N.J. Court Removes Community Association Immunity Under Landowner's Liability Act

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In a recent Appellate Division decision[1], the immunity afforded to owners of open tracts of land under the New Jersey Landowner's Liability Act[2] was limited to exclude owners of suburban residential property. Henceforth only owners of rural open tracts of land may avoid liability from suits filed by recreational users under the Landowner's Liability Act. The case was decided in the context of an injury occurring on the common areas and facilities of a N.J. community association. In conjunction with other cases decided over the past five years, it signals an evolution away from protection to landowners from injuries suffered by passersby and trespassers.

In the case, Linda Toogood was rollerblading on a road within the St. Andrews at Valley Brook Condominium Association, Inc. ("St. Andrews") a residential condominium development. St. Andrews was one of several developments located in the vicinity of the accident. Some of the developments were still in the process of construction. Ms. Toogood was visiting a friend who resided in one of the completed residential units at St. Andrews. At the intersection of two paved roadways, Ms. Toogood slipped and fell due to the apparent accumulation of sand on the roadway's surface. The sand apparently came from one of the adjacent construction sites.

In response to Ms. Toogood's suit for negligence, the defendants including St. Andrews, asserted that they were immune from suit since the N.J. Landowner's Liability Act applied to their "premises" i.e., the common elements of the association. The Landowner's Liability Act states in relevant part:

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[1] Toogood v. St. Andrews at Valley Brook Condominium Association, Inc., 313 N.J. Super. 418(App.Div. 1998)(A-7304-96T1).
[2] N.J.S.A. 2A:42A-2 to -10.

> *An owner, lessee or occupant of premises, whether or not posted . . . and whether or not improved or maintained in a natural condition, or used as part of a commercial enterprise, owes no duty to keep the premises safe for entry or use by others for sport or recreational activities, or to give warning of any hazardous condition of the land* or *in connection with the use of any structure or by reason of any activity on such premises to persons entering for such purposes.*

The trial court agreed that this statute applied to the common elements owned by St. Andrews and dismissed Ms. Toogood's suit. On appeal however, the three judge panel of the Appellate Division disagreed with the interpretation of the Landowner's Liability Act made by the trial court judge and reinstated Ms. Toogood's case.

In doing so, the Appellate Division signaled a return to what they held was the original intent of the legislature in enacting the Landowner's Liability Act (the "Act"). They held that the term "premises" in the Act was not meant to apply to suburban tracts of land as were found in the common elements at St. Andrews. Rather, the intent was to provide the owners of rural tracts of open land with immunity from suit from those who entered and used the land for sporting or recreational purposes. It was meant to encourage those owners of open tracts of rural land to allow the public to enjoy them and not to fence out users for fear of liability. It was not meant to protect owners of open tracts in suburban areas.

By taking away this immunity defense, the court has in turn increased the liability of community associations for those who use their common elements, common areas or facilities for recreational purposes. Real life examples include visitors using association roads for bicycling or rollerblading; joggers using roads or sidewalks; skiers, tobogganers or sledders using snow-covered hillsides during winter; and skaters using ice covered ponds.

By making the rural/suburban landowner distinction, the court in essence ruled that owners of open land located in suburban areas will be held liable for injuries occurring on their land by recreational users. This is consistent with the trend in New Jersey turning away from the traditional

classifications of landowner duty based upon the status of the person on the land. Traditionally, the owner of land would owe a higher duty of care to invitees or licensees than they would to trespassers. Now, the question is not whether the person using the land was invited but rather whether the imposition of a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.[3]

The concern here for community associations is that they are not being afforded the immunities that are afforded other landowners. Owners of rural open tracts of land are still immune from suit under the act.[4] Further, the State, County and local municipalities are immune from certain types of suits under the Tort Claims Act.[5] Owners of ski areas also are afforded immunity under the N.J. Ski Statute.[6]

Although community associations can obtain limited immunity from suit under N.J.S.A. 2A:62A-12 by properly amending their documents, that immunity is limited only to suits against the association by unit owners and their spouses. Under N.J.S.A. 2A:62A-12, community associations can amend their by-laws to exempt the owners' association from civil actions brought either by or on behalf of a unit owner or his spouse for bodily injuries sustained by the unit owner or his spouse. Unit owners and their spouses can hold the owners' association liable when the association's actions are adjudged to be "willfully, wantonly or grossly negligent."

This limited immunity does not apply to tenants, guests, or passersby who use the roads, sidewalks, fields, sports facilities or hillsides of a community association for sports and recreational purposes.

In conclusion, community associations may have lost an important source of protection with the Toogood decision.

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[3] Ocasio v. Amtrack, 299 N.J. Super. 139 (App.Div. 1998)(Upholding portion of $7,500,000 verdict awarded to trespasser who was hit by Amtrack train) citing, Hopkins v. Fox & Lazo Realtors, 132 N.J. 426 (1993)(Mother-in-law of prospective purchasers of home injured while touring premises at "open house" permitted to sue realtors).

[4] Toogood, *supra.*

[5] N.J.S.A. 59:1-1

[6] N.J.S.A. 5:13-1 et seq.

The burden is on associations to inspect and make safe areas that may be used by people other than unit owners.

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