NJ Appellate Division Tosses Slip-and-Fall Claim from Atlantic City Boardwalk

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What are the challenges of suing a city in New Jersey for personal injury?

New Jersey's Appellate Division recently demonstrated the difficulty of suing a municipality after affirming the dismissal of a personal injury lawsuit brought by a plaintiff who tripped on a nail protruding from the Atlantic City boardwalk. In a recent unpublished opinion, *Roening v. City of Atlantic City* (A-1369-20), the court demonstrated the difficulty of overcoming a city's immunity from liability under the New Jersey Tort Claims Act.

Falling on the Boardwalk

In April 2018, plaintiff Sandra Roening tripped on a raised nail on the Atlantic City boardwalk. She fell down and suffered a fracture to her right shoulder. Ms. Roening filed a personal injury lawsuit against the City of Atlantic City. In a deposition, the city boardwalk inspector testified that the four-and-a-half-mile boardwalk in Atlantic City has approximately 80,000 nails and screws. He testified that he inspected the boardwalk five days a week, twice a day. Ms. Roening hired a former boardwalk inspector for Ocean City as an expert to attempt to prove that the city was at fault for her accident. The expert provided a report that the nail in question had been raised for about three months based upon rust observed on the nail. The city filed a motion to dismiss plaintiff's case on the basis that plaintiff could not meet the statutory provisions of the New Jersey Tort Claims Act.

In New Jersey, a plaintiff suing a city or public entity for liability for an injury faces an uphill battle. In general, for Tort Claims Act lawsuits, courts find immunity for public entities, resulting in a dismissal of the lawsuit. Courts finding public entities liable is the exception because of the strict standards that must be met to overcome public entity immunity.

These are various elements that a plaintiff must demonstrate to win a negligence claim under the Tort Claims Act:

- There was a dangerous condition that caused the accident.
- The public entity had actual or constructive notice of the dangerous condition.
- The failure to detect or remedy the dangerous condition was palpably unreasonable.
- If these elements are proven, the plaintiff must demonstrate that his or her injury is a permanent loss of a bodily function and is substantial.
- In addition, a plaintiff must prove that a minimum of $3600 in medical expenses were incurred.

The Trial Court Dismisses Slip-and-Fall Case

The trial judge granted the city's motion to dismiss because it determined that plaintiff had not satisfied the elements of the Tort Claims Act. Although the judge found that the protruding nail was a dangerous condition, the plaintiff had failed to prove actual or constructive notice because plaintiff's expert's report was a net opinion. There was no factual or scientific basis of proof of how long the nail had been raised. The plaintiff's expert was not a metallurgist. In addition, the court ruled that given the frequent inspection of the boardwalk by the Atlantic City boardwalk inspector, "under no circumstances would it be palpably unreasonable for the city's inspector to fail to notice one protruding nail as presented here."

The Appellate Division Affirms

Ms. Roening appealed the dismissal of her case to the Appellate Division. She claimed that the trial judge improperly ruled that her expert report was inadmissible, and that the city's actions in failing to repair the nail were palpably unreasonable. The Appellate Division upheld the dismissal on the basis of public entity immunity under the Tort Claims Act. The court agreed that plaintiff's expert's report was a net opinion and therefore inadmissible. In his report, the expert did not support his opinion with facts, scientific data, or an accepted standard. None were provided. Without explaining the "why and wherefore" of his opinion, the report was an improper net opinion.

The focus of the appellate decision was on the issue of whether the city's failure to detect or repair the raised nail was palpably unreasonable. The court noted that "palpably unreasonable" means more than ordinary negligence; it is behavior that is patently unacceptable under any circumstance. In addressing this stringent standard, the court noted that imperfections in boardwalk surfaces are common. The city did have a boardwalk inspector inspect the boardwalk on a frequent basis. Considering the length of the boardwalk and the number of nails and screws in the boardwalk, the failure of the city to repair or detect every raised nail or screw was not outrageous or patently unacceptable. The Tort Claims Act does not require perfection.

Despite a fractured shoulder, Ms. Roening was unable to obtain a recovery against the City of Atlantic City for failure to detect or repair the raised nail on the boardwalk. The court did not even address whether her injury was considered a permanent loss of a bodily function and significant. That hurdle was never reached because the notice hurdle and palpable unreasonable hurdle could not be demonstrated. This case, like so many other lawsuits against cities and other public entities, shows how difficult it is to prove a public entity is liable for an accident on public property. A person's odds are better inside a casino than on the boardwalk.