TORTS—NEW JERSEY TORT CLAIMS ACT—UNIMPROVED PROPERTY IMMUNITY DOES NOT RELIEVE LIABILITY FROM NEGLIGENTLY SUPERVISING AN OCEAN BEACH, EVEN IF SUCH SUPERVISION IS VOLUNTARY—*Fleuhr v. City of Cape May*, 697 A.2d 182 (N.J. Super. Ct. App. Div. 1997).

I. INTRODUCTION

Hurricane Emily was predicted to hit the New Jersey shore like a bullet.[1] Fortunately for all of the Labor Day weekend tourists,[2] the storm was swept out to sea[3] leaving behind only rolling breakers and swift riptides.[4] New Jersey residents considered themselves lucky to have dodged the bullet. But did they?

Left in Hurricane Emily's aftermath was not only above normal tides and minimal flooding,[5] but also a public outcry regarding the status of unimproved property immunity for public entities under the New Jersey Tort Claims Act.[6] The final result: public entities are

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1. *See Its Fury Spent in N.C., Emily Blows Out to Sea*, THE RECORD (Northern New Jersey), Sept. 2, 1993, at A26.

2. The summer population of Cape May county is approximately 400,000 people. *See* Sue Epstein and David Schwab, *Jersey Charts Hurricane's Course as Shore Starts Taking Precautions*, THE STAR LEDGER (New Jersey), Aug. 31, 1993, at A03. During the off season months, the population drops to 95,000 people. *See id.* at A03.

3. In the eye of Hurricane Emily, winds surged to 115 miles per hour. *See* Estes Thompson, *Battered Storm Appears Headed Out to Sea*, THE RECORD (Northern New Jersey), Sept. 1, 1993, at A1. Luckily for northern New Jersey residents, Hurricane Emily stayed offshore. *See id.* Emily's eye extended outward nearly 35 miles, with its strongest winds to the east away from the shore. *See id.*

4. *See* Sari Harrar, *Jersey Shore Falling Under Storm's Spell Merchants and Residents Taking Precautions*, THE RECORD (Northern New Jersey), Sept. 1, 1993, at A8.

5. *See Florio: N.J. was Ready if Hurricane Hit Shore*, THE RECORD (Northern New Jersey), Sept. 2, 1993, at A9.

6. A representative example of the public outcry surrounding the *Fleuhr* decision is the following editorial letter printed in the Star-Ledger:

> Silly suit . . . I say throw the suit out of court. Any person with half a brain knows waves and undertow are tricky. You do not go into the ocean unless you are alert and in good physical condition. Too many lawyers are talking people into suing. Case closed. Motion to dismiss.

Reader forum, *Perspective*, THE STAR LEDGER (New Jersey), Aug. 24, 1997, at 002. *See also* David Chabak, *Appeals Court Went Too Far in Injured Swimmer's Case*, NEW JERSEY LAW JOURNAL, Aug. 25, 1997, at Voice of the Bar p.23; *Accord* Reader forum, *Perspective*, THE STAR LEDGER

still immune, as long as they do not volunteer to supervise unimproved property and then do so negligently.[7] This would seem to be a fair result.

II. *FLEUHR V. CITY OF CAPE MAY*, 697 A.2d 182 (N.J. Super. Ct. App. Div. 1997)

A. Facts and Procedural History

On August 31, 1993, plaintiff William Fleuhr entered the Atlantic Ocean at the First Avenue Beach in Cape May, New Jersey.[8] This beach was owned, operated, and maintained by the defendant City of Cape May.[9] Lifeguards were on duty at the time the plaintiff entered the ocean.[10]

Plaintiff argued the ocean waters created an unreasonable risk of harm to him,[11] claiming the waters were turbulent due to Hurricane Emily.[12] Plaintiff also argued Cape May had a duty to create a safe place for him to swim and that they undertook the responsibility of supervising the beach and adjacent ocean water by placing lifeguards on the beach in question.[13] In addition, the plaintiff argued the City of Cape May breached its duty to provide a safe place for him to swim by allowing him and others to enter the ocean at the First Avenue Beach that day.[14] Finally, plaintiff argued that the defendant

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(New Jersey), Aug. 17, 1997, at 005.

7. See Fleuhr v. City of Cape May, 697 A.2d 182, 186 (N.J. Super. Ct. App. Div. 1997).

8. *See id.* at 183.

9. *See id.*

10. *See id.*

11. *See Fleuhr*, 697 A.2d at 183.

12. *See id.* In New Jersey, Hurricane Emily resulted in waves ranging in size from three to ten feet. *See Emily Hangs a Right, Missing New Jersey*, THE RECORD (Northern New Jersey), Sept. 2, 1993, at A8. These waves caused lifeguards to keep a close eye on swimmers. *See id.* Swimming was banned at some New Jersey beaches, including but not limited to, Brigantine and Asbury Park. *See id.* At other beaches, lifeguards permitted the beaches to remain open, but allowed swimming in waters only waist high. *See id.* Lifeguards along the coast of New Jersey rescued swimmers from the rough surf and riptides caused by the offshore storm. *See* Dan Weissman and David Schwab, *Shore Towns Girding For Brush With Storm*, THE STAR LEDGER (New Jersey), Sept. 1, 1993, at A03. A coinciding full moon was an additional problem that aggravated the rough seas brought on by Hurricane Emily. *See* Sue Epstein and David Schwab, *Jersey Charts Hurricane's Course as Shore Starts Taking Precautions*, THE STAR LEDGER (New Jersey), Aug. 31, 1993, at A03.

13. *See Fleuhr*, 697 A.2d at 183.

14. *See id.* Plaintiff argued the defendant owed him a duty to provide a safe place for plaintiff to swim and that the defendant had voluntarily undertaken to supervise the waters

breached the duty owed to him by failing to warn him of the dangerous conditions which were present.[15] Plaintiff contended that as a direct result of the defendant's failure to warn of the dangerous conditions present[16] and the allegedly negligent supervision by lifeguards stationed on the First Avenue Beach,[17] he was knocked over by a strong ocean wave and caused to sustain several fractures of his cervical vertebrae.[18]

Plaintiff William Fleuhr broke his neck while body surfing in the Atlantic Ocean.[19] He sued the defendant City of Cape May in the Law Division of the Superior Court in the County of Cape May, New Jersey.[20] He sued the City of Cape May for its failure to (1) supervise the activities of bathers, (2) warn bathers of the dangerous conditions present within the ocean on the day in question, and (3) protect him from the dangerous ocean conditions.[21] The City of Cape May denied these allegations and raised the defense of immunity from suit pursuant to the New Jersey Tort Claims Act.[22] The New Jersey Tort Claims Act affords immunity to unimproved property.[23] Relying on this immunity, the City of Cape May moved for summary judgment.[24] The plaintiff appealed from the dismissal of his complaint based on unimproved property immunity.[25] The trial court granted summary judgment to the City of Cape May.[26] In

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off of the First Avenue Beach by positioning lifeguards there. *See id.* Cape May officials decided against closing the beach. From wire reports, *From Jersey to Virginia, Tourists Are Urged to Leave*, THE HARRISBURG PATRIOT, Sept. 1, 1993, at A1. According to a lifeguard, 100 swimmers had been rescued since Friday, August 27, 1993, two of whom were hospitalized with back injuries caused by rough waves. *See id.*

15. *See Fleuhr*, 697 A.2d at 183. Plaintiff argued that there were dangerous conditions present at the First Avenue Beach due to the fact that turbulent surf was created by Hurricane Emily. *See id.*

16. *See supra* note 15 and accompanying text.

17. Plaintiff predicated his cause of action for negligent performance of protective services on the lifeguards' failure to warn swimmers of the danger posed by the ocean water on the day in question, failure to supervise the activities of swimmers, and failure to protect plaintiff from dangerous ocean conditions. *See Fleuhr*, 697 A.2d at 183.

18. *See id.*

19. *See id.*

20. *See id.* at 182.

21. *See Fleuhr*, 697 A.2d at 182.

22. *See id.* at 183.

23. *See id.*

24. *See id.*

25. *See id.*

26. *See* Ralph Siegel, *Injured Swimmer Can Sue Cape May*, THE RECORD (Northern New Jersey), July 31, 1997, at A3. Summary judgment is appropriate in the absence of a genuine dispute over the existence of an element of the cause of action. *See* Brill v. Guardian Life Ins.

doing so, Judge Visalli indicated the New Jersey Tort Claims Act[27] precluded plaintiff's action because his injury[28] was caused exclusively by the action of the ocean.[29] The plaintiff appealed from the dismissal of his complaint based on unimproved property immunity.[30]

B. Prior Law

1. Tort Claims Act

There are three provisions of the Tort Claims Act which affect the case at hand. These three provisions of the New Jersey Statutes Annotated are section 59:2-7, section 59:3-11, and section 59:4-8. Each provision is described in detail below.

a. N.J. STAT. ANN. § 59:2-7

This section of the Tort Claims Act provides "a public entity is not liable for failure to provide supervision of public recreational facilities, provided however, that nothing in this section shall exonerate a public entity from liability for failure to protect against a dangerous condition."[31]

The Attorney General's Task Force Comment to this section observes that public policy has determined public entities must remain free to conclude that supervision of public recreational facilities will not be provided.[32] This decision must be free from

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of America, 666 A.2d 146 (N.J. 1995). The movant is entitled to judgment if, after consideration of all the evidence presented on the record by both parties, the adverse party has not demonstrated the existence of a dispute whose resolution will ultimately entitle him to judgment. *See id.*

27. N.J. STAT. ANN. § 59:4-8 (West 1972) provides, "Neither a public entity nor a public employee is liable for an injury caused by a condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach." *Id.*

28. *See* Ralph Siegel, *Injured Swimmer Can Sue Cape May*, THE RECORD (Northern New Jersey), July 31, 1997, at A3. William Fleuhr was fifty years old at the time of the accident. *See id.* He sustained severe personal injuries including several fractured bones in his neck. *See id.* He continues to suffer from neck pain, in part because he was forced to have several vertebrae fused together in his neck due to the fracture. *See id.*

29. *See Fleuhr*, 697 A.2d at 183.

30. *See id.*

31. N.J. STAT. ANN. § 59:2-7 (West 1972).

32. *See Fleuhr*, 697 A.2d at 184.

threat of liability.[33]

The legislative concern of this statute[34] is that public entities should not be held liable for failing to provide supervision to public recreational facilities.[35]

b. N.J. STAT. ANN. § 59:3-11

Section 59:3-11[36] provides "a public employee is not liable for failure to provide supervision of public recreational facilities."[37] The section goes on, however, to provide that a public employee will not be exonerated for negligently supervising a public recreational facility even though such supervision was not required.[38]

The Attorney General's Task Force Comment stressed once a public employee[39] (and hence a public entity[40]) undertakes to supervise a facility,[41] the employee will not be exonerated for acts of negligence.[42]

The legislative concern of this statute is that public employees should not be held liable for failing to provide supervision of recreational areas open to the public.[43] However, once supervision is voluntarily undertaken, it must not be performed in a negligent[44] manner.[45]

c. N.J. STAT. ANN. § 59:4-8

This section of the Tort Claims Act provides that "neither a public entity nor a public employee is liable for an injury caused by a

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33. *See id.*

34. The concern of the legislature was discussed by the court in Kleinke v. City of Ocean City, 394 A.2d 1257 (N.J. Super. Ct. Law Div. 1978).

35. *See Kleinke*, 394 A.2d at 1261.

36. This section provides the employee counterpart of N.J. Stat. Ann. § 59:2-7.

37. N.J. STAT. ANN. § 59:3-11 (West 1972).

38. *See id.*

39. *See* N.J. STAT. ANN. § 59:3-11 (West 1972).

40. *See* N.J. STAT. ANN. § 59:2-7 (West 1972).

41. Note, such supervision is not required under § 59:3-11 or § 59:2-7. *See* N.J. STAT. ANN. § 59:3-11 (West 1972) AND N.J. STAT. ANN. § 59:2-7 (West 1972).

42. *See Fleuhr*, 697 A.2d at 184.

43. The concern of the legislature was discussed by the court in *Kleinke.*

44. Negligence is defined as "the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do." BLACK'S LAW DICTIONARY 930 (abr. 5th ed. 1979).

45. *See Fleuhr*, 697 A.2d at 184.

condition of any unimproved public property, including, but not limited to any natural condition, lake, stream, bay, river, or beach."[46]

The Attorney General's Task Force Comment to this section indicates that policy dictates the public must be permitted to use public property in its natural condition.[47] According to the comment, the burdens and expenses of making such property safe, as well as the expense of defending claims based on injuries sustained from such dangerous conditions, would most likely cause many public entities to close such areas to the public.[48] As the comment noted, it is not unreasonable to expect persons who voluntarily use unimproved property to assume the risks involved therein.[49] These risks should be assumed by the voluntary user as part of the price paid for receiving such benefits.[50]

The legislative concern of this statute[51] indicates public entities should not be overburdened with having to make safe natural conditions on unimproved land.[52]

2. Prior Litigation of the Tort Claims Act

This was a case of first impression for the Appellate Division regarding section 59:4-8 of the New Jersey Tort Claims Act and the applicability of unimproved property immunity to a guarded beach.[53] However, other cases involving municipal liability from negligent supervision[54] have been disposed of through the application of other sections of the Tort Claims Act.[55]

In *Stempkowski v. Borough of Manasquan*,[56] the plaintiff was injured

46. N.J. STAT. ANN. § 59:4-8 (West 1972).

47. *See Fleuhr*, 697 A.2d at 184.

48. *See id.*

49. *See id.* The public who voluntarily uses unimproved property knowingly assumes the risks that such property may hold.

50. *See id.*

51. The concern of the legislature was discussed by the court in *Kleinke.*

52. *See id.*

53. *See Fleuhr*, 697 A.2d at 184. The beach in question was guarded by on-duty lifeguards at the time plaintiff Fleuhr entered the water. *See id.* at 182.

54. *See, e.g.*, Stempkowski v. Borough of Manasquan, 506 A.2d 5 (N.J. Super. Ct. App. Div. 1986); Sharra v. City of Atlantic City, 489 A.2d 1252 (N.J. Super. Ct. App. Div. 1985); *Kleinke*, 394 A.2d 1257, *overruled in part by*, 489 A.2d 1252; Kowalsky v. Long Beach Township, 72 F.3d 385 (3d Cir. 1995).

55. For example, *Kowalsky* was resolved on the basis of N.J. Stat. Ann. § 59:3-11. *See Fleuhr*, 697 A.2d at 184. Other sections of the New Jersey Tort Claims Act, other than § 59:4-8, have resolved any prior cases involving similar issues. *See id.*

56. 506 A.2d 5 (N.J. Super. Ct. App. Div. 1986).

while attempting to rescue her children who were swimming off the beach in Manasquan, New Jersey.[57] In her complaint, plaintiff alleged the Borough of Manasquan was negligent for failing to supervise the beach.[58] Plaintiff predicated her cause of action against the Borough of Manasquan on section 59:4-2, which pertains to the liability of municipalities and municipal employees.[59]

Section 59:4-2 holds a public entity "liable for injury caused by a condition of its property."[60] The plaintiff must establish, "(1) the property constituted a dangerous condition at the time, (2) the injury was proximately caused by the dangerous condition, and (3) the dangerous condition was reasonably foreseeable."[61] Plaintiff must also show either (1) a negligent act or omission on the part of a public employee in the scope of his employment which created the dangerous condition, or (2) that the public entity had actual or constructive notice of the dangerous condition with sufficient time before the injury occurred within which the condition could have been protected against.[62]

The plaintiff in *Stempkowski* alleged the municipality's failure to provide lifeguards at the beach created a dangerous condition.[63] The court found the defendant municipality and its employees were protected under section 59:3-11 of the Tort Claims Act.[64] This section dictates that a public entity is not liable for failing to provide supervision of a public recreational facility.[65] The section goes on, however, to indicate that nothing stated in the section shall exonerate a public entity from liability for failing to protect against a dangerous condition.[66] Hence, although dangerous conditions must be protected against,[67] lack of supervision does not constitute a dangerous condition.[68] The appellate court affirmed the trial court's decision to grant summary judgment to the defendant, thereby

57. *See id.* at 5.
58. *See id.*
59. *See id.*
60. N.J. STAT. ANN. § 59:4-2 (West 1972).
61. *Id.*
62. *See id.*
63. *See Stempkowski*, 506 A.2d. 5. There were no lifeguards stationed on the beach at the time the plaintiff entered the ocean. *See id.* at 7.
64. *See id.* at 8.
65. *See* N.J. STAT. ANN. § 59:2-7 (West 1972).
66. *See id.*
67. *See* N.J. STAT. ANN. § 59:4-2 (West 1972).
68. *See Stempkowski*, 506 A.2d at 7-8. Supervision is not required. *See* N.J. STAT. ANN. § 59:2-7 (West 1972).

upholding the dismissal of plaintiff's complaint.[69] In its opinion, the appellate court cited *Sharra v. City of Atlantic City*,[70] explaining that a dangerous condition refers to the physical conditions of the property and not to dangerous activities which may take place on the property.[71]

The *Stempkowski* court, in dicta,[72] indicated that plaintiff's claim was also barred by section 59:3-11 of the Tort Claims Act.[73] The plaintiff's claim was based on the municipality's failure to supervise rather than negligent supervision.[74] As the opinion in *Fleuhr v. City of Cape May* indicates, the *Stempkowski* dicta suggests that had lifeguards been present and performed their duties negligently, the *Stempkowski* court may have held differently.[75] However, as the court in *Fleuhr* indicated, unimproved property immunity was never raised as an issue in *Stempkowski*.[76]

In *Burroughs v. City of Atlantic City*,[77] the plaintiff was injured when he dove from the Atlantic City boardwalk into the Atlantic Ocean.[78] The plaintiff sued Atlantic City as well as the city lifeguards individually.[79] The plaintiff alleged a dangerous condition was created by Atlantic City when it allowed the public to use the boardwalk without adequate warnings against diving from it.[80] Plaintiff also alleged the individual lifeguards were negligent in their supervision of the beach.[81]

The record established there were signs posted on light stations

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69. *See Stempkowski*, 506 A.2d at 8.

70. 489 A.2d 1252, 1255 (N.J. Super. Ct. App. Div. 1985).

71. *See Stempkowski*, 506 A.2d at 7. In material part, the complaint in *Stempkowski* was identical to the complaint in *Sharra*. *See id.* In each case, the plaintiff alleged the municipality and its employees were negligent for failure to supervise. *See id.* at 8.

72. Dicta is a statement which is not part of the court's legal holding and therefore not binding on later decisions.

73. *See Stempkowski*, 506 A.2d at 8.

74. *See Fleuhr*, 697 A.2d at 184 (citing *Stempkowksi*, 506 A.2d at 8).

75. *See Fleuhr*, 697 A.2d at 184.

76. *See id.*

77. 560 A.2d 725 (N.J. Super. Ct. App. Div.), *cert. denied*, 569 A.2d 1345 (N.J. 1989).

78. *See id.* at 726.

79. *See id.*

80. *See id. See also infra* note 100 and accompanying text.

81. *See Burroughs*, 560 A.2d at 732. Plaintiff argued the defendant lifeguards were negligent for failing to warn plaintiff of the hazards associated with diving from the boardwalk, which was conduct the lifeguards frequently encountered; for failing to remove intoxicated members of plaintiff's group so as to prevent them from posing a danger to themselves; and for failing to sufficiently observe the activities of plaintiff's group, which the lifeguards considered a "problem." *See id.* at 732.

along the boardwalk which read NO DIVING FROM BOARDWALK-DEPT. POLICE.[82] Plaintiff, however, claimed he never saw the posted signs and that the signs were inadequate.[83]

The trial court found that although not permitted, diving from the boardwalk occurred on a frequent basis and the lifeguards were aware of the activity.[84] The trial court found the proofs presented by plaintiff, in opposition to the defendant's motion for summary judgment, did not establish a dangerous condition existed under section 59:4-2.[85] Accordingly, the trial court granted summary judgment to the defendants.[86] Plaintiff appealed the trial court's decision.[87]

On appeal, the court in *Burroughs* looked to section 59:4-1(a) for the definition of what constituted a "dangerous condition."[88] Section 59:4-1(a) defines a 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."[89]

The plaintiff contended the dangerous condition which existed at the time of the accident was in close proximity of the boardwalk to the ocean.[90] The plaintiff argued the posted signs were inadequate in that (1) the placement of the signs was unlikely to catch the diver's attention, (2) the wording of the signs was ineffectual in conveying the seriousness of the hazard and of the resulting consequences, (3) the signs did not explain how to act in order to avoid injury, and (4) the signs did not explain the consequences of

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82. *See id.* at 727.

83. *See id.* at 727-28. Plaintiff argued the signs were inadequate in that they were located in such a way as to not catch the attention of observers, did not convey the nature of the hazard, did not warn of the intensity of the danger commensurate with the outcome, did not indicate how to avoid danger, and did not explain the consequences of failing to heed the warning. *See Burroughs*, 560 A.2d at 732. Plaintiff, through his expert, argued the signs should have read, DANGER, SHALLOW WATER, NO DIVING, DIVING CAN CAUSE SERIOUS INJURIES. *See Burroughs*, 560 A.2d at 728. In addition, plaintiff suggested the sign should have included a symbol for diving surrounded by a red circle with a slash through it, indicating the activity was prohibited. *See id.*

84. *See id.* The lifeguards were aware of the activity based on the fact that diving from the boardwalk happened on a frequent, although not daily, basis. *See id.*

85. *See Burroughs*, 560 A.2d at 727.

86. *See id.*

87. *See id.*

88. *See Burroughs*, 560 A.2d at 728.

89. N.J. STAT. ANN. § 59:4-19(a) (West 1972).

90. *See Burroughs*, 560 A.2d at 728.

failing to conform or obey the warning.[91]

The appellate court indicated that whether a dangerous condition existed depended on a combination of factors.[92] These factors include physical condition, permitted conduct, and objectively foreseeable behavior.[93] The court also pointed out the plaintiff diver had engaged in activities which were prohibited yet foreseeable.[94] The court affirmed the dismissal of a portion of plaintiff's complaint which included an allegation of negligent supervision by the individual lifeguards.[95] The court refused to hold the lifeguards liable because they occasionally ventured onto the unprotected beaches and warned people to swim only in protected areas.[96] The court, however, noted that its holding may have been different were it conclusively shown that the plaintiff relied on the lifeguards' warnings and thus expected his activities would be monitored and his safety protected.[97] This comment by the court, however, did not aid the *Fleuhr* court in reaching its decision in view of the fact that in *Burroughs* the activities occurred on an unprotected portion of the beach.[98] The defense of unimproved property immunity was never raised as an issue in *Burroughs*.[99]

In *Kleinke v. City of Ocean City*,[100] the court[101] considered the relationship between negligent supervision of a beach and unimproved property immunity.[102] The plaintiff brought suit against Ocean City and its employees for injuries he sustained when he was struck by a body surfer at a supervised beach.[103] However, the lifeguards on duty were in the water themselves instead of sitting on the elevated lifeguard platform, as they were in *Fleuhr*.[104] In addition,

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91. *See id.* at 727.
92. *See id.* at 731.
93. *See id.* "The ultimate question presented is . . . whether the legislature intended that the circumstances presented by the activity that actually occurred in light of the use permitted constitutes a dangerous condition." *Id.*
94. *See Burroughs*, 560 A.2d at 728.
95. *See id.* at 733.
96. *See id.*
97. *See Fleuhr*, 697 A.2d at 184-85.
98. *See id.* at 184.
99. *See id.*
100. 394 A.2d 1257 (N.J. Super. Ct. Law Div. 1978).
101. Superior Court of New Jersey, Law Division, Honorable Staller, J.S.C. (Temporarily assigned). *See id.* at 1258.
102. *See id.* at 1258-59.
103. *See id.* at 1258.
104. *See Kleinke*, 394 A.2d at 1258.

even though body surfing was prohibited at the beach, a lifeguard on duty admitted he never warned anyone against body surfing.[105]

The *Kleinke* court looked *to Diodato v. Camden County Park Commission*[106] for guidance.[107] In *Diodato,* the plaintiff was injured when he dove into the Cooper River and struck a partially submerged oil drum.[108] The plaintiff argued the defendant had a duty to post warning signs or to remove the hazard from the river.[109] The plaintiff contended the Tort Claims Act did not bar recovery because an oil drum was not a natural condition of unimproved property.[110] In response, the defendant argued immunity would apply because the Tort Claims Act barred recovery for injuries sustained from all conditions of unimproved property.[111] The court disagreed and held the statute applicable to the physical condition of the premises itself.[112] Therefore, the defendant's motion for summary judgment was denied.[113]

In applying the *Diodato* court's interpretation of section 59:4-8, the *Kleinke* court denied the defendant's motion for summary judgment.[114] The court went on to indicate that the proper combination of a body surfer and wave could create a dangerous condition for which the Tort Claims Act would not bar recovery.[115] However, this portion of the *Kleinke* holding was expressly overruled by *Sharra.*[116] *Sharra,* however, did not overrule the portion of the *Kleinke* decision which indicated that unimproved property immunity did not supersede liability for negligent supervision of public recreational facilities.[117]

The relationship between liability and the New Jersey Tort Claims

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105. *See id.*

106. 392 A.2d 665 (N.J. Super. Ct. App. Div. 1978).

107. *See Kleinke,* 394 A.2d at 1260. The *Kleinke* court looked to *Diodato* in order to determine whether the defendant was immune under N.J. Stat. Ann. § 59:4-8. *See Kleinke,* 394 A.2d at 1260-61.

108. *See Diodato,* 392 A.2d 665, 667.

109. *See id.*

110. *See id.* at 670-71.

111. *See id.* at 672.

112. *See Diodato,* 392 A.2d at 672.

113. *See id.*

114. *See Kleinke,* 394 A.2d at 1261.

115. *See id.*

116. *See Sharra,* 489 A.2d 1252. The *Sharra* court overruled *Kleinke* in so far as *Kleinke* held body surfing in waves ranging in size from three to six feet could constitute a dangerous condition. *See id.* at 1256.

117. *See id.*

Act was also considered in *Kowalsky v. Long Beach Township.*[118] The *Kowalsky* court found that, under the New Jersey Tort Claims Act, both the defendant municipality as well as the defendant municipal employees were entitled to immunity as a matter of law.[119]

In *Kowalsky*, Roman Kowalsky entered the Atlantic Ocean at Spray Beach, which was supervised by lifeguards at that time.[120] Gary Petrillo entered the Atlantic Ocean at the 12-14th Street Beach in Surf City which was also supervised by lifeguards at the time he entered the water.[121] The plaintiffs sued the municipality and its employees for injuries[122] sustained while swimming in the ocean waters off the supervised beaches.[123] In Kowalsky's amended complaint, he alleged the defendants (1) negligently supervised the beach, (2) failed to warn of dangerous conditions, and (3) failed to properly train beach patrol employees.[124] Specifically, both plaintiffs alleged that due to Hurricane Gustav, which was approximately 1000 to 1200 miles offshore, the waters at Spray Beach and 12-14th Street Beach were dangerous.[125] The plaintiffs alleged the defendant lifeguards were aware of this danger but allowed him and other swimmers to enter the water regardless and without warning.[126] Both the lifeguard on duty at Spray Beach and his supervisor testified the intensity of the water was normal for that time of year.[127] The defendants claimed they were immune from liability based on the Tort Claims Act.[128] The basis for this defense was that plaintiffs' injuries arose from a condition of unimproved public property.[129]

The federal district court agreed that the plaintiffs' injuries arose from a condition on unimproved property and granted summary

118. *See Kowalsky*, 72 F.3d 385 (3d Cir. 1995).

119. *See id.* at 387.

120. *See id.*

121. *See id.*

122. Kowalsky was left paralyzed from the waist down as a result of his accident. *See Kowalsky*, 72 F.3d at 387. Petrillo was paralyzed from the neck down and is unable to speak as a result of the accident. *See id.*

123. *See id.*

124. *See id.*

125. *See Kowalsky*, 72 F.3d at 387. To support this allegation, the plaintiff claimed an unusually high number of rescues occurred during the Labor Day weekend in which he sustained his injuries. *See id.*

126. *See id.*

127. *See id.*

128. *See* Kowalsky, 72 F.3d at 388.

129. *See id.*

judgment for the defendants.[130] However, in reaching its decision, the federal court attempted to predict how the highest court of New Jersey would decide the issue under New Jersey state law.[131]

C. *Opinion of the Fleuhr Court*

The New Jersey Tort Claims Act grants immunity from liability for injuries sustained on unimproved property.[132] The *Fleuhr* court concluded that plaintiff's claim of negligent supervision was not barred by the Tort Claims Act.[133] This holding appears to fall squarely in line with the underlying policies in the majority of cases examining similar issues,[134] as well as the legislature's concern[135] and public policy.[136] The policy behind these decisions is that although there may be no duty to supervise,[137] once supervision is undertaken, the supervision must not be performed in a negligent manner.[138] The Tort Claims Act established unimproved property immunity in order to encourage public entities to acquire and provide public recreational facilities.[139] This encouragement, however, is not unfettered. The Tort Claims Act expressly disavows immunity from injuries resulting from negligent supervision.[140]

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130. *See id.* at 387.

131. *See id.* (citing *Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1049 (3d Cir.), *cert. denied*, 510 U.S. 964 (1993)). The federal court's interpretation of state law is not binding on future state cases. *See Fleuhr*, 697 A.2d at 186, (citing *Linden Motor Freight Co., Inc. v. Travelers Ins. Co*, 193 A.2d 217 (1963)); *see also* Small v. Dept. of Corrections, 579 A.2d 1263 (N.J. Super. Ct. App. Div. 1990).

132. *See* N.J. STAT. ANN. § 59:4-8 (West 1972).

133. *See Fleuhr*, 697 A.2d at 186 (referring to N.J. STAT. ANN. § 59:4-8).

134. *See, e.g., Stempkowski*, 506 A.2d 5; *Sharra*, 489 A.2d 1252; *Kleinke*, 394 A.2d 1257 (overruled in part, *Sharra, supra*, 489 A.2d 1252). The *Sharra* opinion did not disturb the portion of the *Kleinke* ruling which held that unimproved property immunity did not override liability resulting from negligent supervision of a public beach. *See Fleuhr*, 697 A.2d at 185.

135. The concern of the legislature was discussed by the court in *Kleinke*. The *Kleinke* court indicated that public entities should not be held liable for failing to provide supervision to public recreational facilities, or for having to make safe natural conditions on unimproved land. *See id.* at 1261.

136. The Attorney General's Task Force Comment, referred to by the *Fleuhr* court, indicates public policy warrants allowing the public to assume the risk of using unimproved property so that the public entity is not held responsible for making the property safe. *See Fleuhr*, 697 A.2d at 184.

137. *See* N.J. STAT. ANN. § 59:4-8 (West 1972).

138. *See Fleuhr*, 697 A.2d at 186 (referring to N.J. Stat. Ann § 59:3-11).

139. *See Fleuhr*, 697 A.2d at 186.

140. *See* N.J. STAT. ANN. § 59:3-11 (West 1972).

In reaching its decision to dismiss the plaintiff's complaint, the trial judge in *Fleuhr* relied heavily on the decision rendered in *Kowalsky* despite the fact that the decision was not binding on the lower court because the *Kowalsky* federal court only interpreted New Jersey state law.[141] As such, the *Kowalsky* decision is persuasive, but not binding.[142]

The appellate court in *Fleuhr* agreed with the trial court's findings that the beach and ocean were unimproved property.[143] Based on such a finding, when a swimmer enters the water, he enters at his own risk.[144] If an injury is caused by conditions encountered in the unimproved property, the plaintiff does not have a cause of action against the public entity.[145] This immunity from liability attached because the defendants were not obligated to make safe any dangerous conditions present on the unimproved property.[146] The lack of a duty to improve these conditions also extends to a lack of a duty to warn of these conditions.[147] For this reason, the appellate court affirmed the trial court's dismissal of the plaintiff's claim.[148] The appellate court held the ocean waters did not constitute a dangerous condition and that the defendants did not have a duty to warn about the condition of the water.[149]

The *Fleuhr* court, however, disagreed with the trial court's finding that the City of Cape May was immune from liability resulting from negligent supervision of the beach based on the fact that the property was unimproved.[150] The appellate court found the unimproved property immunity could not be implemented in connection with potential liability for negligent supervision.[151] Once a public entity chooses to provide supervision at a public recreational facility, even though there is no obligation to provide such supervision, the "fundamental reason" for immunity no longer exists.[152] The *Fleuhr* court concluded the plaintiff's claim of negligent

141. *See Fleuhr*, 697 A.2d at 186-87.
142. *See id.* at 186.
143. *See id.*
144. See *id.*
145. *See Fleuhr*, 697 A.2d at 186.
146. *See id.*
147. *See id.*
148. *See id.*
149. *See Fleuhr*, 697 A.2d at 186.
150. *See id.*
151. *See id.*
152. *See id.* The fundamental reason for providing immunity from having to supervise

supervision was not barred by the unimproved property immunity.[153]

The *Fleuhr* court, however, re-affirmed the view that the plaintiff was still responsible for establishing a cause of action for negligent supervision.[154] Due to the trial court's granting of the defendant's motion for summary judgment, there was no consideration at the lower level as to whether plaintiff could adequately establish a claim of negligent supervision.[155] As such, the case was remanded for further proceedings to determine whether the plaintiff could successfully support his allegation of negligent supervision by the lifeguards.[156]

In order to be successful on remand, the plaintiff must establish (1) his injury was sustained at a public recreational facility, (2) a public employee undertook the responsibility of protecting the public recreational facility, and (3) the employee was negligent in his supervision.[157]

According to the court in *Morris v. City of Jersey City*,[158] supervision is defined as:

> some conduct, no matter how minute, evidencing an intention to supervise by way of monitoring, entering into or becoming a part of the activity itself from which the injury sprang. Liability for negligent supervision will not be imposed simply because there was an incidental undertaking at the same place only tangentially related to the recreational activity.[159]

As such, on remand, the plaintiff will need to establish a specific act or omission on the part of the public employee who undertook to supervise the beach, which resulted in plaintiff's injury.[160] In addition, the plaintiff should be prepared to establish that he relied on the supervision of the lifeguards and expected that he could swim safely at the First Avenue Beach.[161]

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unimproved property is that the benefit of allowing the public to access the property would be overridden by the burden of defending lawsuits. *See Fleuhr*, 697 A.2d at 186. Once the public entity decided that more benefits would attach from employing lifeguards than from not, the policy reasons behind such immunity vanished. *See id.*

153. *See Fleuhr*, 697 A.2d at 186 (referring to N.J. Stat. Ann. § 59:4-8).
154. *See Fleuhr*, 697 A.2d at 186.
155. *See id.* at 187.
156. *See id.*
157. *See Fleuhr*, 697 A.2d at 186-87 (citing *Sharra*, 489 A.2d at 1255).
158. 432 A.2d 553 (N.J. Super. Ct. App. Div. 1981).
159. *Morris*, 432 A.2d at 555.
160. *See Fleuhr*, 697 A.2d at 187 (citing *Sharra*, 489 A.2d at 1254).
161. *See id.* (citing *Burroughs*, 560 A.2d at 733).

William Fleuhr's trial attorney[162] as well as the attorney who represented the City of Cape May at the trial level[163] both agree this decision may increase the likelihood that swimming will be banned when offshore hurricanes produce large waves.[164] In response to the court's comment in the *Fleuhr* decision that public entities are under no obligation to provide supervision, the mayor of Cape May indicated he does not believe this decision will affect whether or not a lifeguard is employed to supervise a beach.[165]

III. CONCLUSION

Public entities are not obligated to provide warnings of danger or to provide supervision on public recreational property.[166] Despite this reprieve from safety obligations, it seems only proper that once public entities voluntarily undertake the responsibility of providing supervision, and this supervision is relied on by the public to their detriment, it is imperative that this supervision not be negligent.

This decision does not set a precedent for public entities being held liable for dangerous conditions on unimproved public property. Public entities are still not required to supervise, make safe, or warn of danger on unimproved property. The only precedent this decision has set is that if a lifeguard performs his voluntary duties negligently, he, as well as his employer, may be held liable for injuries resulting therefrom, despite the public entity not being obligated to supervise or make safe the unimproved property.[167]

Contrary to the vast amount of negative opinions and editorials the *Fleuhr* decision has created,[168] This decision is sound and

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162. Gregory Marchesini was the attorney who represented William Fleuhr at the trial court level. *See* Ralph Siegel, *Injured Swimmer Can Sue Cape May*, THE RECORD (Northern New Jersey), July 31, 1997, at A3.

163. Phyllis Coletta was the attorney who represented the City of Cape May at the trial court level. *See id.*

164. *See id.*

165. *See id.*

166. *See Fleuhr*, 697 A.2d at 186.

167. *See id.*

168. For example:

> Our liberal Appellate Division has gone too far. I can think of several reasons to deny this man's claim. In addition to statutorily created immunity . . . he had to see

reassuring. When a person enters the water at a supervised beach, he or she enters with the assumption that should a dangerous condition arise or be present already, the lifeguards will do what is necessary and reasonable to remedy the situation and prevent injury. That person relies on the lifeguards for protection when he or she finds himself or herself in danger. If this means closing the beach because a hurricane is offshore, then so be it. Swimmers rely on lifeguards' expertise and experience in determining the safety of the waters during an offshore hurricane.

The City of Cape May's attorney has been quoted as having said, "It looks like we have another case here of a municipality failing to protect someone from their own folly. Now we have to protect people from their own stupidity."[169] This statement appears to miss the issue. The point is that when a lifeguard is on duty, beach patrons rely on the lifeguard to make an expert assessment as to the safety of the water and the beach on the day in question. The "folly" of the swimmer is not an issue. It should not be said that it is "folly" of a swimmer to rely on a lifeguard,[170] an expert in water safety. After all, isn't that what they are there for? It is the responsibility of the lifeguard to supervise and protect the area. The point of paying a fee to enter a protected beach is that you can rely on the lifeguards to do their job, guard your life. The "folly" would be to allow a lifeguard to be negligent in his duties and put the lives of trusting patrons at risk.

The court's decision granting William Fleuhr the opportunity to establish whether or not the lifeguards on duty were negligent in

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> the surf conditions as he entered the ocean, he knew what the surf conditions were, ... he knowingly and voluntarily assumed the risk by entering the water ... you can't idiot proof the world ... the waves, changing surf conditions, and hurricanes were "Acts of God." He was a grown man who made an informed choice... and now must live with it.

David Chabak, *Appeals Court Went Too Far in Injured Swimmer's Case*, NEW JERSEY LAW JOURNAL, Aug. 25, 1997, at Voice of the Bar p.23.

> The blameless society apparently has struck again ... The idea that Cape May is responsible for the foolish actions of Mr. William Fleuhr is laughable ... Why can't people be accountable for their actions and stop making everyone else pay for their mistakes? ... Another example of people not taking responsibility for their own actions, and finding someone to blame for their stupidity.

Reader forum, *Perspective*, THE STAR LEDGER, Aug. 17, 1997, at 005.

169. Star-Ledger Staff, *Perspective- This Week's Poll*, THE STAR LEDGER (NEW JERSEY), Aug. 10, 1997, at 005.

170. A lifeguard is defined as "an expert swimmer employed to safeguard bathers." MERRIAM-WEBSTER DICTIONARY 406 (3d ed. 1974).

their responsibilities is proper. As the swimmer swims at his own risk, the public entity chooses to supervise at its own risk.

Jennifer A. Carr