

# PRUTTING & LOMBARDI

## LEGAL BRIEFS

RECENT REPORTED NEW JERSEY RULINGS

January 2012, Volume 18, Issue 1

### APPELLATE DIVISION CASES

#### TORTS – PREMISES LIABILITY

#### HOUSING AUTHORITY IS NOT IMMUNE FROM LIABILITY STEMMING FROM SLIP AND FALL ON SIDEWALK ABUTTING ITS PROPERTY.

*Elizabeth Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253 (App. Div. 2011); opinion by Judge Fuentes; decided September 30, 2011.*

Plaintiff Tymczyszyn slipped on an ice-covered sidewalk abutting a multi-unit residential property owned and operated by the Hoboken Housing Authority. Plaintiff filed suit seeking to recover for damages sustained as a result of the fall.

The court granted summary judgment in favor of the Housing Authority applying the immunity provided to public entities by the New Jersey Tort Claims Act. Specifically, it found that Plaintiff did

not establish that Defendant created the dangerous condition that caused the fall or had prior actual or constructive notice of the condition. Additionally, the court found that the ice and snow removal actions taken by the Defendant were not “palpably unreasonable.”

The Plaintiff appealed, arguing that the trial court granted summary judgment in error as there was sufficient evidence presented to create genuine questions of material fact relative to the above determinations. Defendant argued that there were no questions of material fact and the court correctly decided the issues as a matter of law. Moreover, they argued that the common law immunity pertaining to snow removal activities as well as the weather-immunity provision in N.J.S.A. 5-4-7 provided the Housing Authority with immunity from liability.

The Appellate Division reversed the lower court’s grant of summary judgment, holding that sufficient evidence was presented such that a jury

could find that Defendant’s snow removal practices caused the dangerous condition that led to Plaintiff’s fall. Alternatively, even if the jury did not believe that the Defendant caused the dangerous condition, they could make a determination that Defendant was constructively on notice of the dangerous condition. The court found that under either potential determination by the jury, there were sufficient facts presented to conclude that Defendant was “palpably unreasonable” in failing to ensure that the sidewalk was free of snow and ice.

The court also determined that the Housing Authority was not immune from liability based upon common law immunity for snow-related activities or the weather condition immunity provision contained in the Torts Claim Act, N.J.S.A. 5:4-7.

With respect to N.J.S.A. 59:4-7, which grants public entities immunity “for an injury caused solely by the effect of the use of streets and highways of weather

---

---

**George A. Prutting, Jr.**  
**Nicole P. Showers**

---

---

**Marilou Lombardi**  
**Gregory J. Keresztury**

**Southern**  
**New Jersey Office**  
701 S. White Horse Pike  
Audubon, NJ 08106

**Northern**  
**New Jersey Office**  
502 Route 22 West  
Lebanon, NJ 08833

**Pennsylvania Office**  
21 S. Broad Street Suite 1400  
Philadelphia, PA 19107

#### Contact Us

Tele: (856) 547-8404 Fax: (856) 547-0174

E-mail: [esq@pruttinglaw.com](mailto:esq@pruttinglaw.com)

---

---

© Copyright 2012 by Prutting & Lombardi. All Rights Reserved. No portion of this newsletter may be reproduced in any form or by any electronic or mechanical means, including information storage and retrieval systems, without permission in writing from the publisher, except by a reviewer who may quote brief passages in a review.

# PRUTTING & LOMBARDI

## LEGAL BRIEFS

conditions,” the court drew upon the reasoning set forth in *Bligen v. Jersey City Housing Authority*, 131 N.J. 124 (1993) which made clear that the statutory terms limiting immunity to accidents that occur on a “street” or “highway” do not provide immunity for an accident that occurs on the driveway of a housing authority. Extending the *Bligen* court’s logic, the court determined that the immunity provision does not apply to sidewalks. The court determined that under the circumstances in this case, it was not unreasonable to expect the management of the public housing complex to remove snow and ice from the limited area of their property abutting the sidewalk.

The court stated that the existence of a landlord-tenant relationship is not necessary to overcome the common law immunity for snow removal activities. The court applied the well-established duty of commercial landlords to keep the sidewalk abutting their property free of snow and ice to public landlords, therefore the Defendant could not escape liability under the common law immunity for snow removal activities.

### **CONTRACT LAW - CONSUMER PROTECTION**

#### **THIS NEGOTIATED CONTRACT BETWEEN TWO CORPORATE ENTITIES FOR CUSTOM DESIGNED SOFTWARE DOES NOT CONSTITUTE A “SALE OF MERCHANDISE” ACTIONABLE UNDER THE CONSUMER FRAUD ACT.**

*Princeton Healthcare System v. Netsmart New York Inc.* 422 N.J. Super. (App. Div. 2011); opinion by Judge Skillman; decided October 21, 2011.

Plaintiff Princeton Health Care System (PHCS), a nonprofit corporation that provides healthcare services, wanted to upgrade its computer and medical billing system at one of its facilities, Princeton House Behavioral Health Facility (Princeton House.) Princeton House distributed a detailed request for proposals to various companies specializing in computer software and products. Several companies including the Defendant, Netsmart New York, submitted proposals.

Thereafter began a lengthy process of evaluating the proposals that were received. This included PHCS representatives meeting with Netsmart and visiting other healthcare facilities that used Netsmart computer systems. The parties also engaged in negotiations regarding the terms of the proposed contract, in which PHCS’s computer consultant and its legal counsel were active participants.

After three years, Netsmart was selected to provide the computer system. PHCS entered into a contract with Netsmart that specifically outlined Netsmart’s obligations with respect to the installation of the new unique system, including integrating it into Princeton House’s existing system.

There were substantial delays in the implementation of the Netsmart system. The parties eventually met in an attempt to resolve any misunderstandings and move forward with performance of the contract. However, this was unsuccessful and PHCS eventually sent a letter to Netsmart deeming it to be “in default of its obligations,” giving PHCS grounds to terminate the contract.

PHCS subsequently filed this action against Netsmart, alleging breach of

contract, violation of the covenant of good faith and fair dealing, and violation of the Consumer Fraud Act (CFA.)

The trial court granted partial summary judgment to PHCS on the issue of standing to bring suit under the CFA and the Act’s applicability to the commercial nature of this suit. Netsmart appealed and the Appellate Division denied Netsmart’s motion for leave to appeal. The Supreme Court subsequently granted it and remanded the matter back to the Appellate Division to be decided on its merits.

The pertinent portion of the CFA prohibits the use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with the intent that others rely upon such concealment, suppression, or omission in connection with the sale or advertisement of any merchandise or real estate.

Though a corporation falls under the definition of a “person”, the court held that not every contract entered into by a corporation may be the subject of a CFA claim. Instead of looking at the identity of the purchaser, the character of the transaction must be examined. The Act defines “merchandise” as “any objects wares, goods, commodities, services or anything offered directly or indirectly to the public for sale.” The “public” refers to the public at large. Since CFA applicability hinges on the nature of the transaction, it is necessary to engage in a case by case analysis.

The court found that the contract between PHCS and Netsmart did not

# PRUTTING & LOMBARDI

## LEGAL BRIEFS

constitute a simple purchase of computer software sold to the public at large. The court considered the custom designed nature of the software that was specifically created to suit Princeton House's unique needs along with the lengthy contract negotiations that took place. The court concluded that this kind of heavily negotiated contract between two corporate entities does not qualify as a "sale of merchandise" within the intent of the CFA.

### **NEGLIGENCE – DESIGN DEFECT – FAILURE TO WARN**

#### **SUMMARY JUDGMENT WAS APPROPRIATE IN NEGLIGENCE ACTION WHERE THERE WAS NO PROOF THAT THE VACATION CONDOMINIUM POSED AN UNREASONABLE RISK OF HARM AND WHERE THE PLAINTIFF KNEW OR HAD REASON TO KNOW OF THE RISK.**

*D'Alessandro v. Hartzel, 422 N.J. Super. 575 (App. Div. 2011); opinion by Judge Parrillo; decided October 27, 2011.*

Plaintiff D'Alessandro rented the Defendants' vacation condominium. Plaintiff had not previously visited the vacation home but had viewed the layout via online photographs. Upon arriving she propped open a door with her left hand. She had her luggage in her right hand, forcing her to pass through the doorway sideways. As she entered she fell on the step leading from the landing into the living room, causing injury. Plaintiff acknowledged that had she walked straight in she would have had a clear view of the landing, steps, and living room. Moreover, the step carpeting was different from the tile on the landing, it was a bright, sunny day,

and the lighting was adequate. Additionally, there had been no prior complaints or previous falls by other guests.

Plaintiff sued the Defendants alleging a design defect due to the uneven floor and failure on the part of the Defendants to warn her, or otherwise protect her from the alleged dangerous condition.

The suit was dismissed on a summary judgment motion at the trial court level. On appeal, Plaintiff argued that the motion judge erred in granting summary judgment because there were disputed issues of material fact.

The Appellate panel held that since there was no competent proof that the condition which Plaintiff alleged was dangerous or involved an unreasonable risk of physical harm. Also Plaintiff knew of or had reason to know of the condition. Hence, a jury could not reasonably find Defendants liable for breaching a duty of care to the Plaintiff.

The court set forth the four factors needed to establish a *prima facie* case of negligence: 1) a duty of care, 2) breach of that duty, 3) proximate cause, and 4) damages. The duty owed to the Plaintiff is determined by the circumstances that brought the individual to the property. The duty owed as well as the scope of that duty are questions of law for the court to decide. Generally, a property owner owes an invitee like Plaintiff D'Alessandro a duty to provide a reasonably safe place to do that which is within the scope of the invitation.

The Appellate Panel pointed to the foreseeability of harm as a crucial element in determining whether the imposition of a duty on an alleged tortfeasor is appropriate.

Additionally, the court also discussed the case of *Reyes v. Egner, 404 N.J. Super 433 (App. Div. 2009)*, aff'd on other grounds by an equally divided court, 201 N.J. 417 (2011). In *Reyes*, the court specifically addressed the duty the lessor owes to a tenant in the context of a short-term rental property. It was determined that this type of duty falls within the definition outlined in Section 358 of the *Second Restatement of Torts* which permits liability if the plaintiff demonstrates that the lessor failed to disclose a condition that involved an unreasonable risk of harm to individuals on the land if the lessee does not know or have reason to know of the condition or risk involved; and the lessor knows or has reason to know of the condition.

Applying this standard to the facts of the case, the court found that a jury would not be able to reasonably find a breach of duty. The Plaintiff offered no proof that the condition which she complained of involved an unreasonable risk of physical harm. Her mere allegations of a design flaw without evidence supporting her allegations would not defeat summary judgment.

Alternatively, should a potentially dangerous condition have existed, the court determined that liability would still be precluded because Plaintiff knew or had reason to know of the risk involved. Not only did she review photos of the layout prior to the vacation, the change in elevation from the landing to the living room was entirely visible. The court reasoned that the Plaintiff herself acknowledged that had she walked straight in, she would have noticed the change in elevation. Moreover, absent foreseeability of harm, the Defendants had no reason to expect that the Plaintiff would not discover the condition.

# PRUTTING & LOMBARDI

## LEGAL BRIEFS

### ***TRIAL COURT CASES***

#### **PREMISES LIABILITY**

#### **CHURCH THAT PERIODICALLY PERMITS ITS PARISHIONERS TO USE THE PREMISES FOR NON-WORSHIPING EVENTS IN EXCHANGE FOR DONATIONS IS NOT CONSIDERED TO BE A COMMERCIAL PROPERTY AND HAS NO DUTY TO MAINTAIN THE SIDEWALKS ABUTTING ITS PROPERTY.**

*Mohamed v. Iglesia Evangelica Oasis de Salvacion*, 423 N.J. Super. 96 (Law Div. 2011); opinion by Judge Velazquez; decided June 10, 2011.

Plaintiff Mohamed tripped on a defect on the sidewalk in front of the Defendant church and sustained injuries. The church building was used primarily for worship; however several times a year the church would allow its parishioners to park in the parking lot and use the church's basement for various events. Some gave donations in exchange for use of the premises and some did not.

Plaintiff filed suit against the church. The church subsequently moved for summary judgment, asserting that use of the church basement and parking lot did not amount to a "commercial" use that would establish a duty of care. Plaintiff argued that the church is not used exclusively for religious purposes and that practices such as renting out the basement established a duty.

The court held that the use of the church's basement and parking lot by parishioners did not constitute "commercial" use of the premises

within the commonly accepted use of the term.

In assessing whether the uses of the church fell into the "commonly accepted" meaning of "commercial property", the court first looked at *Stewart v. 104 Wallace Street Inc.*, 87 N.J. 146 (1981). *Stewart* imposed the duty on commercial landlords to maintain the sidewalks abutting their buildings but does not extend the duty to residential owners.

In *Lombardi v. First United Methodist Church, N.J. Super* 646 (App. Div. 1985) the court narrowed the *Stewart* decision and held that the duty did not extend to owners of property used exclusively for religious purposes.

However, in *Brown v. St. Venatius School* 111 N.J. 325 (1988) the court held that a religious, non-profit organization that was functioning as a school could be liable for failure to maintain the sidewalk. *Brown* stood for the proposition that the determinative factor in establishing whether a religious organization owes a care of duty is the use of the property. If the use is exclusively religious then the organization will not be considered commercial and a duty is not expected. If the use is partially or entirely commercial, liability will attach regardless of the owner's status as a non-profit organization. Ultimately, the court found that it was more fair to impose a duty upon a school than make the plaintiff suffer the burden of the entire loss because the duty to maintain the sidewalk did not interfere with the religious function of the school and the maintenance of the sidewalk was the type of duty the school had to perform for its students anyway.

Similarly, *Restivo v. Church of St. Joseph of the Palisades*, 306 N.J. Super 456 (App. Div. 1997), held that a church had a duty to maintain the sidewalks that abutted the property where it leased apartments to needy families. The court reasoned that using the property for rental purposes, even at a low rate, constituted a commercial purpose.

The court distinguished this case from that of *Brown* and *Restivo*, stating that this property was not a school or an apartment and lacks the "characteristics of a commercial enterprise." The property was a church parish. There were no fees, leases, or terms of use. The services provided were not advertised and were not open to the public. The money exchanged could be equated to the "money in the donation basket" rather than a commercial exchange.

Further, the court was not convinced that the church's "renting" its basement and parking lot established a commercial use. The fact that only parishioners and their friends and family could use the basement and parking lot was significant. Under the New Jersey Charitable Immunity Act, N.J.S.A. 2A:53A-7, an individual cannot sue a church if the person is a beneficiary of the works of the church. Since the church only provided its basement and parking lot to parishioners and their families it did not have the same type of notice of a duty like in *Brown*.

The court concluded that the property was not "commercial" within the commonly accepted use of the word and therefore the church had no duty to maintain the sidewalk that abutted their property.