SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2165-21

COREY WILKINSON,

Plaintiff-Appellant,

v.

SEAGIRT NATIONAL GUARD
ARMY TRAINING CENTER
and STATE OF NEW JERSEY,

Defendants-Respondents.

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Submitted May 23, 2023 – Decided June 9, 2023

Before Judges Geiger and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-1693-20.

Richard A. Amdur, Jr., attorney for appellant.

Matthew J. Platkin, Attorney General, attorney for respondents (Sookie Bae-Park, Assistant Attorney General, of counsel; Justine M. Longa, Deputy Attorney General, on the brief).

PER CURIAM

In this premises liability case seeking damages under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, plaintiff Corey Wilkinson appeals from a Law Division order that granted summary judgment to defendants Seagirt National Guard Army Training Center (Training Center) and the State of New Jersey, dismissing his complaint with prejudice. We affirm.

We take the following facts from the summary judgment record, viewing them in the light most favorable to plaintiffs. See Richter v. Oakland Bd. of Educ., 246 N.J. 507, 515 (2021).

Plaintiff was a full-time Stockton University (University) student working as a paid intern in the University's environmental program. The state of New Jersey owns the Training Center property (the property). The Training Center is operated by the New Jersey Department of Military and Veteran's Affairs (Department). The Department entered into a Memorandum of Understanding with the University, pursuant to which the University is responsible for "manag[ing] all student interns and hir[ing] new interns" as part of its environmental internship program. The University, not the Department, oversees the internship program. The University controlled "the specifics of the internship program."

On March 14, 2019, plaintiff's internship supervisor, a University employee, asked plaintiff as part of his internship, to traverse the property's sand dunes to search for fox dens. The dunes are located near the beach. Plaintiff could have declined to perform the search as the interns are permitted to decline specific assignments and they participate in assignments at their own election.

Plaintiff alleges he was instructed to look for fox dens by standing on the rocks and obtain GPS locations, without receiving any prior training. Plaintiff alleges that as he climbed on top of a boulder, the boulder dislodged and slid from under him, lodging his legs between other rocks. Plaintiff traversed the dune area for "[a] couple of hours" before the accident occurred. He noticed "the [rocks] were very loose."

The Department had a policy prohibiting access to the property's sand dunes. The policy directs that visitors and those stationed at the Training Center were not to "walk into the dune areas." Defendants maintain there were no prior incidents occurring on the sand dunes at the Training Center. Defendants claim they were unaware how the rocks arrived at the Training Center but indicated "[t]hey serve as a bolster for the sand dunes."

Although the area where the accident occurred was a known restricted area, the internship supervisor instructed plaintiff to proceed into the restricted

area anyway. When asked during his deposition whether he had a problem with interns standing on top of boulders when looking for foxes, he stated: "No." The internship supervisor described the area of the incident as having vegetation and looking like a sandy dune with some half-buried rocks sticking out of it. He indicated that he did not know if the area was off limits to the public.

On June 1, 2020, plaintiff filed his complaint against defendants. Count one alleged the Training Center negligently maintained the property, which had an "innumerable number of boulders that were loose, and dangerous," thereby causing plaintiff to trip and fall and suffer serious injuries. Plaintiff claimed the Training Center, through its agents, servants, or employees, knew or should have known of this dangerous and hazardous condition but failed to take necessary and appropriate action to cure the dangerous condition and failed to warn those lawfully thereon, including plaintiff. Count two alleged the State owned, operated, and maintained the property.

Following discovery, defendants moved for summary judgment. Plaintiff opposed the motion. Defendants argued the sand dunes were unimproved public property, and defendants were entitled to immunity pursuant to N.J.S.A. 59:4-8. Defendants contended the placement of rocks on the sand dunes did not alter the property's unimproved status, citing Freitag v. County of Morris, 177 N.J. Super.

234 (App. Div. 1981). They asserted that "natural conditions altered the sand dunes' characteristics and positioning." Moreover, defendants argued plaintiff did not show that defendants or their "employees . . . acted in a manner that repositioned or 'loosened' the rocks." Accordingly, defendants contended unimproved public property immunity applied. Defendants asserted that because plaintiff's internship supervisor was a University employee, not a State employee, and the interns were not supervised by a State employee, plaintiff's negligent supervision claim was not viable.

Defendants also contended they were not liable to plaintiff for a dangerous condition because plaintiff did not use the property with due care. They argued that plaintiff elected to traverse the sand dunes at his own risk when he personally observed that the rocks were "very loose," and a subsequent investigation revealed he was walking in an "unsafe or generally unsafe" area. Defendants noted the State also had a policy that prohibited visitors from walking along the sand dunes, rendering plaintiff's conduct objectively unreasonable. Defendants argued any reasonable user of the property would have heeded the warning or employed more common sense and avoided traversing the dunes.

Regarding the issue of actual or constructive notice of the alleged dangerous condition, defendants argued plaintiff did not demonstrate defendants had actual notice of the "defect" in the specific area of the dunes that caused his alleged injuries. As to the palpably unreasonable element of liability, defendants contended plaintiff could not establish any palpably unreasonable conduct by defendants. They emphasized that the record was devoid of any facts to suggest that any State employee acted or failed to act in any way that was outrageous, arbitrary, or obviously without reasonable basis. Given these facts and the Tort Claim Act's immunity-first policy, defendants asserted that no rational factfinder could resolve the question of palpable unreasonableness in plaintiff's favor.

In his opposition to summary judgment, plaintiff argued that his internship supervisor's testimony created a factual issue regarding whether the appropriate level of supervision was exercised over the interns. Relying on Troth v. State, 117 N.J. 258 (1989), plaintiff also contended a factual issue existed as to whether the massing of boulders, which were not natural to the area, amounted to a substantial physical modification of the property from its natural state that created a hazard that did not previously exist and required management.

Plaintiff asserted that it could be inferred that the presence of the boulders was artificially created.

On February 7, 2022, the trial court issued an order and written statement of reasons granting summary judgment to defendants dismissing the complaint with prejudice. The court found there were no genuine issues of material fact and that the sand dunes were unimproved public property. Surveying the applicable case law, the court found that although the rocks in the sand dune were an artificial manmade feature, they did not render the property "improved." Therefore, defendants were immunized from liability under N.J.S.A. 59:4-8.

The court rejected plaintiff's negligent supervision claim, finding defendants did not owe plaintiff a duty of care and found plaintiff failed to allege facts meeting the applicable palpably unreasonable standard of conduct. The court found "[p]laintiff fail[ed] to allege any facts to suggest that any State employee acted or failed to act in a way that was outrageous, arbitrary, or obviously without reasonable basis."

Finally, the court found that although the internship program receives funding from the State, Stockton University is a separate and autonomous entity. Thus, it found that defendants did not owe plaintiff a duty of care and his claim for negligent supervision failed. This appeal followed.

Plaintiff raises the following point for our consideration:

> THE TRIAL JUDGE ERRED WHEN IT FOUND THAT THE PLAINTIFF DID NOT USE THE PROPERTY WITH DUE CARE AS A MATTER OF LAW AND THAT THE DEFENDANT DID NOT HAVE ACTUAL CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION.

We review a grant of summary judgment "de novo and apply the same standard as the trial court." Rios v. Meda Pharm., Inc., 247 N.J. 1, 13 (2021). Summary judgment will be granted when "the competent evidential materials submitted by the parties," viewed in the light most favorable to the non-moving party, show there are no "genuine issues of material fact," and that "the moving party is entitled to summary judgment as a matter of law." Grande v. Saint Clare's Health Sys., 230 N.J. 1, 23-24 (2017) (quoting Bhagat v. Bhagat, 217 N.J. 22, 38 (2014)). "An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R. 4:46-2(c).

We give the non-moving party "the benefit of the most favorable evidence and most favorable inferences drawn from that evidence." Est. of Narleski v. Gomes, 244 N.J. 199, 205 (2020) (quoting Gormley v. Wood-El, 218 N.J. 72, 86 (2014)). We owe no special deference to the motion judge's legal analysis.

RSI Bank v. Providence Mut. Fire Ins. Co., 234 N.J. 459, 472 (2018). Legal questions dependent upon the operative facts should not be decided by summary judgment when those facts are in dispute. Cent. Paper Distrib. Servs. v. Int'l Recs. Storage and Retrieval Serv., Inc., 325 N.J. Super. 225, 231-32 (App. Div. 1999).

A.

The Legislature expressly declared "that public entities shall only be liable for their negligence within the limitations of [the TCA] and in accordance with the fair and uniform principles established [therein]." N.J.S.A. 59:1-2. "Section 59:2-1(a) makes the presumption of immunity explicit, stating that '[e]xcept as otherwise provided by this [Act], a public entity is not liable for an injury, whether such injury arises out of an act or omission of the public entity or a public employee or any other person.'" Manna v. State, 129 N.J. 341, 346 (1992) (quoting N.J.S.A. 59:2-1(a)). "The Act's 'guiding principle' is 'that immunity from tort liability is the general rule and liability is the exception.'" O'Donnell v. N.J. Tpk. Auth., 236 N.J. 335, 345 (2019) (quoting D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 134 (2013)).

N.J.S.A. 59:4-8 provides that "[n]either a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public

property . . . ." Public property is no longer "unimproved" when there has been substantial physical modification from its natural state that require management by the public entity and that physical change creates hazards that did not previously exist. Troth, 117 N.J. at 269-70. Troth involved claims of recreational boaters on a lake who were injured, one fatally, when their small fishing boat went over the concrete spillway of a man-made dam that created the lake. Id. at 261-62. The Court held that the dam itself could be considered an improvement and thus immunity pursuant to N.J.S.A. 59:4-8 did not apply, even though the lake and surrounding wildlife tract could be viewed as unimproved. Id. at 269-70.

In Freitag, the plaintiffs sustained serious injuries in a tobogganing accident on a 416-acre county recreation area. 177 N.J. Super. at 236. About half of the recreation area contained a golf course, and the other half was primarily woodlands and open fields. Ibid. The hills on which the plaintiffs were tobogganing had been cleared of rocks, which the plaintiffs argued were placed alongside the edge of the sledding hill, so the condition of the property causing their injuries was manmade, not natural. Ibid. The plaintiffs were injured when they lost control of their toboggan and crashed into one of the rocks. Ibid. The plaintiffs contended that because the row of rocks was placed

there when the hill was cleared, their injuries were not attributable to an artificial condition, not a natural condition, relying on Kleinke v. City of Ocean City, 163 N.J. Super. 424 (Law Div. 1978) and Diodato v. Camden County Park Commission, 162 N.J. Super. 275 (Law Div. 1978). Id. at 236-37. The defendants claimed immunity under N.J.S.A. 59:4-8. Id. at 236.

We reasoned "that the test to be applied in determining the applicability of N.J.S.A. 59:4-8 is whether the property is unimproved. Whether the injury was caused by a natural or 'artificial' hazard would be relevant only insofar as it aids the court in determining the nature of the property." Id. at 238. We held that the sledding hill had not lost its unimproved character merely because it had been cleared and that the county was immune from liability under N.J.S.A. 59:4-8. Id. at 239. We noted that N.J.S.A. 59:4-8 affords immunity for injuries caused by any condition of the unimproved public property, even "dangerous artificial conditions." Id. at 238.

We view the controlling facts in this matter to be strikingly similar to those in Freitag and materially distinguishable from those in Troth. In Troth, the plaintiffs were injured when their boat went over a concrete spillway. 117 N.J. at 260. The Court recognized that "dam spillways pose special hazards to recreational boaters" and downstream property owners. Id. at 270. The Court

found that the over 2,000-foot-long dam and 200-foot-wide spillway "constitute[d] a substantial physical modification of the property's natural condition." Ibid. Therefore, "[i]t would be a contradiction in terms to characterize this dam as 'unimproved' public property." Ibid. The Court found "that large dams pose a hazard to safety sufficient to require a public entity to assume responsibility for their operation and maintenance." Id. at 271. The Court noted "the alleged 'dangerous' condition of the spillway that allegedly caused the injuries . . . would not have existed had the dam not been built," and is "the type of hazard that warrants management and remediation by the responsible public entity." Id. at 271-72. The Court held that "Union Lake Dam is not unimproved public property." Id. at 272. Therefore, the TCA's unimproved-property immunity did not apply to the dam itself. Ibid. Notably, the Court did not criticize the reasoning or holding in Freitag.

"[T]he term unimproved public property should be liberally construed and determined by comparing the nature and extent of the improvement with the nature and extent of the land." Report of the Attorney General's Task Force on Sovereign Immunity 224 (1972) (commenting on N.J.S.A. 59:4-8, -9). Applying that construction to the facts, we hold that the accident occurred on unimproved public property, rendering defendants immune from liability pursuant to

N.J.S.A. 59:4-8. The facts in support of finding immunity in this case are even more compelling than in Freitag. Here, the boulders were placed on dunes in a restricted area. Plaintiff climbed on the boulder. In contrast, in Freitag, a row of rocks was placed alongside the edge of a sledding hill open to the public.

The trial court correctly determined that the property was unimproved, and defendants were immune from liability pursuant to N.J.S.A. 59:4-8. Accordingly, summary judgment dismissal was appropriate.

B.

Although we need not do so, for sake of completeness, we briefly discuss certain other defenses raised by defendants. Even if defendants were not immune from liability pursuant to N.J.S.A. 59:4-8, to recover under N.J.S.A. 59:4-2, plaintiff must show that: (1) the property was in dangerous condition at the time of the accident; (2) the injury was proximately caused by the dangerous condition; (3) the dangerous condition created a reasonably foreseeable risk of the kind of injury that occurred; and (4) defendants had actual or constructive notice of the dangerous condition for a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. N.J.S.A. 59:4-2. "Additionally, there can be no recovery unless the action or inaction [of defendants] in protecting against the condition was 'palpably unreasonable.'"

Kolitch v. Lindedahl, 100 N.J. 485, 492-93 (1985) (quoting N.J.S.A. 59:4-2). Defendants argue that plaintiff is unable to establish that defendants engaged in palpably unreasonable conduct. We agree.

"'Palpably unreasonable' means more than ordinary negligence and imposes a steep burden on a plaintiff." Coyne v. State, 182 N.J. 481, 493 (2005). The term palpably unreasonable "implies behavior that is patently unacceptable under any given circumstance" and "it must be manifest and obvious that no prudent person would approve of its course of action or inaction." Kolitch, 100 N.J. at 493 (quoting Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977)). Our review of the record convinces us that no reasonable juror could find that defendants engaged in palpably unreasonable conduct related to the accident.

C.

Defendants also argue that any claim of negligent supervision was properly dismissed. We again agree. Neither plaintiff nor his supervisor were employed or supervised by defendants. Plaintiff was a paid University intern. His supervisor was a University employee. To establish a claim for negligent supervision, a plaintiff must show that "(1) an employer knew or had reason to know that the failure to supervise or train an employee in a certain way would

create a risk of harm and (2) that risk of harm materializes and causes the plaintiff's damages." G.A.-H. v. K.G.G., 238 N.J. 401, 416 (2019). Plaintiff clearly cannot satisfy the first prong of that test.

Moreover, Stockton University is a separate, autonomous public entity. See N.J.S.A. 18A:64-48(d) (indicating the University may "sue and be sued in its own name"). The TCA expressly omits entities such as the University from the definition of "State." See N.J.S.A. 59:1-3 ("'State' shall mean the State and any office, department, division, bureau, board, commission, or agency of the State, but shall not include any such entity which is statutorily authorized to sue and be sued."). Accordingly, any claim against defendants for negligent supervision fails.

To the extent we have not expressly addressed plaintiff's other arguments, it is because they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.