A-136 SEP 1997

[redacted] SEP 1997

FILED
AUG 29 1997
Stephen W. Townsend
CLERK

WILLIAM FLEUHR,

Plaintiff/Respondent,

v.

CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY,

Defendants/Petitioner,

per tele for case caption

SUPREME COURT OF NEW JERSEY
DOCKET NO. 44,746

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-846-96T3

SAT BELOW:
HON. VIRGINIA LONG
HON. ARIEL A. RODRIGUEZ
HON. MARY C. CUFF

BRIEF AND APPENDIX OF DEFENDANT/PETITIONER CITY OF CAPE MAY IN SUPPORT OF ITS PETITION FOR CERTIFICATION

YOUNGBLOOD, CORCORAN, ALELI, LAFFERTY, STACKHOUSE, GROSSMAN & GORMLEY, P.A.
3205 Fire Road, P.O. Box 850
Pleasantville, NJ 08232
(609) 645-2201
Gerald J. Corcoran, Esquire

Attorneys for Defendant/Petitioner,
City of Cape May

On the Brief:

William L. Gormley, Esquire
and
Phyllis Coletta, Esquire

GERALD J. CORCORAN

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited

Statutes Cited

New Jersey Court Rules Cited

INDEX TO THE APPENDIX

STATEMENT OF THE MATTERS INVOLVED

On August 31, 1993 plaintiff William Fleuhr was injured while exiting the ocean on a guarded beach at First Avenue in the City of Cape May, New Jersey. Plaintiff had been on the beach and in the ocean for several hours, and was struck by a large wave.

Plaintiff sued the City of Cape May ("Cape May") for negligent supervision, asserting that the lifeguards on duty allowed him to remain in the surf. The parties agreed that the injury was incurred solely by the action of the ocean, that is, there was no intervening force such as a raft or a piece of equipment. Plaintiff asserted that the "dangerous condition" which gave rise to the duty to warn and/or supervise was the "ocean conditions" from Hurricane Emily off the coast of North Carolina. The parties agreed that the surf conditions on the date in question were "choppy".

Cape May moved for summary judgment, arguing that the statutory immunity provided in N.J.S.A. 59:4-8 (immunity for conditions of unimproved public property) required dismissal as a matter of law. The trial court agreed, relying on the case of Kowalsky v. Long Beach Township, 75 F.2d 385 (3rd Cir. 1995) where the Third Circuit applied New Jersey law to nearly identical facts, and held that immunity under N.J.S.A. 59:4-8

prevailed over any potentially applicable liability sections of the New Jersey Tort Claims Act.

The appellate court reversed. It agreed that Cape May had no obligation to make unimproved property safe, or to post signs or flags concerning the condition of the water, inform bathers if it was safe for them to enter the ocean. However, the Court remanded the case on the issue of whether there was negligent supervision by the lifeguards on duty (Da 9). The Court held that once a public entity decides to provide lifeguards, "the fundamental reason for its immunity vanishes" (Da 10).

Approximately one year prior to the subject decision, another appellate panel reviewing the same issue found that the immunity provided under N.J.S.A. 59:4-8 prevailed over any liability sections of the Tort Claims Act. In the unreported decision of Aguilar v. Borough of Seaside Heights et al, (A-5205-94T5 filed June 8, 1996), plaintiff was injured when he dove into the ocean at a protected beach. He also sued the public entity for negligent supervision by lifeguards at the beach.

Therefore, there are two conflicting appellate division decisions regarding the same critical public policy issue at stake in this case. Does the Tort Claims immunity "vanish" with the presence of lifeguards at the beach, or should it prevail

over the liability sections of the Act as the Legislature intended?

Since the appellate decision in this case holds that public entity immunity vanishes with the presence of lifeguards on ocean beaches, municipalities are encouraged to remove all supervision rather than risk the enormous liability exposure created by the abrogation of immunity.

Defendant/Petitioner has timely filed a Notice of Petition for Certification (Da 23).

QUESTIONS PRESENTED

1. Should this Court settle conflicting law of the appellate division on this public policy issue?

2. Will the specifically legislated immunity prevail over the liability sections in Title 59?

3. Did the public entity's immunity "vanish" when it decided to provide lifeguards?

4. Should the decision to supervise beaches be free of tort liability as the legislature intended?

ERRORS COMPLAINED OF

1. The appellate division decision abrogates legislative immunity by allowing a claim for negligent supervision or "failure to warn" to supersede absolute immunity.

2. The appellate division decision ignores precedent from the Third Circuit Court of Appeals, applying New Jersey law to a case with identical facts.

3. The appellate division decision ignores the clear mandate of the Tort Claims Act, which consistently holds that where competing sections of the Act may apply, one providing immunity and the other allowing liability, *immunity must prevail over liability*.

4. The appellate division decision exposes the public entity to liability, rendering the legislated immunities null and void.

REASONS FOR CERTIFICATION

POINT I: THE APPEAL PRESENTS A CRITICAL QUESTION OF GENERAL PUBLIC IMPORTANCE WHICH SHOULD BE SETTLED BY THE SUPREME COURT

A. Standard of Review

The standards for granting Certification to the Supreme Court are set forth in Rule 2:12-4.

The standards of the Rule are self-explanatory, as noted by the concurrent opinion in Mahony v. Danis, 95 N.J. 50 (1983). "Typically, a case for certification encompasses several of the relevant factors controlling the exercise of the Court's discretionary appellate jurisdiction." Id. Satisfaction of any one of the criteria governing certification would suffice to

invoke the affirmative exercise of this Court's discretionary appellate authority. 95 N.J. 50, 51.

B. Question of Public Importance

The public importance of the question is apparent when the ramifications of the appellate decision are contemplated. Government, local, state or federal, provide public services including public protection. Elected and appointed officials should not be discouraged from acting in the public interest for fear of tort liability. If providing basic government services imposes a risk of liability, the choice to government is unacceptable. The dilemma presented would be (a) not to provide the service with the attended risk to the public, or (b) provide the service, create the "duty", and assume a potentially devastating financial exposure.

If the decision to provide lifeguard services at the beach causes immunity to "vanish" public entities are forced to make choices which are not in the public interest. They include:

- Prohibiting access to the beach;
- Exposing the public to great dangers with unprotected beaches;
- Suffering a lethal blow to tourist based economies;
- Paying prohibitive insurance costs.

The Atlantic Ocean provides New Jersey its greatest natural resource. Its use and enjoyment should be encouraged and utilized to the fullest potential. This decision has the opposite effect.

Giving claimants the right to sue for injuries incurred by the action of the ocean results in such claims being brought in untold numbers. An older, frail bather may be knocked over by a two foot wave that would not affect a younger person. Conversely, young children can be injured by the most innocuous ocean conditions. Whether such claims have real value is immaterial. Their viability requires government to engage in a risk/benefit analysis for the use and enjoyment of a basic natural resource.

Requiring Courts to inquire of the "focus" of a complaint and determine if it arises out of negligent supervision, or the condition of unimproved land, permits a cleverly worded complaint to skirt and avoid mandated legislative immunity. The Court's exercise of jurisdiction is necessary to avoid such inequity.

The defendant/petitioner respectfully submits that an important public policy is presented. Shore communities and the tourism economy on which they depend will be devastated by this holding which is contrary to legislative intent and prior decisional law.

POINT II: THIS DECISION IS IN DIRECT CONFLICT WITH ANOTHER APPELLATE COURT OPINION ON THE SAME ISSUE, AND THUS CERTIFICATION SHOULD BE GRANTED

Another reason for this Court to exercise its power of review is found in the conflict now created by the appellate court ruling. The rationale and holding of the appellate court is in direct contravention to several published appellate division decisions, and at least one unpublished decision on the same issue.

Another appellate panel had addressed the precise issue before the appellate court approximately one year ago, coming to the opposite conclusion. In the case of Aguilar v. Borough of Seaside Heights et al (A-5205-94T5) plaintiff was injured when he dove into the ocean at a protected beach. He sued the public entity for negligent supervision by lifeguards at the beach, specifically for a "failure to warn of the possible existence of sandbars which might make diving into the surf potentially unsafe". Defendant asserted the same immunity as in this case, N.J.S.A. 59:4-8.

In applying this Court's specific directive in Tice v. Cramer, 133 N.J. 347 (1993), the Aguilar court held that when two conflicting provisions of the Tort Claims Act potentially apply, ***immunity trumps liability***. The appellate court in this case, however, chose to carve out a new claim for "negligent provision

of protective services", despite the unequivocal application of N.J.S.A. 59:4-2 and N.J.S.A. 59:4-8. Therefore, the appellate decision is in conflict with the mandate in Tice v. Cramer, as well as several appellate division decisions.

In Kleinke v. City of Ocean City, 163 N.J. Super. 424 (Law 1978) the trial court held that a body surfer swimming in crowded conditions on a protected beach created a "dangerous condition" of public property within the meaning of N.J.S.A. 59:4-2. The Court also held that the unimproved property immunity under N.J.S.A. 59:4-8 was inapplicable because a body surfer was not a "natural" condition. Finally, the Court held that since there was no immunity, liability for negligent supervision could be found under N.J.S.A. 59:3-11. Kleinke was expressly overruled by Sharra v. City of Atlantic City, 199 N.J. Super. 535 (App.Div. 1985). The holding was also expressly disapproved in Freitag v. Morris Cty, 177 N.J. Super. 234 (App.Div. 1981).

In a critical distinction, the Freitag court noted that N.J.S.A. 59:4-8 expressly provides immunity for **"any condition of unimproved public property"**. Id at 238.

Both critical holdings in Kleinke, the application of N.J.S.A. 59:4-2 and 4-8, were subsequently disapproved by appellate panels. Therefore it provides no precedent. Nevertheless, the appellate court cited and relied upon Kleinke.

In Stempkowski v. Borough of Manasquan, 208 N.J. Super. 328 (App.Div. 1986) plaintiff was injured while attempting to rescue her children who were swimming in the surf off of the beach at Manasquan. The immediate cause of her injury was a wave which knocked her down. Plaintiff filed a complaint against the borough and its employees alleging negligence in not supervising the beach. In affirming summary judgment, the Appellate Division unequivocally held that there was no "dangerous condition" under N.J.S.A. 59:4-3:

> **"There can be no liability on the part of the municipality for injuries caused exclusively by the action of the ocean. The presence or absence of lifeguards was not material, since it was unrelated to physical condition of the property". Id at 332.**

Certainly, this language implies that a claim for negligent supervision by lifeguards could not survive the undisputed immunities provided by the Act. The Stempkowski court specifically found that the presence of lifeguards at the beach was immaterial, since there is immunity for injuries caused by the action of the ocean.

Finally, it should be noted that the Third Circuit Court of Appeals, applying New Jersey law to the exact same facts, dismissed a claim for negligent supervision regarding injuries incurred in hurricane surf at a guarded beach. In Kowalsky v. Long Beach Township et al, 72 F.3d 385 (3rd Cir. 1995) plaintiff

was swimming at Spray Beach in Long Beach Township New Jersey in an area protected by municipal lifeguards. After swimming and "body surfing" for 20 minutes he decided to return to the beach and while "body surfing" to shore, he was caught between two waves and driven into the sand. Plaintiff's neck was broken, resulting in permanent paralysis below the waist. Plaintiff contended that the ocean conditions on the date of the accident were hazardous, resulting from Hurricane Gustav, 100-1200 miles offshore. Plaintiff's complaint mirrored the present one, alleging that the municipal entities and employees negligently supervised the beach and failed to warn of a dangerous condition. Kowalsky is certainly persuasive and should be considered in analyzing the present case.

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION DECISION

POINT I: THE APPELLATE COURT'S ANALYSIS OF THE TORT CLAIMS ACT IS INAPPROPRIATE

As the present action is predicated on the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq., an analysis of the appellate division decision must begin with the Act's relevant provisions and with the comments of the Attorney General's Task Force Report, which provide the legislative history for the Act. Troth v. State, 117 NJ 258, 265 (1985). As a general rule, the analytical "approach should be **whether an immunity applies and if not, should liability attach**", N.J.S.A. 59:2-1, Comment (emphasis supplied).

By providing that "public entities are immune from liability unless they are declared to be liable by an enactment'" the Legislature intended to "provide a better basis upon which the financial burden of liability may be calculated, since each enactment imposing liability can be evaluated in terms of the potential cost of such liability", Ibid, (quoting California Law Revision Comm'n, Recommendations Relating to Sovereign Immunity 811 (1963)).

Pursuant to the 1972 Tax Force Comment to N.J.S.A. 59:2-1, in analyzing a tort claim against a public entity, the judicial approach should be **whether an immunity applies and if not, should liability attach.** It is hoped that in utilizing this approach the courts will exercise restraint in the acceptance of novel causes of action against public entities." Id. N.J.S.A. 59:2-1 (b) specifically provides that the potential liability provisions of the Tort Claims Act are "subject to any immunity of the public entity." The legislative comment to this section explains the meaning of immunity as used in N.J.S.A. 59:2-1(b).

> "Subsection (b) is intended to ensure that any immunity provisions provided in the act or by common law will prevail over the liability provisions."

Consistent with that general policy, two sections of the Act, N.J.S.A. 49:4-8 and -9 limit liability of public entities for

injuries on unimproved property. The two sections pertaining to unimproved property provide:

> Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach (N.J.S.A. 59:4-8).
>
> Neither a public entity nor a public employee is liable for any injury caused by a condition of the unimproved and unoccupied portions of the tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits owned by the State, (N.J.S.A. 59:4-9).

After pointing out that "the State of New Jersey possesses thousands of acres of land set aside for the specific purpose of recreation and enjoyment", the comment concluded:

> The exposure to hazard and risk involved is readily apparent when considering all the recreational and conservation uses made by the public generally of the foregoing acreage, both land and water oriented. Thus in sections 59:4-8 and 59:4-9 a public entity is provided an **absolute immunity irrespective of whether a particular condition is a dangerous one.**
>
> In addition it is intended under those sections that the 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. Certain improvements may be desirable and public entities should not be unreasonably deterred from making them by the threat of tort liability. (Ibid) (emphasis supplied).

Under 59:4-8, public entities and employees are granted immunity from liability for injury caused by **any** condition of unimproved public property, whether that condition of the property

represents a natural or "artificial" hazard. Freitag v. Morris Cty., 177 N.J. Super. 234,238 (A.D. 1981). The term "unimproved public property" should be liberally construed and be determined by comparing the nature and extent of the improvements with the nature and extent of the land. Id. at 239.

The Task Force Comment to N.J.S.A. 59:4-9 notes that "certain improvements may be desirable and public entities should not be unreasonably deterred from making them by the treat of tort liability". Thus the legislature has clearly provided immunity to public entities even where there are improvements to public property. Certainly, the legislature intended to allow immunity despite the provision of protective services, which do not constitute an "improvement" to public property.

In reviewing the trial court's dismissal of plaintiff's claim on summary judgment, the appellate court then had the following mandate:

- **Determine whether an immunity applies;**
- **If an immunity applies, *it prevails over any potentially applicable liability section*;**
- **N.J.S.A. 59:4-8 is to be liberally construed to effectuate the legislature's intent.**

Respectfully, the appellate division decision fails to carry out the legislative and case law requirement in making its

threshold determinations. While the decision freely admits that there is no dangerous condition of public property and, indeed, that the ocean is subject to immunity under N.J.S.A. 59:4-8, it nevertheless concludes that liability can attach via N.J.S.A. 59:3-11. As noted by the Third Circuit in Kowalsky:

> "The second sentence of N.J.S.A. 59:3-11 neither creates liability, nor provides defenses or imunities for negligent supervision. This is left to other statutory provisions like N.J.S.A. 59:4-8, which provides immunity for both public entities and public employees from claims arising from 'injur(ies) caused by a condition of any unimproved public property'" Kowalsky, supra. 72 F. 3d at 390-92.

This, then, is the fatal flaw in the decision for which review is sought: a new cause of action is allowed to proceed, in the face of express legislative immunity. It is important to note that N.J.S.A. 59:3-11 *does not impose liability* for negligent supervision, it only allows such a claim to proceed absent any immunity. The appellate court did not appropriately apply the Tort Claims Act and thus certification should be granted.

POINT II: THE APPELLATE DECISION IS INTERNALLY INCONSISTENT AND THE INTERESTS OF JUSTICE REQUIRE REVIEW

Aside from an overall approach which contravenes the legislation as well as Tice v. Cramer and other case law, the decision under review has several inconsistencies which require review and reversal.

The appellate decision explicitly states that two distinct immunities apply, N.J.S.A. 59:4-2 and N.J.S.A. 59:4-8. Nevertheless, it allows a novel cause of action to exist. These holdings are inconsistent and have resulted in a potentially damaging precedent.

The appellate court has held that once a public entity provides protective services, all immunity "vanishes" (Da 10). Public entity immunity never "vanishes". It either exists as the legislature so desires, or it does not. If it exists, it trumps any potential liability. In no event does it simply dissipate. Most importantly, any applicable immunity should not "vanish" when a public entity makes a decision to provide protective services. The logical extension of this argument requires removal of any optional protective services.

The decision notes that there is no difference between injuries incurred in a municipal swimming pool (improved public property) and a "swimming hole" (unimproved public property). The differences are legion and are set out clearly in the Tort Claims Act. In the case of a municipal swimming pool, liability is governed by N.J.S.A. 59:4-1 et seq. Immunity for injuries incurred in a "swimming hole" - or in this case a somewhat larger body of water - is governed by N.J.S.A. 59:4-8. The Legislature noted the difference, and the courts are bound to accept its

determination. Obviously, a municipal swimming pool is improved. The Atlantic Ocean is vast, unimproved, and touches nearly every public beach in the State of New Jersey. There is simply no logical way to analogize liability for injuries incurred in a swimming pool with those incurred on any lake, stream, river, bay or beach as noted by the Legislature.

Finally, the underlying premise of the decision is that "if the lifeguard properly discharged his/her function, the bather is not exposed to the danger posed by the body of water" (Da 10). A cause of action simply cannot be founded on fiction. People will get hurt in the Atlantic Ocean and there is nothing any beach patrol can do - there are no measures great enough - to protect bathers from the ocean. It is perhaps this State's greatest natural offering and also the most powerful and uncontrolled force of nature. Citizens of this State and tourists from all over want to enjoy the beauty and recreation provided by the Atlantic Ocean. Once anyone steps a foot into it, however, the force of nature prevails.

Lifeguards are present at the beach as added assurance not as life insurance. Riptides, sandbars, unpredictable currents, sharks, jetties, powerful waves - the list of the ocean's perils is endless. According to the appellate division, two lifeguards on a stand protecting hundreds of bathers should somehow be able

to protect each one from "the danger posed by the body of water". In reality, the purpose of lifeguards is the converse: to be there when the worst happens, and to put their own safety in jeopardy to rescue others from this powerful force of nature. The premise of the appellate division decision is that these men and women are more powerful than nature.

Under the Tort Claims Act, there can never be a cause of action for "negligent provision of protective services" when an injury occurs in the ocean. Courts have already held with finality that swimming in the ocean - whether bodysurfing on a crowded protected beach or venturing into hurricane surf - does not create a "dangerous condition" of public property nor does the presence of lifeguards render the Atlantic Ocean "improved".

Given the vast ramifications of this published opinion, Defendant City of Cape May respectfully submits that this Court should hear this matter and re-establish for public entities that absolute immunity the legislature created.

CONCLUSION

For these reasons, Defendant/Petitioner City of Cape May respectfully requests that Certification be granted and that this Court review and reverse the appellate division decision filed July 30, 1997.

Youngblood, Corcoran, Aleli, Lafferty,
Stackhouse, Grossman & Gormley, P.A.
Attorneys for Defendant/Petitioner City of Cape May

By: Gerald J. Corcoran

I, Gerald J. Corcoran, hereby certify pursuant to Rule 2:12-7(a) that this Petition presents a substantial question of public policy for the Supreme Court's review, and it is filed in good faith and not for purposes of delay.

Gerald J. Corcoran

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-0846-96T3

44746

WILLIAM FLEUHR,

Plaintiff-Appellant,

vs.

CITY OF CAPE MAY,

Defendant-Respondent,

and

JOHN DOE and COUNTY OF CAPE MAY,

Defendants.

Submitted: April 23, 1997- Decided: JUL 30 1997

Before Judges Long, A.A. Rodriguez and Cuff.

On appeal from the Superior Court, Law Division, Cape May County.

Sandler & Marchesini, attorneys for appellant (Gregory Marchesini on the brief).

Youngblood, Corcoran, Aleli, Lafferty, Stackhouse, Grossman & Gormley, attorneys for respondent (Phyllis Coletta on the brief).

The opinion of the court was delivered by

CUFF, J.A.D.

Plaintiff William Fleuhr broke his neck while body surfing in the ocean. He sued defendant City of Cape May for failure to supervise the activities of bathers, failure to warn bathers of the danger posed by the ocean on that day, and failure to protect plaintiff from the dangerous ocean conditions. Plaintiff appeals

from the order dismissing his complaint based on the unimproved property immunity, N.J.S.A. 59:4-8, afforded by the New Jersey Tort Claims Act (Tort Claims Act), N.J.S.A. 59:1-1 to 12-3. We reverse the dismissal of plaintiff's claim predicated on negligent supervision by lifeguards stationed at the municipal beach.

On August 31, 1993, plaintiff entered the ocean at the First Avenue Beach, which was owned, operated and maintained by defendant City of Cape May. Lifeguards were on duty at this beach when plaintiff entered the water. He alleges that the ocean was turbulent due to Hurricane Emily and that the water conditions created an unreasonable risk of harm to him. He contends that defendant was under a duty to provide a safe place for plaintiff to swim and that defendant had undertaken to supervise the beach and adjacent ocean water by stationing lifeguards at the First Avenue Beach. He contends that defendant breached its duty to provide a safe place for him to swim by permitting him and others to enter the ocean at that place on that day. He further contends that defendant breached the duty owed to him by failing to warn him of the dangerous surf conditions. As a direct result of the failure to warn him of the dangerous conditions and the negligent supervision by the assigned lifeguards, he alleges that he was knocked over by a strong wave and fractured several cervical vertebrae.

Defendant denied the allegations of the complaint and asserted that it was immune from suit pursuant to the unimproved property immunity afforded by the Tort Claims Act, N.J.S.A. 59:4-8. In

reliance on this immunity, defendant moved for summary judgment, which was granted. In his written opinion, the motion judge reasoned that the immunity granted under N.J.S.A. 59:4-8 precludes this action because "the injury was caused exclusively by the action of the ocean."

Our review must proceed in accordance with the general analytical approach of the Tort Claims Act and then with specific reference to the applicable statutory provisions. Troth v. State, 117 N.J. 258, 265-66 (1989). Generally, we must recognize that the Tort Claims Act reestablishes public entity immunity from suit unless the Act declares that a public entity or public employee may be liable. N.J.S.A. 59:2-1a; Manna v. State, 129 N.J. 341, 346 (1992); Troth, supra, 117 N.J. at 266. Moreover, any liability established by the Tort Claims Act is subordinate to or "trumped" by any immunity recognized by the Act. N.J.S.A. 59:2-1b; Tice v. Kramer, 133 N.J. 347, 356 (1993).

There are three provisions of the Tort Claims Act which affect this case: N.J.S.A. 59:2-7, N.J.S.A. 59:3-11 and N.J.S.A. 59:4-8. N.J.S.A. 59:2-7 provides:

> A public entity is not liable for failure to provide supervision of public recreational facilities; provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition as provided in [N.J.S.A. 59:4-1 to 4-10].

N.J.S.A. 59:3-11 is the public employee counterpart to N.J.S.A. 59:2-7; it provides:

> A public employee is not liable for the failure to provide supervision of public

> recreational facilities. Nothing in this section exonerates a public employee for negligence in the supervision of a public recreational facility.

The Attorney General's Task Force Comments to these sections note that the immunity conferred for failure to supervise a public recreational facility represents a policy determination that public entity managers must remain free to conclude, without threat of liability, that supervision of public recreational facilities will not be provided. Comment on N.J.S.A. 59:2-7. On the other hand, "a public employee (and hence a public entity) is not exonerated for negligence once he undertakes to supervise the facility." Comment on N.J.S.A. 59:3-11.

By contrast, N.J.S.A. 59:4-8 provides:

> Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

The Task Force Comment to this section observes that this section

> reflect[s] the policy determination that it is desirable to permit the members of the public to use public property in its natural condition and that the burdens and expenses of putting such property in a safe condition as well as the expense of defending claims for injuries would probably cause many public entities to close such areas to public use. In view of the limited funds available for the acquisition and improvement of property for recreational purposes, it is not unreasonable to expect persons who voluntarily use unimproved public property to assume the risk of injuries arising therefrom as part of the price to be paid for benefits received.

No appellate court of this State has directly interpreted the applicability of the unimproved property immunity of N.J.S.A. 59:4-

8 to a guarded beach. There have been cases which raised the issue of municipal negligence for negligent supervision of beaches but each has been disposed by the application of other Tort Claims Act provisions. For example, in Stempkowski v. Borough of Manasquan, 208 N.J. Super. 328 (App. Div. 1986), plaintiff alleged that the failure to provide lifeguards at an ocean beach created a dangerous condition of public property. We upheld the dismissal of plaintiff's complaint, citing Sharra v. City of Atlantic City, 199 N.J. Super. 535, 540 (App. Div. 1985), and explaining that a dangerous condition refers to the physical condition of the property itself and not to the activities conducted on the property. Stempkowski, supra, 208 N.J. Super. at 331-32. In dicta, we observed that plaintiff's claim was also barred by N.J.S.A. 59:3-11 because plaintiff's claim rested on the municipality's failure to provide lifeguard services rather than the negligent provision of those services. Stempkowski, supra, 208 N.J. Super. at 332. This passage suggests that the outcome of plaintiff's case may have been different if she had alleged that lifeguards were present and had negligently performed their protective functions. On the other hand, the unimproved property immunity of N.J.S.A. 59:4-8 was not raised.

In Burroughs v. City of Atlantic City, 234 N.J. Super. 208 (App. Div.), certif. denied, 117 N.J. 647 (1989), we affirmed the dismissal of a complaint founded in part on an allegation of negligent supervision of beach activities by lifeguards on an ocean beach. However, Burroughs does not assist resolution of the issue

presented in this case because plaintiff's activities occurred on an unprotected portion of the beach. We rejected plaintiff's position that liability should attach because the lifeguards occasionally ventured onto the unprotected beaches and warned people to swim only in the protected area. We reasoned that their activity manifested a determination to provide lifeguard services only in a specific area. However, we also suggested that the outcome may have been different if plaintiff had relied on the lifeguard's warning and expected that his activities would be monitored and his safety assured. We said:

> At best, plaintiff's proofs in this case establish only general supervision and policing by the lifeguards. The lifeguards' warnings to sunbathers on beach #2 and #3, and plaintiff's group in particular, can be reasonably viewed only as communications which both limited and defined the scope of their supervisory undertaking. Plaintiff does not allege that the warning from lifeguard Ruley was such that plaintiff, or any member of his group, relied upon it and expected that their activities would be monitored and their safety assured by defendant lifeguards.
>
> [Id. at 222.]

Once again, however, there was no discussion of the unimproved property immunity of N.J.S.A. 59:4-8.

The only case by a state court which addresses the relationship between public entity or employee liability for negligent supervision of a beach and the unimproved public property immunity is Kleinke v. City of Ocean City, 163 N.J. Super. 424 (Law Div. 1978), overruled in part, Sharra, supra, 199 N.J. Super. 535. In that case, the motion judge denied the City's motion for summary

judgment on two grounds. First, the motion judge reasoned that a body surfer riding three- to six-foot waves amidst numerous bathers created a dangerous condition of public property (N.J.S.A. 59:4-2). Kleinke, supra, 163 N.J. Super. at 430. Second, he concluded that liability for negligent supervision of a beach did not implicate the reasons for immunizing a public entity for injuries occurring on unimproved public property. Id. at 433. Sharra, supra, overruled that portion of Kleinke which held that a body surfer in three- to six-foot waves amidst many bathers is a dangerous condition of public property. Sharra, supra, 199 N.J. Super. at 541. We did not disturb the portion of the Kleinke ruling that the unimproved property immunity did not override liability for negligent supervision of a public beach, ibid., but it was unnecessary to discuss that issue in Sharra.

In discussing whether a public employee and public entity are immunized for negligent supervision of a beach, the motion judge in Kleinke stated:

> [T]he legislative concern expressed by N.J.S.A. 59:4-8 is that public entities should not be unduly burdened with having to make natural conditions of unimproved land safe. The provisions of N.J.S.A. 59:3-11 do not jeopardize that legislative concern because they provide that a public employee (and hence a public entity N.J.S.A. 59:2-7) is not liable for failure to provide supervision to public recreational areas. The concern of N.J.S.A. 59:3-11, is simply that once supervision is undertaken it must not be done in a negligent manner.
>
> [Kleinke, supra, 163 N.J. Super. at 433.]

This relationship between the liability and immunity provisions was considered in Kowalsky v. Long Beach Township, 72 F.3d 385 (3d Cir. 1995). Indeed, the motion judge relied almost exclusively on Kowalsky in dismissing plaintiff's complaint. Kowalsky involves two swimming accidents which occurred on September 1 and 2, 1992, when Hurricane Gustav was 1000 to 1200 miles off-shore.[1] Id. at 387. On September 1, 1990, Petrillo was swimming and was struck from behind by a wave which knocked him face first into the sand. Ibid. He was rendered a quadriplegic unable to speak. Ibid. On September 2, 1990, Kowalsky was swimming in an area protected by municipal lifeguards, when he was "caught between two waves and driven into the sand." Ibid. He suffered a broken neck and is paralyzed from the waist down. Ibid. The Court of Appeals for the Third Circuit recognized that the plaintiffs asserted a negligent supervision claim and that N.J.S.A. 59:3-11 imposes liability for negligent supervision of a public recreational facility. Kowalsky, supra, 72 F.3d at 390-91. The court determined, however, that the specific immunity for unimproved public property such as a beach overrides a negligent supervision claim. Id. at 392. We are not bound by Kowalsky because the federal court was interpreting state law and was attempting to predict what the Supreme Court of New Jersey would do if faced with the same issue. The decision is informative, but not binding. See Linden Motor Freight Co., Inc. v. Travelers Ins. Co.,

---

[1]On appeal, the separate case of Petrillo v. Borough of Surf City was consolidated with Kowalsky.

40 N.J. 511, 518 (1963); Small v. Department of Corrections, 243 N.J. Super. 439, 444 (App. Div. 1990) (citations omitted).

We agree with the motion judge that the beach and the ocean are unimproved property. We also agree that 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. Thus, a person who encounters turbulence, forceful waves or uneven surfaces and who is injured solely due to those conditions has no cause of action against the public entity or public employee. That is because the public entity and public employee have no obligation to improve natural conditions or to ameliorate inherent but dangerous features of unimproved property. In short, the public entity and public employees have no obligation to make unimproved property safe. Moreover, the public entity has no obligation to post signs or flags concerning the condition of the water and inform bathers if it is safe for them to enter the water. To that extent, we affirm the order granting summary judgment insofar as plaintiff asserts that the ocean constituted a dangerous condition and that the defendant had a duty to warn independent of its decision to provide lifeguards at the beach.

On the other hand, the decision to provide protective services at a beach and potential liability for negligent performance of those services does not implicate the reasons for the immunity for unimproved property. The unimproved property immunity is an extension of the immunity conferred on public entities and their

employees for failing to provide supervision of public recreational facilities. It is designed to encourage public entities to acquire and provide recreational facilities. It also confers on the public entity the authority to provide or not to provide supervision, to improve or not to improve property. The State, county or municipality may still provide access to the public to recreational areas such as a river, lake, bay or ocean. The public entity has no legal obligation to supervise the activities at these sites. However, once a public entity decides to supervise the activities at the site, such as by providing lifeguards, it has presumably determined that more benefits are derived by providing lifeguards than by exercising its right to do nothing. Once it has made that decision, the fundamental reason for its immunity vanishes.

Moreover, a cause of action for negligent performance of protective services does not directly implicate the condition of the unimproved property. Rather, the focus of the claim is not on the condition of the unimproved property but on the fact that someone has undertaken to protect the public from the dangers posed by the property and has failed to do so. Stated differently, if the lifeguard properly discharged his/her function, the bather is not exposed to the danger posed by the body of water.

Recognition of a cause of action for negligent performance of lifeguard services at a beach also avoids the anomalous result of imposing liability for negligent performance of lifeguard services at a municipal pool while immunizing the same actions due to the natural rather than artificial nature of the swimming hole. We see

no reason to have different exposures to liability and perhaps different expectations regarding conduct solely due to the character of the swimming facility.

Having concluded that plaintiff's claim for negligent performance of lifeguard services is not barred by the unimproved property immunity, we focus on the elements of claim of negligent supervision. In order to establish liability based on negligent supervision, a plaintiff must show: (1) that an injury was sustained at a public recreational facility; (2) that a public employee undertook supervision of a public recreational facility, and (3) that the employee was negligent in supervision of the public recreational facility. Sharra, supra, 199 N.J. Super. at 539. In Morris v. City of Jersey City, 179 N.J. Super. 460 (App. Div. 1981), we defined supervision as follows:

> [T]here must be some conduct, no matter how minute, evidencing an intention to supervise by way of monitoring, entering into or becoming a part of the activity itself from which the injury sprang. Liability for negligent supervision will not be imposed simply because there was an incidental undertaking at the same place only tangentially related to the recreational activity.
>
> [Id. at 464.]

Thus, a plaintiff must show a specific act or omission by a public employee who has undertaken actions which evidence involvement in the activity conducted at the facility from which the injury sprang. Sharra, supra, 199 N.J. Super. at 538. Moreover, plaintiff should be prepared to show that he relied on the

protective services and expected that he could swim safely at that site. Burroughs, supra, 234 N.J. Super. at 222.

Due to the motion judge's conclusion that plaintiff's claim for negligent supervision of the beach was barred by an immunity, there has been no consideration of whether plaintiff can establish a negligent supervision claim. Therefore, we reverse and remand for further proceedings consistent with this opinion.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5205-94T5

HAROLD AGUILAR, ERNESTO AGUILAR
and MIRIAM AGUILAR,

Plaintiffs-Appellants,

v.

THE BOROUGH OF SEASIDE HEIGHTS,
THE DIRECTOR OF PUBLIC SAFETY FOR
THE BOROUGH OF SEASIDE HEIGHTS,
CAPTAIN OF LIFEGUARDS OF THE
BOROUGH OF SEASIDE HEIGHTS,

Defendants-Respondents.

FILING DATE
APPELLATE DIVISION
JUN 3 1996

Argued: May 1, 1996 - Decided: JUN 03 1996

Before Judges King, Landau and Humphreys.

On appeal from Superior Court of New Jersey, Law Division, Ocean County.

Thomas A. Kalapos argued the cause for appellants (Atkinson, DeBartolo & Kalapos, attorneys).

Thomas E. Monahan argued the cause for respondent (Gilmore & Monahan, attorneys; Stephen K. Foran, on the brief).

PER CURIAM

Plaintiff, Harold Aguilar (plaintiff) brought this suit against the Borough of Seaside Heights and its various officials and employees claiming they negligently failed to warn him of a dangerous condition at the public beach. In March 1995 Judge Oles granted summary judgment to the defendants, ruling against the plaintiff's claim of defective condition of public property and

negligent supervision. We conclude that the ruling was correct and affirm.

I.

At about noon on June 1, 1991 the plaintiff, aged 18 and a high-school senior, went with friends to a recreational beach in the Borough of Seaside Heights, Ocean County. He paid a beach fee and entered the beach at the Franklin Avenue entrance, between Casino and Funtown Piers. The beach is patrolled and lifeguard stations are located at about every 200 to 300 feet on the beach. The sign posted at the Franklin Avenue entrance informed beachgoers of the prohibition on picnics, alcohol, pets, ball and frisbee throwing, skateboarding, open fires and loud music. It also set out the times when bicycling and surfing are allowed, admonished beachgoers to wear proper attire, instructed them to purchase beach tickets, and warned that regulations are enforced by the police. The sign did not mention the presence of sandbars known to form at this beach or warn that diving into shallow water can be dangerous. Tide information was posted in two other locations in Seaside Heights but not at Franklin Avenue. The nearest posted tide information was three blocks north, at Sumner Avenue. High tide that day was between 10 and 10:30 a.m., and low tide was to be at about 4:30 p.m.

A little more than an hour after arriving, or between 1 and 1:30 p.m., plaintiff, an experienced swimmer, waded out until he was thigh-deep in the ocean, placed his hands out over his head, and dove out "into an oncoming wave." He claimed to have done a

Dg 14

"shallow dive." His hands did not strike anything. His head was not scraped or marked. The top center portion of his head, however, struck something which he initially believed was another swimmer or perhaps even a shark. Several days later, some physicians told plaintiff he probably hit a sandbar. Plaintiff is apparently still uncertain about what his head struck. There were no witnesses to the accident.

Seaside Heights Beach Patrol Captain Aires testified that Aguilar's accident was the only spinal-cord injury case in his fifteen years on the Patrol. Lt. Bishop, a lifeguard for nineteen years, testified that Aguilar was perhaps the second person he heard of who might have been injured by hitting his head on the ocean floor. Sgt. Parise, a lifeguard for thirteen years, testified that he had not witnessed a single serious injury caused by a swimmer striking his head on the ocean floor. Each of the lifeguards testified that conditions on the ocean floor change constantly and cannot be predicted. The accident rendered Aguilar quadriplegic; he is confined to a wheelchair.

Plaintiff's principal theory is that the Borough and its employees negligently supervised the beach by failing to warn of the possible existence of sandbars which might make diving into the surf potentially unsafe. Plaintiff asserts that a warning of this alleged hazard should have been placed on the sign at the entrance to the beach.

Under the New Jersey Tort Claims Act (Act) neither a public entity nor employee may be liable for failure to provide

supervision of a public recreational facility. N.J.S.A. 59:2-7[1] N.J.S.A. 59:3-11.[2] See, e.g., finding no liability, Fahey v. Jersey City, 52 N.J. 103 (1968) (decision not to hire supervisor for playground); Burroughs v. Atlantic City, 234 N.J. Super. 208 (App. Div.), certif. denied, 117 N.J. 647 (1989) (failure to provide permanent lifeguards); Morris v. Jersey City, 179 N.J. Super. 460, 463 (App. Div. 1981) (no supervision of persons shooting baskets on public-school basketball floor after hours). The decision whether to expend funds to supervise an activity or area is inherently a policy decision to be made free from the threat of tort liability. Fahey, supra, 52 N.J. at 110; Stempkowski v. Manasquan, 208 N.J. Super. 328, 333 (App. Div. 1986). Once the public entity chooses to provide supervision, however, neither section immunizes it nor its employees from claims

---

[1]N.J.S.A. 59:2-7 states:

> Recreational facilities.
>
> A public entity is not liable for failure to provide supervision of public recreation facilities, provided, however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition as provided in chapter 4.

[2]N.J.S.A. 59:3-11 states:

> Recreational Facilities.
>
> A public employee is not liable for the failure to provide supervision of public recreational facilities. Nothing in this section exonerates a public employee for negligence in the supervision of a public recreational facility.

of negligent supervision. N.J.S.A. 59:2-7; N.J.S.A. 59:3-11. Cf. Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479 (1960). The Borough does not deny that it chose to provide lifeguards to supervise the beach where plaintiff was injured. Consequently, a cause of action could possibly lie against the Borough and its employees for negligent supervision, depending however whether the Borough and its employees are entitled to any other immunity or defense. Whether recovery may be had, however, depends on whether the Borough and its employees are entitled to immunity. See N.J.S.A. 59:2-1;[3] Tice v. Cramer, 133 N.J. 347, 355 (1993).

The Borough and its employees claim immunity under N.J.S.A. 59:4-8, which provides:

> Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach.

N.J.S.A. 59:4-9, also pertinent, provides:

---

[3]N.J.S.A. 59:2-1 states:

> Immunity of public entity generally.
>
> a. Except 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.
>
> b. Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person.

> Neither a public entity nor a public employee is liable for any injury caused by a condition of the unimproved and unoccupied portions of the tidelands and submerged lands, and the beds of navigable rivers, streams, lakes, bays, estuaries, inlets and straits owned by the State.

The part of the ocean floor on which plaintiff claims to have been hurt "in hip high water" qualifies as unimproved public property under this section and as part of the beach mentioned in § 4-8. See Troth v. State, 117 N.J. 258, 268 (1989).

A property may be partially improved and partially unimproved for purposes of N.J.S.A. 59:4-8 and -9, Troth, supra, 117 N.J. at 272; Whitney v. Jersey Central Power & Light Co., 240 N.J. Super. 420, 426 (App. Div. 1990), but the improvement of one portion of a property does not remove the immunity for injuries caused by conditions on the unimproved portion. Accord Rombalski v. Laguna Beach, 213 Cal. App.3d 842, 853 (App. Dist. 1989) (city-built stairway to beach and lifeguard tower did not make rock from which plaintiff dove into ocean non-natural or improved and remove immunity); Geffen v. Los Angeles Cty., 197 Cal. App.3d 188, 192 (App. Dist. 1987) (beach unimproved despite provision of lifeguards); Fuller v. State, 51 Cal. App.2d 926, 932 (App. Dist. 1975) (where plaintiff jumped or dove from ledge into ocean and struck bottom, immunity not removed because city built jetty which may have caused shift in water and sand, nor by city's construction of restrooms and guard towers); Rendak v. State, 18 Cal. App.3d 286, 288 (1971) (cliff collapsed killing person walking on beach at state park; area not unimproved merely because state built

restrooms and fireplaces elsewhere in park). Accord Freitag v Morris City, 177 N.J. Super. 234, 238-39 (App. Div. 1981) (hill where plaintiffs tobogganed unimproved even though cleared of timber and brush, where hill was in unimproved portion of property), cited with approval, Troth, supra, 117 N.J. at 268.

We reject plaintiff's argument that improvements in the beach or boardwalk area rendered the ocean floor an improved area. Plaintiff had waded into the water to the top of his thigh when he dove into the breaking wave. The alleged sandbar, even it if existed, was thoroughly submerged. Plaintiff has failed to demonstrate in this record that "man-made" changes had any influence on the particular mechanism of his injury, even accepting the speculation that he dove into a sandbar. The beach loses its unimproved status only if "there has been substantial physical modification of the property from its natural state and . . . the physical change creates hazards that did not previously exist and that require management by the public entity." Troth, supra, 117 N.J. at 269-70 (emphasis added). See also Kowalsky v. Long Beach Tp., 72 F.3d 385, 389-90 (3d Cir. 1995). Accord Knight v. City of Capitola, 6 Cal. Rptr.2d 874 (1992) (action for injuries sustained by bodysurfer hurled by waves against hard sand bottom; artificially rebuilt beach and improvements such as jetties and groins did not negate immunity). We conclude that there is no showing in this record that the ocean floor was in any way improved or managed by the Borough in a manner that could have contributed to plaintiff's injury. The ocean floor for purposes of this case

was "unimproved public property" within the meaning of N.J.S.A. 59:4-8.

II.

Plaintiff's argument that N.J.S.A. 59:3-11 (negligent supervision) abrogates the grant of immunity under N.J.S.A. 59:4-8 (unimproved public property) also fails. We adopt the view of the Third Circuit as expressed by Judge Scirica recently in Kowalsky, supra, 72 F.3d at 390-92, involving a surf-related accident at Spray Beach on Long Beach Island. The panel there stated:

> The question remains whether N.J.S.A. 59:4-8 immunity precludes all causes of action arising from plaintiffs' injuries, including causes of action for negligent supervision and failure to warn. Kowalsky and Petrillo generally contend defendants assumed responsibility for the safety of the beaches and were aware the weather created dangerous surf conditions, but nevertheless failed to take action to prevent their accidents. They also argue that as a matter of law N.J.S.A. 59:3-11 abrogates any grant of immunity which might be conferred by N.J.S.A. 59:4-8. We cannot agree. Section 3-11 provides:
>
> > [a] public employee is not liable for the failure to provide supervision of public recreational facilities. Nothing in this section exonerates a public employee for negligence in the supervision of a public recreational facility. (emphasis added).
>
> The second sentence of N.J.S.A. 59:3-11 neither creates liability, nor provides defenses or immunities, for negligent supervision. This is left to other statutory provisions like N.J.S.A. 59:4-8, which provides immunity for both public entities and public employees from claims arising from "injur[ies] caused by a condition of any unimproved public property." It is well-

established that supervision, once undertaken, must be conducted in a non-negligent manner. See Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479, 161 A.2d 479, 488 (1960); see also Restatement (Second) of Torts § 323 (discussing negligent performance after undertaking to render services). But the express language of N.J.S.A. 59:4-8 and the policy judgments underlying it demonstrate that immunity may still apply in the face of negligence. Once it has been determined that N.J.S.A. 59:4-8 immunity applies, the New Jersey Tort Claims Act makes clear that "[a]ny liability of a public entity established by this act is subject to any immunity of the public entity." N.J.S.A. 59:2-1b.

Significantly, our understanding of the relationship between N.J.S.A. 59:3-11 and N.J.S.A. 59:4-8 is reinforced by the view of the New Jersey Supreme Court that "[w]hen both liability and immunity appear to exist, the latter trumps the former." Tice v. Cramer, 133 N.J. 347, 627 A.2d 1090, 1095 (1993) (setting out the general principles of the Act and applying them to find that a police officer enjoys absolute immunity under N.J.S.A. 59:5-2b(2), absent willful misconduct, for injuries to bystander arising from pursuit of fleeing vehicle); see also id. at 1102 ("Under no circumstances, however, may ... [liabilities of public employees], whatever their origin, trump the immunities provided for in the Act. Where inconsistent, the liabilities fall, the immunities stand."). Any possible liability allowed under N.J.S.A. 59:3-11 must be subordinate to immunity conferred by N.J.S.A. 59:4-8. To "rule otherwise would be to ignore what is probably the clearest and most important command of the Act, namely, that the immunities set forth in the Act prevail over any liabilities, whether found in the Act or in preexisting law, including statutes." Id. at 1103.

In addition, notwithstanding that the Tort Claims Act is less sweeping in immunizing public employees than [in immunizing] public entities, see generally Chatman v. Hall, 128 N.J. 394, 608 A.2d 263 (1992) (discussing the differential treatment of public employees and entities by the Act), N.J.S.A. 59:4-8 makes

clear that public entities and employees share the same immunity status with regard to "unimproved" property.

We conclude that the Tort Claims Act, and the guidance offered in Tice v. Cramer, SUPRA, establish that a negligent supervision claim, such as advanced in this case — failure to place a sign on the beach warning about the dangers of diving in the surf — is subject to the statutory immunity conferred by N.J.S.A. 59:4-8. That same principle, i.e., that liability is subordinate to immunity, applies to public employees. See N.J.S.A. 59:3-1.

Affirmed.

I hereby Certify that the foregoing is a true copy of the original on file in my office.

Clerk

YOUNGBLOOD, CORCORAN, ALELI, LAFFERTY
STACKHOUSE, GROSSMAN & GORMLEY, P.A.
3205 Fire Road, P.O. Box 850
Pleasantville, NJ 08232
(609)645-2201

Attorneys for: Defendant/Petitioner City of Cape May

WILLIAM FLEUHR Plaintiff/Respondent vs. CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY Defendant/Petitioner	SUPREME COURT OF NEW JERSEY Docket No. ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No: A 846-96T3 SAT BELOW: HON. VIRGINIA LONG HON. ARIEL A. RODRIGUEZ HON. MARY C. CUFF

CIVIL ACTION

NOTICE OF PETITION FOR CERTIFICATION

TO: CLERK - APPELLATE DIVISION
Richard J. Hughes Justice Complex
Trenton, NJ 08625

Gregory Marchesini, Esquire
Sandler & Marchesini
22 Alpha Avenue
Voorhees, NJ 08043

PLEASE TAKE NOTICE that at a time and place to be determined by the Supreme Court of New Jersey, Richard J. Hughes Justice Complex, Trenton, NJ, Phyllis Coletta, Esquire of the law firm of Youngblood, Corcoran, Aleli, Lafferty, Stackhouse, Grossman & Gormley, P.A., attorneys for Defendant City of Cape May, shall make application before the Supreme Court of New Jersey for an Order allowing Certification to the Supreme Court to review the Appellate Division decision entered July 30, 1997.

Youngblood, Corcoran, Aleli, Lafferty,
Stackhouse, Grossman & Gormley, P.A.
Attorneys for Petitioner

By: Phyllis Coletta

Dated: _____

A-136 SEP 1997

WILLIAM FLEUHR Plaintiff/Respondent vs. CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY Defendants/Petitioner	: SUPREME COURT OF NEW JERSEY : DOCKET NO. 44,746 : : : ON APPEAL FROM: : : SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION : DOCKET NO. A-846-96T3 : : SAT BELOW: : : HON. VIRGINIA LONG : HON. ARIEL A. RODRIGUEZ : HON. MARY C. CUFF

FILED
SEP 15 1997
Stephen W. Townsend
CLERK

BRIEF AND APPENDIX OF PLAINTIFF/RESPONDENT WILLIAM FLEUHR IN SUPPORT OF HIS RESPONSE TO DEFENDANT'S PETITION FOR CERTIFICATION

SANDLER & MARCHESINI, P.C.
22 Alpha Avenue
Voorhees, NJ 08043
(609) 354-8484
attn Gregory Marchesini, Esquire

Attorneys for
Plaintiff/Respondent, William
Fleuhr

On the Brief:

Paul N. Sandler, Esquire

A-136 SEP 1997

WILLIAM FLEUHR	: SUPREME COURT OF NEW JERSEY
	: DOCKET NO. 44,746
Plaintiff/Respondent	:
	:
vs.	: ON APPEAL FROM:
	:
	: SUPERIOR COURT OF NEW JERSEY
CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY	: APPELLATE DIVISION
	: DOCKET NO. A-846-96T3
	:
Defendants/Petitioner	: SAT BELOW:
	:
	: HON. VIRGINIA LONG
	: HON. ARIEL A. RODRIGUEZ
	: HON. MARY C. CUFF

FILED
SEP 15 1997
Stephen W. Townsend
CLERK

BRIEF AND APPENDIX OF PLAINTIFF/RESPONDENT WILLIAM FLEUHR IN SUPPORT OF HIS RESPONSE TO DEFENDANT'S PETITION FOR CERTIFICATION

SANDLER & MARCHESINI, P.C.
22 Alpha Avenue
Voorhees, NJ 08043
(609) 354-8484
attn Gregory Marchesini, Esquire

Attorneys for
Plaintiff/Respondent, William Fleuhr

On the Brief:

Paul N. Sandler, Esquire

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited

Statutes Cited

New Jersey Court Rules Cited

COUNTER-STATEMENT OF MATTERS INVOLVED

On August 31, 1993, Plaintiff/Respondent, William Fleuhr ("Fleuhr") broke his neck while body surfing in the ocean. Fleuhr sued the City of Cape May ("Cape May")for negligence which included claims for negligence in permitting plaintiff and others to enter the water and negligent supervision.

Cape May moved for summary judgment based on the unimproved property immunity, N.J.S.A. 59:4-8, afforded by the New Jersey Tort Claims Act ("Tort Claims Act"), N.J.S.A. 59:1-1 to 12-3. The Trial Court dismissed plaintiff's Complaint. The Appellate Court reversed the dismissal, holding that plaintiff's claims for negligent supervision are permitted to proceed.

It is important to note that Cape May has incorrectly noted that "the parties agreed that the injury was incurred solely by the action of the ocean, that is, there was no intervening force such as a raft or a piece of equipment". (Db1). Cape May further incorrectly states that "plaintiff asserted that the "dangerous condition" which gave rise to the duty to warn and/or supervise was the "ocean conditions" from Hurricane Emily off the coast of North Carolina"(Db1). All three of these assertions are not agreed to and do not form part of the record.

The Appellate Court held that the Motion Judge was correct that the beach and ocean are unimproved property (Da9); 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 an unimproved body of water (Da9); a person who encounters turbulence, forceful waves or uneven surfaces and is injured solely due to these actions has no cause of action against the public entity or public employee (Da9); public entity and public employee have no obligation to improve natural conditions or ameliorate inherent but dangerous features of unimproved property (Da9); public entities and public employees have no obligation to make unimproved property safe (Da9); public entity has no obligation to post signs or flags concerning the condition of the water and inform bathers if it is safe for them to enter the water (Da9); summary judgment was affirmed insofar as plaintiff asserts that the ocean constituted a dangerous condition and that defendant had a duty to warn independent of its decision to provide lifeguards at the beach (Da9); the decision to provide protective services at a beach and potential liability for negligent performance of those services does not implicate the reasons for the immunity for unimproved property (Da9).

The Appellate Court reasoned that the focus on the claim is not on the condition of the unimproved property, but on the fact that someone has undertaken to protect the public from the dangers posed by the property and has failed to do so (Da10). The Court further held that recognition of a cause of action for negligent performance of lifeguard services at a beach also voids the anomalous result of imposing liability for negligent performance of lifeguard service at a municipal pool while immunizing the same actions due to the natural rather than artificial nature of the

swimming hole(Da10).

Cape May has argued that the unpublished opinion of Aguilar v. Borough of Seaside Heights, (A-5205-94T5 filed June 8, 1996) conflicts with the Appellate Court decision in the present matter and supports the City of Cape May's request for certification. As this Court and counsel for Cape May is aware pursuant to Rule 1:36-3, "No unpublished opinion shall constitute precedent or be binding upon any Court. Therefore, it is clear that the unpublished opinion of Aguilar v. Borough of Seaside Heights, Id., does not have stare decisis effect and does not constitute precedent and is not binding upon any Court. Therefore, Aguilar has no precedential value and can not be argued to be in conflict with the present Appellate Court reported decision.

Cape May has filed a Notice of Petition for Certification in a timely fashion and has filed its Brief and Appendix in support of its Petition for Certification to which plaintiff/respondent files the instant response thereto.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does the appeal present a critical question of general public importance which should be settled by the Supreme Court?

2. Has Cape May demonstrated that there are conflicting Appellate Court decisions on the same issue?

STANDARD OF REVIEW

Rule 2:12-4 provides the grounds for certification to this Court. Typically, a case for certification encompasses several other relevant factors controlling the exercise of the Court's

discretionary appellate jurisdiction. Mahoney v. Danis, 95 N.J. 50, 53 (1983). Grounds for certification have been stated in terms of a question of general public importance, a conflict in decisions and in other matters that the interest of justice requires. Certification is not to be granted where there has been a final judgment of the Appellate Division except for special reasons. (Rule 2:12-4.) The Rule recognizes that where the parties have had one appeal, there must be special reasons for granting certifications. Questions of fact should not have to be reviewed here unless intertwined with a determination of vital legal issues. Giangrasso v. Dean Floor Covering Co., 51 N.J. 80, 84, 237 A.2d 866 (1968).

I. CAPE MAY HAS NOT PRESENTED QUESTIONS OF "GENERAL PUBLIC IMPORTANCE" BEARING REVIEW AND RESOLUTION BY THIS COURT.

On the question of public importance, Cape May provides argument and speculation as to the ramifications that Cape May believes the Appellate Court decision would have rather than on any particular issue of public importance. It is argued by Cape May that "if the decision to provide public lifeguard service at the beach causes immunity to vanish, public entities are forced to make choices which are not in the public interest." (Db 5). The Court's opinion will result in such actions being brought in untold numbers (Db 6); decision requires Courts to inquire of the "focus of a Complaint and to determine if it arises out of negligent supervision, or the condition of unimproved la d (Db 6); permits a cleverly worded Complaint to skirt and avoid mandated legislative

immunity and the Court's exercise of jurisdiction is necessary to avoid such inequity (Db 6). Cape May argues that each of these issues are questions of public importance.

Cape May's arguments are speculation as to ramifications of the decision not issues of general public importance.

The speculation and argument of Cape May ignores the holdings of the Court. Cape May has argued that the opinion gives "claimants the right to sue for injuries incurred by the action of the ocean" and would result "in such claims being brought in untold numbers" (Db6). As the Appellate decision states very clearly, injuries caused exclusively by the action of the ocean are barred.(Da3). Therefore, Cape May's argument must fail. The Appellate Court, in its opinion, has clearly provided that any liability established by the Tort Claims Act is subordinate to or trumped by any immunity recognized by the Act.(Da3). In addition, the Court holds that 59:4-8 provides, "Neither a public entity nor a public employee is liable for an injury caused by a condition of an unimproved public property including, but not limited to, any natural condition of any lake, stream, bay, river or ocean. (Da4). The Appellate Court agreed with the Motion Judge that the beach and ocean are unimproved property, and there can "be no liability for injuries which occur solely due to conditions encountered in an unimproved body of water".(Da9).

The Court confirmed the rationale that "the public entity and public employee have no obligation to improve natural conditions or ameliorate inherent but dangerous features of unimproved property.

In short, public entities and public employees have no obligation to make unimproved properties safe".(Da9). The Court specifically affirmed the granting of summary judgment insofar as plaintiff asserts that the ocean constituted a dangerous condition and that the defendant had a duty to warn independent of its decision to provide lifeguards at the beach.(Da9). If the injuries occurred by action of the ocean alone, immunity applies.

The focus of the claims which are permitted to remain are not on the condition of the unimproved property which would invoke immunity, but on the fact that someone has undertaken to protect the public from the dangers posed by the property and has failed to do so. The Appellate Court indicates that "there has been no consideration of whether plaintiff can establish a negligent supervision claim when the Court held the defendant's claims for negligent supervision were barred by immunity"(Da12). This issue is not an issue which raises an issue of public importance, but is rather a determination by the Court below as to whether or not plaintiff's claims for negligent supervision implicate the condition of the unimproved property. The Appellate Court was clear in that if the injuries occurred solely to due conditions encountered in an unimproved body of water, the plaintiff could not prevail. Therefore, Cape May's arguments must fail.

Cape May has not addressed any issues of general public importance warranting the granting of certification. Cape May has argued speculation and anticipated ramifications which are not part of the record nor relevant to a determination by this Court as to

the request for certification.

Cape May's argument that the Courts would now need to inquire as to the focus of a Complaint and determine if it arises out of negligent supervision or the condition of unimproved land and that this Court's exercise of jurisdiction is necessary to avoid such inequity is without merit as well. Certainly, this argument is not an issue of general public importance, but is rather an argument that goes to the obligations of the courts and attorneys in their pleadings and filings. As this Court is aware, in order for a plaintiff to prevail in a claim, they must do more than just "cleverly word a Complaint", but rather must meet the requirements mandated by both statute and case law. Certainly, this Court's granting of certification cannot be founded on the Cape May's fear that "cleverly worded Complaints" may require the Courts to inquire unnecessarily into the focus of a Complaint. It is respectfully requested that this Honorable Court deny certification as Cape May has not shown an issue of general public importance to be at issue in the above matter.

II. THERE ARE NO CONFLICTING OPINIONS ON THE SAME ISSUE AND, THEREFORE, CERTIFICATION SHOULD BE DENIED.

(1) AQUILAR IS AN UNPUBLISHED OPINION AND, THEREFORE, NOT IN CONFLICT WITH THE PRESENT OPINION.

Cape May has asserted that the unreported opinion of Aquilar v. Borough of Seaside Heights, supra, is in direct conflict with the Appellate Court opinion. Further, Cape May has argued that "the rationale and holding of the Appellate Court is in direct contravention to several published Appellate Division decisions,

and at least one unpublished decision on the same issue." (Db7). In support of this argument, Cape May has addressed Kleinke v. City of Ocean City, 163 N.J. Super. 424 (Law 1978) (Db8) and Stempkowski v. Borough of Manasquan, 208 N.J. Super. 328 (App. Div. 1986) (Db9). In addition, Cape May has also cited Kowalsky v. Long Beach Township, 782 F.3d 385 (3rd. Cir. 1995), a Third Circuit Court of Appeals opinion.

The Appellate Court addresses Kleinke v. City of Ocean City, supra, (Da6-7) and Stempkowski v. Borough of Manasquan, supra, (Da5-6) and, Kowalsky, supra, (Da8) in its opinion. The Aguilar opinion was not discussed as it was not argued by the parties nor is it a published opinion.

Cape May has argued that Aguilar is a conflicting opinion of the Appellate Division and, therefore, warrants granting of certification. As this Court is aware, pursuant to New Jersey Court Rule 1:36-3, unpublished opinions do not constitute precedent and are not binding upon any Court. By citing Aguilar, an unpublished opinion, as binding precedent, Cape May has ignored Rule 1:36-3. State v. One 1979 Pontiac Sunbird, 191 N.J. Super. 578, 581 (App. Div. 1983). See also Charatan v. Board of Review, 200 N.J. Super. 74 (App. Div. 1985). (An unpublished decision has no precedential value.)

In addition, Aguilar is not binding and not in conflict with the Appellate Court opinion. The Court in Aguilar held that the failure to place a sign on a beach warning about the dangers of diving in the surf is subject to the statutory immunity conferred

by N.J.S.A. 59:4-8 (Da22). The same language is cited in the Appellate Court opinion herein which states that "public entity has no obligation to post signs or flags concerning the condition of the water and inform bathers if it is safe for them to enter the water". (Da9).

Aguilar involved injuries sustained by the plaintiff while diving into a sandbar. The plaintiff in Aguilar argued that the Borough had failed to warn that sandbars might make diving into the surf potentially unsafe. The Court in Aguilar held that the failure to place a sign on the beach warning about the dangers of diving into the surf is subject to the statutory immunity conferred by N.J.S.A. 59:4-8. This is the same holding as in the present case. The Appellate Court opinion in the present matter affirmed the granting of summary judgment insofar as plaintiff was asserting that the ocean constituted a dangerous condition and that the defendant had no duty to warn independent of its decision to provide lifeguards (Da9). The focus on the Court in Aguilar was on the dangerous condition, the sandbar, and the failure place a sign warning about the dangers of diving into the surf. Both the Aguilar opinion and the Appellate Court opinion agree that there can be no recovery by the plaintiff asserting liability due to a failure to place a sign on a beach warning of the condition of the water and the dangers therein. Aguilar is unpublished and not of precedential value and, further, is not in conflict with the present matter.

(2) KLEINKE IS NOT IN CONFLICT WITH THE PRESENT OPINION.

Cape May argues that the Appellate Court cited and relied upon Kleinke and that the application of N.J.S.A. 59:4-2 and 4-8 were subsequently disapproved by Appellate panels and, therefore, provides no precedent. In support of its argument, Cape May states that a portion of Kleinke was overruled by Sharra v. City of Atlantic City, 199 N.J. Super. 535 (App. Div. 1985). This point was also acknowledged by the Appellate Court in its opinion wherein the Court held Sharra overruled the portion of Kleinke which held that a body surfer in three to six foot waves is a dangerous condition of public property (Da7). Cape May further argues that the Court in Freitag v. Morris County, 177 N.J. Super. 234 (App. Div. 1981), expressly provides immunity for any condition of unimproved public property". Id. at 238. Cape May has failed to note that the Appellate Court cited Kleinke and confirmed that portions of Kleinke had been overruled and had noted that the Court left undisturbed the portion of the Kleinke ruling that the "unimproved property immunities did not override liability for the negligent supervision of a public beach, but it was unnecessary to discuss that issue in Sharra" (Da7). This holding of Kleinke was not overruled by Freitag nor by Sharra as correctly pointed out by the Appellate Court and, as such, formed a proper basis for the Appellate Court opinion.

(3) THE STEMPKOWSKI OPINION IS CONSISTENT WITH THE APPELLATE COURT AS UNIMPROVED PROPERTY IMMUNITY WAS NOT RAISED.

Cape May argues that Stempkowski v. Borough of

Manasquan, supra, holds that "there can be no liability on the part of the municipality for injuries caused exclusively by the action of the ocean. The presence or absence of lifeguards was not material, since it was unrelated to the physical condition of the property". This is also the holding of the Court in the present matter. The Appellate Court clearly states in its opinion that neither a public entity nor a public employee is liable for an injury caused by conditions of an unimproved public property (Da4). The Appellate Court below also points out that in dicta, the Stempkowski Court observed plaintiff's claim was also barred by 59:3-11 because plaintiff's claim rested on the municipality's failure to provide lifeguard services rather than a negligent provision of those services (Da5). The Appellate Court notes that "this passage suggests that the outcome of plaintiff's case may have been different if he had alleged that the lifeguards were present and had negligently performed their protective function." (Da5). The unimproved property immunity of 59:4-8 was not raised in Stempkowski(Da5). The opinion of Stempkowski is consistent with the opinion of the Appellate Court and, in fact, was cited and relied upon by the Appellate Court and, therefore, cannot form a basis for a request for certification of this matter.

(4) KOWALSKY IS NOT A DECISION OF THE SAME OR HIGHER COURT.

Cape May argues that the Third Circuit decision in Kowalsky v. Long Beach Township, et al., supra, conflicts with the Appellate Court's decision in the instant case. The Appellate Court is not bound by Kowalsky because the Federal Court was interpreting state

law and was attempting to predict what the Courts of New Jersey would do when faced with the same issue. The decision is informative, but not binding(Da8). Kowalsky does not constitute a decision of the same court or a higher Court, therefore, for the purposes of Rule 2:12-4 cannot properly form the basis for a request for Certification under Rule 2:12-4.

REPLY TO COMMENTS WITH RESPECT TO APPELLATE DIVISION DECISION

Cape May made part of its Brief "Comments with respect to the Appellate Division decision" arguing that the Appellate Court's analysis of the Tort Claims Act was inappropriate and, second, that the Appellate decision is internally inconsistent and the interest of justice require review. The comments of Cape May to the Appellate Court opinion do not address these issues in relation to grounds for certification. These comments apply to legal argument in opposition of the Appellate Court decision which more appropriately, would be the subject of argument should this Court grant certification and not before. Nonetheless, since these issues have been raised, I feel compelled to address these issues and make a response.

(1) RESPONSE TO POINT 1 OF APPELLANT'S COMMENTS

Cape May argues as it had to the Appellate Court that under 59:4-8 public entities and employees are granted immunity from liability for injury caused by any condition of unimproved public property whether the condition represents a natural or artificial hazard. This is the same holding as the Appellate Court that stated "Neither a public entity nor a public employee is liable for

an injury caused by a condition of an unimproved property, including but not limited to, any natural condition of any lake, stream, bay, river or beach"(Da4).

The focus of the Appellate Court decision is on the performance of protective services once the public entity decides to supervise the activities at the site such as providing lifeguards. Cape May's argument is flawed when it states in bold print at page 13 of its opinion that "If an immunity applies, it prevails over any potentially applicable liability section". This is clearly not the law of the State of New Jersey. In fact, there is no case law cited by Cape May that supports the proposition that "If any immunity applies, it prevails over any potentially applicable liability section". The statute provides that public entity and public employee are not liable for an injury caused by a condition of an unimproved public property. The immunity applies to injury caused by a condition of any unimproved public property. Appellant's insertion of the words "any potentially" is not found in the law or Court opinions.

The Appellate Court below cited the holding of Tice v. Cramer, 133 N.J. 347, 356 (1993), that any liability established by the Tort Claims Act is subordinate to or "trumped" by any immunity recognized by the Act. The language of Tice does not relate to any potentially applicable liability section, but rather, to "any immunity recognized by the Act".

As argued by Cape May, Section 59:3-11 imposes liability for negligent supervision of a public recreational facility. Section

59:3-11 provides, clearly, that a public employee is not liable for the failure to provide supervision of recreational facilities. It is well settled that once a public employee undertakes supervision, a duty to exercise reasonable care arises and liability for negligence attaches. Cape May has attempted to stretch the holdings of Kowalsky and Freitag to hold that immunity prevails over "any potentially applicable liability section", which is not the holding of the Court.

The Appellate Court very soundly argues and provides that it has upheld the motion judge's holding that the beach and ocean are unimproved property(Da9); that once a bather enters a body of water which is unimproved, there can be no liability for injuries which occur solely due to the conditions encountered in an unimproved body of water(Da9); that once a person encounters turbulence, forceful waves or uneven surfaces and is injured solely due to these conditions they have no cause of action against the public entity or public employee and the public entity has no obligation to post signs or flags condition of the water and inform bathers if it is safe for them to enter the water (Da9); public entity and public employees have no obligation to make unimproved property safe (Da9) and affirm the granting of summary judgment insofar as plaintiff asserts that the ocean constituted a dangerous condition that the defendant had a duty to warn independent of its decision to provide lifeguards at the beach.(Da9).

The focus of the Appellate Court was on the issue of plaintiff's claim for negligent performance of protective services

not implicated by the reasons for immunity for unimproved property. The holding of the Appellate Court does not permit a cause of action to proceed in the face of express legislative immunity, but rather affirms the immunity provided by N.J.S.A. 59:4-8 which provides that plaintiff cannot present a claim for injuries sustained solely due to conditions encountered in an unimproved body of water and solely due to the condition of the unimproved property. Rather, the Court has held that plaintiff may only proceed with its claims for negligence in the performance of protective services which do not implicate the reason for the immunity for unimproved property.(Da9).

Again, this is an issue which is more appropriately to be addressed should certification be granted. The Appellate Court's interpretation and holdings with respect to the Tort Claims Act and, in particular, N.J.S.A. 59:4-8 and 59:3-11 are not in conflict with any other decision of the same or higher Court. Therefore, the request for certification should be denied accordingly.

(2) RESPONSE TO POINT 2 OF APPELLANT'S COMMENTS

Cape May argues that there are inconsistencies in the Appellate Court opinion which require review and reversal which include: Appellate Court has held that once a public entity provides protective services, all immunity vanished(Db5); the differences between injuries incurred in a municipal swimming hole are "legion and are set out clearly in the Tort Claims Act" (Db15); the underlying premise of the decision is that "if the lifeguard properly discharged his or her function, the bather is not exposed

to the danger posed by the body of water" (Db16); under the Tort Claims Act, there can never be a cause of action for negligent provision or protective services when an injury occurs in the ocean (Db17); given the vast ramifications of this published opinion, this Court should hear this matter and reestablish for public entities that absolute immunity legislature created (Db17).

Once again, the comments of Cape May clearly rise to the level of argument unrelated to the grounds for certification mandated under Rule 2:12-4. The Appellate Court did not hold that once a public entity provides protective services, all immunity vanishes. A review of the opinion clearly provides that the Court held that once there has been a decision to supervise activities, "it has presumably determined that more benefits are derived from providing lifeguards than by exercising its right to do nothing" (Da10). The Court goes on to hold that once it has made the decision, the fundamental reason for immunity vanishes. (Da10). The Court does not state that immunity vanishes, but rather that the reason for immunity has vanished.

The analysis of the Appellate Court sets forth the distinction when one focuses on supervisory actions as opposed to unimproved property. Clearly, immunity prevails and has been held to prevail by the Appellate Court when the injury relates to the unimproved property. The Appellate Court held that the decision to provide protective services at a beach and potential liability for negligent performance of these services does not implicate the reasons for the immunity for unimproved property. (Da9). That is

to say the reasons to provide immunity for injuries related to unimproved property are different than when discussing liability attaching for negligent performance of protective services at a beach. Cape May has incorrectly asserted that the Appellate Court suggested that once a public entity provides protective services, all immunity vanishes. The Court very clearly says, "once it has made that decision, the fundamental reason for its immunity vanishes" (Da10). The Court has held that the reason for immunity has vanished, not that immunity has vanished.

Cape May argued that the distinction between liability for a lifeguard at a municipal swimming pool as opposed to a lifeguard at a beach "are legion". (Db15). The Court states that the "recognition of a cause of action for negligent performance of lifeguard service at a beach also avoids the anomalus result of imposing liability for negligent performance of lifeguard services at a municipal pool while immunizing the same actions due to the natural rather than artificial nature of the swimming hole". (Da10). The Court saw no reason to have different exposures to liability and, perhaps, different expectations regarding conduct solely due to the character of the swimming facility (Da10).

Once again, Cape May has missed the point of the Court's opinion. The Court has clearly provided that the focus of the claim is not on the condition of the unimproved property, but on the fact that someone has undertaken to protect the public from the dangers posed by the property and has failed to do so. As such, the issue of unimproved versus improved property should not be

determinative when discussing liability for negligent performance of protective services. The Court very clearly provides the criteria for proving a claim for negligent performance of lifeguard services as set forth in Sharra, supra., and adds additional requirements (Da11-12).

The comments of Cape May engage in speculation, argument and sensationalism as to its belief as to the ramifications of the Appellate opinion which do not properly form a basis for a request for certification. The arguments of Cape May that "people will get hurt in the Atlantic Ocean and there is nothing any beach patrol can do--there are no measures great enough to actually protect bathers from the ocean, and lifeguards are present to be as added insurance, not as life insurance" are all unsubstantiated arguments which do not properly form a basis for request for certification by this Court and should be disregarded.

The unsubstantiated, unsupported assertions by Cape May that "Under the Tort Claims Act, there can never be a cause of action for "negligent provision of protective services" when an injury occurs in the ocean and that the Courts have "already held with finality that swimming in the ocean--whether body surfing on a crowded protected beach or venturing into a hurricane surf, does not create a "dangerous condition" of public property nor does the presence of lifeguards render the Atlantic ocean "improved"" (Db17) are not supported by case law. The arguments of counsel for Appellant would make more appropriate closing arguments than arguments for certification and therefore should be disregarded.

The Appellate Court below has clearly reaffirmed the immunity provided to a public entity and public employee for injuries caused by conditions of unimproved public property. The present decision is limited to the issues of providing protective services at a beach and potential liability for negligent performance of those services which are not implicated by the reasons of immunity for unimproved property. In fact, the Appellate Court properly stated that "there has been no consideration of whether plaintiff can establish a negligent supervision claim when the Court held that defendant's claims for negligent supervision were barred by immunity"(Da12). The issue remains as to whether or not the plaintiff can prevail on its claims for negligent supervision. The arguments raised by Cape May are issues for the trier of fact and not issues to be determined by the Supreme Court when rendering a decision as to whether or not to accept certification, therefore it is respectfully requested that the comments of the Appellant be disregarded and stricken and that certification be denied.

Respectfully submitted,

SANDLER & MARCHESINI, P.C.

BY: _____
GREGORY MARCHESINI, ESQUIRE
Attorney for
Plaintiff/Respondent

CERTIFICATE OF SERVICE

STATE OF NEW JERSEY :
COUNTY OF CAMDEN :

Gregory Marchesini, Esquire, being duly sworn according to law, deposes and says that:

1. I am an attorney at the firm of Sandler & Marchesini, P.C. and the attorney assigned to handle the matter of Fleuhr v. City of Cape May.

2. On this 15th day of September, 1997, a copy of the within pleading was served upon the following by hand-delivery at the address as follows:

Gerald J. Corcoran, Esquire
YOUNGBLOOD, CORCORAN, ALELI,
LAFFERTY & STACKHOUSE, P.A.
3122 Fire Road
P.O. Box 850
Pleasantville, NJ 08232-0850

SANDLER & MARCHESINI, P.C.

BY: _____
GREGORY MARCHESINI, ESQUIRE
Attorney for
Plaintiff/Respondent
22 Alpha Avenue
Voorhees, NJ 08043

CERTIFICATE OF SERVICE

STATE OF NEW JERSEY :
COUNTY OF CAMDEN :

Gregory Marchesini, Esquire, being duly sworn according to law, deposes and says that:

1. I am an attorney at the firm of Sandler & Marchesini, P.C. and the attorney assigned to handle the matter of Fleuhr v. City of Cape May.

2. On this 15th day of September, 1997, a copy of the within pleading was served upon the following by hand-delivery at the address as follows:

Gerald J. Corcoran, Esquire
YOUNGBLOOD, CORCORAN, ALELI,
LAFFERTY & STACKHOUSE, P.A.
3122 Fire Road
P.O. Box 850
Pleasantville, NJ 08232-0850

SANDLER & MARCHESINI, P.C.

BY: _____
GREGORY MARCHESINI, ESQUIRE
Attorney for
Plaintiff/Respondent
22 Alpha Avenue
Voorhees, NJ 08043

A-136 SEP 1997

FILED

SEP 24 1997

RECEIVED

SEP 24 1997

SUPREME COURT
OF NEW JERSEY

WILLIAM FLEUHR,

Plaintiff/Respondent,

v.

CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY,

Defendants/Petitioner,

SUPREME COURT OF NEW JERSEY
DOCKET NO. 44,746

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-846-96T3

SAT BELOW:
HON. VIRGINIA LONG
HON. ARIEL A. RODRIGUEZ
HON. MARY C. CUFF

REPLY BRIEF OF DEFENDANT/PETITIONER CITY OF CAPE MAY IN SUPPORT OF ITS PETITION FOR CERTIFICATION

YOUNGBLOOD, CORCORAN, ALELI, LAFFERTY, STACKHOUSE, GROSSMAN & GORMLEY, P.A.
3205 Fire Road, P.O. Box 850
Pleasantville, NJ 08232
(609) 645-2201
Gerald J. Corcoran, Esquire

Attorneys for Defendant/Petitioner,
City of Cape May

On the Brief:

Gerald J. Corcoran

A-136 SEP 1997

FILED

SEP 24 1997

CLERK

RECEIVED

SEP 24 1997

SUPREME COURT
OF NEW JERSEY

WILLIAM FLEUHR,

Plaintiff/Respondent,

v.

CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY,

Defendants/Petitioner,

SUPREME COURT OF NEW JERSEY
DOCKET NO. 44,746

ON APPEAL FROM:

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-846-96T3

SAT BELOW:
HON. VIRGINIA LONG
HON. ARIEL A. RODRIGUEZ
HON. MARY C. CUFF

REPLY BRIEF OF DEFENDANT/PETITIONER CITY OF CAPE MAY IN SUPPORT OF ITS PETITION FOR CERTIFICATION

YOUNGBLOOD, CORCORAN, ALELI, LAFFERTY, STACKHOUSE, GROSSMAN & GORMLEY, P.A.
3205 Fire Road, P.O. Box 850
Pleasantville, NJ 08232
(609) 645-2201
Gerald J. Corcoran, Esquire

Attorneys for Defendant/Petitioner,
City of Cape May

On the Brief:

Gerald J. Corcoran

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited

Statutes Cited

New Jersey Court Rules Cited

REASONS FOR CERTIFICATION

POINT I. THE PETITION SHOULD BE GRANTED AS IT PRESENTS SIGNIFICANT QUESTIONS OF GENERAL PUBLIC IMPORTANCE.

The respondent suggests that there is no question of "general public importance" requiring review of the Appellate Division decision. This position is ill-informed and inaccurate. It ignores the greatest natural resource of the State of New Jersey, the Atlantic Ocean, the use and enjoyment of that natural resource, and the effect of the lower court decision upon municipalities which own or operate beaches for the benefit of the general public.

The respondent suggests that the petitioner is overreacting and speculating about the consequences of the decision. The issue is not whether residents and tourists will continue to flock to the beaches of New Jersey to enjoy the sun and ocean, but how municipalities which own and operate municipal beaches will react to the potential liability imposed by this decision. While the reaction and decision of all beach front municipalities cannot be predicted, it is not speculative to assume either higher liability costs as a result of the increased risk, or a negative affect upon the services presently offered to beachgoers.

The dichotomy between acknowledged immunity and potential liability underscores the importance of the issue. As the respondent has admitted, municipalities remain immune for the following conditions:

- Injuries occurring solely to conditions in unimproved body of water. (Pb2)
- Injuries caused solely by turbulence, forceful waves or uneven surfaces in the ocean. (Pb2)

Respondent further acknowledges that municipalities have no obligation to improve the natural conditions of the ocean, to make unimproved property "safe", to post signs or flags concerning the danger of water, to post signs or flags informing bathers of safety related to the water. For those actions immunity exists. (Pb2) The respondent suggests that it is only when municipalities choose to provide lifeguard services at beaches, that the duty arises, creating the vehicle for potential liability.

In distinguishing between the conditions of the ocean and the actions of lifeguards, the respondent phrases the issue as follows, "If the injuries occurred by the actions of the ocean alone, immunity applies." (Pb6) That distinction was also made the Appellate Division when it stated, "We agree that 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 an unimproved body of water." (emphasis supplied). (Da9) This analysis misinterprets the immunity of N.J.S.A. 59: 4-8, and misunderstands the overall intent of providing immunity to public entities.

The statute at issue does not contain the words "solely", or "alone". This is a significant difference which was overlooked by both the Appellate Division and the respondent. It was a focus, however, of the courts in Aguilar v. Borough of Seaside Heights, et al (A-5205-94T5 filed June 8, 1996) and Kowalsky v. Long Beach Township, 75 F.2d 385 (3rd Cir. 1995).

Respondent suggests that Aguilar, supra, is dissimilar because its focus was a dangerous condition of unimproved property, the ocean, and not allegations of negligent supervision. To the contrary, both the facts and allegations in Aguilar were quite similar. As noted by that Court, "Plaintiff's principal theory is that the Borough and its employees negligently supervised the beach by failing to warn of the possible existence of sandbars which might make diving into the surf potentially unsafe." (Da15) The Court specifically analyzed and addressed the immunities of N.J.S.A. 59:4-8 and the potential

liability for alleged negligent supervision. In doing so, it relied upon Kowalsky, supra.

The following passage from Kowalsky, supra, cited approvingly by the Court in Aguilar, supra, is illustrative.

> The question remains whether N.J.S.A. 59:4-8 immunity precludes all causes of action arising from plaintiffs' injuries, including causes of action for negligent supervision and failure to warn. Kowalsky and Petrillo generally contend defendants assumed responsibility for the safety of the beaches and were aware the weather created dangerous surf conditions, but nevertheless failed to take action to prevent their accidents. They also argue that as a matter of law N.J.S.A. 59:3-11 abrogates any grant of immunity which might be conferred by N.J.S.A. 59:4-8. We cannot agree.

The Court in Kowalsky further noted,

> It is well-established that supervision, once undertaken, must be conducted in a non-negligent manner. See Dudley v. Victor Lynn Lines, Inc., 32 N.J. 479 (1960); see also Restatement (Second) of Torts § 323 (discussing negligent performance after undertaking to render services). But the express language of N.J.S.A. 59:4-8 and the policy judgments underlying it demonstrate that immunity may still apply in the face of negligence. Once it has been determined that N.J.S.A. 59:4-8 immunity applies, the New Jersey Tort Claims Act makes clear that "[a]ny liability of a public entity established by this act is subject to any immunity of the public entity." N.J.S.A. 59:2-1b. (emphasis supplied)

It is interesting that the respondent ignores this analysis while indicating that, "The Appellate Court, in its opinion, has clearly provided that any liability established by the Tort Claims Act is subordinate to or trumped by any immunity

recognized by the act." (Pb5). If this Court's ruling in Tice v. Cramer, 133 N.J. 347 (1993) is meaningful, it must support the opinions and reasoning in both Aguilar, supra, and Kowalsky, supra, that the immunities of N.J.S.A. 59:4-8 "trump" any potential liability for negligent supervision of the beach.

The respondent's approach, as previously suggested, will encourage municipalities to remove previously offered lifeguard services, to avoid potential claims of negligent supervision. Removal of public safety services is not in the public interest. More importantly, however, it is not necessary when the correct analysis of the Tort Claims Act is applied, consistent with the Court's ruling in Tice v. Cramer, supra.

POINT II. CERTIFICATION SHOULD BE GRANTED AS THE LOWER COURT DECISION IS INCONSISTENT WITH OTHER APPELLATE DIVISION DECISIONS, AS WELL AS PRIOR DECISIONS OF THIS COURT.

Respondent is incorrect in suggesting there is no conflict between this decision and the prior decisions in Aguilar, supra, and Kowalsky, supra. Further, the respondent fails to understand and apply this Court's prior holding in Tice, supra.

R. 1:36-3 does not preclude this Court from reviewing and considering the prior decision in Aguilar, supra. While it may not constitute "precedent", this Court is certainly free to review it and utilize it as a basis for granting certification.

As previously noted, the facts and legal issues in Aguilar, supra, and Kowalsky, supra, are remarkably similar to the present matter. In reaching its decision, the Third Circuit in Kowalsky was prognosticating how this Court may decide the issue. Any doubt about the identity of issues in Aguilar and the present matter are dispelled by the Court's concluding paragraph:

> "We conclude that the Tort Claims Act, and the guidance offered in Tice v. Cramer, supra, establish that a negligent supervision claim, such as advanced in this case - failure to place a sign on the beach warning about the dangers of diving in the surf - is subject to the statutory immunity conferred by N.J.S.A. 59:4-8." (Da22)

The Appellate Division decision herein, is also inconsistent with this Court's opinion in Tice, supra. While the factual patterns are dissimilar, the legal issues are not. There the Court analyzed the interaction between N.J.S.A. 59:2-2a, N.J.S.A. 59:3-1a and N.J.S.A. 59:4-8. In an exhaustive analysis of the Tort Claims Act, its history and purpose, the Court noted in part, "When both liability and immunity appear to exist, the latter trumps the former." Id. at 356. This language has been subsequently cited approvingly by the courts in Aguilar, supra Kowalsky, supra, and surprisingly, the Appellate Division in the within matter. The result reached by the Appellate Division, however, was totally inconsistent with this tenet and cannot be reconciled with the clear unequivocal language of This Court. It

leaves lower courts with conflicting opinions requiring a judge to determine what type of alleged negligence otherwise escapes the court's clear mandate that immunity trump liability. It is not difficult to plead negligent supervision in a fact pattern where immunity would otherwise apply. When done, the concept of immunity is abrogated and the fact finder will analyze the traditional negligence concept of duty, breach and proximate causation. That is precisely the circumstance meant to be avoided by the Tort Claims Act and the court's analysis in Tice. The statute and case law are inconsistent with the Appellate Division ruling herein, and should be reviewed to provide proper guidance to lower courts.

CONCLUSION

This Court should grant certification as there are significant issues of public importance implicated by the Appellate decision, which incorrectly applied the Tort Claims Act, and this court's holding in Tice v. Cramer, supra.

YOUNGBLOOD, CORCORAN, ALELI, LAFFERTY
STACKHOUSE, GROSSMAN & GORMLEY, P.A.

BY _____
Gerald J. Corcoran, Esquire
Attorney for defendant/petitioner,
City of Cape May

A-136 SEP 1997

RECEIVED
Nov 20 2 14 PM '97
SUPREME COURT
CLERK'S OFFICE

FILED
NOV 20 1997
Stephen W. Townsend
CLERK

HIERING, HOFFMAN and GANNON
29 Hadley Avenue
P.O. Box 5258
Toms River, New Jersey 08754-5258
(908)349-1800
Attorneys for *Amicus Curiae*, Ocean County Joint Insurance Fund
Our File No. 2070-175

WILLIAM FLEUHR, Plaintiff/Respondent, vs. CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY, Defendants/Petitioners:	SUPREME COURT OF NEW JERSEY DOCKET NO. 44,746 APPELLATE DIVISION DOCKET NO. A-846-96T3 CIVIL ACTION BRIEF OF AMICUS CURIAE SAT BELOW HON. VIRGINIA LONG HON. ARIEL A. RODRIGUEZ HON. MARY C. CUFF

BRIEF ON BEHALF OF OCEAN COUNTY JOINT INSURANCE FUND, AS *AMICUS CURIAE*

F/Y/I

HIERING, HOFFMAN and GANNON
29 Hadley Avenue
P.O. Box 5258
Toms River, New Jersey 08754-5258
(732)349-1800
Attorneys for Ocean County Joint
Insurance Fund, *Amicus Curiae*

RONALD E. HOFFMAN
Of Counsel

RONALD E. HOFFMAN
MICHAEL J. MC KENNA
On the Brief

A-136 SEP 1997

RECEIVED
Nov 20 2 14 PM '97
SUPREME COURT
CLERK'S OFFICE

FILED
NOV 20 1997
Stephen W. Townsend
CLERK

HIERING, HOFFMAN and GANNON
29 Hadley Avenue
P.O. Box 5258
Toms River, New Jersey 08754-5258
(908)349-1800
Attorneys for *Amicus Curiae*, Ocean County Joint Insurance Fund
Our File No. 2070-175

WILLIAM FLEUHR, Plaintiff/Respondent, vs. CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY, Defendants/Petitioners:	SUPREME COURT OF NEW JERSEY DOCKET NO. 44,746 APPELLATE DIVISION DOCKET NO. A-846-96T3 CIVIL ACTION BRIEF OF AMICUS CURIAE SAT BELOW HON. VIRGINIA LONG HON. ARIEL A. RODRIGUEZ HON. MARY C. CUFF

BRIEF ON BEHALF OF OCEAN COUNTY JOINT INSURANCE FUND, AS *AMICUS CURIAE*

F/Y/I

HIERING, HOFFMAN and GANNON
29 Hadley Avenue
P.O. Box 5258
Toms River, New Jersey 08754-5258
(732)349-1800
Attorneys for Ocean County Joint Insurance Fund, *Amicus Curiae*

RONALD E. HOFFMAN
Of Counsel

RONALD E. HOFFMAN
MICHAEL J. MC KENNA
On the Brief

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Statutes Cited:

Rules Cited:

PROCEDURAL HISTORY

1. On August 29, 1995, the Complaint was filed on behalf of the plaintiff, William Fleuhr, in the Superior Court of New Jersey, Law Division, Cape May County, Docket No. CPM-L-632-95. The plaintiff therein alleged that he was seriously injured on August 31, 1993 as a result of being struck by a wave while swimming in the ocean at the First Avenue Beach in the City of Cape May, N.J., due to the alleged negligence of the defendants in permitting a dangerous condition of public property to exist and in failing to properly supervise the area.

2. On or about June 7, 1996, the defendant, City of Cape May, filed a Motion for Summary Judgment, citing numerous *Title* 59 provisions and contending that the First Avenue Beach did not constitute a dangerous condition under *N.J.S.A.* 59:4-2 on the date of the plaintiff's injury and that neither the City of Cape May nor its employees could be held liable for the plaintiff's injuries.

3. On August 26, 1996, the trial court [Honorable Joseph C. Visalli, J.S.C.] granted the defendant's Motion for Summary Judgment, concluding that since the plaintiff's injury was caused exclusively by the action of the ocean, the unimproved public property immunity conferred by *N.J.S.A.* 59:4-8 was applicable and that the application of the immunity precluded the plaintiff's negligent supervision claim.

4. On July 30, 1997, following an appeal, the Appellate Division, in *Fleuhr v. City of Cape May*, A-0846-96T3, reversed

the decision of the trial judge and held that the plaintiff's claim for negligent supervision was not barred by the unimproved public property immunity. Since the merits of the negligent supervision issue had not been addressed by the trial court, the Appellate Division remanded the case to the trial court for consideration of the plaintiff's negligent supervision claim.

5. Thereafter, on August 29, 1997, the defendant, City of Cape May, having previously filed a timely Notice of Appeal, filed a Petition for Certification with this Court, seeking review of the decision of the Appellate Division.

6. By Order of the Court dated October 28, 1997, the Petition for Certification was granted.

7. On or about September 30, 1997, the Ocean County Joint Insurance Fund ("JIF") filed a Motion for Leave to Appear as *Amicus Curiae*.

8. By Order of the Court dated October 28, 1997, the Motion for Leave to Appear *Amicus Curiae* filed on behalf of the Ocean County JIF was granted.

STATEMENT OF FACTS

The Ocean County Joint Insurance Fund ("JIF") will rely on the briefs to be submitted by the parties for a full and complete recitation and development of the facts. For present purposes, however, the following facts all appear to be undisputed..

1. On August 31, 1993, the plaintiff, William Fleuhr, broke his neck when he was knocked over by a strong wave while body surfing in the ocean at the First Avenue Beach in Cape May, N.J. (*See*, Court's opinion, p. 2.)

2. The First Avenue Beach was owned, operated, and maintained by the defendant, the City of Cape May, at the time of the plaintiff's injury. (*See*, Court's opinion, p. 2.)

3. Lifeguards were employed by the City of Cape May and were on duty at the First Avenue Beach at the time of the plaintiff's injury. (*See*, Court's opinion, p. 2.)

4. The beach and the ocean at the First Avenue Beach were determined by both the trial court and the Appellate Division to be unimproved public property at the time of the plaintiff's August 31, 1993 injury. (*See*, Court's opinion, p. 9.)

LEGAL ARGUMENT

POINT I

SINCE *N.J.S.A.* 59:2-1b AND *N.J.S.A.* 59:3-1b RENDER ANY LIABILITY ESTABLISHED BY THE TORT CLAIMS ACT SUBJECT TO ANY APPLICABLE IMMUNITY, THE COURT BELOW ERRED IN CONCLUDING THAT THE APPLICATION OF N.J.S.A. 59:4-8 DOES NOT PRECLUDE THE PLAINTIFF'S 59:3-11 NEGLIGENT SUPERVISION CLAIM.

A. *The Tort Claims Act/Liability of Public Entities.*

In order to properly consider whether the Appellate Division's reversal of the trial court's decision to grant summary judgment in favor of the defendants was correct, this Court must first consider the intent of the Legislature in enacting the "New Jersey Tort Claims Act," *N.J.S.A.* 59:1-1 *et seq.* The Act establishes the only grounds pursuant to which a court may determine that liability exists against a public entity. In *N.J.S.A.* 59:1-2, the Legislature declared that:

> "[i]t recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should be construed with a view to carry out the above legislative declaration."

N.J.S.A. 59:1-3 defines "public entity" as including "the State, and any county, municipality, district, public authority, public agency, and any other sub-division or public body in the State." The Comment to *N.J.S.A.* 59:1-3 states that:

> "The definition of 'Public Entity' provided in this section is intended to be all inclusive and to apply uniformly throughout the State of New Jersey to all entities exercising governmental functions."

See, D'Eustacio v. Beverly, 177 N.J. Super. 566 (Law Div. 1979).

In *Lopez v. City of Elizabeth*, 245 N.J. Super. 153 (App. Div. 1991), the Appellate Division explained that:

> "[a] private person or firm that cannot afford the people and equipment to do a good job can withdraw rather than perform in a dangerous way. Government rarely has that option. It cannot withdraw from law enforcement if its police force is too small, from fire protection if its trucks are in poor repair, or from maintaining streets if it cannot afford to keep them in perfect condition."
>
> *Id.* at 164.

The courts have repeatedly and consistently affirmed the Legislative intent, as set forth above. *See, Pico v. State*, 116 N.J. 55 (1989) ("We begin by affirming the now-familiar principle that the public policy of this state is that a public entity shall be liable for their negligence only as set forth in the Tort Claims Act.") *See also, Kolitch v. Lindedahl*, 100 N.J. 485 (1985) ("The statute is therefore unmistakenly clear in providing that liability on the part of [a public entity] [public employee] cannot be imposed unless consistent with the

entire act itself"); and *Ball v. New Jersey Bell Telephone Co.*, 207 N.J. Super. 100 (App. Div. 1986) ("...the plainly expressed Legislative mandate...is to immunize public bodies except where there is a statutory declaration to the contrary.")

The concept of governmental immunity serves as the cornerstone of the Tort Claims Act. In *N.J.S.A.* 59:2-1a, the Legislature specifically re-established governmental immunity in the State of New Jersey. That statutory provision provides as follows:

> "Except 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."

In explaining this section, the "1972 Task Force Comment" states that "the basic statutory approach of the New Jersey Tort Claims Act shall be that [the] immunity of all governmental bodies in New Jersey is re-established."

Since the City of Cape May is clearly an "entity" within the scope of *N.J.S.A.* 59:1-3, any liability against the City of Cape May in this case must rest upon the provisions of the Tort Claims Act, as set forth above. The Act protects the City of Cape May from liability in this case and in all negligence cases by re-establishing governmental immunity. As a result, unless the plaintiff is able to demonstrate otherwise, the City of Cape May is immune from liability for all of the plaintiff's alleged injuries.

The Legislature has provided additional protection to

entire act itself"); and *Ball v. New Jersey Bell Telephone Co.*, 207 N.J. Super. 100 (App. Div. 1986) ("...the plainly expressed Legislative mandate...is to immunize public bodies except where there is a statutory declaration to the contrary.")

The concept of governmental immunity serves as the cornerstone of the Tort Claims Act. In *N.J.S.A.* 59:2-1a, the Legislature specifically re-established governmental immunity in the State of New Jersey. That statutory provision provides as follows:

> "Except 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."

In explaining this section, the "1972 Task Force Comment" states that "the basic statutory approach of the New Jersey Tort Claims Act shall be that [the] immunity of all governmental bodies in New Jersey is re-established."

Since the City of Cape May is clearly an "entity" within the scope of *N.J.S.A.* 59:1-3, any liability against the City of Cape May in this case must rest upon the provisions of the Tort Claims Act, as set forth above. The Act protects the City of Cape May from liability in this case and in all negligence cases by re-establishing governmental immunity. As a result, unless the plaintiff is able to demonstrate otherwise, the City of Cape May is immune from liability for all of the plaintiff's alleged injuries.

The Legislature has provided additional protection to

public entities from liability for their negligence by specifically making any and all of *Title* 59's liability imposing provisions "*subject to*" (1) any and all *Title* 59 provisions which afford immunity, and "*subject to*" (2) any and all other [non-*Title* 59] defenses and immunities which would be available to the entity if it were a private individual. Specifically, *N.J.S.A.* 59:2-1b provides that:

> "Any liability of a public entity established by this act is subject to any immunity of the public entity and is subject to any defenses that would be available to the public entity if it were a private person."

The "1972 Task Force Comment" to this statutory section explains that the approach that a court should take in cases coming under the provisions of the Tort Claims Act is to determine "whether an immunity applies and, if not, should liability attach." When it enacted *N.J.S.A.* 59:2-1, the Legislature hoped that "the courts [would] exercise restraint in the acceptance of novel causes of action against public entities." *See*, "1972 Task Force Comment," *N.J.S.A.* 59:2-1. *See also*, *Brothers v. Highland*, 178 N.J. Super. 146 (App. Div. 1981). The Legislature also intended that a public entity could assert all defenses available to a private person and that those defenses would supersede and override any other provisions imposing liability. *Speziale v. Newark Housing Authority*, 193 N.J. Super. 413 (App. Div. 1984).

As this Court said in *Tice v. Cramer*, 133 N.J. 347 (1993),

> "The liability of the public entity must be found in the Act, and where found, is subject to any immunity found in the Act and further subject to any immunity previously established by common law."
>
> *Id.* at 355.

Therefore, all of the immunities provided by *Title* 59, as well as any and all other defenses and immunities found within the statutory or common law of the State of New Jersey, protect the City of Cape May from liability.

B. *The Tort Claims Act/Liability of Public Employees.*

1. *Public employees are generally liable for injuries caused by their negligence.* The basic statutory premise of public employee liability (non-immunity) is set forth in *N.J.S.A.* 59:3-1a, which makes the public employee liable to the same extent as a private person, *except as otherwise provided by the Act.* This section is in contrast with the basic statutory premise of non-liability (immunity) for public entities. *N.J.S.A.* 59:2-1a. In *Chatman v. Hall*, 128 N.J. 394 (1992), this Court noted this fundamental difference and stated that:

> "In determining the issues posed by this appeal, we rely on the New Jersey Tort Claims Act, *N.J.S.A.* 59:1-1 to 12-3 (Act), which governs claims against public entities and public employees. We emphasize initially that the Act re-establishes sovereign immunity for public entities, but does not similarly shield public employees. *Longo v. Santoro*, 195 N.J. Super. 507 (App. Div.), certif. denied, 99 N.J. 210 (1984). A public entity is deemed 'not liable for an injury' except as provided in the Act, *N.J.S.A.* 59:2-1. In contrast, a public employee 'is liable for injury' except as

otherwise provided. *N.J.S.A.* 59:3-1."[1]

Id. at 402.

It is therefore well settled that pursuant to *N.J.S.A.* 59:3-1a, a public employee is generally liable for an injury caused by his or her act or omission to the same extent as a private person, *except as otherwise provided by the Act.*

2. *Public employees are not liable for injuries caused by their negligence when they are otherwise immune by operation of the Act.* As noted, public employees are generally liable for injuries caused by their negligence, *except as otherwise provided by the Act.* *N.J.S.A.* 59:3-1a. Stated differently, public employees are *not* liable, that is, they are *immune* from liability, whenever a specific provision of the Act so provides.

As this court said in *Tice v. Cramer*, 133 N.J. 347 (1993),

> "Liability of the public employee, however, may be found either in the Act or at common law but it too is subject to the immunities of the Act and the common law. [Citation omitted] When both liability and immunity appear to exist, the latter trumps the former."

Id. at 355-56.

C. N.J.S.A. 59:2-1b and N.J.S.A. 59:3-1b.

N.J.S.A. 59:2-1b, as previously noted, relates to public entities and provides as follows:

"*Any liability* of a public entity

---

[1] Effective June 23, 1994, the Legislature added a new section, *N.J.S.A.* 59:3-1c, which provides that "A public employee is not liable for an injury where a public entity is immune for that injury."

established by this act is *subject to any immunity* of the public entity and is subject to any defenses that would be available to the public entity if it were a private person." [Emphasis added.]

The "1972 Task Force Comment" to *N.J.S.A.* 59:2-1b, which itself has the precedential value and weight of legislative history, *Rochinsky v. State of N.J., Dept. of Transp.*, 110 N.J. 399 (1988), states that:

> "Subsection (b) is intended to *insure that any immunity provisions provided in the act or by common law will prevail over the liability provisions.* It is anticipated that the Courts will realistically interpret both the statutory and common law immunities in order to effectuate their intended scope." [Emphasis added.]

See also, Malloy v. State, 76 N.J. 515 (1978).

N.J.S.A. 59:3-1b, which relates to public employees, and which is the counterpart to *N.J.S.A.* 59:2-1b, provides as follows:

> "*The liability of a public employee established by this act is subject to any immunity of a public employee provided by law* and is subject to any defenses that would be available to the public employee if he were a private person." [Emphasis added.]

The "1972 Task Force Comment" to this section provides that:

> "This provision adopts existing case law in this State and throughout the country which has established the principle that public employees are liable for injury caused by their acts or omissions to the same extent as private persons, *unless granted immunity.*" [Emphasis added.]

Judicial recognition of the basic framework of the Tort

established by this act is *subject to any immunity* of the public entity and is subject to any defenses that would be available to the public entity if it were a private person." [Emphasis added.]

The "1972 Task Force Comment" to *N.J.S.A.* 59:2-1b, which itself has the precedential value and weight of legislative history, *Rochinsky v. State of N.J., Dept. of Transp.*, 110 N.J. 399 (1988), states that:

> "Subsection (b) is intended to *insure that any immunity provisions provided in the act or by common law will prevail over the liability provisions.* It is anticipated that the Courts will realistically interpret both the statutory and common law immunities in order to effectuate their intended scope." [Emphasis added.]

See also, Malloy v. State, 76 N.J. 515 (1978).

N.J.S.A. 59:3-1b, which relates to public employees, and which is the counterpart to *N.J.S.A.* 59:2-1b, provides as follows:

> *"The liability of a public employee established by this act is subject to any immunity of a public employee provided by law* and is subject to any defenses that would be available to the public employee if he were a private person." [Emphasis added.]

The "1972 Task Force Comment" to this section provides that:

> "This provision adopts existing case law in this State and throughout the country which has established the principle that public employees are liable for injury caused by their acts or omissions to the same extent as private persons, *unless granted immunity.*" [Emphasis added.]

Judicial recognition of the basic framework of the Tort

Claims Act is plentiful. In *Tice v. Cramer*, 133 N.J. 347 (1993), this Court made the following observations:

> *"Under no circumstances, however, may those liabilities* [liabilities of public employees], *whatever their origin, trump the immunities provided for in the Act. Where inconsistent, the liabilities fall, the immunities stand."* [Emphasis added.]

Id. at 369, citing *Bombace v. City of Newark*, 125 N.J. 361, 372 (1991).

> "The rule otherwise would be to ignore what is *probably the clearest and most important command of the* [Tort Claims] *Act, namely, that the immunities set forth in the Act prevail over any liabilities*, whether found in the Act or in pre-existing law, including statutes. See *N.J.S.A.* 59:2-1b; *N.J.S.A.* 59:3-1b, and comments thereto. " [Emphasis added.]

Id. at 371.

In *Henschke v. Borough of Clayton*, 251 N.J. Super. 393 (App. Div. 1991), the Appellate Division made the following observations:

> "The legislative purpose underlying the Tort Claims Act, *N.J.S.A.* 59:1-1 *et seq.*, was thoroughly reviewed by the Supreme Court in *Rochinsky v. State of N.J., Dept. of Transp.*, [citation omitted.] The court noted that *N.J.S.A.* 59:2-1a 'provides that the basic statutory approach of the [act] shall be that immunity of all governmental bodies in New Jersey is reestablished.' *Id.* at 407. The Legislature specifically rejected the rationale favoring governmental liability expressed in *B.W. King, Inc. v. Town of West New York* [citation omitted], observing that:
>
> > [T]his approach is no longer necessary in light of this comprehensive Tort Claims Act.

> Rather the approach should be *whether an immunity applies and if not should liability attach.* It is hoped that in utilizing this approach courts will exercise restraint in the acceptance of novel causes of action against public entities. [*N.J.S.A.* 59:2-1, Task Force comment (emphasis in original)] [*Rochinsky*, 110 N.J. at 408].
>
> Immunity is the dominant consideration of the act. *Kolitch v. Lindedahl*, 100 N.J. 485 (1985) (O'Hern, J. concurring). Even when one of the act's provisions establishes liability, that liability is ordinarily negated if the public entity possesses a corresponding immunity. *See, Malloy v. State*, 76 N.J. 515 (1978)."

Henschke v. Borough of Clayton, 251 N.J. Super. at 399. *See, Malloy v. State*, 76 N.J. 515 (1978).

In *Malloy v. State*, 76 N.J. 515 (1978), the Court emphasized that *N.J.S.A.* 59:2-1b (and by inference *N.J.S.A.* 59:3-1b) was intended to insure that the Act's immunity provisions "*will prevail*" over the liability provisions. The Court stated:

> "However, *N.J.S.A.* 59:2-1b...provides that any liability of a public entity under the act is subject to any immunity provided by the act. The comment to this subsection...states that it 'is intended to insure that any immunity provisions in the act or by common law *will prevail* over the liability provisions.'"
>
> *Id.* at 520.

Despite the unmistakably clear legislative pronouncements contained in both *N.J.S.A.* 59:2-1b and *N.J.S.A.* 59:3-1b, and notwithstanding the clear directives contained in numerous prior

decisions of this Court, the Appellate Division in the case at bar held that the immunity conferred upon both the City of Cape May and its municipal employees by *N.J.S.A.* 59:4-8 does not preclude the plaintiff's *N.J.S.A.* 59:3-11 negligent supervision claim. In doing so, the Appellate Division committed reversible error.

D. *The Appellate Division's Decision in Fleuhr v. City of Cape May* (A-0846-96T3).

The plaintiff, William Fleuhr, broke his neck while body surfing in the ocean. (*See, Fleuhr v. City of Cape May*, A-0846-96T3, p. 1.)

The Appellate Division stated that:

> "We agree with the motion judge that the beach and the ocean are unimproved property. We also agree that 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. Thus, a person who encounters turbulence, forceful waves or uneven surfaces and who is injured solely due to those conditions has no cause of action against the public entity or public employee. That is because the public entity and public employee have no obligation to improve natural conditions or to ameliorate inherent but dangerous features of unimproved property. In short, the public entity and public employees have no obligation to make unimproved property safe. Moreover, the public entity has no obligation to post signs or flags concerning the condition of the water and inform bathers if it is safe for them to enter the water. To that extent, we affirm the order granting summary judgment insofar as plaintiff asserts that the ocean constituted a dangerous condition and that the defendant

had a duty to warn independent of its decision to provide lifeguards at the beach."

Id. at 9.

The Appellate Division concluded that the plaintiff's claim for negligent supervision was not barred by the application of the unimproved public property immunity provided to both public entities and public employees by *N.J.S.A.* 59:4-8. *Id.* at 11.

The Appellate Division began its analysis by citing *Troth v. State*, 117 N.J. 258 (1989) and observing that:

> "Our review must proceed in accordance with the general analytical approach of the Tort Claims Act and then with specific reference to the applicable statutory provisions."
>
> *Id.* at 3, citing *Troth*, 117 N.J. at 265-66.

In its discussion of the general analytical approach of the Tort Claims Act, the Appellate Division properly cited two of the most firmly established interpretive principles (both of which are discussed above), as follows:

> "Generally, we must recognize that the Tort Claims Act reestablishes public entity immunity from suit unless the Act declares that a public entity or public employee may be liable. *N.J.S.A.* 59:2-1a; *Manna v. State*, 129 *N.J.* 341, 346 (1972); *Troth, supra*, 117 *N.J.* at 266. Moreover, any liability established by the Tort Claims Act is subordinate to or 'trumped' by any immunity recognized by the Act. *N.J.S.A.*59:2-1b; *Tice v. [C]ramer*, 133 *N.J.* 347, 356 (1993)."
>
> *Id.* at 3.

However, after having first acknowledged in the above quoted passage that *N.J.S.A.* 59:2-1b renders any liability

imposing provision *subject to*, or "subordinate to," any provision affording immunity, such as *N.J.S.A.* 59:4-8, the Appellate Division inexplicably makes no further reference to *N.J.S.A.* 59:2-1b or *N.J.S.A.* 59:3-1b or explains how the defendants could possibly be immune under *N.J.S.A.* 59:4-8, yet potentially liable under either *N.J.S.A.* 59:2-7 or *N.J.S.A.* 59:3-11.

The Appellate Division's analysis includes a discussion of three cases, *Stempkowski v. Borough of Manasquan*, 208 N.J. Super. 328 (App. Div. 1986); *Burroughs v. City of Atlantic City*, 234 N.J. Super. 208 (App. Div.), *certif. denied*, 117 N.J. 647 (1989); and *Kleinke v. City of Ocean City*, 163 N.J. Super. 424 (Law Div. 1978), reversed in part, *Sharra v. City of Atlantic City*, 199 N.J. Super. 535 (App. Div. 1985). It is respectfully submitted that none of the cited cases supports the Appellate Division's conclusion that a *N.J.S.A.* 59:3-11 negligent supervision claim is viable despite the applicability of the unimproved public property immunity conferred upon public entities and public employees alike by *N.J.S.A.* 59:4-8.

In *Stempkowski v. Borough of Manasquan*, 208 N.J. Super. 328 (App. Div. 1986), the plaintiff was injured while attempting to rescue her children who were swimming in the surf off the beach in Manasquan, N.J. The immediate cause of her injury was a wave which knocked her down. *Id.* at 330. The Court determined that the trial judge was correct in granting summary judgment in favor of the Borough of Manasquan based upon the plaintiff's

inability to demonstrate, as required by *N.J.S.A.* 59:4-2, the existence of a "dangerous condition." *Id.* at 332. The Court noted that "there can be no liability on the part of the municipality for injuries caused exclusively by the action of the ocean." *Id.* at 332. "The presence or absence of lifeguards was not material, since it was unrelated to physical condition of the property." *Id.* at 332.

Referring to *Stempkowski*, the Appellate Division noted that "we observed that plaintiff's claim was also barred by *N.J.S.A.* 59:3-11 because plaintiff's claim rested on the municipality's failure to provide lifeguard services rather than the negligent provision of those services." *Fleuhr v. City of Cape May*, A-0846-96T3, p. 5. The Appellate Division, again referring to *Stempkowsi*, also noted that:

> "This passage [from *Stempkowsi*] suggests that the outcome of plaintiff's case may have been different if she had alleged that lifeguards were present and had negligently performed their protective functions."
>
> *Id.* at 5.[2]

The Appellate Division's analysis in citing *Stempkowski* as support for its conclusion that a negligent supervision claim property immunity is flawed. The suggestion, of course, is that since the beach at Manasquan did not constitute a "dangerous condition" and thus the immunity of *N.J.S.A.* 59:4-2 (non-

---

[2] The Court also noted, quite correctly, that the defendants in *Stempkowski* did not raise the unimproved public property immunity defense. *N.J.S.A.* 59:4-8. *Id.* at 5.

liability) was determined to apply, it would have been unnecessary, if liability is "trumped" by immunity, for the court in *Stempkowski* to separately address the negligent supervision claim.

However, the *Stempkowski* court's separate treatment of the negligent supervision claim is rather easily explained. In *Stempkowski*, the plaintiff sued the Borough of Manasquan *and its municipal employees*. The Court determined that the property did not constitute a dangerous condition under *N.J.S.A.* 59:4-2 and thus the immunity (non-liability) afforded by that section applied. *Stempkowski*, 208 N.J. Super. at 329. That provision, *N.J.S.A.* 59:4-2, concerns the liability of *public entities* for injuries caused by dangerous conditions of public property. Liability may be imposed upon a *public entity* under that section whenever a plaintiff can demonstrate that his or her injuries were caused by a dangerous condition of public property and when the other requirements of the statute are met. A *public entity* enjoys immunity whenever a plaintiff cannot satisfy the requirements of the statute. This particular immunity, *N.J.S.A.* 59:4-2, however, is not shared by public employees.[3] Since *N.J.S.A.* 59:4-2 protects only public entities, the municipal employees named as defendants in *Stempkowski* remained exposed to

---

[3] In clear contrast, the unimproved public property immunity, *N.J.S.A.* 59:4-8, explicitly provides, in relevant part, that: "Neither a public entity *nor a public employee* is liable for an injury caused by a condition of any unimproved public property..." [Emphasis added].

liability) was determined to apply, it would have been unnecessary, if liability is "trumped" by immunity, for the court in *Stempkowski* to separately address the negligent supervision claim.

However, the *Stempkowski* court's separate treatment of the negligent supervision claim is rather easily explained. In *Stempkowski*, the plaintiff sued the Borough of Manasquan *and its municipal employees*. The Court determined that the property did not constitute a dangerous condition under *N.J.S.A.* 59:4-2 and thus the immunity (non-liability) afforded by that section applied. *Stempkowski*, 208 N.J. Super. at 329. That provision, *N.J.S.A.* 59:4-2, concerns the liability of *public entities* for injuries caused by dangerous conditions of public property. Liability may be imposed upon a *public entity* under that section whenever a plaintiff can demonstrate that his or her injuries were caused by a dangerous condition of public property and when the other requirements of the statute are met. A *public entity* enjoys immunity whenever a plaintiff cannot satisfy the requirements of the statute. This particular immunity, *N.J.S.A.* 59:4-2, however, is not shared by public employees.[3] Since *N.J.S.A.* 59:4-2 protects only public entities, the municipal employees named as defendants in *Stempkowski* remained exposed to

---

[3] In clear contrast, the unimproved public property immunity, *N.J.S.A.* 59:4-8, explicitly provides, in relevant part, that: "Neither a public entity *nor a public employee* is liable for an injury caused by a condition of any unimproved public property..." [Emphasis added].

liability in connection with the plaintiff's negligent supervision claim. Thus, the court was called upon to address the plaintiff's negligent supervision claim.[4]

For the very same reasons, *Burroughs v. City of Atlantic City*, 234 N.J. Super. 208 (App. Div. 1989), does not support the contention that a negligent supervision claim may be sustained despite the applicability of *N.J.S.A.* 59:4-8. In *Burroughs*, the court first determined that the property in question did not constitute a dangerous condition under *N.J.S.A.* 59:4-2. *Id.* at 218-19. Since public employees are not immunized by operation of *N.J.S.A.* 59:4-2, the court next addressed the plaintiff's *N.J.S.A.* 59:3-11 negligent supervision claim against the lifeguards. The court held that the plaintiff could not prevail as a matter of law, because the lifeguards had not undertaken supervision of the portion of the beach upon which the plaintiff sustained his injuries. The lifeguards were accordingly not liable under *N.J.S.A.* 59:3-11. *Id.* at 222. The Appellate Division in this case, however, in citing *Burroughs*, stated;

---

[4] The Appellate Division is correct to the extent that it suggests that the *Stempkowski* case may have turned out differently had the plaintiff alleged that lifeguards were present and that they were negligent. However, that is so only because the lifeguards would not have been protected by *N.J.S.A.* 59:4-2, the immunity which the *Stempkowski* court found to apply. On the other hand, although the Appellate Division acknowledged that *N.J.S.A.* 59:4-8 was not raised in *Stempkowski* (*see*, p.5), the importance of that fact was not explored. We submit that had the *Stempkowsi* court held *N.J.S.A.* 59:4-8 to be applicable, it would have been unnecessary to reach the negligent supervision claim, since *N.J.S.A.* 59:4-8, unlike *N.J.S.A.* 59:4-2, provides immunity for *both* public entities and public employees.

> "[W]e also suggested [in *Burroughs*] that the outcome may have been different if plaintiff had relied on the lifeguard's warning and expected that his activities would be monitored and his safety assured."
>
> *Fleuhr v. City of Cape May*, A-0846-96T3, p. 6[5].

As set forth above regarding *Stempkowski*, the only way that the outcome in *Burroughs* could have been different is if the plaintiff had perfected his negligent supervision claim.

The issue in this case is whether a negligent supervision claim is even viable when the unimproved public property immunity afforded by *N.J.S.A.* 59:4-8 to both public entities and public employees is determined to apply. While *N.J.S.A.* 59:4-8 applies in this case, it was not held to apply (it was not raised) in either *Stempkowski* or *Burroughs*. The point is that insofar as this case is concerned, *Stempkowski* and *Burroughs* are relevant only because of the significance of the reason which clearly distinguishes them from this case. What makes the cases different, and what the Appellate Division did not sufficiently appreciate, is that while (1) the negligent supervision claims in both *Stempkowski* and *Burroughs* were potentially viable despite the application of *N.J.S.A.* 59:4-2, because that statute immunizes only public entities and thus the public employee defendants had no immunity with which to "trump" the negligent supervision liability claim, (2) the negligent supervision claim in this case is statutorily foreclosed by operation of *N.J.S.A.*

---

[5] Once again the Appellate Division observed that *N.J.S.A.* 59:4-8 was not raised. *Id.* at 6.

59:2-1b and *N.J.S.A.* 59:3-1b, because the unimproved public property immunity provided by *N.J.S.A.* 59:4-8, which has already been held to apply in this case, applies to both public entities and public employees.

The Appellate Division cited *Kleinke v. City of Ocean City*, 163 N.J. Super. 424 (Law Div. 1978), overruled in part, *Sharra v. City of Atlantic City*, 199 N.J. Super. 535 (App. Div. 1985), as "the only case by a state court which addresses the relationship between public entity or employee liability for negligent supervision of a beach and the unimproved public property immunity." *Id.* at 6.[6] The Appellate Division stated:

> "We did not [in *Sharra*] disturb the portion of the *Kleinke* ruling that the unimproved property immunity did not override liability for negligent supervision of a public beach, but it was unnecessary to discuss that issue in *Sharra*."
>
> *Fleuhr v. City of Cape May*, A-0846-96T3, p.7.

However, the Appellate Division is incorrect. The court in *Kleinke* made no such ruling. The plaintiff in *Kleinke* was injured while in the Tenth Street Beach in Ocean City, N.J., when he was simultaneously struck by a wave at chest height and by a person believed to be body surfing. *Kleinke v. City of*

---

[6] As previously indicated by counsel for the City of Cape May in its Petition for Certification, in *Aguilar v. Borough of Seaside Heights*, A-5205-94T5, decided June 3, 1996, a separate panel of the Appellate Division specifically addressed the issue now before the court and, adopting the analysis of *Kowalsky v. Long Beach Township*, 72 F.3d 385 (3rd Cir. 1995), held that a negligent supervision claim, such as advanced here, is *subject* to the statutory immunity conferred by *N.J.S.A.* 59:4-8.

Ocean City, 163 N.J. at 426. The court first determined that the concurrence of the actions of a body surfer and the existence of three to six-foot waves is capable of creating a dangerous condition as defined by the Tort Claims Act. *Id. at* 430.[7] The court then concluded that the unimproved public property immunity, *N.J.S.A.* 59:4-8, did *not* apply. That the court found *N.J.S.A.* 59:4-8 to be inapplicable is evident by the following:

> "It follows, however, that a body surfer riding a three to six-foot wave would be, in effect, a 'superimposition of an artificially created hazard,' and the proper combination of body surfer and wave could create a dangerous condition of property for which *N.J.S.A.* 59:4-8 would not grant immunity."
>
> *Id.* at 431.
>
> "Therefore, *N.J.S.A.* 59:4-8 does not grant immunity to Ocean City for an injury resulting from an allegedly dangerous condition of property created by a body surfer riding three to six-foot waves."
>
> *Id.* at 432.

Thus the court determined that neither *N.J.S.A.* 59:4-2 nor *N.J.S.A.*59:4-8 were applicable. The court consequently denied the City of Ocean City's summary judgment motion. *Id. at* 433. The court then addressed the plaintiff's final ground for relief, i.e. the plaintiff's *N.J.S.A.* 59:3-11 negligent

---

[7] It was this portion of *Kleinke* that was overruled in *Sharra, supra*, where the court held that "We overrule *Kleinke* insofar as it holds that a body surfer, in three to six foot waves, constitutes a 'dangerous condition.'" *Sharra*, 199 N.J. Super. at 541.

supervision claim. In seeking summary judgment as to this claim, the defendant argued that since beaches are included in the general immunity afforded by *N.J.S.A.* 59:4-8, it would be inconsistent to interpret "public recreational facilities," as set forth in *N.J.S.A.* 59:3-11, as including beaches. The court disagreed and concluded that the defendant could not defeat a negligent supervision claim merely because "beaches" are explicitly included in the immunity provided by *N.J.S.A.* 59:4-8, *where the latter statute* [59:4-8] *did not itself apply*. In other words, the defendant argued that there could be no negligent supervision liability with regard to beaches irrespective to the applicability of *N.J.S.A.* 59:4-8, since *N.J.S.A.* 59:4-8 explicitly covered beaches. As noted, the court rejected this argument. In doing so, the court said no more than that where the unimproved public property immunity, *N.J.S.A.* 59:4-8, does not actually apply, the mere fact that *N.J.S.A.* 59:4-8 explicitly covers beaches does not preclude a claim under *N.J.S.A.* 59:3-11 for the negligent supervision of a beach area.

Since the defendants in *Kleinke* did not enjoy any *Title* 59 immunities, the court was not even required to address either *N.J.S.A.* 59:2-1b or *N.J.S.A.* 59:3-1b and the effect thereof. In fact, the court itself stated:

> " *Since defendant Ocean City is not immune under N.J.S.A. 59:4-8 nor under N.J.S.A. 59:3-11*, and because a 'dangerous condition' of property can be created by a body surfer riding three to six-foot waves under crowded

> conditions, numerous questions of fact arise concerning the liability of Ocean City."
>
> *Id.* at 433. [Emphasis added.]

Not only does the *Kleinke* decision not stand for the proposition cited by the court below, the case actually supports the defendants' position in this case. Referring to *Diodato v. Camden City Park Commission*, 162 N.J. Super. 275 (Law Div. 1978), the *Kleinke* court stated:

> "In applying the *Diodato* [Court's] interpretation of *N.J.S.A.* 59:4-8 to the facts of the present case, it is clear that if the force of a wave alone - a natural condition of the ocean - had caused plaintiff's injuries, *defendant would be immune from liability.*"
>
> *Id.* at 424. [Emphasis added]

The case now before the Court thus presents the precise factual scenario which the *Kleinke* court concluded would trigger *N.J.S.A.* 59:4-8 immunity, i.e. a situation where the force of a wave alone - a natural condition of the ocean - caused the plaintiff's injuries.

It is respectfully submitted that for the above reasons the Appellate Division's analysis of the relationship between *N.J.S.A.* 59:4-8 and *N.J.S.A.* 59:3-11 is inconsistent with not only the express provisions of the Tort Claims Act, but also with both the prior decisions of this court and with previous decisions of the Appellate Division.

E. *The Appellate Division's Decision in Aguilar v. Borough of Seaside Heights* (A-5205-94T5).

conditions, numerous questions of fact arise concerning the liability of Ocean City."

Id. at 433. [Emphasis added.]

Not only does the *Kleinke* decision not stand for the proposition cited by the court below, the case actually supports the defendants' position in this case. Referring to *Diodato v. Camden City Park Commission*, 162 N.J. Super. 275 (Law Div. 1978), the *Kleinke* court stated:

> "In applying the *Diodato* [Court's] interpretation of *N.J.S.A.* 59:4-8 to the facts of the present case, it is clear that if the force of a wave alone - a natural condition of the ocean - had caused plaintiff's injuries, *defendant would be immune from liability.*"
>
> *Id.* at 424. [Emphasis added]

The case now before the Court thus presents the precise factual scenario which the *Kleinke* court concluded would trigger *N.J.S.A.* 59:4-8 immunity, i.e. a situation where the force of a wave alone - a natural condition of the ocean - caused the plaintiff's injuries.

It is respectfully submitted that for the above reasons the Appellate Division's analysis of the relationship between *N.J.S.A.* 59:4-8 and *N.J.S.A.* 59:3-11 is inconsistent with not only the express provisions of the Tort Claims Act, but also with both the prior decisions of this court and with previous decisions of the Appellate Division.

E. *The Appellate Division's Decision in Aguilar v. Borough of Seaside Heights* (A-5205-94T5).

The Court below, in stating that "[n]o appellate court of this State has directly interpreted the applicability of the unimproved property immunity of *N.J.S.A.* 59:4-8 to a guarded beach," was evidently unaware of *Aguilar v. Borough of Seaside Heights* (A-5205-94T5), which was decided by a separate panel of the Appellate Division on June 3, 1996.[8] It is submitted that the Appellate Division's decision in *Aguilar*, unlike the Appellate Division's decision in this case, is entirely consistent with the Tort Claims Act and with prior case law.

The plaintiff in *Aguilar* was seriously injured on June 1, 1991 when he dove out into an oncoming ocean wave and struck his head on what was believed to be a sandbar. Lifeguards were present at the time and were supervising the beach area. *Id.* at 2-5. Like the plaintiff in this case, the plaintiff in *Aguilar* alleged that (1) the beach and the ocean in Seaside Heights, N.J., constituted a dangerous condition on the date of his injury, *N.J.S.A.* 59:4-2, and that (2) the Borough and its employees negligently supervised the beach by failing to warn of the possible existence of sandbars which would make diving in the surf potentially unsafe. *N.J.S.A.* 59:3-11.

The court in *Aguilar* first articulated the appropriate analytical framework. Referring to the negligent supervision claim ("plaintiff's principal theory"), and the fact that the

---

[8] A copy of the court's opinion in the *Aguilar* case was filed with the Court as part of the Petition for Certification in this case.

Borough of Seaside Heights did, in fact, provide lifeguards to supervise the beach, the court stated:

> "Consequently, a cause of action could possibly lie against the Borough and its employees for negligent supervision, *depending however* [on] *whether the Borough and its employees are entitled to any other immunity or defense."*
>
> *Id.* at 5. [Emphasis added]
>
> "Whether recovery may be had, however, *depends on whether the Borough and its employees are entitled to immunity."*
>
> *Id.* at 5, citing *N.J.S.A.* 59:2-1 and *Tice v. Cramer*, 133 N.J. 347, 355 (1993).

The court in *Aguilar* then determined that the ocean floor on which the plaintiff was injured ("in hip high water") constituted unimproved public property within the meaning of *N.J.S.A.* 59:4-8. *Id.* at 5-8.

The court in *Aguilar* then directly addressed the precise issue which is now before this Court (and which was also presented in *Kowalsky v. Long Beach Township*, 72 F.3d 385 (3rd Cir. 1995), but which was *not* presented in the cases cited by the court below, *Stempkowski*, *Burroughs*, or *Kleinke*), i.e. whether the applicability of the unimproved public property immunity [*N.J.S.A.* 59:4-8] foreclosed the plaintiff's negligent supervision claim, by operation of *N.J.S.A.* 59:2-1b and *N.J.S.A.* 59:3-1b.[9]

---

[9] As noted above, the Appellate Division in *Fleuhr* offers little, if any, analysis as to precisely how the defendants could be entitled to immunity under *N.J.S.A.* 59:4-8 and yet be exposed to

The court, adopting the analysis of the Third Circuit in the *Kowalsky* case, held that the plaintiff's negligent supervision claim was subject to the statutory immunity conferred by *N.J.S.A.* 59:4-8. *Id. at* 8-10.[10] Accordingly, the court affirmed the trial court's decision to grant summary judgment in favor of all defendants.

It is respectfully submitted that the analysis of the court in *Kowalsky*, later adopted by the Appellate Division in *Aguilar*, is entirely correct and fully consistent with both the express language of the Tort Claims Act and the prior decisions of this Court.

---

liability on the negligent supervision claim. The court's analysis essentially renders *N.J.S.A.* 59:2-1b and *N.J.S.A.* 59:3-1b inoperative without explanation. In a similar setting, this Court stated "[t]he defect in the Appellate Division's analysis...is its failure to recognize the statutory mandate that 'any immunity provision in the act or by common law will prevail over the liability sections.'" *Pico v. State*, 116 N.J. 55, 62-63 (1989).

[10] The court noted that the second sentence of *N.J.S.A.* 59:3-11 ["Nothing in this *section* exonerates a public employee for negligence in the supervision of a public recreational facility"] neither creates liability, nor provides defenses or immunities, for negligent supervision. "This," the court stated, "is left to other statutory provisions like *N.J.S.A.* 59:4-8..." *Id.* at 8.

POINT II

SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF THE DEFENDANTS, SINCE THERE IS NO DISPUTE AS TO ANY MATERIAL FACT AND SINCE THE DEFENDANTS ARE ENTITLED TO PREVAIL AS A MATTER OF LAW.

Rule 4:46 provides that a litigant may move for entry of a judgment in his favor in advance of trial. In this application, known as a motion for summary judgment, the pleadings, discovery and affidavits (at the option of the parties) are open to the Court for examination. Pursuant to Rule 4:46-2 "the judgment of order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment for order as a matter of law." The summary judgment procedure, introduced in New Jersey in the Practice Act of 1912, is intended to provide a method for the prompt and businesslike disposition of suits which present no genuine issue of material fact requiring disposition at a trial. The summary judgment procedure is designed to cut through sham and frivolous allegations and thus place the case before the trial court in its true light. Litigants are thereby saved the time and expense of protracted suits, and judicial manpower and facilities, always in short supply, are reserved for meritorious cases. *Judson v. Peoples Bank & Trust Company of Westfield*, 17 N.J. 67, 74 (1954), *Monmouth Lumber Company v. Indemnity Insurance Company of America*, 21 N.J. 439, 448 (1955); *Robbins*

POINT II

SUMMARY JUDGMENT WAS PROPERLY GRANTED IN FAVOR OF THE DEFENDANTS, SINCE THERE IS NO DISPUTE AS TO ANY MATERIAL FACT AND SINCE THE DEFENDANTS ARE ENTITLED TO PREVAIL AS A MATTER OF LAW.

Rule 4:46 provides that a litigant may move for entry of a judgment in his favor in advance of trial. In this application, known as a motion for summary judgment, the pleadings, discovery and affidavits (at the option of the parties) are open to the Court for examination. Pursuant to Rule 4:46-2 "the judgment of order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment for order as a matter of law." The summary judgment procedure, introduced in New Jersey in the Practice Act of 1912, is intended to provide a method for the prompt and businesslike disposition of suits which present no genuine issue of material fact requiring disposition at a trial. The summary judgment procedure is designed to cut through sham and frivolous allegations and thus place the case before the trial court in its true light. Litigants are thereby saved the time and expense of protracted suits, and judicial manpower and facilities, always in short supply, are reserved for meritorious cases. *Judson v. Peoples Bank & Trust Company of Westfield*, 17 N.J. 67, 74 (1954), *Monmouth Lumber Company v. Indemnity Insurance Company of America*, 21 N.J. 439, 448 (1955); *Robbins*

v. Jersey City, 23 N.J. 229, 241 (1957).

The leading case on the summary judgment procedure is *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995). The *Brill* court modified the previous standard governing summary judgment, see *Judson v. Peoples Bank & Trust Co. of Westfield*, 17 N.J. 67 (1954); *Monmouth Lumbar Company v. Indemnity Insurance Company of America*, 21 N.J. 441 (1955), by providing that the determination of whether there exists a genuine issue concerning a material fact on a motion for summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rationale fact finder to resolve the alleged disputed issue in favor of the non-moving party. *Id.* at 523. The court in *Brill* embraced and adopted the summary judgment standard which is applied in the federal courts and which was set forth by the United States Supreme Court in *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The *Brill* court stated that:

> "Read together, Matsushita, Liberty Lobby and Celotex adopted a standard that requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a

sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Liberty Lobby*, supra, 477 U.S. at 251-52, 106 S.Ct. at 2512, 91 L.Ed. at 214. That weighing process requires the court to be guided by the same evidentiary standard of proof -- by a preponderance of the evidence or clear and convincing evidence -- that would apply at the trial on the merits when deciding whether there exists a "genuine" issue of material fact." *Id.* at 254-56, 106 S.Ct. at 2513, 91 L.Ed. at 215-16.

The New Jersey Supreme Court in *Brill* held that:

> "[c]onsistent with this national trend,[11] we hold that under *Rule* 4:46-2, when deciding summary judgment motions trial courts are required to engage in the same type of evaluation, analysis or sifting of evidential materials as required by *Rule* 4:37-2(b) in light of the burden of persuasion that applies if the matter goes to trial." *Id.* at 539-540.
>
> "Under this new standard, a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.' *Liberty Lobby, supra*, 477 U.S. at 249, 106 S.Ct. at 2511, 91 L.Ed. 2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged

---

[11] The *Brill* court cited the Arizona Supreme Court's decision in *Orme School v. Reeves*, 166 Ariz. 301, 802 P.2d 1000 (1990), as an example of the "national trend" regarding summary judgment, and stated that: "We live in what is widely perceived as a time of great increase in litigation and one in which many meritless cases are filed, vastly increasing the dockets before our trial judges. As a result, the courts of this country have been urged to liberalize the standards so as to permit summary judgment in a larger number of cases." *Brill v. Guardian Life Ins. Co.of America*, 142 N.J. at 539.

> disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2. *Liberty Lobby, supra*, 477 U.S. at 250, 196 S.Ct. at 2511, 91 L.Ed.2d at 213. The import of our holding is that when the evidence 'is so one-sided that one party must prevail as a matter of law,' *Liberty Lobby, supra*, 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214, the trial court should not hesitate to grant summary judgment."

Noting that it has been suggested that trial courts, out of fear of reversal or out of an overly restrictive reading of *Judson v. Peoples Bank & Trust of Westfield*, 17 N.J. 67 (1954), or a combination thereof, allow cases to survive summary judgment so long as there is *any* disputed issue of fact, the New Jersey Supreme Court in *Brill* stated that "the thrust of today's decision is to encourage trial courts not to refrain from granting summary judgment when the proper circumstances present themselves. *Id.* at 541.

In the proceeding, it is the movant's burden to show the absence of any genuine issue of material fact. The papers supporting the motions are required to be closely scrutinized and those opposed to it are indulgently treated. All inferences of doubt are drawn against the moving party in favor of the party opposing the motion. Doubts must be resolved in favor of the conventional trial. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995); *Judson v. Peoples Bank & Trust Company of Westfield*, 17 N.J. at 74, 75; *Frank Rizzo, Inc. v. Alatsas*, 27 N.J. 400, 405 (1958); *Westside Trust Company v. Gasgiogne*, 39 N.J. Super. 467, 470 (App. Div. 1956); *Sokolay v.*

Edlin 65 N.J. Super. 112, 120 (App. Div. 1965).

In ruling on a motion for summary judgment, it is the function of the court to determine whether or not a genuine issue of material fact exists, but not to resolve such factual issues as the court finds existing. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995); *Judson v. Peoples Bank & Trust Company*, 17 N.J. 73; *Bickwick v. Hammes*, 34 N.J. Super. 568, 573 (App. Div. 1955). If the facts produced by the opponent of the motion are of an insubstantial nature, a mere scintilla, fanciful, frivolous, gauzy, or merely suspicious, the motion for summary judgment should be granted. *Judson v. Peoples Bank and Trust Company of Westfield*, 17 N.J. at 75.

The party moving for summary judgment must sustain the burden of establishing that no material issue of fact exists. However, where the movant demonstrates a *prima facie* right to summary judgment, the adverse party must come forward with competent evidential material and show a genuine factual dispute. *Brill v. Guardian Life Ins. Co. of America*, 142 N.J. 520 (1995); *Robbins v. Jersey City*, 23 N.J. 229, 241. *Heljon Management Corp. v. Di Leo*, 55 N.J. Super. 306, 312 (App. Div. 1959); *N.J. Mortgage & Investment Corporation v. Calvetti*, 68 N.J. Super. 18, 32 (App. Div. 1961). Bare conclusions in pleading without factual support in affidavits, will not defeat a deserving application for summary judgment. *A. Kaplan & Son v. Housing Authority of Passaic*, 42 N.J. Super. 230, 235 (App. Div. 1956); *U.S. Pipe & Foundry Company v. American Arbitration 31 Association*, 67 N.J. Super. 384, 399-407 (App. Div. 1961).

CONCLUSION

It is for all of the above reasons respectfully submitted that the Appellate Division's conclusion that the plaintiff's negligent supervision claim is not barred by the application of the unimproved public property immunity is incorrect and that the Court should enter an order reversing that decision and declaring all defendants to be immune from liability for the plaintiff's injuries by operation of *N.J.S.A.* 59:4-8, *N.J.S.A.* 59:2-1b, *N.J.S.A.* 59:3-1b, and as otherwise provided by the Tort Claims Act.

HIERING HOFFMAN & GANNON
Attorneys for Ocean County Joint Insurance Fund, as *Amicus Curiae*

By: _____
RONALD E. HOFFMAN

Dated: November 20, 1997

SUPREME COURT OF NEW JERSEY
M-335 September Term 1997
44,746

WILLIAM FLEUHR,

Plaintiff-Respondent,

v.

CITY OF CAPE MAY, et al.,

Defendant-Petitioner.

ORDER

FILED

OCT 29 1997

Stephen W. Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion of Ocean County Joint Insurance for leave to appear amicus curiae is granted, limited to the filing of a brief, said brief to be served and filed within twenty-one of the filing date of this Order. The parties may respond within twenty-one days thereafter.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 28th day of October, 1997.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT
NEW JERSEY

CLERK OF THE SUPREME COURT

SUPREME COURT OF NEW JERSEY
M-335 September Term 1997
44,746

WILLIAM FLEUHR,

Plaintiff-Respondent,

v.

CITY OF CAPE MAY, et al.,

Defendant-Petitioner.

ORDER

FILED

OCT 29 1997

Stephen W. Townsend
CLERK

This matter having been duly presented to the Court, it is ORDERED that the motion of Ocean County Joint Insurance for leave to appear amicus curiae is granted, limited to the filing of a brief, said brief to be served and filed within twenty-one of the filing date of this Order. The parties may respond within twenty-one days thereafter.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 28th day of October, 1997.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE SUPREME COURT
OF NEW JERSEY

CLERK OF THE SUPREME COURT

A 136 SEP 1997

Supreme Court of New Jersey

WILLIAM FLEUHR	*Docket No.* 44,746
Plaintiff-Respondent	ON CERTIFICATION TO:
vs.	Superior Court of New Jersey Appellate Division Docket No. A-846-96T3
CITY OF CAPE MAY, JOHN DOE and COUNTY OF CAPE MAY	
Defendant-Petitioner	***SAT BELOW:***
	Hon. Virginia Long, J.S.C. Hon. Ariel A. Rodriguez, J.S.C. Hon. Mary C. Cuff, J.S.C.

FILED
FEB 11 1998
CLERK

CIVIL ACTION

JOINT BRIEF SUBMITTED ON BEHALF OF AMICUS CURIAE
SEA-NJ AND SURFRIDER FOUNDATION

STEPHEN J. FOLEY, JR., ESQ.
CAMPBELL, FOLEY, LEE, MURPHY & CERNIGLIARO
601 Bangs Ave. P.O. Box 1040
Asbury Park, NJ 07712-1040
(732) 775-6520
ATTORNEYS FOR SEA-NJ amicus curiae

and

PHILIP G. MYLOD, ESQ.
P.O. Box 484
107 Grand Central Ave.
Lavallette, NJ 08735
(732) 830-6464
ATTORNEYS FOR Surfrider Foundation amicus curiae

attn
STEPHEN J. FOLEY, JR., ESQ.
and
PHILIP G. MYLOD, ESQ.
On The Brief

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED:

OTHER:

AMICUS CURIAE'S SPECIAL INTEREST AND EXPERTISE

As outlined in the certifications submitted in support of the application by the New Jersey chapters of Surfers' Environmental Alliance (SEA-NJ) and Surfrider Foundation to appear herein as amicus curiae, each of those organizations is comprised of individuals, primarily surfers, who make year-round, recreational use of this State's coastal waters. Many members of these groups, including the authors of the instant brief, have in excess of twenty-five years experience surfing not only the waves off the Jersey Shore but those found around the world as well. In addition, both groups consistently have advocated for the easing of governmental restrictions upon the use of public trust lands and waters. As advocates, both SEA-NJ and Surfrider have had numerous discussions, and at times have engaged in adversarial proceedings, with representatives of state, county and local government agencies in attempts to resolve conflicts arising between those agencies' exercise of the State's police powers and the citizenry's exercise of its deeply inherent right to use the oceanfront. Thus, as amicus curiae, these groups now offer to the court their particular knowledge and expertise in the matters involving the assessment of ocean conditions and the interplay between governmental and public interests in ocean access issues.

NATURE OF THE PUBLIC INTEREST IMPACTED
BY THE APPELLATE DIVISION'S DECISION.

The "public trust doctrine acknowledges that the ownership, dominion and sovereignty over land flowed by tidal waters, which extend to the mean high water mark, is vested in the State in trust for the people. The public's right to use the tidal lands and water encompasses navigation, fishing and recreational uses, including bathing, swimming and other shore activities." Matthews v. Bay Head Imp. Ass'n., 95 N.J. at 312 (citing Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309 (1972). The public's right to use and enjoy public trust lands was characterized as a "deeply inherent right of the citizenry" by the New Jersey Supreme Court in Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. at 306. Consequently, the State's ability to exercise its police powers over public trust lands is limited by its obligation to preserve the inherent right of all citizens to use those lands.

In Illinois Central R.R. v. Illinois, 146 U.S. 387, 453 (1892), the United States Supreme Court held that the "State can no more abdicate its trust over property in which the whole people are (beneficially) interested ... than it can abdicate its police power." Similarly, in Arnold v. Mundy, 6 N.J.L. 1, 78 (Sup. Ct. 1821), the court recognized that the "sovereign ... cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right." Thus, the Arnold court held

that the sovereign could only exercise its legislative powers over trust lands "for the common benefit of every individual citizen." Any acts of the legislature, or of local governments pursuant to any legislatively delegated authority which impairs the common interest of the citizenry violates the public trust. See Jaffee, The Public Trust Doctrine Is Alive and Kicking in New Jersey Tidalwaters: Neptune City v. Avon-by-the-Sea - A Case of Happy Atavism, 14 Nat. Resources J. 309, 312-13 (1974); see also Matthews v. Bay Head Imp. Ass'n, 95 N.J. at 319-21 n.5 (fact that some compensation paid for grants and leases may not eliminate public's right to use of common property); Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. at 308 (public trust doctrine implies obligations on grantee to use conveyed lands only consistently with public rights therein); N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 67-68 (Hall, J. concurring in part and dissenting in part) (state's conveyance of riparian lands subject to public use depending on nature of land), appeal dismissed sub nom., Borough of East Rutherford v. N.J. Sports & Exposition Auth., 409 U.S. 943 (1972). As will be set forth more fully below, SEA-NJ and Surfrider respectfully submit that, if affirmed, the rule of law announced by the appellate court will impair the right of the public to use New Jersey's public trust lands.

ERRORS COMPLAINED OF AND COMMENTS WITH RESPECT TO THE APPELLATE DIVISION DECISION

The decision of the appellate division recognizes a cause of action for the "negligent performance of protective services" by municipal lifeguards. Fleuhr v. City of Cape May, 303 N.J. Super. 481, 489 (App. Div. 1997). Although it acknowledges that a municipality has no duty to provide lifesaving services, it holds that once such services are provided voluntarily, municipal employees may be held liable for injuries arising from their negligent supervision of encounters between bathers and the forces at play both above and below the surface of the sea. Id. at 488-89. Essentially, the court reasoned that the physical instrument of plaintiff's injury (i.e. a wave) was not the efficient legal cause thereof, and therefore, the immunity afforded to municipalities for injuries arising from dangerous conditions on unimproved public property was not applicable to Fleuhr's claim. It respectfully is submitted that the distinction drawn between the actual physical cause of the injury and the legal cause identified by the court is an artificial one which can not be reconciled with the realities of the coastal environment.

In distinguishing between the actions of the wave which injured Fleuhr and those of the lifeguards supervising the oceanfront, the appellate court opined that if lifeguards properly discharge their functions, bathers are "not exposed to the danger posed by the body of water." Id. at 489.

Unfortunately, this assertion ignores a number of undeniable facts about the marine environment.

Initially, it must be remembered that human beings are neither aquatic nor amphibious creatures. We do not immerse ourselves in water in response to biological imperatives causing us to move as freely in that element as we do when we walk the earth's land masses. Instead, we "visit" in the sea only so long as our individually acquired abilities permit. Even those who come to feel "at home" in the ocean lodge there temporarily and subject to the whim and caprice of forces over which they exert no control. Such forces are neither static nor entirely predictable.

In the instant matter, plaintiff acknowledges that the ocean conditions he encountered were attributable to a hurricane churning coastal waters several hundred miles to the south. Consequently, the "danger" presented to him was created by forces incapable of direct observation and subject only to inferential assessment. That is, the local impact of the hurricane was shaped by marine and meteorological conditions encountered en route to Cape May's beaches so that when the storm's final "products" expended themselves in the shallows around him, plaintiff felt the rush and pull of innumerable distant invisible forces. The task of evaluating those forces and protecting plaintiff from them is not at all as simple as the appellate court's reasoning implies.

Waves are primarily products of wind, current, tide and

seabed contour. As in plaintiff Fleuhr's case, the ocean swells oftentimes must travel hundreds, if not thousands, of miles before crashing as surf upon New Jersey's shores. Travelling through open waters, these swells are shaped and re-shaped by the changing winds blowing over the expanses they traverse. A hurricane, for example, is a tropical cyclone whose winds travel in a counter-clockwise direction around the storm's center, or eye. Along the east coast of the United States, these winds blow from the northeast as a hurricane approaches. The watery effects of such storms, however, are felt long before the winds. Consequently, as swells move out from the eye, they are subjected to winds blowing from varying directions. These local winds differ in intensity, direction and duration depending upon the weather conditions prevailing in the areas through which the swells move. In that swells crossing hundreds of miles of water may take several days to reach our shores, they typically are subjected to multiple changes in wind conditions en route. Thus, as they approach our waters, these ocean swells are as much the product of the winds beneath which they have travelled as they are the offspring of the storms which generate them.

In addition to wind, ocean swells are effected by features of coastal geography which focus or deflect their power as they move across the continental shelf. Closer to shore, the effects of tide, current and bottom contour become so pronounced that the resulting surf can have vastly different characteristics on beaches in very close proximity to each other. Finally, the

waves themselves, breaking as they do onto submerged stretches of sand which are constantly being sculpted, play a role in changing the faces of following waves because as the waves move out of the surf zone it is carried along the shore in currents for deposit further down the beach. Thus, the nearshore seabed which retards the shoreward movement of ocean swells and transforms them into rising and then falling breakers changes from moment to moment. As a result, predicting the force with which any single wave will break and the point at which that breaking will occur is more "educated guess" than science.

In a very real sense, a breaking wave is like an iceberg. That part of the wave which is visible above the ocean's surface is but a small part of the equation necessary to calculate the volume of mass and energy which will envelope bathers in it path. Although the visible parts of waves give clues as to the likely result of their breaking, individual waves are the product of so many variable factors that it is not unusual for a single wave or series of waves to break in a completely unexpected and unforeseeable manner. Sudden changes on the sandy seabed in the surf zone, for example, not only create dangerous rip tides which can carry swimmers rapidly out to sea, but they instantaneously alter the characteristics of breaking waves as well. Thus, although experience and knowledge of local conditions provide some measure of protection, even the most vigilant lifeguards are not guarantors of the safety of those who venture into the ocean.

The task of ocean lifesavers is further complicated by the individual characteristics of their charges. Like the ocean conditions they encounter, swimmers, bathers and other recreationists do not present static conditions for their watchers. A swimmer who enters the surf does not emerge with the same energy he or she took into it. The speed with which such energies are depleted depends as much upon an individual's strength, stamina and experience as it does upon the power of the waves encountered. Thus, an individual who experiences no initial difficulties in rough surf conditions may suffer such an ebbing of his or her energies that the same conditions can prove life-threatening a short time later. In situations where a swimmer is far enough offshore that only his or her head is visible above the water, the task of evaluating and anticipating a deteriorating physical condition actually can be much more difficult that evaluating changing wave conditions.

Given the foregoing, it respectfully is submitted that the appellate court erred in its assumption that the proper discharge of a lifeguard's duty frees bathers from the dangers posed by the ocean. The ocean, even on the calmest of days, presents dangers which no amount of vigilance or precaution can remove. Anyone entering the water exposes himself or herself to those dangers, and although lifeguards provide some measure of protection, it is not possible to avoid the dangers altogether.

Summarized briefly, the fundamental flaw in the appellate division's decision is its view of ocean lifesaving services as

the equivalent of similar services provided at municipal swimming pools. Id. at 490. It is the hope of both SEA-NJ and Surfrider that the foregoing discussion of the forces which shape the waves breaking on our shores demonstrates quite clearly that the Atlantic Ocean is not a swimming pool. The surf which breaks upon our beaches is neither generated nor controlled by forces conducive to the type of regularity and predictability which would be required to prevent exposing bathers to the inherent dangers presented by venturing into the sea. In addition, the inability to recognize the ocean and municipal swimming pools as vastly different public facilities is inconsistent with the lower court's own acknowledgement that "the beach and the ocean are unimproved public property." Id. at 488. Thus, although the court acknowledges that the ocean is unimproved public property, it fails to recognize any difference between bathing upon such property and bathing in man made structures specifically designed to eliminate the hazards presented by the natural facility.

Swimming pools are nothing more than large containers designed to hold water. Their "tides" are controlled by drains and pumps. In most instances, the water is chemically treated to ensure a clarity which allows careful observation into its deepest reaches. There are neither waves nor currents in pools. Those who use them enjoy the security which comes from venturing into a well regulated and predictable body of water. As a result, pool bathers do not expose themselves to the dangers which the appellate court's decision compels seaside lifeguards

to negate so that ocean bathers are not "exposed to the danger posed by the body of water." Id. at 489.

If affirmed, the appellate court's decision will have a detrimental impact upon the public's exercise of its rights under the public trust doctrine. In a day and age marked by caps upon increases in municipal spending and popular calls for reduced government expenditures, the experience of SEA-NJ and Surfrider to date leaves neither organization with any doubt that local governments will react to the appellate division's decision by adopting conservative oceanfront policies which restrict access to our coastal waters. Simply stated, the surest and cheapest way to eliminate dangers presented by the ocean is to remove human beings from it. Towns faced with the prospect of defending a new wave of lawsuits, therefore, will either remove lifeguards from their beaches altogether or empty the ocean at the first sign of whitecaps thereby ensuring that bathing will only be permitted in conditions which are literally equivalent to those found in a swimming pool. The removal of lifeguards will adversely effect the ability of those who prefer the security provided by such services to enjoy the oceanfront while the restriction of bathing and other activities to the most docile conditions will unduly limit those who revel in the challenges presented by rough, breaking seas. Neither course will serve the public interest.

Reduced to its essence, the appellate division's decision in this case is a bad one because it attempts to circumvent

undeniable facts by resorting to fictions. William Fleuhr was struck by a large wave and was injured. Wave action is a component of the marine environment which must be encountered by all those who choose to enter our coastal waters. The unpredictability of such action exposes swimmers, bathers and all other recreational users to risks which no amount of vigilance or precaution can eliminate. Unfortunately, the lower court assumes without factual foundation that these risks can be removed by lifeguards who properly discharge their duties. As a result, it imposes an impossible burden upon them as a means of avoiding the rule of law which must be applied to claims arising from injurious encounters with the forces of nature. The resulting harm to the public undeniably conflicts with the policy and purpose of the public trust doctrine which is to "be molded and extended to meet changing conditions and needs of the public it was created to benefit." Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. at 309. It, therefore, respectfully is submitted that the provisions of the Tort Claims Act must not be construed in a manner which substantially impairs the deeply inherent right of the citizenry to use public trust lands and waters.

CONCLUSION

For the foregoing reasons, it respectfully is requested that this court reverse the Judgment of the appellate division and reinstate the trial court's Order for summary judgment.

Respectfully submitted,

CAMPBELL, FOLEY, LEE, MURPHY & CERNIGLIARO
A Professional Corporation
Attorneys for SEA-NJ amicus curiae

STEPHEN J. FOLEY, JR.

PHILIP G. MYLOD
Attorney At Law
Attorneys for Surfrider Foundation

PHILIP G. MYLOD


NEW
FOLDER
BEGINS