# Playing Outside: N.J. Landowners' Liability Act Protects PI Defendants

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With the sounds of children playing in the Jersey Shore's crashing waves a few scant weeks behind us, many of us returned from summer vacations to a rising pile of paper work and new lawsuits to prosecute and defend. Fortunately, landowners who face lawsuits stemming from injuries sustained on undeveloped or rural land may find solace in the little known but applicable provisions of the New Jersey Landowners' Liability Act.

The Landowners' Liability Act provides that owners of certain premises, whether improved or maintained in a natural condition, or used as part of a commercial enterprise, owe no duty to keep the premises safe or give warning of any hazardous condition on the land to persons entering the property for the purpose of sports and recreational activities. N.J.S.A. §§2A:42A-2 to 10. The definition of "sports and recreational activities" as used in this act includes but is not limited to hunting, fishing, horseback riding, hiking, swimming, skating, skiing and "any other outdoor sports, game, and recreational activity including practice and instruction thereof." N.J.S.A. §2A:42A-2. The purpose of the act is to encourage landowners to allow members of the general public to have limited access to the land for some recreational use and induce owners to do so without fear of liability. N.J.S.A. §2A:42A-5.1.

In 1962, the New Jersey legislature enacted the forerunner of this act, which specifically limited the "liability of landowners of agricultural lands or woodlands for personal injuries to or the death of any person while hunting or fishing upon landowner's property." N.J.S.A. §2A:42A-1 (repealed 1968). This act was "intended specifically to apply to owners of rural or semi-rural lands, pointedly, agricultural and wooded tracts." *Harrison v. Middlesex Water Co.*, 80 N.J. 391 (1979).

However, in 1968, the legislature repealed the act and replaced it with an arguably broader version. Among the changes enacted was use of the word "premises" in place of the phrase "agricultural lands or woodlands." Even though the legislature did not define "premises" as used in this act, courts concluded and continue to maintain that this change in language was not intended to enlarge the protected class of landowners to suburban landowners. *Boileau v. DeCecco*, 125 N.J. Super. 263 (App.Div.1973), aff'd o.b., 65 N.J. 234 (1974). Rather, this change was "intended to better define, and perhaps somewhat broaden, the protected class originally specified."

In *Harrison v. Middlesex Water Co.*, the New Jersey Supreme Court found that the defendant landowner owed a duty to the decedent who was attempting to rescue two boys ice-skating on a man-made 94-acre lake at a reservoir. The court found that the 42-acre land surrounding the lake was heavily populated and bound by a high school and several athletic fields, as well as many private homes. Moreover, the lake was readily accessible to the public. 158 N.J. Super. 368 (App. Div.), certif. granted, 78 N.J. 402, reversed on other grounds, 80 N.J. 391 (1979). The court found that this type of land was distinct from rural or woodland areas where the activities of people could not be supervised or controlled and therefore, the land did not fall within the protections of the act.

Subsequently, in 1991, the legislature further amended the act to provide that this immunity would also apply with regard to activities on land, whether in a natural or improved state or whether

the land is the site of a commercial enterprise. N.J.S.A. §2A:42A-3. As part of the 1991 amendments, the legislature also required that the provisions of the act be "liberally construed." N.J.S.A. §2A:42A-5.1. The legislature's statement that the act be "liberally construed," however, did not announce a departure by the legislature from the narrow interpretation of "premises." *Toogood v. St. Andrews at Valley Brook Condo. Ass'n*, 313 N.J. Super. 418 (App. Div. 1998), citing N.J.S.A. §2A:42A-5.1.

Today, despite the fact that the act is to be liberally construed, the act still does not extend to suburban landowners. See *St. Andrews at Valley Brook Condo. Ass'n* (finding that a sandy road located within a residential condominium development does not qualify a landowner for immunity under the act); *Mancuso by Mancuso v. Klose*, 322 N.J. Super. 289 (App. Div. 1999) (act did not apply where minor was injured in neighbors' yard because immunity under the act did not extend to owners of land located in residential, semi-rural neighborhoods); *Benjamin v. Corcoran*, 268 N.J. Super. 517 (1993) (denying immunity to the New Jersey Fireman's Home for injuries suffered by child sledding on the grounds where the grounds were improved lands located in a suburban area).

However, courts today continue to construe the protections of the act liberally with regard to open tracts of land situated in sparsely populated areas. For example, in *Lareau v. Somerset County Park Com'n*, the plaintiff was crossing a footbridge on a closed golf course to get to a nearby complex when he fell on "wet carpet" and suffered personal injuries. 2013 WL 5538867 (App. Div., Oct. 9, 2013). The motion judge granted the defendant's motion for summary judgment based upon the act and the plaintiff appealed.

The Appellate Division held that the defendant landowner was entitled to immunity under the act because the golf course consisted of a large tract of open land comparable to an open tract of land in a sparsely populated area. The fact that the land had been improved so that it could be used as a golf course was irrelevant because the act provided immunity regardless of whether it was improved or used for commercial purposes. Although the golf course abutted a developed residential area, the court found that the golf course was not situated within a suburban, residential development. Moreover, the fact that the golf course was open to the public is exactly the type of situation intended to be protected under the act. Thus, the Appellate Division upheld summary judgment relieving the defendants of liability.

However, even when the type of land qualifies a landowner with immunity under the act, the act does not limit liability which would otherwise exist for willful or malicious failure to warn against a dangerous condition, especially when a landowner creates or knowingly permits a condition which foreseeably would lead to an accident. N.J.S.A. §2A:42A-4. In *Krevics v. Ayars*, the court found that the defendant's deliberate placement of a cable across a motorbike trail to keep others off the land foreseeably created a serious injury and the defendant therefore was not entitled to immunity under the act. 141 N.J. Super. 511 (Law Div. 1976). Compare to *Lauber v. Narburt*, where the plaintiff's jeep struck a steel cable and the court found that there was no evidence that the cables were placed deliberately to keep people off the land, thereby entitling the landowner to immunity under the act. 178 N.J. Super. 591 (App. Div. 1981). See also *Monk v. State*, 2011 WL 2349856 (App. Div. May 6, 2011) (finding that there was no willful or malicious failure to warn against a metal bracket on a concrete abutment at a state park).

Our courts also are faced with the question of whether an activity is considered a "sports or recreational activity" pursuant to the protections of the act. Courts interpreting the act have held that so long as a particular activity is sporting or recreational within the meaning of the act, the activity need not be specifically delineated within the act in order to confer immunity upon the landowner. For example, despite the fact that biking can be considered a common recreational activity, the act inexplicably does not include biking in its definition of "sport and recreational activities," even though "dirt bikes" and "all-terrain vehicles" are expressly included. N.J.S.A. §2A:42A-2. As recently as 2013, however, courts have found that biking may fall within the catch-all provision of

"any other outdoor sport, game and recreational activity" and that an activity need not be delineated within the act in order to confer immunity upon a landowner. *Cosh v. United States*, No. 12-308, 2013 U.S. Dist. LEXIS 157362 (D.N.J. Nov. 2013).

In *Cosh*, the plaintiff was riding his bicycle in the Delaware Water Gap National Recreational Area??when he ran over a pothole and lost control of his bicycle, sustaining personal injuries. The court in *Cosh* agreed with the landowner that cycling on a touring bike may fall under the catch-all provision—"any other outdoor sport, game and recreational activity"—of the act. However, the court found that there was a disputed fact as to whether the plaintiff was using his bike for recreational or transportation purposes based on the plaintiff's testimony that he was riding his bicycle as a means of meeting his friend. The court disagreed with the landowner's argument that the injured party's subjective intent was immaterial to the determination of whether he was engaged in a sports or recreational activity at the relevant time.

Interestingly, courts recently extended the act to people not necessarily engaged in a recreational purpose at the time of the incident so long as they enter qualified premises for a recreational activity or purpose.In *Vaxter v. Liberty State Park*, the plaintiff had completed her workout at a park and returned to the park to throw a water bottle away in the trash can when she stepped into a hole in the grassy area. The plaintiff argued that she was not engaged in recreational activity at the time of the incident because she had already completed her workout. The Appellate Division rejected her interpretation of the act and held that she indisputably "entered" and was on the park premises for a recreational purpose or activity. No. L-5623-08, 2010 WL 4237242, at *1 (N.J. Super. Ct. A.D. Oct. 28, 2010). Thus, the court reasoned that the act's protective immunity neither restricted nor limited injuries incurred??during??recreation, but rather extended to persons who entered qualified premises for a recreational activity or purpose.

As New Jersey is becoming more densely populated, the public is looking to undeveloped land as recreational playgrounds for activities such as swimming, fishing, jogging, hunting and more. Landowners with concerns of personal injury liability should be encouraged by the protections afforded by the New Jersey Landowners' Liability Act and its progeny of case law that can have a big impact on the defendant's position in a personal injury action.

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