaches may open on weekends after Labor Day, weather permitting. Albanese Dep 78:17 thru 79:2 (Ja210). Albanese testified that once the beaches close for the season all equipment, including lifeguard stands, are removed and stored for the winter. He further testified that signs are prominently posted along the entire stretch of the beach warning the public that the beach is closed for swimming and no lifeguards are on duty. Additionally, Albanese testified that red flags are hung on several flag poles located along the beach to

warn beachgoers in the off-season that it is unsafe to enter the water. Albanese Dep 79:3 thru 81:13 (Ja210).

Albanese testified that the drowning in this case occurred on Wednesday, September 23, 2020, which is approximately 2 weeks after the Defendants' beach closed for the season. Albanese Dep 162:5-22 (Ja231). Defendants' entire lifeguard staff had been furloughed until the next beach season, which begins every year in May. Chernofsky Dep 150:5 thru 151:10 (Ja681). At the time of the incident, Defendants, like other beach owners on the Jersey Shore, were authorized to operate their beaches in accordance with two New Jersey Department of Environmental Protection (NJDEP) permits (Ja 247-254) and (Ja255-262). NJDEP issued the permits on August 28, 2020 and were in effect for five years (i.e., August 27, 2025 expiration date) (Ja248, Ja256). The permits granted permission to Defendants ("Permittees") to conduct beach and dune maintenance activities within their respective boundaries in accordance with the Rules on Coastal Zone Management (N.J.C.A. 7:7-10) (Ja248, Ja256). Within the permits, NJDEP imposed several conditions that were required to be followed by the permittee (Ja249-253) and (Ja257-262). The conditions included "Special Condition" No. 13, which states the following: "The Permittee cannot limit vertical or horizontal public access to its dry sand beach area nor interfere with the public's right to free use of the dry sand for intermittent recreational purposes connected with the ocean

and wet sand. However, the Permittee may charge a fee to those members of the public who remain upon and use its beach for an extended period provided it cleans the beach, picks up trash regularly, and permits use of its shower facility, if any available. The Permittee must also provide customary lifeguard services for members of the public who use ocean areas up to the high water mark, regardless of whether they are just passing through or remaining on the beach area of its property." (Ja250, Ja259). The conditions also include "Standard Condition" No. 12, which states the following: "The issuance of a permit does not relinquish public rights to access and use tidal waterways and their shores." (Ja252, Ja260).

During discovery, Jenkinson's Pavilion executive/manager Anthony J. Storino was deposed (Ja263-308). Storino has managed Jenkinson's Pavilion since approximately 1990 and has firsthand knowledge of the NJDEP permits issued to Jenkinson's Pavilion. A.J. Storino Dep 15:7-15 (Ja268). Storino testified that pursuant to the NJDEP permit, Defendants must keep their beaches open year-round for public access. A.J. Storino Dep 121:13-21 (Ja294). Storino testified that there are only two exceptions to the general rule. The first is during the summer season when all Point Pleasant Beaches are required by local ordinance to close at 7:00 p.m.; and the second is when a significant storm event occurs, such as a hurricane or tropical storm, that creates the risk of catastrophic flooding for the upland areas of the Borough of Point Pleasant. A.J. Storino Dep 136:2 thru

137:21; and 143:8-15 (Ja298, Ja300). During pre-trial discovery the parties stipulated that Borough of Point Pleasant Ordinance 2020-12 was in effect at the time of the drowning (Ja309-315). The ordinance, as testified to by Storino, expressly states that during the summer season all beaches "shall" close at 7:00 p.m. See §21-1.1-2 (Ja310). The ordinance further makes exceptions to members of the public who wish to surf, fish, or scuba dive while the beach is closed. It also exempts members of the public who wish to exercise on the wet sand or in the ocean. The ordinance expressly states that exercising in these two areas is "permitted at all times." See §21-1.1-2(A)(3) and (4) (Ja310-311). With respect to Storino's testimony regarding catastrophic flooding, Defendants constructed a seawall in 2018 following the issuance of another NJDEP permit (Ja316-321). Pursuant to the permit, Defendants were authorized to construct a "shore protection project consisting of a seawall, rock revetment, boardwalk modifications, three vehicle access ramps, eight pedestrian accessways and beach berm maintenance as shown on the plans referenced on the last page of this permit." (Ja317). Storino testified that the purpose of the seawall was to serve as a "flood gate" to be deployed when a hurricane or tropical storm posed an imminent flooding danger to the area. A.J. Storino Dep 139:11-15; and 159:13 thru 160:1 (Ja299, Ja304). During discovery the depositions of the two NJDEP employees involved in the seawall permit were deposed (Ja32-336, Ja337-347). Erik Virostek is an

Environmental Specialist III with the NJDEP. Virostek was responsible for reviewing Defendants' seawall permit application. See Virostek Dep 17:17 thru 18:1 (Ja327-328). He testified that the sole purpose of the seawall was that of "protection of upland areas...adjacent to the beach, from wave action, storm surges, things of those nature." Virostek Dep 20:5-18 (Ja328). Joanne Davis an Environmental Specialist IV with the NJDEP; she was deposed on June 15, 2022 as well. (Ja338). Davis was responsible for approving Defendants' seawall application. Davis Dep 19:8-20 (Ja343). Like Virostek, Davis testified that the purpose of the seawall was "to provide shore protection to the upland." Davis Dep 22:22 thru 23:3 (Ja344).

Pursuant to the permit, Defendants were responsible for creating a maintenance manual for the seawall (Ja317). Defendants complied with the permit by creating a document entitled "Seawall Operations & Maintenance Manual" (hereinafter "O&M Manual") (Ja348-365). The O&M Manual expressly defines what constitutes a "Significant Storm Event" that would potentially trigger deployment of the seawall gates. It states the following: 1) Designation of the Jenkinson's Boardwalk within a tropical storm or hurricane watch or warning area, as determined by the National Hurricane Center; 2) Designation of the Jenkinson's Boardwalk with a National Weather Service Coastal Flood Warning area, provided a surge of at least 3 feet is predicted to occur at the Watson Creek Station of the

Stevens Flood Advisory System; and 3) Designation of Jenkinson's Boardwalk within an area of a State of Emergency for Storm or Flooding as issued by the NJ Governor's Office. See §7.0 (Ja355-356).

On the day of the drowning, none of the above conditions existed. Hurricane Teddy had been downgraded to a tropical storm and was located hundreds of miles away making landfall in Nova Scotia, Canada. (Ja597-600). On September 23, 2020, no tropical storm, hurricane, or coastal flood warnings were in effect for New Jersey (Ja597-600). On September 23, 2020, no State of Emergency had been declared by Governor Murphy (Ja597-600). As reflected in Plaintiffs' photographs`, as well as the deposition testimony of David Timpanaro, the weather on the day of the drowning was sunny and warm, and ocean water conditions were generally calm/normal. No imminent threat of coastal flooding or storm surge existed on September 23, 2020 (Ja183-188). In light of the prevailing weather conditions, Defendants' seawall flood gates were open to provide public access to the beach, as required by Defendants' NJDEP permits. No lifeguards were on duty, but numerous warning signs and red flags were prominently posted by Defendants warning members of the public stay out of the water (Ja437-444). As discussed more fully below, Plaintiffs and Decedents ignored the warnings and a drowning occurred.

PROCEDURAL HISTORY

On May 19, 2021, Plaintiffs filed a Complaint against Defendants for Counts of Wrongful Death (Count I), Survivorship (Count II), and Negligent Infliction of Emotional Distress (Count III) (Ja1-13). After completing extensive pre-trial discovery, Defendants moved for summary judgment. After considering the complete evidentiary record, the Court granted Defendants' motion in its entirety and dismissed the Plaintiffs' complaint with prejudice.

In its 21-page opinion, the Court stated its reasons for granting summary judgment (Ja34-54). First, the Court found that as a matter of law, Defendants' property qualifies as a "premises" under the LLA (Ja40-45). In arriving at its decision, the Court relied primarily on the case of Toogood v. St. Andrews Condo Ass'n., 313 N.J. Super. 418 (App. Div. 1998). The Court correctly noted that according to Toogood, the ultimate issue with respect to whether a property qualifies as a protected "premises" under the LLA is the dominant use of the land (Ja44-45). It rejected Plaintiffs' argument that the geographical location of the property is the determining factor. The Court then applied Toogood to the facts of the case and found that being on the beach near the ocean is clearly a covered recreational activity under the LLA (Ja66). The Court further noted that the LLA requires that the provisions of the Act be liberally construed to serve as an inducement to [parties]...that might otherwise be reluctant to do so for fear of

liability, to permit persons to come onto their property for sport and recreational activities. (N.J.S.A. 2A:42A-5.1) (Ja43). After determining that Defendants' property qualified as a "premises" under the LLA and that Decedent was in fact engaged in sport and recreational activities while at Defendants' premises, the Court concluded that Defendants had no duty of care or liability for damages for the death or injury to person or property (Ja44).

Although determining that Defendants were immune from liability for the Decedent's drowning, the Court nonetheless addressed Defendant's second argument regarding "duty." Initially, the Court noted that Defendants' property is "unique and without comparison" because it borders the ocean (Ja45). Next the Court found that the ocean itself is "inherently dangerous" year-round, and at all times of the day (Ja45). Importantly, the Court found that the ocean cannot be made reasonably safe due to the ever-present risk of drowning (Ja45). After discussing the dangers that the ocean presents to the public, the Court found that pursuant to its NJDEP permits, Defendants were required to ensure public access to the beach and ocean during the off-season (Ja44). The Court referenced conditions within the permits requiring Defendants to ensure year-round vertical and horizontal access to the wet sand/ocean and free use of the dry sand for intermittent recreational purposes (Ja52-54). With respect to the subject incident, the Court correctly noted that same indisputably occurred in the wet sand/ocean

area, not the dry beach area (Ja39). The Court further correctly noted that Decedent voluntarily left the dry beach area and entered the wet sand/ocean area of the property (Ja39). Once Decedent left the dry beach area, the Court found that Decedent exceeded the scope of invitation to Defendants' premises (Ja45-46). The Court correctly noted that Decedent voluntarily entered the wet sand/ocean area despite being warned not to do so (Ja39, Ja43-46). The Court further correctly noted that Defendants prominently posted signs and flags throughout their premises warning members of the public that the beaches were unsupervised and that it was dangerous to enter the water (Ja4-50). After considering the evidence regarding the issue of "duty," the Court held that members of the public, such as Decedent, "who enter the ocean during a beach's off-season cannot be business invitees by definition." (Ja45). The Court, although sympathetic to the tragic loss suffered by Plaintiffs, nonetheless concluded that Defendants, as well as all other New Jersey beach owners, have a legal obligation to ensure public access to the beach during the off-season, but are not liable for members of the public who disregard warning signs and voluntarily enter the ocean.

Following the Court's dismissal of this matter, Plaintiffs filed a motion for reconsideration. The motion presented no new facts or law for the Court to consider. Plaintiffs simply presented the same arguments and contended the Court erred for not agreeing with them. In response to Plaintiff's motion, the Court

expounded upon its prior findings and conclusions. As to its finding that Defendants are immune under the LLA, the Court noted the recent (unpublished) opinion of Arias v. County of Bergen, Docket No. A-2574-22 (App. Div. 2024) (Ja66). While acknowledging that Arias was not binding, the Court agreed with its logic and conclusion (Ja66). The Court noted that in the present matter the "premises" is the beach and ocean. It found that "the fact that the beach sits alongside the busy boardwalk of Point Pleasant is not dispositive of the issue of immunity pursuant to the Landowners Liability Act." (Ja66). The Court noted that the beach and ocean share similar characteristics to rural and semi-rural lands "in spite of the fact that they abut a boardwalk and town." (Ja66). After finding that "being on the beach near the ocean is clearly a covered recreational activity", the Court confirmed its opinion that Defendants are entitled to immunity under the LLA (Ja66).

Plaintiffs' motion for reconsideration also provided the Court with an opportunity to further explain its finding with respect to "duty." First, the Court discussed its finding that Defendants' property consists of two distinct "premises." The Court stated that it "saw one property with two distinct premises: the beach and ocean. The beach with its sand and dunes, and the ocean with its roaring waves and endless blue stand in stark contrast with one another." (Ja65). The Court further stated that "[t]o consider this one "premises" would fly in the face of

the unique nature of each portion of Defendants' property, the unique uses for each portion of Defendants' property, and the unique risks each portion of Defendants' property could pose to the public." (Ja65). Second, the Court noted that Decedent's incident indisputably occurred in the wet sand/ocean area of the property (Ja66). The Court referenced the language of Plaintiffs' complaint in support of its finding. It noted that "per the language of Plaintiff's Complaint Decedent was pulled into the ocean by waves." (Ja66). Based upon same, the Court logically concluded that "[t]he incident where all of Plaintiffs claims stem from occurred in the ocean and not the beach." (Ja66). And third, the Court reiterated its logical conclusion that Decedent voluntarily left the dry sand beach area and entered the wet sand/ocean area prior to the incident occurring. The Court stated, "While sympathetic to the tragic circumstances, the Court does not see a material difference between a person standing on the beach at the water's edge in the face of an approaching tide, subsequently having the water hit them, and then being swept away from a wave as opposed to walking in the water and then being swept away from a wave." (Ja62-63). As to Decedent's actions, the Court found that "Decedent voluntarily approached the water's edge in the face of an approaching tide and was swept into the ocean and drowned. The undisputed facts are that the Decedent rolled up his pants, took off his shoes, and walked onto the wet sand. The Decedent clearly put himself within reach of the ocean and its

waves. For all practical purposes it was Decedent's decision to approach the water that resulted in him being swept into the ocean." (Ja63). Similar to the motion for summary judgment, the Court rejected all Plaintiffs' arguments upon reconsideration and stood firm on its holding that Defendants owed Decedent no duty of care once he left the dry sand/beach area.

LEGAL ARGUMENT

POINT I
THE COURT DID NOT ERR IN HOLDING DEFENDANTS DID NOT VIOLATE THEIR DUTY TO PLAINTIFFS AS A MATTER OF LAW

Plaintiffs present several arguments relevant to the issue of "duty." They generally contend that the Court erred in holding that Defendants did not violate their duty to Plaintiffs as a matter of law. Specifically, Plaintiffs contend that the Court erred in determining that Decedent exceeded the scope of his invitation; that Defendants' monitoring and warnings were adequate; and that Defendants were not permitted to close its flood gates on the day of the drowning.

Plaintiffs' first argument relates to the Court's finding that Decedent exceeded the scope of his invitation and therefore was not a business invitee of Defendants when the incident occurred. Plaintiffs argue that Decedent "remained on the beach before he was swept away by sudden dangerous hurricane related waves." See Plaintiff-Appellants Brief p.35. They further argue that Decedent was

not "in" the water but rather standing in the wet sand on the seashore when he was knocked over by an incoming wave. See Plaintiff-Appellants Brief p.35. The crux of Plaintiffs' argument is that the Court erred in concluding that Decedent voluntarily entered the ocean. Despite acknowledging that Decedent took off his shoes and socks, rolled up his pant legs, and walked directly toward the ocean, Plaintiffs argue that there is "zero evidence" showing that Decedent voluntarily entered the water. See Plaintiff-Appellants Brief p.36. Plaintiffs further argue that despite regularly taking his family to the Jersey Shore, the 69-year-old Decedent was unaware of the dangers presented by standing on the seashore in face of oncoming waves (Ja 20:3 thru 22:6). As reflected in its summary judgment and reconsideration opinions, the Court rejected all of Plaintiffs' arguments.

Plaintiffs briefly discuss the Public Trust Doctrine in their Statement of Facts but fail to mention its significance with respect to the Court's holding that Decedent exceeded his scope of invitation. In order to properly understand the Court's holding, it is necessary to understand the Public Trust Doctrine and its application to the New Jersey coastline. Over the past 200 years, the common law in New Jersey pertaining to the Public Trust Doctrine has developed and thoroughly addressed the issue of public access. See A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey, *A Timeline of Public Trust Rights in New Jersey*, pp. 4-14, Monmouth University Urban Coast Institute

(Summer 2017). Lands subject to public trust rights are generally tidal waterways to either the ordinary high water line or the ordinary low water line, and those lands that are beneath them. (NJDEP Public Access Webpage, Public Trust Doctrine, *Lands and Waters Subject to Public Trust Rights*, par. 1, http://www.nj.gov/dep/cmp/access/njparightslegal.htm (2021)). New Jersey is a high water state and further clarifies the upland boundary as the "mean high water line" (MHW). Id. The MHW is line on the beach that represents the average reach of the high tides. In contrast, the "mean low water line" represents the line on the beach that represents the average reach of low tides. Id. The MHW line has been established for the entire New Jersey coastline. Id. All lands and waters extending seaward are held in trust by the state on behalf of the public. The rights of the public are vested in the state as owner and trustee. Id. (emphasis added). These lands include the wet sand and ocean.

"As the Public Trust Doctrine evolved over the years, courts have ruled that the dry sand areas beyond the MHW line are also subject to certain public rights, as needed for the enjoyment of the tidal waterways and lands below the MHW line." Id. (citing Matthews v. Bay Head Improvement Assoc., 95 N.J. 306 (1981); Raleigh Ave. Beach Assoc. v. Atlantis Beach Club, 185 N.J. 40 (2005)). As the trustee of public rights to tidal waterways and their shores, it is the duty of the government to not only allow and protect the public's right to use them, but also to

ensure that there is adequate access to dry sand, wet sand, and ocean. Id. at par. 2, *Public Access and Use*. Access is ensured both vertically (or perpendicular) and horizontally (or lateral/linear). Id.

Since Arnold v. Mundy, 6 N.J. L. 1 (1821) was decided, the courts have broadly interpreted the Public Trust Doctrine, which has led to expansive rights granted to the public to access and enjoy the ocean. The public has the right to swim, fish, boat, walk, and sunbathe year-round on all New Jersey beaches. In accordance with the law, the public must be given access that is "reasonably necessary" to enjoy public trust lands (i.e., ocean and wet sand), as well as a reasonable amount of dry upland sand to fully enjoy its rights. Matthews, supra, 95 N.J. 306; Raleigh, supra, 185 N.J. 40.

All levels of government, from federal to local, have the responsibility to ensure adequate public access to the ocean and its shoreline. (NJDEP Public Access Webpage, Public Trust Doctrine, *State Implementation of Public Access*, par. 1, http://www.nj.gov/dep/cmp/access/njparightslegal.htm (2021)) The Coastal Zone Management Act of 1972 (CZMA) led to the creation of a federal framework that developed statewide coastal management programs. (See NJDEP Public Access in New Jersey, The Public Trust Doctrine and Practical Steps to Enhance Public Access, Robert Freudenberg, p. 31 (2006). In 1973, the New Jersey legislature passed the Coastal Area Facility Review Act (CAFRA). N.J.S.A.

13:19-21. CAFRA authorized the New Jersey Department of Environmental Protection (NJDEP) to regulate the 1,376 square mile coastal region designated as the "CAFRA area." Id. at p. 40. In furtherance of its role in regulating the coast line, the NJDEP has developed several administrative rules called the Coastal Zone Management Regulations (CZM rules). N.J.A.C. 7:7E. The CZM rules serve as the "substantive core" of the NJDEP Coastal Management Program and ensure enforceability of CAFRA. Id. at p. 42. The primary means by which the NJDEP regulates the New Jersey coastline is through a state-issued permit process. Id. at p. 34. The permits, known as "CAFRA permits," regulate almost all development activities on the coastline. It is through the permit conditions that NJDEP incorporates the Public Trust Doctrine to ensure public access to the ocean and wet sand, (i.e., public trust lands). Finally, in 2019 Governor Murphy codified the Public Trust Doctrine by signing legislation expressly intended to protect the public's right to access beaches and waterfronts in New Jersey. N.J.S.A. 13:1D-150(b). The law confirmed that all tidal lands are held in trust by the State for the benefit of the public. The law mandated that NJDEP ensure that any action taken by the regulatory agency is consistent with the tenants of the Public Trust Doctrine.

With respect to the present matter, the Court in its opinion recognized the Public Trust Doctrine and noted the clear boundary line between the dry sand/beach area and the wet sand/ocean area. The Court further correctly noted

that the incident involving Decedent occurred on the wet sand/ocean area (i.e., seaward of the MHW line). Decedent was standing on the shoreline facing oncoming waves when he was knocked off balance. He then was hit by several successive waves and ultimately carried out to the ocean. None of this occurred on the dry sand area. As stated several times in its opinion, the Court found that Decedent voluntarily left the dry sand area and entered the wet sand/ocean area prior to beginning of this unfortunate event.

The Court did not err by finding that the beach and the ocean are two different premises separated by a clear boundary line (i.e., the MHW line). In its opinion granting Defendants' motion for summary judgment, the Court noted that, "While Plaintiffs were invited to visit the beach, they were not invited to enter the ocean, which is a severable part of the Defendants' property due to the starkly different nature of the ocean versus that beach." (Ja44) (emphasis added). The Court reiterated this finding in its opinion denying Plaintiffs' motion for reconsideration when it stated that it "saw one property with two distinct premises: the beach and ocean. The beach with its sand and dunes, and the ocean with its roaring waves and endless blue stand in stark contrast with one another." (Ja65) (emphasis added). The Court further stated that "[t]o consider this one 'premises' would fly in the face of the unique nature of each portion of Defendants' property, the unique uses for each portion of Defendants' property, and the unique risks each

portion of Defendants' property could pose to the public." (Ja 65). Most importantly, the Court did not err by finding that Decedent's drowning occurred in its entirety in the wet sand/ocean area. In its summary judgment opinion, the Court stated that, "Decedent voluntarily approached the water's edge in the face of an approaching tide and was swept in the ocean and drowned. The undisputed facts are that the Decedent rolled up his pants, took off his shoes, and walked onto the wet sand. The Decedent clearly put himself within reach of the ocean and its waves." (Ja63). In further support of its finding, the Court noted that Plaintiffs, themselves, acknowledge that the incident occurred on the wet sand/ocean area. The Court noted that, "Per the language of Plaintiff's Complaint Decedent was pulled into the ocean by waves." See Pl. Compl. At ¶23 (Ja66). Based upon the above, the Court found that, "The incident where all of Plaintiffs claims stem from occurred in the ocean and not the beach." (Ja66).

In its decision, the Court correctly applied the law to the specific facts and circumstances of this unfortunate event. Its decision was based upon the indisputable factual evidence presented by both sides. It properly concluded that based upon his conduct, Decedent voluntarily left the dry sand area and entered the wet sand/ocean area, which ultimately led to his drowning.

Plaintiffs' second argument with respect to "duty" relates to the Court's finding that Defendants' monitoring and warnings were adequate. See Plaintiff-

Appellants Brief pp.37-39. Plaintiffs argue that as the owner of the beach/dry sand area, Defendants had a duty to guard against any dangerous conditions on their property that they either knew about or should have discovery through a reasonable inspection. Importantly, it must be noted that the *dangerous conditions* alleged by Plaintiffs are that of strong surf and rip currents, both of which occur in the ocean and seashore, not the dry sand beach. Plaintiffs contend that the evidence in this matter arguably showed constructive notice on behalf of Defendants of the dangerous ocean water conditions. Plaintiffs argue that despite acknowledging the existence of dangerous ocean water conditions, the Court erred in concluding that Defendants' numerous warning signs and red flags adequately warned members of the public about the danger. See Plaintiff-Appellants Brief pp.37-39

In arriving at its decision, the Court repeatedly noted that the dangerous condition alleged by Plaintiffs in this matter was located not on the dry beach area, but rather the wet sand/ocean area. To be clear, the dangerous condition alleged by Plaintiffs that put beachgoers at risk is that of dangerous rip currents and swells. Importantly, natural water conditions at a beach, such as dangerous rip currents and swells, are viewed as natural hazards, not "dangerous conditions." See, e.g., Fleuhr v. City of Cape May, 195 N.J. 532 (1999) ("Once a bather enters a body of water, such as a river, lake, ocean or bay which is unimproved, there can be no liability for injuries which occur solely due to conditions encountered in that

unimproved body of water"); See also Stemkowski v. Borough of Manasquan, 208 N.J. Super. 328, 332 (1986) (natural action of waves not "dangerous condition"); and, see also, Keinke v. City of Ocean City, 163 N.J. Super. 424, 431 (1978) ("...if force of wave alone had injured plaintiff, defendant would be immune from liability."). Rip currents and swells are common ocean water conditions that occur naturally. Also important, rip currents and swells pose no safety concern to beachgoers who are not standing on the seashore or in the ocean water. As recognized by the Court, the hazards present in the ocean are vast and impossible to prevent and/or control. Dangerous ocean water conditions include forceful waves, rough water conditions, dangerously low water temperatures, low visibility, dangerous winds, dangerous ocean water debris, and marine life. Moreover, ocean water conditions are unpredictable, constantly changing, and uncontrollable. The water may be safe on one section of the beach, but unsafe at another. The Court agreed with Defendants that it is unreasonable to suggest that beach owners have the opportunity and/or ability to monitor ocean water conditions year-round to prevent injuries from occurring.

In its opinion, the Court recognized the inherently dangerous nature of the ocean and concluded that Defendants' actions in notifying members of the public that swimming was prohibited because lifeguards were no longer on duty (signs posted in Defendants' parking lot, boardwalk, and beach ramp) and that dangerous

ocean waters were present (red flags hoisted on poles lining the boardwalk) satisfies any duty that it arguably owes to people visiting Point Pleasant Beach during the off-season (Ja53).

Plaintiffs' third argument with respect to "duty" relates to the issue of public access. See Plaintiff-Appellants Brief pp.39-41. Plaintiffs contend that the Court erred in holding that Defendants were not permitted to close their flood gates and thus close the entire beach on the day of the drowning. Plaintiffs assert three arguments in support of their claim that the Court erred. They contend that the Court misinterpreted Defendant's NJDEP CAFRA permits, the CZM rules, and Defendant's Operations & Maintenance Manual. As reflected in its opinion, the Court interpreted all three documents consistent with the plain, express language contained therein.

Plaintiffs initially contend that the Court misinterpreted Defendants' NJDEP permits. As previously noted, Defendants were authorized to operate their beaches in accordance with two New Jersey Department of Environmental Protection (NJDEP) permits at the time of the subject incident (Ja247-254, Ja255-262). The permits expressly precluded Defendants from limiting vertical or horizontal public access to its dry sand beach area. The permits further did not relinquish public rights to access and use tidal waterways and their shores. (Ja252, 260).

During discovery, Jenkinson's Pavilion executive/manager Anthony J.

Storino testified that Defendants have been subject to CAFRA permits since 1976 when they first began operating their beaches. The general permits issued to Defendants primarily concern beach and dune maintenance activities during the summer season, but also include conditions that require mandatory year-round compliance. Storino testified that the two permits require Defendants to provide public access to public trust lands 365 days a year. A.J. Storino Dep 121:13-21 (Ja294). He testified that the permits do not differentiate between in-season and off-season.

Storino's testimony regarding year-round access to the beach is consistent with several NJDEP witnesses deposed in this matter. During pre-trial discovery, depositions of five NJDEP witnesses were completed. Two of the witnesses were directly involved in the approval and issuance of Defendants' CAFRA permits in 2020. The witnesses confirmed that the permits were in effect at the time of the drowning and that the Special Condition No. 13 is not limited to the summer season. Garret Esler is an Environmental Specialist II with NJDEP. He was responsible for reviewing Defendants' CAFRA permits to ensure compliance with the CZM rules. Vivian Fanelli is an Environmental Specialist III with NJDEP. She is Esler's supervisor and was responsible for reviewing and approving Defendants' CAFRA permit applications. Both witnesses testified at their respective depositions that Defendants' CAFRA permits were in effect on the day

of the drowning. Esler Dep 18:20-23 (Ja607) and Fanelli Dep 21:12-15 (Ja627). Esler further testified that Special Condition No. 13 is not limited to the summer season. Esler Dep 35:16-20 (Ja611). Fanelli testified that while the permits were in effect, Defendants were neither allowed to limit vertical or horizontal public access to their respective beaches nor to interfere with the public's free use of the dry sand area for recreational purposes. Fanelli Dep 33:4-16 (Ja630). She also confirmed that public access was a requirement of Defendants' CAFRA permits. Fanelli Dep 34:18-20 (Ja631). Finally, Fanelli testified that creating/drafting CAFRA permits is the sole responsibility of NJDEP. Permittees have no input with respect to the specific conditions (both Standard and Special) included within the permits. Fanelli Dep 40:1-25 (Ja632). NJDEP Region Supervisor Robert Clark was also deposed during discovery (Ja445-477). Clark testified that permittees, such as Defendants, are required to comply with all conditions of a CAFRA permit. Clark Dep 60:6-20 (Ja460). Like Esler and Fanelli, Clark testified that there are no time limitations with respect to NJDEP CAFRA permits. He testified that CAFRA permits are in effect year-round. Clark Dep 64:3-12 (Ja461).

It is indisputable that the NJDEP permits are official government documents that provide authorization for Defendants to operate their beach. There is further no dispute in this matter that on September 23, 2020, Defendants' CAFRA permits

were in effect and that same expressly state that Defendants "cannot limit vertical or horizontal public access to its dry sand beach area." (Ja250, Ja259). The permits further expressly state that Defendants cannot "interfere with the public's right to free use of the dry sand for intermittent recreational purposes connected with ocean and wet sand." (Ja250, Ja259). There is also no dispute that on September 23, 2020, it was the responsibility of the State of New Jersey, through the Public Trust Doctrine, to hold the ocean and wet sand in trust for the public, and that as trustee, the State of New Jersey had a duty to ensure access to all public trust lands, including Defendants' beach located in Point Pleasant Beach. In accordance with their permits, Defendants had no legal right to prevent Plaintiffs from accessing their beaches and using the dry sand area for recreational purposes. Defendants further had no legal right to prevent the decedent from standing on the shoreline with his feet in the wet sand. As previously argued, Defendants do not own the wet sand or ocean, and by law cannot prevent the public from accessing these two areas. Had Defendants denied Plaintiffs access to the beach on the day of the drowning they would have been in violation of their CAFRA permits and subject to legal enforcement action by the State.

Although Plaintiffs acknowledge that the two NJDEP CAFRA permits were in effect at the time of the incident, they nonetheless contend that Defendants' beach should have been closed on the day of the drowning. In their Complaint,

Plaintiffs specifically allege Defendants should have closed their beach due to "dangerous **ocean conditions** including, but not limited to, dangerous currents and/or swells and/or a high risk of other dangerous, life-threatening conditions." See FACTS COMMON TO ALL COUNTS, ¶18) (Ja4) (emphasis added). The allegation specifically relates to natural conditions in the ocean, including rip currents and swells. In its opinion, the Court acknowledged the clear language of the Defendants' NJDEP CAFRA permits and concluded that Defendants "had a legal obligation to maintain public access to the beach." (Pg. 20). The Court further held that "Plaintiffs assertions that [Defendants] could have closed the beach entrances or otherwise barred public access from the beach to prevent access during dangerous conditions are unsubstantiated." (Ja53)). In finding that the Defendants had a legal obligation to ensure public access to their beaches during the off-season, the Court rejected Plaintiffs' argument that Defendants could have simply ignored their NJDEP permits because no easement leading from the boardwalk to the ocean existed at the time of the drowning. Rather, the Court agreed with Defendants and held that regardless of whether an easement exists, Defendants are required to comply will all terms of their NJDEP CAFRA permits during both the in-season and off-season. For the reasons argued above, the Court did not err with respect to its holding.

Plaintiffs' second argument regarding public access relates to the CZM

rules. See Plaintiff-Appellants Brief pp.40-41. Again, Plaintiffs contend that the Court misinterpreted the CZM rules by holding that Defendants were not legally obligated to close the beaches to the public on the day of the drowning because dangerous ocean water conditions existed. In support of their second argument, Plaintiffs rely upon N.J.A.C. 7:7-16.9(b)(4). Otherwise known as the "Public Access Rule", N.J.A.C. 7:7-16.9 was adopted by the NJDEP in 2012. It acknowledges that, as trustee of the public rights to natural resources, "it is the duty of the State to not only allow and protect the public's right to us them, but also ensure that there is adequate access to these natural resources." See A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey, *A Timeline of Public Trust Rights in New Jersey*, pp. 4-14, Monmouth University Urban Coast Institute (Summer 2017)(quoting N.J.A.C. 7:7-16.9(aa). The rule does, however, place limited restrictions on the public's right to access the ocean. One exception is N.J.A.C. 7:7-16.9(b)(4), which reads as follows:

> 4. **Public access to tidal waterways and their shores shall be provided in such a way that it shall not create conditions that may be reasonably expected to endanger public health or safety, or damage the environment. To that end, public access may be restricted seasonally, hourly, or in scope (for example, access restricted to a portion of the property, or access allowed for fishing but not swimming due to consistent strong currents).**

The "public health and safety" exception is a limited exception that depends

on the circumstances. It may apply to situations where rough seas create dangerous conditions for swimmers and surfers; however, once the situation changes, the restrictions are no longer applicable. For example, if the upland property is no longer subject to a public health risk, the restrictions are no longer applicable and the rights of citizens to access the public trust lands is immediately reinstated. See A Practical Guide to Beach Access and the Public Trust Doctrine in New Jersey, *A Timeline of Public Trust Rights in New Jersey*, p. 20, Monmouth University Urban Coast Institute (Summer 2017).

In its opinion, the Court held that on the day of the drowning, the "public health and safety" exception to the Public Access Rule was not triggered and therefore not applicable to the decedent's drowning (Ja69). First, the Court noted that the public was warned not to enter the ocean via numerous signs and flags prominently posted on the boardwalk and beach. Signs explicitly stating "NO SWIMMING" were located in Defendants' parking lot, in front of the Point Pleasant Beach Police substation on Arnold Avenue, on the Point Pleasant Beach boardwalk, and on the Arnold Avenue beach access ramp. See photos (Ja437-444). Additionally, red warning flags are hung on several flag poles located along the beaches to warn beachgoers that it is unsafe to enter the water (Ja440). While accessing the beach on the day of the drowning, Plaintiffs and Decedent walked past literally all of signs mentioned above, including a large sign at the end of the

Arnold Avenue beach ramp. See sign stating "BEACHES CLOSED NO SWIMMING" (Ja443). As noted earlier, the signs are posted by Defendants' beach patrol employees at the end of the summer season and are left in place during the entire off-season. The signs and flags are intended to warn beachgoers that it is unsafe to swim in the ocean when lifeguards are off-duty. The signs also warn beachgoers that water conditions may be dangerous.

Second, the "public health and safety" exception to the Public Access Rule was not triggered on September 23, 2020 because no public health or safety condition existed on the dry sand/beach area. Plaintiffs' contention in this matter is that the ocean was dangerous, not the upland beach areas. The photographs taken by Plaintiffs minutes before the drowning contradict their claim that the beach was dangerous or posed a threat to public health (Ja183-188). As seen in the photos, members of the public are seen sitting in beach chairs, searching for seashells, and walking along the seashore. The water conditions in the background are generally calm and the water is several hundred feet from the boardwalk. In its opinion, the Court correctly found that Plaintiffs' argument that Defendants were negligent for not closing of the beach that morning due to dangerous/hazardous conditions was contrary to the evidentiary record in this matter.

Finally, plaintiffs' allegation seeks to impose a duty on all beach owners in the State to deny public access to the beach during the off-season if ocean water

conditions present a danger or safety concern. If the court were to impose this duty, the 60 designated beaches from Sandy Hook to Cape May would be legally obligated to monitor the beaches daily during the entire off-season and prevent members of the public from access the ocean if, for example, water temperatures dropped too low or a storm located hundreds of miles from the coast created rough seas and rip currents. Imposing such a duty on beach owners, public and private, would be unreasonable, unfair, and overwhelmingly burdensome. There is nothing in CAFRA or the CZM rules suggesting that NJDEP intended to impose such a responsibility during the 9-month off-season period. There is also nothing in the Point Pleasant Borough ordinance that indicates local officials required Defendants to restrict access to the beach during the off-season when ocean swimming may be unsafe.

In arriving at its decision, the Court applied the plain language of CZM rules to the facts and circumstances surrounding the drowning and found that same did not require Defendants to restrict public access to the dry sand/beach area. The Court concluded that, "While the CZM permits an owner of beach premises to restrict public access in the face of conditions that could endanger public health or safety it does not require owners of beach premises to do so." (Ja53) The Court further found that Defendants adequately warned beachgoers to stay out of the water because it was unsupervised (i.e., "LIFEGUARDS ARE OFF-DUTY). It

stated, "While the CZM…could have permitted Defendants to close the beach they were not legally obligated to do so. Instead, Defendants opted to use signs warning the public against swimming or entering the beach. This has a congruent effect on public awareness of dangerous ocean water conditions." (Ja53). The Court further added, "It is reasonable to conclude that other measures, such as signage warning the public 'NO SWIMMING WHEN LIFEGUARDS ARE OFF-DUTY' and 'BEACHES CLOSED NO SWIMMING,' can provide a fully effective means to alert the public of dangerous ocean water conditions." (Ja53).

Plaintiffs' third argument regarding public access relates to Defendants' flood gate Operations and Maintenance Manual (Ja348-356). Plaintiffs, again, contend that the Court misinterpreted the manual by holding that Defendants were not obligated to close the beaches to the public on the day of the drowning. Plaintiffs' argument with respect to the closure of Defendants' flood gate concerns two significant events. The first occurred in 2017, and the second approximately two weeks prior to Decedent's drowning. As to the 2017 event, same involves an out-of-court settlement agreement between Defendants and the State relevant to an eminent domain action (Ja500-583). By way of background, following the devastation caused by Superstorm Sandy in 2012, the NJDEP initiated a major project to build a beach dune system along a large area of New Jersey's coastline. In 2014, Defendants filed a lawsuit seeking to enjoin NJDEP from taking its

beachfront property through eminent domain with respect to this project. NJDEP planned to use Defendants' property to build a massive beach dune alongside the entire stretch of the Point Pleasant Beach boardwalk. In 2017, the parties settled the case with the Defendants agreeing to build a seawall with various flood gates at their own expense (Ja500-583). In 2018, NJDEP issued a special permit approving the construction of Defendants' seawall (Ja317-321). Pursuant to the permit, Defendants were required to prepare a beach berm maintenance manual (i.e., O&M Manual). Defendants complied with the permit and created a manual that covers various topics including when the flood gates were to be deployed. The manual requires Defendants to close the flood gates when a "significant storm event" occurs, which is expressly defined as occurring when one or more of the following criteria is satisfied:

- **Designation of the Jenkinson's Boardwalk within a tropical storm or hurricane watch or warning area, as determined by the National Hurricane Center.**
- **Designation of the Jenkinson's Boardwalk within a National Weather Service or Coastal Flood Warning area, provided a surge of at least 3 feet is predicted to occur at the Watson Creek Station of Stevens Flood Advisory System.**
- **Designation of the Jenkinson's Boardwalk within an area of a State of Emergency for Storm or Flooding as issued by the NJ Governor's Office.**

See §7.0 (Ja355-356).

During discovery, Anthony Storino provided testimony regarding the seawall and its purpose. He testified that the purpose of the seawall was to serve as a "flood gate" to be deployed when a hurricane or tropical storm posed an imminent flooding danger to Point Pleasant Beach. A.J. Storino Dep 139:11-15; and 159:13 thru 160:1 (Ja299, Ja304). Also during discovery, the depositions of the two NJDEP employees involved in the seawall permit were deposed. The employees, Erik Virostek and Joanne Davis, testified that the sole purpose of the seawall was that of "protection of upland areas…adjacent to the beach, from wave action, storm surges, things of those nature." Virostek Dep 20:5-18; see also, 32:25 thru 33:4 (Ja328, Ja331). They further testified that the seawall permit expressly required Defendants to maintain all existing public accessways. Virostek Dep 39:7-11 (Ja333); and Davis Dep 30:2-23 (Ja346).

The second significant event relevant to this matter occurred approximately two weeks prior to the drowning. At said time, a tropical storm formed in the Atlantic Ocean off the West African coast (Ja872-881). Tropical Storm Teddy initially formed on September 12, 2020. It later intensified and was declared a hurricane. The storm was tracked by the National Hurricane Center (NHC) from its beginning to end. The NHC is a division of the National Oceanic and Atmospheric Administration (NOAA)/National Weather Service (NWS) that is responsible for tracking and predicting tropical weather systems. The NHC

collects and publishes data on all tropical storms involving the United States. A graphic prepared by the NHC regarding Hurricane Teddy is included within the parties' Joint Appendix (Ja584-600). The graphic shows that Teddy never made landfall along the Eastern United States. In fact, the storm remained several hundred miles off the coast the entire time that it made its way north. It was not until Teddy passed the U.S. before it made landfall in Nova Scotia, Canada (Ja597-600). As is depicted in the graphic, the NHC never declared either a tropical storm warning or hurricane watch for any of the states located along the U.S. east coast, including New Jersey (Ja584-600). The NHC documents further reflect that no flood warnings were issued for the U.S. east coast, including New Jersey. The NHC documents show that on September 23, 2020, Teddy had been downgraded from a hurricane to a tropical storm and was located off the Eastern Canadian coast, which is several hundred miles from Point Pleasant Beach. Finally, the NHC documents indicate that no U.S. state along the eastern seaboard declared a *State of Emergency* while Teddy traveled in a northly direction in the Atlantic Ocean, including New Jersey. According the NHC records, although Teddy was a strong hurricane, it fortunately did not have a significant impact on the United States.

In the instant matter, Plaintiffs contend that on the day of the drowning Defendants were obligated to close the seawall's flood gates, not because of the

potential for upland flooding, but rather because hazardous rip currents in the Atlantic Ocean were forecasted by the NWS. Plaintiffs acknowledge that no tropical storm, hurricane, or flood warnings were in effect for the state of New Jersey. Plaintiffs further acknowledge that no *State of Emergency* had been declared by Governor Murphy. Notwithstanding all the above, Plaintiffs contend that Defendants were obligated on the morning of September 23, 2020 to deploy their flood gates and close the beach to all members of the public. As reflected in its two opinions, the Court rejected Plaintiffs' argument because there was no "significant storm event" occurring and therefore Defendants had no responsibility to deploy their flood gates (Ja69).

As reflected in the deposition testimony of Anthony Storino and the NJDEP witnesses, the sole purpose for the seawall is to prevent upland flooding. The seawall is to be deployed only when the Borough of Point Pleasant Beach is threatened with a storm surge that could result in flooding. During the summer season, the gates are open during the day but closed at 7:00 p.m. pursuant to the Point Pleasant Beach ordinance (Ja310-311). Defendants, however, must accommodate members of the public during the summer who wish to surf, fish, or scuba dive when the beach is closed (Ja310-311). During the off-season, Defendants close some of the gates to mitigate beach maintenance. However, Defendants always leave several gates open to comply with their NJDEP CAFRA

permits. Storino testified that beach access is guaranteed year-round by Defendants for members of the public who want to surf, fish, exercise, or simply get a close view of the ocean water. Other than periods when a "significant storm event" occurs, Defendants have little discretion to close their beaches during the off-season. In fact, as noted above, the NJDEP permit for the seawall required Defendants to maintain all existing public access points. Same reinforced the understanding between NJDEP and Defendants that the sole purpose of the seawall was to prevent the Borough from being flooded like it was in 2012 following a sudden surge generated by Superstorm Sandy. Interestingly, the most persuasive evidence contradicting the Plaintiffs' allegation that the beach was "dangerous", "hazardous", and "unsafe" for beachgoers on September 23, 2020, are their own photographs taken on the day of the incident (Ja183-188). The photos depict near perfect beach conditions for late September. The photos further show that the ocean water was several hundred feet from the boardwalk.

In its summary judgment opinion, the Court noted that, "At the time of Decedent's drowning, weather advisories allegedly noted dangerous ocean water conditions including dangerous currents, swells, and other life-threatening conditions. However, no hurricane watch or warning was declared by the National Hurricane Center in Point Pleasant during that day. Defendants' beach premises were never identified as being part of a Coastal Flood Warning area nor had the NJ

Governor's Office issued a State of Emergency for Storm or Flooding." (Ja51-52). The Court reiterated this fact in its opinion for Plaintiffs' motion for reconsideration. It stated that, "Defendants' duty to deploy their floodgates was defined by the 2017 settlement agreement with the New Jersey Department of Environmental Protection. The triggering events were clear and the Court did not abuse its discretion in ruling that Defendants did not breach an alleged duty to close its seawall gates on the day of the incident as none of the triggering events occurred." (Ja69). Given these facts, the Court held that, "As no conditions that would require Defendants to restrict public access to the beach were in effect on the date of Decedent's drowning and Defendants had a legal obligation to maintain public access to the beach, Plaintiffs' assertions that they could have closed the beach entrances or otherwise barred public access from the beach to prevent access to dangerous conditions are unsubstantiated." (Ja53). For the reasons stated, the Court did not err in finding Plaintiffs' claims "unsubstantiated." In arriving at its conclusion, the Court simply applied the plain language of Defendants' O&M Manual to the weather conditions that existed on the date of the incident. The Court further acknowledged that the purpose of Defendants' seawall was to prevent upland flooding. Since the prevailing weather conditions posed no threat to upland flooding, the Court correctly found that Defendants had no duty to close public access to its beaches/dry sand area.

POINT II
THE COURT DID NOT ERR IN CONCLUDING THAT NEW JERSEY'S LANDOWNER LIABILITY ACT IMMUNIZES DEFENDANTS

Plaintiffs contend in Point II of their appellate brief that the Court erred in concluding that New Jersey's Landowner Liability Act (hereinafter "LLA") immunizes Defendants from off-season drownings, such as what occurred in the instant matter. See Plaintiff-Appellants Brief pp.41-50. Plaintiffs present several arguments relevant to their interpretation of the LLA. They contend that the Court failed to address their argument regarding the decedent's legal status; that Defendants' premises are not the types of "premises" protected under the LLA; and that the Court failed to address the merits of their argument relevant to allegations of gross negligence and/or willful or malicious conduct on the part of the Defendants. As reflected in its opinions, the Court rejected all of the above arguments and held that the LLA provides immunity to New Jersey beach owners who are sued for off-season drownings.

Plaintiffs first argument relates to the issue of Decedent's legal status on the day of the drowning. Plaintiffs contend that the Court did not address their argument that Decedent was a business invitee at time of the drowning, and therefore the LLA does not apply. Plaintiffs discuss the LLA in their brief, but fail to mention certain key provisions relevant to the Court's holding. In order to

properly understand the Court's holding, it is necessary to discuss the LLA and its application to the facts and circumstances surrounding Decedent's off-season drowning.

In 1962, the New Jersey legislature enacted the Landowner Liability Act (LLA). (L. 1962, c. 107). The LLA was created to encourage landowners to make their properties available for sport and recreational activities by the limiting the tort liability that landowners might otherwise be subject to under the common law. Harrison v. Middlesex Water Co., 80 N.J. 391 (1979). The LLA provides that a landowner owes no special duty to keep its property safe for entry or use by others for sport and recreational activities. It further provides that landowners owe no duty to warn persons entering the property of any hazardous conditions of the land. N.J.S.A. 2A:42A-3. The LLA's limitations on liability apply to several types of landowners, including commercial landowners who have agreements with the NJDEP requiring public access on or across their properties. Landowners that have agreements with the government are immune from liability under the LLA, so long as they do not act in a willful or malicious manner, or charge a fee to individuals to engage in recreational activities. N.J.S.A. 2A:42A-8. Finally, in 1991, the legislature further broadened the act by amending it to provide immunity for activities on land "whether in a natural or improved state or whether the land is the site of a commercial enterprise." N.J.S.A. 2A:42A-8. The legislature also

explicitly required that the provisions of the LLA be liberally construed. N.J.S.A. 2A:42A-5.1

The LLA is an important protection for New Jersey beach owners (private, commercial, and municipal), who are required by law to provide public access to the ocean. It provides tort immunity in exchange for public entry and use of the landowner's property. In the instant matter, Defendants fall squarely within the LLA's protected class. They are landowners who own property that is used solely for sport and recreational activities. The Defendants' beach occupies approximately 4,000 feet of oceanfront property. It is wider than most beaches at the Jersey Shore, with varying widths of 200 – 400 feet. Activities at the premises include swimming, surfing, scuba diving, fishing, exercising, and sunbathing. These activities are precisely what the legislature intended to make available to members of the public when it passed the LLA. As noted above, the intent of the act was to induce landowners to make their property available so that individuals, such as the Plaintiffs in this mater, could participate in sport and recreational activities. Moreover, Defendants operate their beach in accordance with two CAFRA permits issued by the NJDEP. The permits include several conditions, including a condition requiring Defendants to ensure public access to the ocean. (i.e., Special Condition No. 13) (Ja250, Ja259). The same condition also expressly prevents Defendants from interfering with the public's right to "free use of the dry

sand for intermittent recreational purposes connected to the ocean and wet sand."

Under the LLA, a private landowner, such as the Defendants, generally is not liable for injuries suffered by a member of the public when they are present on the premises for "sport and recreational activities." See N.J.S.A. 2A:42A-3. The above language refers to activities that are "conducted in the true outdoors, not in someone's backyard." Boileau v. DiCecco, 125 N.J. Super. 263, 267 (N.J. App. Div. 1973). Swimming in the ocean, standing on the seashore, and sunbathing on a beach are considered types of recreational activities that occur in the "true outdoors." Moreover, ocean waves have been found to be natural conditions of unimproved property. Fleuhr v. City of Cape May, 159 N.J. 532 (1999). They are by their very nature natural hazards.

In their first argument, Plaintiffs focus on the "business invitee" exception to the LLA (Section 8). They contend that the Court failed to address their argument that Decedent was a business invitee at the time of the drowning, and therefore the LLA does not apply to the Defendants. To the contrary, the Court devoted much of its opinion to Decedent's legal status. In its opinion, the Court held that although Decedent "arguably" was an invitee to Defendants' beach, he was not an invitee to the ocean, which is where the drowning occurred (Ja45-46). Throughout its opinion, the Court makes clear that Decedent was not invited by Defendants to enter the ocean once the beach closed for the season. The Court notes that

numerous warnings were provided to Decedent that it was unsafe to enter the water. The Court concluded that Decedent ignored the warnings and voluntarily entered the ocean, where he subsequently encountered a relatively small wave that caused him to lose balance in the water and ultimately drown (Ja62). Based upon the Decedent's own conduct, the Court concluded that he exceeded his scope of invitation and therefore could not be considered a business invitee to Defendants' beach (Ja45-46).

As reflected in the Court's opinions, the issue of Decedent's legal status is thoroughly addressed. In accordance with the law, the Court primarily focused its analysis on nature of the Defendants' property. It describes Defendants' property as two "severable" premises (Ja44). On the one hand is the beach with its dry sand, and on the other hand is the ocean with its constantly changing and unpredictable nature. The Court describes the ocean as "inherently dangerous" and impossible to "make...safe." (Ja45-46). Importantly, the Court takes judicial notice of the reality that "the ocean is inherently dangerous and those who enter its water may drown at any time." (Ja45). The Court further takes judicial notice that, "There may be ocean conditions in which the danger is more prevalent than other times, but even tranquil waters pose an unmitigable threat to the public." (Ja45). Within this framework, the Court concluded that once Decedent left the safety of the dry sand area and voluntarily "put himself within the reach of the ocean and its

waves," his legal status changed (Ja45-46). After considering the facts and circumstances regarding the drowning, the Court correctly held that New Jersey beach owners, such as Defendants, are entitled to immunity under the LLA when members of the public go to the beach in the off-season but disregard posted warning signs and voluntarily expose themselves to the dangers of the Atlantic Ocean (Ja45-46). The Court noted that "public policy of New Jersey favors access to the state's beaches and oceans. The shore is one of the most identifying features of New Jersey and attracts people from across the country to go and engage in recreational activities. To hold a landowner responsible for the death of someone who observed warning signs and opted to enter the ocean is exactly the type of circumstances the Landlord (sic) Liability Act is intended to prevent." (Ja43).

Plaintiffs' second argument in Point II of their brief relates to the issue of whether Defendants' beaches qualify as "premises" under the LLA. Plaintiffs argue the Defendants' beaches are not "large tracts or areas of natural and undeveloped lands located in thinly populated rural or semi-rural lands, particularly as to size, naturalness and remoteness or insulation form populated areas," and therefore do not qualify as "premises" under the LLA. See Plaintiff-Appellants Brief p.46 quoting Harrison v. Middlesex Water Co., 80 N.J. 391 (1979). Notably, Plaintiffs provide little discussion regarding the legal authority that the Court primarily relied upon in its summary judgment opinion, Toogood v.

St. Andrews Condo Ass'n., 313 N.J. Super. 418 (App. Div. 1998). Plaintiffs further do not even mention the case of Arias v. County of Bergen, Docket no. A-2574-11 (App. Div. 2024), which factored into the Court's denial of Plaintiff's motion for reconsideration.

In its analysis of this issue, the Court noted in its summary judgment opinion that, "The Courts have clashed over the parameters of what qualifies as protected 'premises' under the Landowner Liability Act." (Ja42). The Court, however, relied upon Toogood as the current legal authority with respect to this issue. It noted that following the 1991 amendments to the LLA, the focus of inquiry as to whether a property owner is protected by the LLA concerns the "dominant character" of the land (Ja44). The Court noted that the focus of inquiry is not concerned with whether the land is improved or in its natural condition, or whether a commercial enterprise owns the property, but rather the dominant use of the land (Ja44). The Court further noted that Toogood requires the Court to focus is on specific location of the property where the injury-causing event occurred, not the surrounding properties (Ja66).

In its reconsideration opinion, the Court also recognized a recent Appellate Division case that further analyzed the issue of what qualifies as a "premises" under the LLA. On June 14, 2024, the Appellate Division issued an (unpublished) opinion in the case Arias v. Couty of Bergen, Docket No. A-2574-22 (App. Div.

2024). In Arias, the Appellate Division confirmed that the proper analysis for determining an LLA "premises" should focus the "dominant character of the land" analysis adopted under Toogood. (Arias at p. 8, ¶ 8). Also noteworthy, the Appellate Division found that the "four factor" test in Harrison was "incongruous" with the 1991 LLA amendment and therefore no longer the proper analysis. (Arias at p. 7, ¶ 7). In its opinion, the Appellate Division noted that a clarification of the definition of "premises" was necessary due to the diminishing open tracts of land in New Jersey, which was not the case in 1979 when Harrison was decided. (Arias at p. 7, ¶ 3)

In its reconsideration opinion in the instant matter, the Court noted that Arias is an unpublished opinion and therefore not binding on it, but nonetheless "agree[d] with its logic and conclusion." (Ja66). The Court stated that, "The 'premises' in this matter is the beach and ocean. The fact that the beach sits alongside the busy boardwalk of Point Pleasant is not dispositive of the issue of immunity to the Landowners Liability Act." (Ja66). The court further stated that the issue in Arias is similar to the issue in the instant matter. It stated, "Certainly, the beach and vast ocean have similar characteristics to rural and semi-rural property. Being on the beach near the ocean is clearly a covered recreational activity. The beach and vast ocean are similar in nature to large sized tracts of rural and semi-rural lands in spite of the fact that they abut a boardwalk and town."

(Ja66). The Court's decision in this matter is correct. It properly focused on the "dominant use" of Defendants' beaches and concluded that "Defendant's ocean property is of the type protected by the Landlord (sic) Liability Act." (Ja45).

Plaintiffs' third argument in Point II of their brief relates to their contention that the Court failed to address the merits of their argument relevant to allegations of gross negligence and/or willful or malicious conduct on the part of the Defendants. Plaintiffs contend that the Court acknowledged the arguments, but simply overlooked them." See Plaintiff-Appellants Brief p.49. Although the Court did not spend considerable time analyzing this issue, it clearly held that, "The immunity granted by the LLA clearly applies resulting in the dismissal of the complaint." (Ja67). Prior to dismissing the case, the Court reviewed this matter's extensive evidentiary record. The Court also entertained oral argument for both motions. In the parties' respective briefs, the Plaintiffs argued that Defendants were grossly negligent and/or willful or malicious because they failed "to guard against or warn against a dangerous condition." See Plaintiff-Appellants Brief p.48. Specifically, Plaintiffs argued that Defendants failed to have procedures in place to monitor ocean water conditions during the off-season; displayed a "lackadaisical" attitude about off-season safety; and placed monetary interests over public safety. Defendants countered the argument by pointing out that the evidentiary record is devoid of any evidence of gross negligence or

willful/malicious conduct on the part of either Defendant. Defendants argued that there was no evidence for the jury to consider that Defendants created the alleged dangerous condition in this matter (i.e., strong rip currents and swells) or that Defendants were aware of the ocean water conditions that morning and yet showed a complete indifference to the safety of beachgoers. Defendants further argued that there was no evidence that deliberately or knowingly intended to injure the Decedent. In its opinion, the Court recognized that although the Decedent's drowning was tragic, the allegations against the Defendants involved claims of simple negligence (i.e., failure to close seawall gates and failure to warn of dangerous ocean water conditions), and nothing more. Like Plaintiffs' other allegations, the Court found the allegations of gross negligence and malicious/willful conduct to be unsubstantiated and accordingly dismissed Plaintiffs' entire complaint with prejudice.

CONCLUSION

For all the above reasons, this Court should affirm the Trial Court's dismissal of the Plaintiffs' complaint.

Respectfully submitted,

By: */s/ Michael C. Corcoran*
MICHAEL C. CORCORAN, ESQ.
Attorneys for Defendants-Respondents

Dated: January 21, 2025

DAVID TIMPANARO, individually and as Executor and Administrator Ad Prosequendum of the ESTATE OF ANTHONY J. TIMPANARO, LIA TIMPANARO, individually and as Guardian of minor, C. T. Plaintiff-Appellants, v. JENKINSON'S PAVILION, INC., a corporation of the State of New Jersey, JENKINSON'S SOUTH, INC., a corporation of the State of New Jersey, JOHN DOES 1-10 (fictitious names), and ABC CORPS. 1-10 (fictitious entities), Defendant-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-000183-24 T4 CIVIL ACTION ON APPEAL FROM ORDERS FOR SUMMARY JUDGMENT AND DENYING CROSS-MOTION AND MOTION FOR RECONSIDERATION SUPERIOR COURT OF NEW JERSEY LAW DIVISION, MORRIS COUNTY DOCKET NUMBER: MRS-L-1110-21 Sat Below: HON. STEPHAN C. HANSBURY, JSC

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANTS

SARNO DA COSTA
D'ANIELLO MACERI WEBB LLC
Paul da Costa, Esq. (#042042003)
425 Eagle Rock Avenue, Suite 100
Roseland, New Jersey 07068
(973) 274-5200
pdacosta@sarnolawfirm.com
ATTORNEYS FOR PLAINTIFF-APPELLANTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/ADMINISTRATIVE CODE

PRELIMINARY STATEMENT

Defendants' response continues to miscast facts to support the trial court's errors. They characterize Mr. Timpanaro's death as a freak accident caused by 'small' waves on a 'normal and calm' day, rather than by the unusual, severe dangers proven by credible evidence to have existed. They incorrectly insinuate that imposition of liability on a commercial beach operator who invites and directs patrons to its beach in the face of knowable hazards, would expose 'all' private beach owners to liability. They assert, despite contrary law, testimony and legal authorities that vague language in several DEP permits, referencing the Public Trust Doctrine, precludes closure of beach access to protect business patrons when life-threatening conditions exist. Further, while Defendants now concede New Jersey's Landowner Liability Act, N.J.S.A. 2A:42A-2, et seq. (LLA), does not immunize commercial beach operators from liability to business invitees, they argue the trial court was correct in holding Decedent, as a matter of undisputed fact exceeded the bounds of his beach invitation by walking on wet sand, thereby surrendering his business invitee status.

This lawsuit is about a significant and 'life-threatening' multiday weather event whose land dangers were reported by the National Weather Service and were at least constructively known to JSouth, the commercial beach and related business operator who stood to economically benefit from Plaintiffs' use of its beach. It is

about the preventable drowning death of a business invitee who was unaware of the dangers and a business operator who failed to provide any warning about the conditions or to simply close sliding metal beach entrance gates during the three days the life threatening dangers were present. Plaintiffs do not seek a novel imposition of liability but rather enforcement of long-standing common law obligations owed to business invitees.

The important legal question raised, whether the (LLA) can properly be read to immunize commercial beach operators from liability to business invitees was not addressed by the court because of its flawed conclusion Decedent had surrendered his business invitation as a matter of law. The defense brief which concedes the business invitee exception to LLA immunity provides a strained effort to justify the court's false equivalency between walking along wet sand looking for shells and 'voluntarily' swimming or entering the water to support the incorrect and disputed factual conclusion that Decedent's business invitee status changed because he entered the ocean.

Defendants erroneously argue JSouth's beach constituted a 'premises,' a necessary requirement for LLA immunity, by failing to distinguish the applicable case law and facts to the contrary. Finally, the defense cannot justify the court's complete silence in failing to consider the properly pleaded claims for Defendant's grossly negligent, willful or reckless conduct, concededly outside LLA immunity.

I. DEFENDANTS' DISTORTION OF MATERIAL FACTS:

(a) The hurricane related weather and water conditions presented significant land hazards that would not be appreciated by beach patrons: The defense assertion this was simply a 'nice' day with 'normal' and 'calm' water conditions, flies in the face of substantial credible evidence, Pb12-13, and is based exclusively on reference to photos taken by Plaintiffs, which they claim "depict near perfect beach conditions," and David Timpanaro's deposition testimony which they describe as "the most persuasive evidence contradicting the Plaintiffs' allegation that the beach was 'dangerous,''hazardous' and 'unsafe' for beachgoers." Defbr 3, 10, 32, 39 (citing photos Ja183-188); Defbr 4-5 (describing the waves as 'normal').

There was ample, indisputable evidence not only about the life-threatening hurricane related beach hazards, but also their insidious and rapidly changing nature which would not be recognized or appreciated by unsuspecting beach patrons. Pb24 (quoting Lifesaving Association Manual describing dangers of swells from off-shore storms causing "high wave run-up" on beaches which "often surprise beach visitors expecting water conditions to reflect …tranquil local weather…. who may be swept into the water as waves grow...and run up on the beach.") The court acknowledged this is exactly what Plaintiffs alleged. Ja35.

The court not only acknowledged the National Weather Service's published land advisories were "available to Defendants and their employees," (Ja35) but that

the testimony supported the conclusion that persons like Plaintiffs would be unaware of the weather-related dangers presented. Ja50, citing A.S.Storino Dep73:25-74:5(Ja761-62) ("Storino himself acknowledges that someone cannot directly look at the ocean [and] recognize…there are…dangerous conditions."). The defense brief misrepresents the photographic depictions and Timpanaro's testimony. David testified the photos depict only conditions existing at "the moment" taken, not at the time of the occurrence, a few minutes later. Ja153 (Dep35:9-20). While the weather seemed "nice" and the water looked "normal" when the photos were taken, id. (Dep34:8-35:3), by the time his father was swept off the beach, the wave "came up much further" than expected," followed quickly by two more waves that made David realize "things had changed" when the power of the waves "flipped" his father. As David grasped his father's hand, the strength of a wave "ripped my dad right from my hands" and "it literally felt like suction." Id. (Dep73:19-77:23).

The defense cites several decisions to support their argument the conditions presented that day cannot be 'dangerous' beach conditions because "strong surf and rip currents…occur in the ocean and seashore…" and are natural conditions of the ocean, not land. Defbr 23 (citing, Fleuhr v. City of Cape May, 195 N.J. 532 (1999); Stempkowski v. Borough of Manasquan, 208 N.J. Super. 328, 332 (App. Div. 1986); Kleinke v. City of Ocean City, 163 N.J. Super. 424, 431 (Law Div. 1978)). Those inapposite cases do not address weather-related dangers to persons "on" the beach

but only to persons "in" the ocean. They reject liability claims against municipal beach owners, pursuant to Tort Claims Act provisions precluding liability for injuries occurring in "unimproved" and "submerged" lands, not on owned beach. Stempkowski involved injuries to persons rescuing children swimming in the surf. Kleinke involved a person standing chest deep in surf when hit by a body surfer. Fluehr applied a causation analysis to deny liability to a surfer who voluntarily encountered a known risk by knowingly choosing to surf in large hurricane-generated waves. None of those cases supports the notion that hurricane-related surf conditions cannot present dangers to persons on a beach or that private commercial beach owners cannot be liable for failing to warn or protect business invitees from such knowable dangers. See, Pb45 (discussion about landowner liability for failure to warn or guard against weather related hazards affecting sidewalk or other land.)

(b) Decedent, standing "on" the beach, not "in" the ocean, was within the scope of his business invitation at the time of the occurrence: The defense brief cannot defend the court's erroneous conclusion that Decedent was at fault for standing on damp sand (for which there was no warning) or its corollary conclusion that walking on wet sand is equivalent to voluntarily 'swimming' or 'entering' the ocean (neither of which Decedent did). In the absence of any factual support, the defense simply quotes the court's opinion and leaves it at that. Defbr13 ("the court held that members of the public 'who enter the ocean during a beach's off-season

cannot be business invitees by definition' because they "disregarded warning signs and voluntarily enter[ed] the ocean" (quoting Ja45)); Defbr15 ("The court does not see a material difference between a person standing on the beach at the water's edge …and then being swept away …as opposed to walking in the water and then being swept away from a wave") which they describe as "logical." (quoting Ja62-63).

Whereas the lower court recognized the beach and ocean were two "distinct premises," each with its own "unique risks" (Ja65), the defense did not try to justify that outcome determinative fact conclusion or its removal from a jury.

(c) False Comparison of JSouth's Beach to All other New Jersey beaches: Defendants repeatedly attempt to liken JSouth's Arnold Avenue Beach to "most beaches on the Jersey Shore, …which are open only from Memorial Day through Labor Day." Defbr 5. See also: Defbr 13 ("Defendants, like all other New Jersey beach owners have a legal obligation to ensure public access to the beach during the off-season."); Defbr 32 ("[P]laintiffs …seek to impose a duty on all beach owners" and "[i]f the court were to impose this duty, the 60 designated beaches from Sandy Hook to Cape May would be legally obligated to monitor the beaches daily during the entire off-season and prevent…public… access.")

These fearmongering comparisons are inapt. Unlike 'most,' or even any other New Jersey beaches, JSouth's beach is not municipally owned with required vertical public access easements and protections afforded by the Tort Claims Act. JSouth,

unlike virtually all private beach owners, did not accept federal taxpayer aid for free beach replenishment and dunes in exchange for perpetual public access easements and other controls. Instead of accepting the federal aid that also came with certain liability protections, Jenkinsons paid $5 million out-of-pocket to build a seawall limiting vertical beach access, avoiding easement requirements and also avoiding limitations on their ability to charge beach fees, particularly avoiding the requirement of free beach entry for children under age 12. As A.S. Storino conceded, Defendants wanted no government interference with their ability to profit from or use the beach as a draw to their boardwalk businesses and kiddie arcades. See, Pb 9-10, 20. These factors distinguish JSouth from most, if not all other New Jersey beaches, which are open, unfenced and neither owned by nor part of a year-round commercial entertainment complex which use the beach as an economic draw.

(d) Misrepresentations about warnings: In an effort to validate the lower court's holding that JSouth's warnings were adequate as a matter of law, Defendants repeatedly misstate that 'many' warning signs and flags are "prominently posted along the entire stretch of the beach …that warn beachgoers in the off-season it is unsafe "to enter the water" or warn "to stay out of the water." Defbr5-6, 10 (referencing photos (Ja437-444), 13, 23, 31 and Albanese Dep79:3-81:13 (Ja210). Such mischaracterizations are evidentially unsupported. There was no dispute warnings advised "no swimming when lifeguards are off duty" but as the defense

expert conceded, such warnings are irrelevant since Plaintiffs "were not dressed for, nor were they planning on going swimming." (Ja366). The relevant warnings boiled down to one, not numerous, BEACHES CLOSED NO SWIMMING sign at the Arnold Avenue beach entrance (Ja443) and one red flag (not numerous) on a flagpole north of the Arnold Ave entrance, barely visible from the beach, whose in-season explanatory sign was removed days before the drowning. Albanese Dep81:12-17, Ja210. See, photos of flag, Ja444 & Ja187. SeeJa50 (court citing A.S.Storino testimony that "while the meaning of the flags is affixed to signage…, [it] is taken down during the off-season").

Removal of the signage was not only a violation of accepted standards of care but of Jenkinson's Operating Manual, Ja730, requiring a "permanent" sign be posted at JSouth's beach entrance advising "no swimming or wading." See also, photo, Ja931 (in-season sign prohibiting "entering" water when lifeguards off duty.) There was little dispute the BEACHES CLOSED NO SWIMMING sign did not mean the beach was, in fact, closed. The testimony was that sign meant the beach was "closed for swimming," but otherwise open. A.S.Storino Dep78:25-79:5 (Ja763) ("we try to use the sign as a deterrent …to keep them out of the water, out of the swimming."); A.J. Storino dep72:11-18;76:9-20 (Ja282-83) (The sign means the beach is closed for "amenities" but remains open); Albanese Dep79:3-8 (Ja210) (the sign means "there's no more lifeguards"). Pulitano Dep38:10-39:18 (Ja 917)

(that sign means "no swimming but there is always beach access."); See also, OpI, (Ja46) (lower court conceding the warnings "inform potential swimmers of the dangers of swimming unsupervised") & (Ja49) (the signs warn the "beaches are closed for swimming"); OpII (Ja62) (Decedent ignored signs "against swimming").

There is no evidence that any off-season sign warned beach users not to 'enter' the water, not to 'wade' or, more relevant, to 'stay away from the water's edge.' There was simply zero evidence any warnings advised about the significant dangers to beach pedestrians during the multi-day weather event leading up to and including the day of the drowning. Even if there was some evidence to the contrary, it would present a fact issue for the jury, not one for the court as a matter of law.

(e) Factual distortions about Beach Permits, CAFRA & CZM Rules: The court adopted the defense misinterpretation about form conditions in beach permits issued to Jenkinsons, pursuant to CZM permitting rules which, they concede "regulate almost all development activity on the coastline." Defbr20 (emphasis added). It is important that Jenkinsons were operating their respective beaches and related businesses for years before the State enacted CAFRA or the CZM permitting rules and were indisputably "existing" businesses, exempted from CZM vertical public access requirements when those permits were issued. Public access requirements were not only confined to new development but also carried stringent and clear requirements for establishing vertical public accessways, including recorded

dedication via perpetual easements, none of which were claimed to exist on JSouth's beach. See discussion, Pb17-21 and CZM public access rules, N.J.A.C. 7:7-16.9 et seq. While the rules require vertical easements for new, not pre-"existing" commercial entities (subsection (b)3), the referenced language in the permits also assures any previously designated ("existing") public access easements, as well as common law imposed horizontal access rights "shall be maintained to the maximum extent practicable," (subsection (b)2) and may not be relinquished. The form conditions of the 2018 sea wall construction permit, simply reflect the CZM requirements and exemptions: Ja318, Condition 6 ("Any existing public access at the site shall be maintained"); Ja319, Condition 9 ("The issuance of a permit does not relinquish public rights to access and use tidal waterways and their shores"). See also, form conditions of the 2020 permit: Ja250, Condition 13 ("The Permittee cannot limit vertical or horizontal public access to its dry sand beach area nor interfere with the public's right to free use of the dry sand for intermittent recreational purposes connected with the ocean and wet sand…"); and Ja252, Condition 12 ("The issuance of a permit does not relinquish public rights to access and use tidal waterways and their shores").

Defendants continue to insist and the court erroneously agreed that (1) "plain express" permit language created vertical public access from JSouth's upland, which (2) precluded closure of its seawall gates even in the face of dangerous

conditions. Defbr 25. They are incorrect on both points. First, there was never a vertical access easement from or across JSouth's upland beach. A.S.Storino so testified, Dep53:1-22, 56:1-5 (Ja756-57) and the defense has provided no evidence to the contrary except its faulty interpretation of the permit language. However, as a point of comparison there was a preexisting perpetual vertical access easement established at the northern most tip of JPav's beach. It was required and established years before JPav came into ownership of that beach property when the federal government built the Manasquan inlet and a long stone pier (jetty) across the beach of JPav's predecessor. That easement, which required vertical public access, has been subject to several enforcement actions by the New Jersey DEP against JPav for attempts to block vertical access without good cause, including dangers, to permit such closure.[1]

---

[1] A.J.Storino, manager/owner of JPav conceded that many years ago, before his ancestors bought JPav's beach properties, the Army Corps of Engineers built a causeway and stone pier (jetty) along the Manasquan inlet at the northern most tip of JPav's property with public funds requiring a vertical public access easement from its upland beach along the stone jetty to the public trust waters and beach below the MHW line. JPav has periodically run afoul of that easement resulting in several DEP enforcement actions. JPav improperly maintained a fence across the pier barring vertical public access to and along the jetty resulting in a consent order for removal in approximately 2006. See, A.J.Storino Dep18:3-13;30:8-24;31:4-21;37:19-38:4;44:12-21;52:2-21(Ja269, 272-274,275,277). JPav again closed and chain locked public access resulting in an investigation and violation notice in 2023. See dep of Robert Clarke, DEP Enforcement Officer at 25:11-16 (Ja452) 46:4-11(Ja 457). He also testified that the gates were closed for some 21 days after the effects of a hurricane and no public safety concerns were raised as a legitimate reason for the closure. Clarke Dep 108:22-109:1 (Ja472-73).

The defense assertion the permit language established vertical public access in 2018 or 2020 was clearly refuted by the testimony of DEP representatives (Esler and Fanelli), on which the defense relied, as well as the testimony of DEP representatives, Joanne Davis and Eric Virostek. All four, responsible for permit review and issuance, testified none of the permits required any new vertical public access since Jenkinsons were grandfathered as existing commercial entities and the permits did not involve "new" development. Davis testified (Dep 30:11-31:6, Ja 346):

> Q. …was part of your job to review this [2018] permit to see if …it required …any designation of public access areas or accessways?
> A. Yes
> Q. And is there any requirement in there for any designation of a public access area or public accessway?...
> A. Special condition 6 says any existing public access at the site shall be maintained.
> Q. But you've already testified you are not aware of any existing public access?
> A. Correct.
> Q. So, would you agree there is nothing under the special conditions that requires them to create a public access or designate a public access area.
> A. Correct

Virostek (Dep 41:19-42:3, Ja333-34) similarly testified:

> Q. Would this described activity here [in the 2018 permit] be activity that is occurring on an existing commercial development?
> A. I would consider it, yes, an existing commercial development.
> Q, And in your review of the rules…this …work on existing commercial developments did not require additional public access. Correct?
> A. Correct.

The testimony of Esler and Fanelli, about the 2020 pemit was to similar effect.

Esler testified (Dep53:20-25; 55:17-56:16; 60:14-19, Ja615-617):

> Q. [C]an you tell…whether this was considered by you to be a…new commercial development… or an existing commercial development?
> A. It would have been an existing commercial development.
> Q. Well, in their public access compliance statement, which I read to you previously, they, the applicant, who is Jenkinson's, asserts that it qualified as an existing commercial development where the proposed activity is limited to maintenance and rehabilitation entirely within the parcel containing the existing development. And it goes on to say therefore, no public access is required.... [I]s that statement something that you have any understanding that you would have challenged if it were inaccurate?...
> A. Again, that would have been reviewed during the application process. And whatever conclusions that were made…would have been included on the permit, in the compliance statement prepared by the division....
> Q. One of the previous witnesses testified that if there had been existing designated public access there would have been reference to it in the…conditions section of the permit. Do you agree with that?
> A. Yes. I would agree with that.

Fanelli testified (Dep 54:2-18; 55:4-9; 57:13-20 Ja636):

> Q. So, would it be fair to say this [2020] permit was taken out with respect to a present [sic]existing commercial development?....
> A. …It was an existing commercial development, yes…
> Q. I take it then… what …these general permits and Special Conditions are doing is making sure that where there is…designated public access that it's preserved, not relinquished, not infringed upon. Correct?
> A. Yes....
> Q. There is nothing in the Special Conditions that indicates there is a designated public access on this property. Correct?
> A. No
> Q. Is that something…you would have expected Mr. Esler to put in there if there had been a designated public access on the property?
> A. Yes.

It is clear there never was and probably never will be, under the opposition

by its ownership, a dedicated vertical public access easement across JSouth's private upland beach. However, even if the permits had established vertical public accessways, the CZM permitted gate closure "seasonally, hourly or in scope" for public safety. N.J.A.C. 7:7-16.9 (b)4. See also, O&M manual requiring gate closure when surges of at least 3 feet are predicted at the nearest buoy to the Arnold Avenue beach, Watson Creek. As Plaintiffs' expert testified, these outlined conditions were met on the date of the drowning and during the preceding three days requiring clearance of the beach and closure of the access gates. Pb 12, 28 & Ja790.

While the defense brief, Defbr31, acknowledges the above "public health and safety" exception to public access, and concedes it applies to 'situations where rough seas create dangerous conditions' they argue, full circle, the exceptions do not apply because the court found the warnings adequate and the safety risk had passed--- not substantiated by law or undisputed evidence.

II. DEFENDANTS' POSITION ABOUT THE LLA

Defendants agree LLA immunity is restricted to "commercial landowners who have agreements with the NJDEP requiring public access." Defbr42. They do not dispute JSouth had no agreement requiring vertical public access.

Defendants also acknowledge the LLA's "business invitee" exception to immunity. Defbr44. They do not address the published decisions supporting

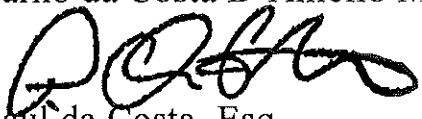
liability and rejecting LLA immunity when business invitees are endangered by the acts or failures of commercial landowners. Instead, they argue the business invitee exception is irrelevant because the court decided Decedent had exceeded the scope of his business invitation by entering the ocean, a dubious proposition and one for which the court improperly gave Defendant, not Plaintiffs, the benefit of all inferences. They cannot justify the court's failures to even consider additional LLA exceptions to liability for Defendant's gross negligence, wanton or willful conduct. They cannot defend the court's misreading of Plaintiffs' Complaint resulting in its analytical failure to even address the issue.

CONCLUSION

For all the above reasons and those previously presented, there was no basis to preclude liability as a matter of law and undisputed fact and this matter should be remanded for trial on the merits.

On the brief:
Cynthia Walters, Esq.

Respectfully submitted,
Sarno da Costa D'Aniello Maceri Webb LLC



Paul da Costa, Esq.
Attorneys for Plaintiffs

Dated: February 13, 2025