

PARK FIREWORKS DISPLAY INJURES BOY WEEKS LATER, OFF SITE

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In the case of *Smith v. Fireworks by Girone, Inc.*, 180 N.J. 199; 850 A.2d 456 (2004), a ten-year-old boy severely injured his left hand after igniting fireworks he had found in a municipal park. Plaintiff Karen Smith, in her capacity as the guardian of Brenden Wasniewski (collectively plaintiff), filed a lawsuit against the Township of Deptford, Deptford Parks and Recreation, Deptford Fun Day Committee (collectively Deptford), and Fireworks by Girone, Inc. (Girone). Plaintiff alleged that Brenden was injured as a result of a dangerous condition on public property for which Deptford and Girone were both responsible. To establish governmental liability for negligence, the state tort claims act (TCA) required the public entity's property to be in a "dangerous condition at the time of the injury." N.J.S.A. 59:4-2 (Plaintiff settled with Girone prior to trial.)

FACTS OF THE CASE

Deptford owns and maintains Fasola Park, a recreational area containing basketball courts, baseball fields, a swimming pool, walking trail, and picnic area. The park is the setting for "Deptford Day," an annual festival held in May. To celebrate Deptford's tricentennial, the 1995 Deptford Day was scheduled to culminate in the largest fireworks display ever held in connection with that event.

In anticipation of Deptford Day, Deptford entered into a contract with Girone to conduct the fireworks display. Under the terms of the contract, Girone guaranteed a "Thorough Check Of The Area For Any Misfired Shells" on the night of the show. Deptford, in turn, assumed responsibility for the post-display clean-up: "CUSTOMER will also be RESPONSIBLE for all POST DISPLAY CLEAN-UP with respect to removal of debris and POLICING of area AT FIRST LIGHT following the exhibition." Both the Fire Marshal and the President of Girone testified in depositions that if unspent shells were found, Girone was to be notified immediately to come and reclaim them; municipal officials were not to touch those items.

Following the display on the evening of May 20, Girone employees and Deptford's Fire Marshal, using high-powered lamps provided by the Fire Department, conducted a post-display search. That search resulted in the recovery of at least six potentially live fireworks, all of which were turned over to Girone. The following morning, the Fire Marshal returned to the park to search for additional fireworks in accordance with the contract. After two hours, although he found debris, he found no more unexploded charges.

A week after the display, Brenden Wasniewski picked up fireworks and fireworks debris, both on and near the launch site at Fasola Park. He disposed of all but the largest fireworks, ultimately hiding it at his home. On July 3, Brenden and a friend took the fireworks to a nearby wooded area, treated it with gasoline and repeatedly cut away the cardboard encasing the actual charge. Eventually the fireworks exploded in Brenden's left hand, causing severe injuries. Subsequently, a private investigator hired by plaintiff found additional unspent fireworks in Fasola Park.

TRIAL COURT

Deptford claimed there was no basis for liability under the state tort claims act because the explosion occurred on private property more than a month after the boy had removed the fireworks from the park. The trial court rejected this argument. In the opinion of the trial court, "the combination of the firework and the park constituted a consolidated 'dangerous condition' that satisfied the TCA." In reaching this conclusion, the trial court held the dangerous condition of the park was "capable of creating a 'continuing injury' that began when Brenden picked up the firework and ended when it exploded weeks later." As a result, the case was allowed to proceed to trial after which a jury found as follows:

- (1) after the fireworks display, the unexploded firework created a dangerous condition at Fasola Park; (2) the dangerous condition was a proximate cause of Brenden's accident; (3) the dangerous condition created a foreseeable risk of injury; (4) Deptford's action or inaction was palpably unreasonable; (5) Girone was negligent; (6) Girone's negligence was a proximate cause of Brenden's injuries; (7) Brenden was negligent; and (8) his negligence was a proximate cause of his own injuries.

Based on these findings, the jury awarded a verdict totaling \$1,600,000 in damages which apportioned liability to Deptford at 56% (i.e., \$896,000), Girone at 33% (i.e., \$528,000), and Brenden at 11% (i.e., \$176,000). Deptford appealed.

ON APPEAL

In reversing the judgment of the trial court, a majority on the appeals court found "the firework was neither owned nor controlled by the public entity." Moreover, in the opinion of the majority, "the infant plaintiff's removal of it from the park prevented the conclusion that the public property (the park) remained in a 'dangerous condition at the time of the injury'." In a dissenting opinion, one of the appellate judges maintained that "plaintiff's injury was an inevitable and foreseeable result of harmful 'contact' or 'exposure' to a dangerous condition on public property" which "fell squarely within the contemplation of the TCA":

In my view, it is counterintuitive to conclude that by picking up the firework and taking it home with him (thereby curing the dangers to others), the very danger that the entity's negligence created, Brenden has relieved the town of all responsibility for its own palpably unreasonable failure to clean up after the fireworks display.

The temporal separation between Brenden's picking up the firework and his actually setting it off is what the majority finds fatal to his recovery. To the contrary, I view that separation in time as part of the logical, predictable chain of events prompted by the dangerous condition.

Another way to express my view of the first required element of the cause of action for the injury resulting from a dangerous condition of public property is to consider the word "injury" in this section more broadly than immediate physical injury and to include harmful "contact" or "exposure" that sets into motion a predictable, if not inevitable, resulting injury.

The New Jersey state supreme court granted plaintiff's appeal. On appeal, plaintiff contended that "the firework itself constituted the dangerous condition of public property." Furthermore, plaintiff asserted that Deptford controlled "the errant firework by contractually assuming responsibility for the post-display cleanup," thus satisfying the "dangerous condition at the time of the injury" requirement of the state tort claims act, N.J.S.A. 59:4-2. In response, Deptford maintained that "the fireworks were not public property because its contract with Girone was for services only. Moreover, Deptford claimed "the assumption of some cleanup duties was insufficient to transfer control" and responsibility for any unexploded fireworks. Further, Deptford asserted that governmental liability in this instance was inconsistent with the legislative intent of the TCA and would ultimately "chill a municipality's willingness to undertake recreational activities for its citizens."

As cited by the state supreme court, in pertinent part, the expressed language of the state tort claims act limited governmental liability to injuries caused by a "dangerous condition of public property" as follows:

A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:

- a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
- b. a public entity had actual or constructive notice of the dangerous condition ... a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or failure to take such action was not palpably unreasonable. [N.J.S.A. 59:4-2.]

DANGEROUS CONDITION

As described by the state supreme court, the state tort claims act defined "Dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." Further, the court noted that the statutory definition of "public property" in the state tort claims act did not include personal property located on the property of the public entity that was "not owned or controlled by the public entity." According to the state supreme court, these provisions of the state tort claims act were consistent with "common law principles of landowner liability."

On appeal, plaintiff had contended that "the firework was owned or controlled by Deptford, and that it constituted the public property that was in a dangerous condition at the time of Brenden's injury." The state supreme court disagreed, adopting the appeals court's

determination that “Deptford did not own the firework” and “Deptford's contract with Girone was for services and not for goods.” According to the state supreme court, “if all had gone as planned, all of the fireworks would have been destroyed in the show.” In so doing, however, the supreme court acknowledged that found the contract between Deptford and Girone recognized the possibility that “all of the fireworks might not be disposed of during the display”:

[T]he contract specifically provided that Girone would search for and retrieve “misfired shells” on the night of the show. Although Deptford undertook first-light cleanup of “debris,” along with a “policing” function, the testimony of the Fire Marshal and the president of Girone established that if any unspent shells were found at Fasola Park, Girone was to be called to the scene immediately to retrieve them. Under no circumstances were the municipal officials even to “pick up” the unexploded fireworks.

As a result, the state supreme court concluded that “Deptford neither owned nor controlled the firework.” In the opinion of the supreme court, this fact precluded “the firework itself from being characterized as the dangerous public property.” On the other hand, the supreme court acknowledged the possibility that “the dangerous condition of public property was the combination of the unexploded firework and the public park.” The specific issue before the state supreme court was, therefore, whether the public property was in “a dangerous condition at the time of the injury” despite the fact that “Brenden was injured on private property after removing the firework from the park.”

FIREWORKS LIABILITY

In its research of prior fireworks liability cases, the state supreme court found that “private landowners holding fireworks displays were not immune from damages to children injured by unexploded shells after the exhibition.” Moreover, the supreme court found that “public entities sponsoring such fireworks displays have been held to the same standard as private landowners.” According to the supreme court, “[i]n the majority of the cases in our courts as well as the courts of other States involving explosives, the injured child has taken the explosive either to his home or to some other place than where he found it before being injured.” In general, the state supreme court found further that “our courts specifically have recognized that injuries occurring off dangerous public property are neither novel nor insulated from liability”:

[A] dangerous condition on public property could underpin liability for injuries occurring off the site where the dangerous condition of public property increased the risk that persons accepting the invitation... would encounter the dangers...

[T]here is nothing novel or unusual about holding a public entity liable for foreseeable injury caused by a dangerous condition on public property even if the injury occurs off the public premises.

In this particular instance, however, the state supreme court acknowledged that the expressed language of the state tort claims act required the public property to be in a ‘dangerous condition at the time of the injury’.” In the opinion of the court, evidence that “at least one more unexploded firework was found at Fasola Park” after the accident” indicated “the park was still in a dangerous condition when Brenden was injured several weeks after the fireworks display.”

The state supreme court, therefore, had to determine whether the state legislature intended to limit governmental liability to a situation “where a child comes upon a live firework in a public park and is injured when it explodes on the spot.” As characterized by the court, interpreting the legislative intent of the state tort claims act in this manner would provide immunity to a public entity “if the same child finds the live firework in the park and carries it across the street to private property where it explodes and injures him.”

LEGISLATIVE INTENT

In the opinion of the state supreme court, it would not be reasonable to narrowly construe the language and legislative intent of the state tort claims act to limit governmental liability “for injuries that occur only at the point in time and at the location of the dangerous condition.” On the contrary, the supreme court found that courts have allowed “recovery for injuries occurring on private property after the passage of time, so long as the injury was foreseeable and was proximately caused by the dangerous condition on public property.” As a result, the state supreme court held that “the ultimate injury sustained by a plaintiff need not occur at the time and location of the dangerous condition on public property for public entity liability to attach” under the state tort claims act.

[A narrow interpretation of the state tort claims act would result] in the conclusion that a child who finds a left-over firework in a public park and is injured on the spot has recourse against a careless public entity, but that a child who picks up the firework and takes it across the street to his home where he is killed or maimed, a likely more common scenario, is remediless. Not only is that unreasonable, it flies in the face of the overall purpose of N.J.S.A. 59:4-2, which is to hold a public entity liable for the dangerous condition of its property...

Most "dangerous condition" cases involve injuries occurring at the point of danger. People fall on ice and tumble over loose guardrails. Nevertheless, as this matter demonstrates, occasionally a dangerous condition on public property leads ineluctably and foreseeably to an injury on private property at a point at which the public property may no longer be dangerous.

We hold, therefore, that when a public entity creates or suffers a dangerous condition on public property that leads ineluctably and foreseeably to injury, it is not insulated from liability under N.J.S.A. 59:4-2, even if the ultimate injury takes place off the public site at a point at which the public premises is no longer dangerous.

Accordingly, the state supreme court reversed the judgment of the appeals court, effectively reinstating the jury verdict in favor of plaintiff.