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February 1, 2017

Via Overnight Delivery
Honorable Julio L. Mendez, A.J.S.C.
Atlantic County Superior Court
1201 Bacharach Blvd.
Atlantic City, New Jersey 08401

Re: Sandra Smith v. City of North Wildwood and State Of New Jersey
Matter No.: CMP-L-00415-16

Dear Judge Mendez,

Please accept this letter brief in reply to Plaintiffs' opposition to the State's motion to dismiss in lieu of a more formal brief in the above-referenced matter.

First, DEP reiterates that Plaintiffs lacks standing to claim a public nuisance since such claims must also include the right to recover damages. In this instant, Plaintiffs claim liability in a natural and unimproved area, an area for which the Legislature has deemed public entities immune. Second, to the extent Plaintiffs do not seek damages, Plaintiffs seek an order to close the beach area, an order of mandamus, against the DEP for a wholly discretionary agency determination which involves an array of balancing factors. Finally, this action

against DEP may also be dismissed without prejudice because Plaintiffs have never petitioned the agency or the City for a full or partial closure.

At the outset, we note that the State's motion, which Plaintiffs oppose, is a motion to dismiss, governed by R. 4:6-2. Plaintiffs' apparent issue that the State did not utilize a Statement of Material Facts (Pb1) confuses the motion for summary judgment standard with that of a motion to dismiss. A motion to dismiss is considered on the pleadings and only if the motion is based on a failure to state a claim AND the opponent relies upon materials beyond the scope of the pleadings does the motion convert to a motion for summary judgment. R. 4:6-2, American Humanist Association v. Matawan-Aberdeen Regional School District, 440 N.J. Super. 582, 588 (App. Div. 2015).

Here, the State only included the CAFRA permit for Point III of its brief to support its motion to dismiss for failure to exhaust administrative remedies pursuant to R. 4:6-2(a). Thus, the State's motion should properly be considered under the motion to dismiss standard. In re Reglan Litig., 226 N.J. 315, 324 FN 5 (2010) (explaining that under a motion to dismiss, "the court reviews the complaint to determine whether the allegations suggest a cause of action, whereas in a R. 4:46-2(c) motion, a court reviews the evidence of record 'in the light most

favorable to the non-moving party' to determine whether the moving party is entitled to judgment as a matter of law.")(citations omitted).

Plaintiffs' arguments misunderstand the State's standing arguments and the application of the Tort Claims Act ("TCA") immunities, which are intertwined in this case. Plaintiffs argue that Mr. Smith's drowning gave rise to a private interest which coincides with the public interest to prevent future drownings and also argue that the TCA does not bar injunctive relief. Pb 10-21 and Pb 14-15. However, both arguments fundamentally misunderstand how the TCA interacts with private actions to abate a public nuisance.

The most relevant provision of the Restatement (Second) of Torts regarding the question of who may pursue a public nuisance action explains that "(2) In order to maintain a proceeding to enjoin to abate a public nuisance, one must (a) have *the right to recover damages*, as indicated in Subsection (1)…" or have authority to pursue the matter either on behalf of a public entity or as a member of a class. Restatement (Second) Torts, §821C(2) (1979) (emphasis added). Our State Supreme Court clarifies public nuisances, explaining "[u]nder the Restatement (Second)'s formulation, if a private plaintiff has a right to sue for damages because of a harm different in kind, *then* that

party may also pursue an action to abate the nuisance as it affects all members of the public." In re Lead Litigation, 191 N.J. 405, 428 (2007) (emphasis added). Thus, in order for Plaintiffs, who are indisputably private citizens acting on their own behalf, to have standing to enjoin the alleged public nuisance here, Plaintiffs must also have the right to recover damages as a result of a special injury. In other words, the elements of standing in this case - not just the remedy sought - trigger the TCA provisions.

Turning to the TCA, it is well-settled that a plaintiff cannot proceed to demonstrate a public entity's liability until after it is determined whether the TCA's specific immunities apply. Manna v. State, 129 N.J. 341, 348 (1992). The relevant inquiry is "whether an immunity applies and if not, should liability attach." Troth v. State, 117 N.J. 258, 265-66 (1989). Plaintiffs' argument that the State and City somehow were the proximate cause of Mr. Smith's injury by keeping the beach open attempts to elevate the dangerous condition liability above any applicable immunities. (Pb 16-17). Even accepting solely for argument's sake that Plaintiffs' stance is accurate, in cases where both liability and immunity are present, "the latter trumps the former." Tice v. Cramer, 133 N.J. 347, 356 (1993).

Here, as explained in the State's moving papers, two

immunities under the TCA apply: the general unimproved public property immunity (N.J.S.A. 59:4-8) and the unimproved and unoccupied portions of certain lands immunity (N.J.S.A. 59:4-9). Under both provisions, so long as the geographic area where the accident occurred is publicly owned and is unimproved, the public entity is immune. Id.; see also Troth v. State, supra, 117 N.J. at 269-270 (explaining that an area is deemed improved when there "has been substantial physical modification of the property from its natural state and when the physical change creates hazards that did not previously exist…").

It is undisputed that Mr. Smith's accident occurred in an unimproved beach and tidal area along the Hereford Inlet in North Wildwood which is owned by public entities. Although Plaintiffs attempt to argue that the State posits the area is developed due to the City's CAFRA beach maintenance permit, Plaintiffs misunderstand the State's position on the permit. (Pb 16-17). A CAFRA permit is necessary if an applicant wishes to "develop" any part or all of an area of land within CAFRA's jurisdictional boundaries. N.J.S.A. 13:19-3 and 13:19-4. However, simply because a property owner successfully obtains a CAFRA permit for a given property does not mean that the permit authorizes actual development, disturbances or improvements throughout the entirety of that property. Such is the case

here, where the City's beach maintenance CAFRA permit makes clear that the area where Mr. Smith's accident occurred is to remain undeveloped, as it constitutes either threatened and endangered species habitat or lies too far removed from any lifeguard chairs. Thus, although the City has a permit that covers the disputed area, the area remains undeveloped and in its natural condition.[1]

Since the accident occurred on an area of land that is unimproved - whether it is defined as being part of the beach or part of the tidelands - and that land is publicly owned, the State is immune from any damages stemming from injuries on that land. Further, since the Plaintiffs hold no right to collect damages against the State for Mr. Smith's injuries, Plaintiffs also lack standing as private citizens to seek an injunction to abate the alleged public nuisance.

Plaintiffs' other arguments are similarly flawed. For instance, Plaintiffs argue that the DEP has the authority to

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[1] Furthermore, even if Plaintiffs' position that the geographic scope of the CAFRA permit coincides with the "development" of the area, there is nothing in the pleadings or the record which shows that the "development" permissible under the permit caused the alleged hazard here. In the case of a partially improved publicly owned area, the public entity is not liable unless there is a "causal connection" between the improvement and the injury. Troth v State, 117 N.J., supra at 270. Plaintiffs have neither alleged in their pleadings nor argued in their opposition that any beach maintenance the City may have undertaken directly or proximately caused Mr. Smith's accident.

close a municipally-owned beach, relying on N.J.S.A. 26:1A-9 and N.J.A.C. 8:26-1.2. Pb 17-18. However, neither provision stands for that proposition, especially not in such a clear manner as to override Avalon v. Department of Environmental Protection, 403 N.J. Super. 590 (App. Div. 2008).

The statutory provision cited by Plaintiffs simply gives the State Sanitary Code the force of law and permits local entities to enforce the Code. N.J.S.A. 26:1A-9. The regulatory provision allows the Department of Health and Senior Services and local entities to enforce regulations regarding public recreational bathing places in New Jersey. N.J.A.C. 8:26-1.2. Neither provision is related to the DEP and the regulatory provision is specifically in connection with public "bathing beaches" which are further defined as "the designated area of a natural or artificially constructed...ocean or other body of fresh or salt water, which *is used for bathing and swimming purposes...*" N.J.A.C. 8:26-1.3.

As the parties agree that swimming is impermissible along the Hereford Inlet in North Wildwood, these regulations are inapplicable to this beach. However, the Avalon decision is directly applicable here, as the Appellate Division there held that coastal municipalities hold "exclusive control over municipally-owned beaches." Avalon v. DEP, 403 N.J. Super. at

599. Since Plaintiffs' remedy seeks to close a municipally-owned beach, Avalon instructs that an injunction only against the State to close this beach would be ineffective.

Finally, Plaintiffs argue that the failure to exhaust doctrine should be set aside when, in the interest of justice, a matter should be speedily determined. Pb 13-14. However, the timeframe of this case belies this argument. Mr. Smith's unfortunate accident occurred in July, 2012. Plaintiffs filed the wrongful death suit in 2014. This action was filed in October, 2016. Over four years have elapsed when Plaintiffs could have asked the City or the State to close the beach. Thus, Plaintiffs should not be able to now argue that a speedy determination of this case precludes exhaustion of administrative remedies. Further, though Plaintiffs argue that the City would not close the beach, part of the policy behind the exhaustion doctrine is to permit the public entity and the complainant to discuss the complainant's concerns in an attempt to narrow the scope of issues and perhaps resolve disputes without the need for judicial review. As explained in the State's moving papers, the fact that Plaintiffs have not approached either the City or the State about the possibility of closing the beach means that the scope of Plaintiffs' request before this court is vague. Db 22-23.

Ultimately, since a) the State is immune under the TCA from any accidents on unimproved land, b) Plaintiffs, as private parties, lack standing to pursue an injunction under a public nuisance theory, c) an injunction here would constitute an impermissible mandamus[2], and d) Plaintiffs have failed to exhaust their administrative remedies, the State's motion to dismiss Plaintiffs' complaint should be granted.

Respectfully submitted,

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ATTORNEY GENERAL OF NEW JERSEY

By: _____
Kristina Miles
Deputy Attorney General

Cc: Paul D'Amato, Counsel for Plaintiffs (via overnight mail)
Joseph Grassi, Counsel for Plaintiffs (via overnight mail)
Michael Barker, Counsel for City of North Wildwood (via overnight mail)

[2] Of note, Plaintiffs do not dispute in their opposition brief the State's contention that an injunction here amounts to an inappropriate mandamus of a State discretionary action. Db 17-19.