Plan To Be Immune: Derivative Protection for Design Professionals Via Title 59

By Adam E. Levy, Esq.

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The potential future liability arising out of a construction project is, as Forrest Gump's mother would say, "like a box of chocolates—you never know what you're gonna get." This open-ended risk is somewhat tempered by the New Jersey Statute of Repose, the statutorily created 10-year time frame in which suit must be filed for any deficiency in the "design, planning, surveying, supervision or construction" of a project. But the granddaddy of legislative prophylactics is based in the historical concept of sovereign immunity. While it doesn't eliminate the possibility of a bad bon-bon in the box, the New Jersey Tort Claims Act, N.J.S.A. 59:4-1 et. seq., sets thresholds for suits against the state and its governmental subdivisions. Derivatively, design professionals may also avail themselves of the act, if the right steps are taken in the early stages of their involvement in public projects.

Since 1972, the liability of the state and all public entities has been controlled by the Tort Claims Act. It reestablished an all-inclusive sovereign immunity for all governmental bodies except as otherwise provided by the act. *Malloy v. State*, 76 N.J. 515 (1978); *Burg v. State of New Jersey*, 147 N.J. Super. 316, 320 (App. Div. 1977). One specific subsection of the act, namely N.J.S.A. 59:4-6, provides immunity for the state and its employees for any injury "caused by the plan or design of public property." The immunity only applies when the plan or design "has been approved in advance of the construction or improvement." By derivative extension, the immunity also blankets design professionals, such as architects and engineers. But questions of what constitutes sufficient advance approval for the immunity to apply abound, as do questions regarding exactly what has been approved.

The act reflects the considered legislative response to the judicial abrogation of the traditional doctrine of sovereign immunity in *Willis v. Dep't of Conservation & Econ. Dev.*, 55 N.J. 534 (1970). Consistent with this declaration of public policy, the Tort Claims Act follows the basic approach of providing immunity to all public entities unless liability is expressly allowed. The act basically confines claimants to only three causes of action: (1) N.J.S.A. 59:2-2(a), incorporating the doctrine of respondeat superior; (2) N.J.S.A. 59:4-2, creating liability for dangerous conditions of public property; and (3) N.J.S.A. 59:4-4, creating liability for failure to provide emergency signals or devices. The act also provides further specific limitations on liability by way of express immunities, and well-settled New Jersey law repeatedly has held that the immunities provisions always take precedence over and subordinate any provisions of the act that create liability. *Manna v. State*, 129 N.J. 341 (1991). Indeed, N.J.S.A. 59:2-1(b) provides that "[a]ny liability of a public entity established by this Act is subject to any immunity of the public entity."

Consistent with the premises of the act, the Supreme Court of New Jersey has directed trial courts to first inquire whether an immunity applies and, only if one does not, should the judge proceed to questions of liability. *Pico v. State*, 116 N.J. 55, 59 (1989). Liability provisions

always yield to a grant of immunity. Id. at 62; *Weiss v. New Jersey Transit*, 128 N.J. 376 (1993).

One of the specific and absolute immunities established by the act is for the plan and design of public property. N.J.S.A. 59:4-6 provides:

> Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

The comment to N.J.S.A. 59:4-6 reveals the intent of the legislature with regard to this section:

> This section is intended to grant a public entity and a public employee complete immunity for injuries resulting from a plan or design of public property when it has been officially approved by an authorized body… approval of plans or designs is peculiarly a function of the … government and is an example of the type of highly discretionary governmental activity which the courts have recognized should not be subject to threat of tort liability. (Internal citations omitted.) In addition, this particular area of governmental activity provides a very broad and extensive amount of exposure to liability against which the state would have difficulty providing economical and adequate protection.

The plan-and-design immunity provided by N.J.S.A. 59:4-6 is rooted in the traditional immunity granted to governmental entities where their activities were the result of the exercise of discretion. Prior to adoption of the Tort Claims Act, courts recognized that executive and legislative personnel must be insulated from liability when engaged in the task of deciding what best suits the competing demands of society. See *Fitzgerald v. Palmer*, 47 N.J. 106 (1966).

Thus, pursuant to the act, where executive or legislative personnel have been engaged in the task of deciding what will best suit the competing demands of society, the legislature has taken cognizance of the discretionary nature of the function. N.J.S.A. 59:4-6. Plan-and-design immunity grants a state entity and/or employee complete immunity for injuries, even those resulting from dangerous conditions of public property, when such plan or design has been officially approved by an authorized person or body. *Thompson v. Newark Housing Auth.*, 108 N.J. 525 (1987).

The plan-and-design immunity provided for in N.J.S.A. 59:4-6 has been expanded pursuant to public policy to include derivative immunity to contractors of the immune public entity. As stated in *Vanchieri v. New Jersey Sports & Exposition Auth*., 104 N.J. 80, 86 (1986), the public policy behind derivative immunity is that:

> [T]he immunity of the entity itself would become meaningless if contractors complying with its design were liable in tort for defects in that design. (Internal citations omitted.) If contractors never shared government immunity, their costs of doing business would be higher and those higher costs would be passed on to the government entities hiring the contractors. In respect of costs, therefore, the effect would be nearly the same as if the public entity were liable itself.

Application of plan-or-design immunity turns on whether the public entity has approved the feature in question so as to immunize it from challenge. As the Supreme Court states in *Manna*, "[o]ur case law has accepted … [the] premise that the defect that causes the injury must be in the plans before immunity is conferred." *Manna*, 129 N.J. at 353, citing *Thompson*, 108 N.J. at 535. "In other words, the public entity must establish that an approved feature of the plan sufficiently addressed the condition that is causally related to the accident." *Thompson*, 108 N.J. at 536.

It is not necessary to prove that a particular safety condition was considered by the public entity. As reasoned by the *Manna* court, "the immunity is not lost even if new knowledge demonstrates the dangerousness of the design, or the design presents a dangerous condition in light of a new context … [i]mmunity attaches to the state's decision regarding how to design a particular *feature*, and does not turn on explicit consideration of specific *options*." *Manna*, 129 N.J. at 355-357.

More recently, in the unpublished appellate decision of *Wood v. Township of Wall*, 2013 WL 6592769 (App. Div. 2013), at issue was exactly what was being approved. In *Wood*, the plaintiff was injured while riding a bike on a portion of a municipal bike path designed by a professional engineer that had a 20 percent downward slope. That particular slope exceeded an established engineering standard which provided that an acceptable slope for a bike path is between 4 to 8 percent. There was no evidence in the *Wood* case that the municipality had considered the established standards for bike path slopes when it approved the construction of the bike path. In other words, there was no proof that the municipality, with knowledge of the acceptable standard, nonetheless approved a plan that included a much steeper slope for its bike path. As such, the Appellate Division reversed the lower court decision, which granted the municipality immunity, remanding the case to determine if the municipality had exercised a discretionary choice by "sufficiently addressing" the 20 percent slope of the path.

The lesson to be learned by design professionals from the *Manna* and *Wood* decisions is to plan early and plan often. Consideration should be taken of all aspects of design for which standards are in effect during the planning of public projects. Design professionals may enjoy immunity for aspects of their design that are discretionarily approved by the sovereign. Open discussion of such standards during the design phase, and the rationale for the professionals' specific project designs related to those standards, are the best proactive mode of protection for design professionals. While the exact nature of "sufficiently addressing" an aspect of design is unclear, one forum for such discussions is town-hall type presentations at which actual hard-copy plans can be presented, disseminated and discussed in depth, thereby creating a record of what the municipality considered during the approval process. By planning to be immune in this fashion, design professionals may be able to know what is in their chocolate boxes before any potential litigation.

Levy is an associate at Marshall Dennehey Warner Coleman & Goggin in Cherry Hill, N.J. His practice is concentrated in the representation of design professionals and construction law.