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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

Marc J. MIGNANO and Jennifer L. McGuckin–Mignano, as parents and Guardians ad Litem of Isaac J. Mignano, a minor, on his behalf and for all others similarly situated, Plaintiffs,
v.
JIM SULLIVAN, INC., Jim Sullivan Real Estate Services, Inc., Navillus Group, a general partnership, James Sullivan, Jr., James Sullivan, Iii, Drew A. Sullivan, Sandra Sullivan–Lyons, and Terri Clay, Defendants–Appellants,
and
Accutherm, Inc., Philip J. Giuliano, Kiddie **Kollege** Daycare & Preschool, Inc., Stephen and Becky Baughman, Julie and Matthew Lawlor, Theodore Miller, Sgt. Joseph Olsen, Robert Errera, William Atkinson, James "Chip" Woods, and the County of Gloucester, New Jersey, Defendants,
and
The Township of Franklin, New Jersey, Defendant/Third–Party Plaintiff–Respondent,
v.
New Jersey Department of Environmental Protection, New Jersey Department of Children and Families, New Jersey Department of Human Services Division of Children and Families, and PNC Bank National Association, Successor to Midlantic Bank, Third–Party Defendants.
Wayne Adair, Jr., in his own right and as father and Guardian ad Litem of minor plaintiffs, Taylor Minyon, Joey Adair and Wayne Adair, III, and on behalf of all others similarly situated, Plaintiffs,
v.
Jim Sullivan, Inc., Jim Sullivan Real Estate Services, Inc., Navillus Group, LLC, Jim Sullivan, III, and Jim Sullivan, IV, Defendants–Appellants,
and
Philip J. Giuliano, Accutherm, Inc., and County of Gloucester, Defendants,
and
New Jersey Department of Environmental Protection, Defendant–Respondent,
and
Township of Franklin, New Jersey, Defendant/Third–Party Plaintiff–Respondent,
v.
New Jersey Department of Children and Families, New Jersey Department of Human Services Division of Children and Families, and PNC Bank National Association, Successor to Midlantic Bank, Third–Party Defendants.
Jamie Kahana, individually and as Guardian ad Litem for Haley Kahana and Robert Kahana, III, minors, Andrew Franks, and Robert Kahana, Jr., Plaintiffs,
v.
Jamie Kahana, individually and as Guardian ad Litem for Haley Kahana and Robert Kahana, III, minors, Andrew Franks, and Robert Kahana, Jr., Plaintiffs,
and
Jim Sullivan, Inc., Jim Sullivan Real Estate Services, Inc., James Sullivan, III, James Sullivan, IV, and Navillus Group, LLC, Defendants–Appellants,
and
New Jersey Department of Environmental Protection, Defendant–Respondent,
and
Township Of Franklin, New Jersey, Defendant/Third–Party Plaintiff–Respondent,
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Sullivan, III, Drew A. Sullivan, Sandra Sullivan–Lyons, Terri Clay, Accutherm, Inc., Philip J. Giuliano, Kiddie **Kollege** Daycare & Preschool, Inc., Stephen and Becky Baughman, Julie and Matthew Lawlor, Theodore Miller, Sgt. Joseph Olsen, William Atkinson, James "Chip" Woods, and the County of Gloucester, New Jersey, Defendants,
and
Robert Errera, Defendant–Appellant/Cross–Respondent,
and
The Township of Franklin, Defendant/Third–Party Plaintiff–Appellant/Cross–Respondent,
v.
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Accutherm, Inc., Philip J. Giuliano, Jim Sullivan, Inc., Jim Sullivan Real Estate Services, Inc., James Sullivan, III, James Sullivan, IV, Navillus Group, Llc, Kiddie **Kollege** Daycare & Preschool, Inc., Steven and Becky Baughm, Julie and Matthew Lawlor, New Jersey Department of Environmental Protection, and County of Gloucester, Defendants,
and
Township of Franklin, Defendant/Third–Party Plaintiff–Appellant/Cross–Respondent,
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New Jersey Department of Environmental Protection,
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Jamie Kahana, individually and as Guardian ad Litem for Haley Kahana and Robert Kahana, III, minors, Andrew Franks, and Robert Kahana, Jr.,
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Jim Sullivan, Inc., Jim Sullivan Real Estate Services, Inc., James Sullivan III, James Sullivan IV, Navillus Group, LLC, Kiddie **Kollege** Daycare & Preschool, Inc., Steven and Becky Baughm, Julie and Matthew Lawlor and County of Gloucester,
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Township of Franklin,
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v.
New Jersey Department of Children and Families, New Jersey Department of Human Services Division of Children and Families, and PNC Bank National Association, Successor to Midlantic Bank, Third–Party Defendants.

A-3587-12T2, A-3732-12T2, A-2995-12T2
|
Argued March 8, 2016.
|
Decided May 26, 2016.

On appeal from Superior Court of New Jersey, Law Division, Gloucester County, Docket Nos. L–1309–06, L–1730–06, and L–1823–06.

Attorneys and Law Firms

Alan C. Milstein argued the cause for appellants Jim Sullivan, Inc., Jim Sullivan Real Estate Services, Inc., Navillus Group, L.L.C ., James Sullivan, Jr., Drew A. Sullivan, James Sullivan, III, Sandra Sullivan–Lyons, and Terri Clay[1] in A–2995–12 (Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., attorneys; Mr. Milstein, on the brief).

M. James Maley, Jr., argued the cause for respondent Township of Franklin in A–2995–12; appellants/cross-respondents Township of Franklin and Robert Errera and A–3587–12 (Maley & Associates, P.C., attorneys; Mr. Maley, Emily K. Givens, Erin E. Simone, and M. Michael Maley, on the briefs).

Randall B. Weaver, Deputy Attorney General, argued the cause for respondent in A–2995–12 and appellant/cross-respondent in A–3732–13 State of New Jersey, New Jersey Department of Environmental Protection (John J. Hoffman, Acting Attorney General, attorney; Melissa H. Raksa, Assistant Attorney General, of counsel; Mr. Weaver, on the briefs).

Thomas T. Booth, Jr., Michael J. DeBenedictis, and Stuart J. Lieberman argued the cause for respondents/cross-appellants in A–3587–12 and A–3732–12 (Locks Law Firm, LLC, DeBenedictis & DeBenedictis, LLC, Law Offices of Thomas T. Booth, Jr., LLC, and Lieberman & Blecher, P.C., attorneys; Mr. Booth, Mr. DeBenedictis, Mr. Lieberman, and Michael G. Sinkevich, Jr., on the briefs).

Before Judges YANNOTTI, ST. JOHN and GUADAGNO.

Opinion

***1** The opinion of the court was delivered by

YANNOTTI, P.J.A.D.

These three appeals are calendared back-to-back and consolidated for the purpose of our opinion.

In A–3587–12, the Township of Franklin

(Township) and Robert Errera (Errera) appeal from the trial court's judgment finding them liable under the Tort Claims Act (TCA), *N.J.S.A.* 59:1–1 to 12–3, and 42 *U.S.C.A.* § 1983 (Section 1983). The Township and Errera also appeal from the court's order awarding plaintiffs attorney's fees and costs pursuant to 42 *U.S.C.A.* § 1988. Plaintiffs cross-appeal from the trial court's application of the collateral source doctrine to certain settlement funds, its denial of counsel fees under the TCA, and its refusal to enforce an alleged settlement agreement with the Township.

In A–3732–12, the State of New Jersey, Department of Environmental Protection (DEP), appeals from the judgment finding it liable to plaintiffs under the TCA. Plaintiffs cross-appeal and raise the same arguments they raise in A–3587–12, to the extent those arguments apply to the DEP.

In A–2995–12, the Sullivan defendants appeal from the trial court's orders granting summary judgment to the Township and the DEP, dismissing their fraud and negligence claims.

We address the three appeals in this opinion. For the reasons that follow, in A–3587–12, we reverse the judgment entered against the Township and Errera and the order awarding plaintiffs attorney's fees; and we affirm in part and dismiss in part on the cross-appeal. In A–3732–12, we reverse the judgment entered against the DEP and dismiss the cross-appeal. In A–2995–12, we affirm the grant of summary judgment to the Township and the DEP.

I.

A. *The Complaint.*

These appeals arise from class actions filed as a result of the operation of a daycare center by Kiddie **Kollege** Daycare & Preschool, Inc. (Kiddie **Kollege**) on property that was previously the site of Accutherm, Inc. (Accutherm), a thermometer factory. Plaintiffs are children who attended the daycare center, and adults who worked or visited the center. Plaintiffs alleged they had been exposed to toxic mercury on the site.

In these actions, plaintiffs named as defendants: (1) Accutherm and Philip J. Giuliano, the chief executive officer and sole shareholder of the company; (2) the Sullivan defendants, who were involved in the acquisition and conversion of the property for use as a daycare center; (3) the Township and Township employees Theodore Miller (Miller), Sergeant Joseph Olsen (Olsen), and Errera (collectively, the Township defendants); (4) the County of Gloucester (County) and County employees William Atkinson (Atkinson) and James Woods (Woods) (collectively, the County defendants); (5) the State of New Jersey, Department of Environmental Protection (DEP); (6) Kiddie **Kollege**; (7) Julie and Matthew Lawlor (the Lawlors), the initial owners of Kiddie **Kollege**; and (8) Stephen and Becky Baughman (the Baughmans), who later owned Kiddie **Kollege**.

***2** Plaintiffs asserted various common law claims, as well as claims against the public entity defendants under Section 1983. They sought, among other relief, an order establishing a court-administered medical monitoring fund, punitive damages, and attorneys' fees.

The trial judge certified the matters as class actions, and thereafter the actions were consolidated. The judge later conducted a bench trial on plaintiffs' claims.

B. *Evidence Presented at Trial.*

1. *The Accutherm Property.*

In June 1984, Accutherm acquired property in the Township, where it operated a thermometer factory. Environmental contamination of the site first came to light in the late 1980s, at which time, the County health department investigated the property, in coordination with the State's Department of Health (DOH) and the DEP. Woods and Atkinson performed the investigation. The County found tetrachloroethene in the water. Blood testing of Accutherm's employees also revealed elevated levels of mercury. Giuliano told Woods he planned to clean up the property.

Because of the threat to the health of Accutherm's employees, the County filed a complaint with the federal Occupational Safety and Health Administration (OSHA), which thereafter investigated the complaint. In April 1988, the DEP ordered Accutherm to immediately cease the discharge of industrial pollutants into the septic system on the property, and later directed the company to analyze and obtain a classification of the contents of the septic tank. There is no evidence that Accutherm complied with the DEP's directive.

In August 1989, OSHA issued a citation and notification of penalty to Accutherm, for its failure to provide its employees with a safe workplace due to the presence of mercury vapors. OSHA provided a copy of the citation to the Township. In April 1990, OSHA wrote a letter to the Township's Mayor, advising of the "serious health threat" posed by Accutherm's operations. OSHA noted that Giuliano had indicated he intended to sell the property, and OSHA stated that it was concerned the property would be sold to an unsuspecting buyer, who would be "saddled with the burden of th[e] contaminated building, while the current owner escapes cleaning up the problem he created."

OSHA provided a copy of the letter to the Township's construction official from 1987 to 2003. The Mayor also provided copies of the letter to the Township's Office of Emergency Management (OEM), and the County health department. The Mayor expected the County to handle the matter, in part because the Township had no role in remediating contaminated sites.

Miller did not remember receiving OSHA's letter. However, he recalled that around the time this letter was written, someone from the State or federal government came to his office and advised that the Accutherm building was contaminated with mercury, and was not to be occupied, used, or sold because it was unsafe.

In 1992, Accutherm ceased operations at the factory because it could not afford to clean up the property, and filed a petition for Chapter 11 bankruptcy. While the bankruptcy proceedings were pending, Midlantic National Bank (Midlantic) filed a foreclosure action against Accutherm and retained Environmental Waste Management Associates (EWMA) to undertake an environmental assessment of the property.

***3** EWMA issued a report which stated that ambient air results for mercury vapor in the building exceeded permissible limits at all tested locations. The report also stated that free mercury had been observed at numerous locations within the structure.

EWMA recommended limiting human access to the building until interior mercury levels could be confirmed by long-term testing and laboratory analysis. It said persons entering the site should wear protective gear and should be decontaminated upon exiting. EWMA also recommended further testing, remediation, and notification to the County health department of the results of its assessment.

Due to the environmental contamination of the property, Midlantic elected to charge off Accutherm's loan balance, but nevertheless followed up on some of EWMA's recommendations. In September 1994, Midlantic's counsel wrote to Accutherm's attorney and provided a copy of EWMA's report. Midlantic's counsel asked Accutherm to notify the County's health department and a real estate broker involved in the matter of the contamination. Midlantic's counsel also asked that warning signs be posted on the property.

Accutherm's attorney forwarded the letter to the County. Several months later, Midlantic's counsel sent another letter to Accutherm's attorney. Midlantic's counsel requested the posting of signs on the property, and provided samples that could be used. Accutherm's attorney provided the letter to Giuliano, and forwarded the EWMA report to the County health department. Atkinson spoke with Olsen, one of the Township's police officers, who also worked on the Township's emergency management staff. Olsen provided his entire file on Accutherm to Atkinson, which included a copy of OSHA's letter to the Mayor. Atkinson contacted Accutherm's attorney, the DOH, and the DEP. Atkinson provided the DEP with the information Olsen had given to him.

In November 1994, the DEP informed Accutherm that it was required to comply with the Industrial Site Recovery Act (ISRA), *N.J.S.A.* 13:1K–6 to –14. Accutherm thereafter filed with the DEP a general information notice concerning its ISRA obligation. Accutherm noted that it was in

bankruptcy and could not afford to pay the required filing fee.

Josh Gradwohl (Gradwohl) of the DEP understood that Accutherm was not going to comply with its ISRA obligation. He referred the matter to the DEP's compliance and enforcement section, which issued a letter dated April 7, 1995, ordering the company to clean up and remove the hazardous discharges on the property. Gradwohl explained that the DEP was required to exhaust all means for obtaining compliance by the responsible party before seeking assistance from the federal Environmental Protection Agency (EPA).

In July 1995, Midlantic's counsel wrote to Woods at the County's health department, and provided him with copies of prior correspondence with Accutherm's attorney and the reports concerning the mercury contamination at the property. Counsel expressed concern that no signs had been posted at the property, and prospective buyers had toured the building unaware of the potential risks. Counsel noted that the bank did not have possession or control of the property and did not believe it had the right to post signs there. Counsel thought it "prudent" to alert the County of the status of the matter.

***4** Shortly thereafter, Woods sent Accutherm's attorney a letter urging that warning signs be posted on the property immediately and persons be restricted from entering the building pending a clean-up of the site. Copies of the letter were sent to Olsen and Gradwohl. Olsen placed the letter in his file. He did not, however, put signs on the property, nor did the County.

The DEP continued its ongoing ISRA enforcement efforts and placed the property on its Known Contaminated Site List. In August 1995, the DEP sent an investigator to examine the property. The DEP's investigator reported that residential properties were located adjacent to the site, which was un-fenced and did not have posted signs warning of the hazards inside the building. The investigator noted that the windows and doors of the building were locked, but one outer window was broken. The DEP took no steps to secure the property.

The DEP continued its efforts to obtain federal funding for a clean-up. In August 1995, the DEP wrote to the EPA, requesting that the site be considered for removal action under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 *U.S.C.A.* §§ 9601–9675. In September and October 1995, the EPA performed testing at the property.

In January 1996, the EPA issued a mini-pollution report in which it stated:

> Based on air monitoring results, the potential for exposure to [mercury] vapor outside the building does not exist. Soil sampling data indicates that, though [mercury] is present in two samples, it is well below the Emergency Removal Guidelines. In addition, the material does not appear to be distributed over the entire property.
>
> Air monitoring inside the building did not indicate that any significant levels of [mercury] vapor were present. Wipe sample analytical did result in locating two areas where [mercury] was present in concentrations greater than the [DEP's] proposed contaminant levels. The building, however, appears to be structurally sound and secure, which greatly minimizes the possibility of a direct contact exposure to the material.
>
> Based on air monitoring, soil sample analysis, wipe sample analysis and the condition and security of the building and surrounding property, the site does not present an immediate threat to human health or the environment.

At that point, the DEP's efforts to obtain remediation of the site ended. The property remained contaminated. The DEP assigned the property the status of "awaiting assignment" on the Known Contamination Site List. That status is given to contaminated properties that pose no imminent threat to the public health, and where there is no active clean-up activity.

2. *Acquisition of the Property by Navillus Group.*

In April 1994, Accutherm ceased paying taxes on the property, and in 1994 and 1997, the Township sold tax sale certificates to FUNB of Florida for the unpaid taxes pursuant to the Tax Sale Law, *N.J.S.A*. 54:5–19 to –137. Also in 1994, Sullivan moved his real estate business to offices in a building

across the street from the Accutherm site. Sullivan is licensed as a real estate broker and as a property appraiser. Although Sullivan had lived most of his life in the Township, he denied any knowledge of the nature of Accutherm's business.

***5** In 1999, Navillus Group, a general partnership in which Sullivan was partner, purchased the 1994 and 1997 tax sale certificates from FUNB. The property taxes remained in arrears. In 1999, Navillus purchased another tax sale certificate from the Township. Sullivan did not investigate the property before Navillus purchased the certificates, although he was aware of rumors that the property was contaminated.

Furthermore, the notices issued by the Township for the tax sales included a warning that the property involved may be industrial property subject to environment clean-up responsibilities under state law. The notices did not, however, specifically indicate that the Accutherm property was contaminated or subject to ISRA. Sullivan did not believe the general warning applied to the Accutherm site because he considered it to be commercial rather than industrial property.

Nevertheless, Sullivan investigated the property on his own. He obtained a title search that revealed Accutherm's former ownership of the site. Moreover, in January 2000, after Navillus purchased the December 1999 tax sale certificate, Sullivan discussed with his attorneys rumors that the property was contaminated. Thereafter, Sullivan's attorneys advised him that it would be in his "best interest" to secure an "independent opinion as to the environmental soundness of th[e] property."

Sullivan did not obtain such an opinion, nor did he take any other steps to determine whether the property was contaminated. Instead, Sullivan made inquiries about the property with various Township officials, including Philip Sartorio, who was the Township's director of community development between 1998 and November 2003.

Sartorio recalled speaking with Sullivan about his plans for the property and discussing the site's contamination issues. Later, Olsen was asked to give Sullivan information about the property, and he provided Sullivan with the EPA's mini-pollution report. Sullivan reviewed the report on his own and understood it to mean the property was safe. He also thought that if there was something "wrong" with the property, no one would issue him the necessary permits for its use.

In February 2000, Sullivan wrote to the DEP regarding his intent to "foreclose on the property and refurbish it." He stated that he had reviewed the EPA report, which had concluded that mercury had been found but "nothing was above acceptable levels." He asked whether the DEP had any additional information regarding the property.

The DEP did not respond to Sullivan's letter, and he never followed up with the department. In April 2000, Sullivan's attorneys wrote to Sullivan and confirmed that he intended to proceed with foreclosure on the tax sale certificates. The letter indicated that Sullivan told his attorneys that he had obtained an environmental assessment of the property. However, he had not done so.

In August 2000, Navillus commenced foreclosure proceedings on its tax liens. Final judgment in that action was entered in June 2001, at which time Navillus obtained title to the property.

3. *Permits and Licensing Activity*.

***6** Around that time, the Sullivan defendants began to renovate the property, but they lacked the necessary permits. Miller became aware of the renovations and in July 2001 issued a stop work order and penalty. However, after applications were filed and the penalty paid, the Township issued permits for electrical, roofing, siding and plumbing work.

About a year later, Navillus applied to the County health department for a license to alter the property's septic system, and on July 24, 2002, the County issued the license and provided a copy to Miller. Atkinson testified that the County was not aware of any ongoing contamination at the site. The County thought the DEP and EPA had handled or were handling those issues.

In August 2002, Navillus transferred title to Jim Sullivan, Inc., a corporation formed by Sullivan's father, which employed Sullivan. Sullivan's siblings Drew Sullivan, Terri Clay, and Sandra Sullivan–Lyons also were employed by the company, and they were partners in Navillus.

Thereafter, Sullivan advertised the property for sale or lease, and the Lawlors approached him with the idea of leasing the property for use as a daycare center. Sullivan told the Lawlors they were responsible for obtaining any necessary permits or variances. Sullivan claimed he provided the Lawlors with a copy of the EPA's mini-pollution report.

Sometime in 2003, Julie Lawlor went to the Township's zoning office and inquired as to whether the property could be used as a daycare center. Errera, the Township's zoning and code enforcement officer from February 2002 to May 2010, told her that it could be. However, Errera went to Sartorio, who was his supervisor, and expressed concerns about use of the property as a daycare center, in light of its history and contamination.

Sartorio checked the DEP's website, or a hard copy of the list of known contaminated sites, and noted that the property was not on the list. Errera was still concerned, so Sartorio phoned the DEP and left a message, asking that someone contact Errera. Sartorio also told Errera to call Sullivan and ask for a copy of the EPA mini-pollution report, and to confirm with the DEP that the site had either been cleaned up or remained contaminated.

In September 2003, Errera spoke with Gradwohl at the DEP and stated that there was a plan to use the property as a daycare center. Errera recalled being told that the site was listed as "NFA." Errera did not know what that meant and asked Sartorio, who told him that NFA status means the case had been closed. Therefore, Errera thought there were no current environmental concerns about the property.

Gradwohl testified, however, that he told Errera that an NFA letter had not been issued for the property, the site had not been remediated, and it was still contaminated. According to Gradwohl, Errera was told that it would be inappropriate to put anyone in the building. Gradwohl testified that there was "no way [he] would have said something that would have in any way implied that the site was clean and suitable for occupancy."

***7** Gradwohl posted an electronic note of his conversation with Errera, which supported his recollection. According to the note, Gradwohl told Errera that no NFA approval had been issued, and converting the property to a daycare center was "NOT recommended." Gradwohl did not follow up on this conversation since he did not believe anything else needed to be done.

Around this time, the Lawlors approached Sullivan about purchasing the property and presented him with documentation from a bank indicating that the bank required information from the DEP and an NFA letter. Sullivan sought records from the DEP regarding the site, and the DEP provided a copy of certain records, including the EPA's mini-pollution report. Apparently as an oversight, the DEP's ISRA records were not provided.

Meanwhile, work continued on the property. In November 2003, the Lawlors sought a zoning permit to allow the operation of a daycare center, and Errera asked for written documentation that the environmental contamination had been remediated. Sullivan eventually provided Errera with a copy of the EPA's report, highlighting the statement that the property presented no immediate threat to human health or the environment.

Errera apparently only read the highlighted statement. He brought the matter to Sartorio, who instructed him to issue the permit. In January 2004, the Township's construction officer issued a temporary certificate of occupancy (CO), and in February 2004, a final CO was issued. Thereafter, Kiddie **Kollege** operated on the property for about two years, through July 2006.

4. *Closure of Kiddie **Kollege**.*

In late 2005 or early 2006, the DEP placed the Accutherm site on a list of properties to be re-evaluated. Upon inspecting the site, the DEP discovered that it was being used as a child care facility. In April 2006, the DEP contacted Sullivan and ordered that the site be tested. Sullivan retained an environmental firm to perform that work.

The initial test results revealed mercury vapor, as well as mercury in wipe and vacuum samples, both in the basement and on the first floor of the building, with the air sample results registering well above actionable federal standards. On July 28, 2006, the daycare center was closed on an emergent basis, at the direction of the DEP and the DOH.

5. *Expert Testimony.*

The State conducted urine tests of mercury-exposed individuals. Based on those test results, the State believed that health impacts were not expected, due to the level of mercury found in the samples tested. The State's review of individuals' medical records also revealed no symptoms, signs or conditions consistent with mercury exposures.

Plaintiffs presented expert testimony in toxicology from John Norris, Ph.D., and in neuropsychology from David Hartman, Ph.D. Dr. Norris testified that, due to their exposure to mercury at the daycare center, the class members had a continued risk to their central nervous and immune systems, with the child class members at greater risk than the adult members because they had a higher sensitivity to mercury. He recommended neuropsychological and immunological testing, while Dr. Hartman testified that neuropsychological testing was warranted due to mercury's known neurotoxicity.

***8** Defendants presented three rebuttal experts: Bruce J. Shenker, Ph .D., an expert in immunology; Margit Lukk Bleecker, M.D., Ph.D., an expert in neurology and neurotoxicology; and David C. Bellinger, Ph.D., an expert in pediatric neurophsychology, epidemiology, and neurotoxicological psychology. Dr. Shenker opined that the adults and children in the class were not at risk for developing an immunological disease or compromised immune system due to the mercury exposure.

Dr. Bleecker testified that, given their limited exposure and their urine test results, adult members of the class could not develop mercury toxicity, and they were not at greater risk of developing or having a neuropsychological disease or a compromised immune system. According to Bleecker, the adult testing proposed by plaintiffs' experts was unreasonable and unnecessary.

Furthermore, Dr. Bellinger would not expect mercury toxicity in the child class members based on their test results, and he disagreed that the child class members were more vulnerable than the adult class members. He opined that there was no value in the neuropsychological testing proposed by plaintiffs' experts because those tests would not reveal anything tied to mercury specifically, and the proposed tests were not warranted for individuals who were not suffering from any symptoms that required intervention.

C. *The Trial Court's Decision, and Post–Trial Activity.*

On January 11, 2011, the trial judge rendered an oral decision on the record, which assessed liability against the Sullivan defendants (35%), the Township defendants (35%), the County defendants (20%), and the DEP (10%). The judge determined that a $1.5 million medical monitoring fund should be established, but only for the benefit of the children class members and for neuropsychological tests only. Thereafter, the trial judge retired and another judge assumed responsibility for the case. In June 2011, the court entered judgment in accordance with the trial judge's decision.

In August 2011, we reversed the trial court's order in a related matter, which had vacated the tax foreclosure judgment and restored ownership of the property to Accutherm. *Navillus Group v. Accutherm, Inc.*, 422 *N.J.Super.* 159, 172 (App.Div.2011), *certif. denied*, 209 *N.J.* 232 (2012). We held that the trial court had erroneously determined that a tax foreclosure judgment could be set aside pursuant to a provision of ISRA, which allows for the voiding of a sale or transfer of an industrial establishment in the event the transferor fails to remediate the property and obtain DEP approval. *Id.* at 180–83.

We observed that, when Navillus and Jim Sullivan, Inc. purchased the tax sale certificates, they had sufficient information to put them on notice of possible environmental contamination of the property, and the Tax Sale Law places the risk of discovering facts that might affect the value of the property upon the purchasers of the certificates. *Id.* at 183.

***9** Thereafter, in this case, the trial court denied motions by the Township for relief from the judgment, based upon our decision in *Navillus.* In November 2011, the Sullivan defendants filed a consolidated amended cross-claim against the

Township and third-party claim against the DEP, asserting causes of action for negligence and fraud.

In March 2012, the judge entered an order which denied a motion by plaintiffs to enforce a purported settlement between plaintiffs and the Township, and granted the Township's motion to bar disclosure of confidential mediation communications regarding the alleged settlement.

In April 2012, the judge determined that all of the Sullivan/Baughman settlement proceeds would be deemed a collateral source of recovery under *N.J.S.A.* 59:9–2(e), thereby reducing the damages payable by the Township and the DEP. The judge also ruled that the Township and the DEP were not liable for counsel fees under the TCA.

In October 2012, the judge awarded attorneys' fees to plaintiffs pursuant to 42 *U.S.C.A.* § 1988(b). The fees were awarded only with regard to the Section 1983 claims, on which only the Township and Errera had been found liable.

In August 2012, the DEP and the Township filed motions for summary judgment on the claims asserted by the Sullivan defendants. The judge entered orders dated February 22, 2013, granting the motions for reasons stated on the record on October 12, 2012, and in a written opinion dated December 10, 2012.

We note that, while the appeals were pending, we affirmed a judgment entered by the Law Division imposing liability upon Navillus, the Navillus general partners, and Jim Sullivan, Inc. for the remediation of the Accutherm site pursuant to the Spill Compensation and Control Act, *N.J.S.A.* 58:10–23.11 to –23.11z. *N.J. Dep't of Envtl. Prot. v. Navillus Grp.*, No. A–4726–13T3 (App.Div. Jan.14, 2016) (slip op. at 29). We held, however, that there was insufficient evidence on the record to pierce the corporate veil of Jim Sullivan, Inc. or impose liability on the basis of unjust enrichment, and remanded for further proceedings on these issues. *Ibid.* On April 29, 2016, the Supreme Court denied certification in that case. —— *N.J.* —— (2016).

II.

We turn first to the Township and Errera's appeal, and plaintiffs' cross-appeal. The Township and Errera argue that the trial judge erred by finding them liable under the TCA. They further argue that the judge erred by finding them liable under Section 1983 and by awarding plaintiffs attorneys' fees pursuant to 42 *U.S.C.A.* § 1988(b).

We note initially that the findings of fact of a trial judge will not be disturbed on appeal when supported by competent, relevant, and reasonably credible evidence in the record. *Zaman v. Felton*, 219 *N.J.* 199, 215, 98 A.3d 503 (2014); *Rova Farms Resort, Inc. v. Investors Ins. Co. of Am.*, 65 *N.J.* 474, 484, 323 A.2d 495 (1974). However, the trial judge's legal determinations are subject to de novo review. *Zaman, supra*, 219 *N.J.* at 216, 98 A.3d 503.

A. *The Township's Liability Under the TCA.*

1. *Negligence.*

***10** Here, the trial judge found that the Township was liable under the TCA because its employees knew that the Accutherm site was contaminated with mercury, and had the authority to warn the public and stop development of the site as a daycare center by refusing to issue the necessary permits, but failed to do so.

The judge observed that the record was "replete with evidence" that the "municipal officials had knowledge concerning the contamination of the Accutherm site before it was approved to become a daycare center, and even after it was established as a daycare center." The judge stated that "everyone" had pointed "fingers everywhere else" but "unbelievably, the approvals were granted and the Kiddie **Kollege** was opened."

The judge determined that the Township was liable for the negligence of its employees, and that such negligence justified imposition of liability under the TCA, specifically *N.J.S.A.* 59:2–2(a). The judge rejected the Township's claim that it was immune from liability in this matter.

On appeal, the Township and Errera argue that the judge erred by failing to recognize the immunities

afforded to them under the TCA and the common law. We agree.

As noted, in finding the Township liable, the trial judge relied upon *N.J.S.A.* 59:2–2(a), which states, "A public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances." However, this liability provision is subject to the immunities enumerated in the TCA. *N.J.S.A.* 59:2–1(b); *Tice v. Cramer*, 133 *N.J.* 347, 355–56, 627 A.2d 1090 (1993); *Turner v. **Twp**. of Irvington*, 430 *N.J.Super.* 279, 283 (App.Div.2013).

Here, the trial judge found that the Township was liable due to the negligent issuance of construction, occupancy and zoning permits that allowed the operation of the daycare center on the contaminated property. Such actions are immune from liability under *N.J.S.A.* 59:2–5, which provides that:

> [a] public entity is not liable for an injury caused by the issuance ... of ... any permit, license, certificate, approval, order, or similar authorization where the public entity or public employee is authorized by law to determine whether or not such authorization should be issued....

Interpreting this immunity provision, our Supreme Court has stated:

> Licensing activity is a vital exercise of governmental authority. In this State there are literally millions of licenses, certificates, permits and the like applied for, issued, renewed or denied. It is inevitable that with such a staggering volume of activity, mistakes, both judgmental and ministerial, will be made. The purpose of the immunity is to protect the licensing function and permit it to operate free from possible harassment and the threat of tort liability.
>
> [*Malloy v. State*, 76 *N.J.* 515, 521, 388 A.2d 622 (1978).]

***11** Thus, the immunity granted to a public entity's permit activity "is pervasive and applies to all phases of the licensing function, whether the governmental acts be classified as discretionary or ministerial." *Id.* at 520, 388 A.2d 622. *N.J.S.A.* 59:2–5 therefore precludes the trial court's finding of liability based upon the Township's issuance of construction, occupancy and zoning permits.

The trial judge also found that the Township was liable due to its failure to "properly expose and act upon knowledge" of contamination at the Accutherm site. We recognize that the Township and its officials could have taken actions to warn the public with regard to the contamination of the Accutherm property. However, any decision to take or not take such actions was discretionary, not ministerial as found by the trial judge. The failure to take such actions is immune from liability under the TCA.

A public entity cannot be held liable for the exercise of discretion in carrying out governmental functions. *See N.J.S.A.* 59:2–3(a), (c), (d); *S.P. v. Newark Police Dep't*, 428 *N.J.Super.* 210, 230, 52 A.3d 178 (App.Div.2012) (noting that discretionary acts call for exercise of deliberation and judgment, examining facts, reaching reasoned conclusions, and acting on conclusions in a way not specifically directed).

In addition, the Township and its employees have immunity under the TCA for the failure to adopt or enforce a law. *See N.J.S.A.* 59:2–4. The Township and its employees also have common law immunity for nonfeasance. *See N.J.S.A.* 59:1–2 ("government should not have the duty to do everything that might be done"); *Lentini v. Montclair*, 122 *N.J.L.* 355, 356, 5 A.2d 692 (Sup.Ct.1939) (holding that a public entity is not liable for the nonfeasance of its employees and agents unless such liability is established by "positive statutory law").

Plaintiffs argue, however, that the Township had a duty to act with regard to the contamination of the site because it involved "a situation of an emergent and high risk nature," compelling an urgent response to warn the public. In support of this argument, plaintiffs rely upon *Bergen v. Koppenal*, 52 *N.J.* 478, 246 A.2d 442 (1968).

In *Koppenal*, the Court held that a police officer may have a duty to act if the officer "learns of an emergent road condition which is likely not to be observed by a motorist and which holds an unusual risk of injury." *Id.* at 480, 246 A.2d 442. The Court held that in determining whether a municipality could be liable in such circumstances, the finder of fact should consider whether, at the time of the emergency, the police force had competing demands and whether the failure to deploy the police was palpably unreasonable. *Ibid.*

Plaintiffs also rely upon *Wuethrich v. Delia*, 134 *N.J.Super.* 400, 341 A.2d 365 (Law Div.1975), *aff'd*, 155 *N.J.Super.* 324, 382 A.2d 929 (App.Div.), *certif. denied*, 77 *N.J.* 486, 391 A.2d 500 (1978). In that case, the plaintiff claimed that the police department had been notified that an individual was menacing members of the public with a firearm a short distance from police headquarters. *Id.* at 405, 391 A.2d 500. The police did not respond to this information. *Ibid.*

***12** A short time later, the individual shot a person in the head with a gun, killing him instantly. *Ibid.* The court held that, under the circumstances, the police had a non-discretionary duty to investigate the warning, and a jury could find the municipality liable for failing to do so. *Id.* at 411, 414, 391 A.2d 500. The court indicated that the jury should consider any competing demands that police may have had at the time, and determine whether the decision not to investigate was "palpably unreasonable." *Id.* at 414, 391 A.2d 500.

We are convinced that plaintiffs' reliance upon *Koppenal* and *Wuethrich* is misplaced. As the record shows, this matter involves private property located in the Township, which was discovered to be contaminated in the late 1980s, and which remained contaminated for more than a decade after it was abandoned and unoccupied.

The property did not present an immediate threat about which the Township had a duty to warn the public. Indeed, neither the DEP nor the EPA viewed the property as requiring immediate action to clean up the mercury contamination. We conclude that, under these circumstances, the Township did not have a non-discretionary duty to warn the public of the contamination.

Plaintiffs also cite *Hopkins v. Fox & Lazo Realtors*, 132 *N.J.* 426, 625 A.2d 1110 (1993), in support of their contention that the Township had a duty to warn the public of the contamination. In *Hopkins*, the Court held that real estate broker had a duty to conduct a reasonable inspection and warn prospective buyers and visitors who tour an open house. *Id.* at 448, 625 A.2d 1110. The Court explained that the duty to inspect and warn arises from the professional services undertaken by a broker attempting to sell the house on behalf of the owner, when the broker has an adequate opportunity to undertake the inspection. *Ibid.* The duty is limited to defects reasonably discoverable through ordinary inspection. *Ibid.*

Hopkins does not, however, support the imposition of liability upon the Township in this matter. Here, the Township neither owned nor possessed the property, nor did it ever invite citizens onto the property. We therefore reject plaintiffs' contention that the Township had a duty to warn the public of dangers posed by contamination of the Accutherm site.

2. *Public Nuisance.*

The Township further argues that the trial judge erred by finding it liable for creating a public nuisance. Again, we agree.

A public nuisance is defined by the *Restatement (Second) of Torts*, § 821B (1979), as follows:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
>
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
>
> (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or

the public convenience, or

(b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or

***13** (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Claims against a public entity for creating a public nuisance are subject to the TCA. *Posey v. Bordentown Sewerage Auth.*, 171 *N.J.* 172, 181, 793 A.2d 607 (2002) (citing *N.J.S.A.* 59:2–1(a)); *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 144 *N.J.* 84, 97–98, 675 A.2d 1077 (1986); *Birchwood Lakes Colony Club, Inc. v. Borough of Medford Lakes*, 90 *N.J.* 582, 587, 593–96, 449 A.2d 472 (1982). "[A] public entity may be liable for creating a nuisance under the TCA," by maintaining a dangerous condition on public property, *N.J.S.A.* 59:4–2, or "for creating a hazardous condition on the property of another." *Posey, supra*, 171 *N.J.* at 185, 793 A.2d 607.

For purposes of the TCA, public property is property that is owned or controlled by the public entity. *N.J.S.A.* 59:4–1(c). Here, the property is private property that was owned by Accutherm and thereafter by Navillus and Jim Sullivan, Inc. Moreover, there is no evidence that the Township created the dangerous condition of the property. Indeed, the Township played no role in the contamination of the site.

Plaintiffs argue that the Township may be held liable for creating a nuisance because it granted the permits which allowed the property to be used as a daycare center. We disagree. If the property was dangerous, it was because it was contaminated. The issuance of the zoning or occupancy permit did not create that condition. In any event, as we stated previously, the Township is immune under the TCA for its permitting activities.

B. *Section 1983 Liability of The Township and Errera.*

The Township and Errera argue that the judge erred by finding them liable under Section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

[42 *U.S.C.A.* § 1983.]

Section 1983 "does not, by its own terms, create substantive rights." *Kaucher v. Cnty. of Bucks*, 455 *F.*3d 418, 423 (3d Cir.2006). Rather, it is "a means of vindicating rights guaranteed in the United States Constitution and federal statutes." *Gormley v. Wood–El*, 218 *N.J.* 72, 97, 93 A.3d 344 (2014); *Gonzales v. City of Camden*, 357 *N.J.Super.* 339, 345, 815 A.2d 489 (App.Div.2003). To determine whether a plaintiff has validly stated a claim under Section 1983, the court must first identify the constitutional right violated. *Kaucher, supra*, 455 *F.*3d at 423.

1. *Errera.*

The judge found Errera liable under Section 1983 based on his issuance of the zoning permit. The judge held that, by issuing the permit, Errera violated plaintiff's right to protection from harm resulting from a state-created danger, a right protected by the substantive due process guarantee of the Fourteenth Amendment to the United States Constitution. *See Kaucher, supra*, 455 *F.*3d at 431; *Gormley, supra*, 218 *N.J.* at 98–101, 93 A.3d 344.

***14** In *Gormley*, the Court adopted the four-factor test for Section 1983 claims based upon a

state-created danger. *Id.* at 101, 112, 93 A.3d 344 (citing *Bright v. Westmoreland Cnty.*, 443 *F.*3d. 276, 281 (3d Cir.2006), *cert. denied*, 549 *U.S.* 1264, 127 *S. Ct* . 1483, 167 *L. Ed.*2d 228 (2007)). Under this test, the plaintiff must establish that (1) the harm ultimately caused was "foreseeable and fairly direct"; (2) the public employee who created the danger acted with a degree of culpability that shocks the conscience; (3) the plaintiff and the state had a relationship from which it could be concluded that the plaintiff was foreseeable victim of the state's actions, rather than merely a member of the general public; and (4) the state actor affirmatively used his or her authority, which created a danger to the plaintiff or made the plaintiff more vulnerable to danger than if the state had not acted at all. *Id.* at 101 (citing *Bright, supra,* 443 *F.*3d at 281).

Here, the evidence does not support the trial judge's legal conclusion that Errera's action in issuing the zoning permit meets the test for a state-created danger under *Gormley*. Clearly, Errera was negligent in doing so, as the trial judge found. However, we cannot conclude that his actions were so egregious as to shock the conscience. We note that Errera had no education or experience in environmental matters. His primary role as zoning official was to determine whether use of the property as a daycare center was permitted by the Township's zoning ordinance.

The permit merely indicated that the proposed use was allowed. It was not a representation that the property was environmentally safe for use as a daycare center. We recognize that Gradwohl told Errera the property had not been cleaned up. He also recommended against its use as a daycare center. Even so, Errera misunderstood the meaning of NFA status and may have reasonably believed there were no current concerns about the property.

2. *The Township.*

a. *State-created Danger.*

The trial judge found the Township liable under Section 1983 on the theory that it was responsible for a state-created danger. The judge based this finding upon the Township's issuance of the tax sale certificates and its participation in the tax sale foreclosure process, which allowed Navillus and later Jim Sullivan, Inc. to obtain title to the property. We conclude, however, that the trial judge erred as a matter of law in finding that plaintiffs met the four-factor test under *Gormley* for imposing liability upon the Township on this basis.

Here, the Township sold the tax certificates pursuant to the Tax Sale Law. When doing so, the Township informed purchasers of the certificates that industrial property might be subject to environmental cleanup responsibilities. As noted previously, purchasers of the tax sale certificates are responsible for discovering any facts, such as environmental contamination, that might have an impact upon the value of the property. *Navillus, supra,* 422 *N.J.Super.* at 183, 27 A.3d 973.

***15** Therefore, the Township's actions in issuing the tax sale certificates and participating in the tax foreclosure were not a direct and foreseeable cause of any harm to plaintiffs, and these actions do not shock the conscience. Furthermore, plaintiffs were not foreseeable victims of the Township's actions because at the time the tax sale certificates were sold and Navillus acquired the property in the foreclosure process, the Township could not have anticipated that a daycare center would operate on the site.

The trial judge also imposed liability upon the Township pursuant to Section 1983 based on the issuance of construction permits for the property. We conclude that the judge erred as a matter of law in doing so because evidence regarding the issuance of these permits also fails to meet the four-part test for a state-created danger under *Gormley.*

Plaintiffs did not establish that issuance of the construction permits was the direct or foreseeable cause of any harm suffered by the children exposed to mercury at the daycare center. The record shows that at the time the permits were issued, there was no plan to operate a daycare center on the property. Even if the officials were negligent in issuing the permits, their actions were not egregious and do not shock the conscience.

In addition, the judge imposed liability upon the Township based upon the issuance of the zoning and occupancy permits. However, as we stated

previously, the judge erred as a matter of law by holding Errera personally liable for issuing the zoning permit. That conclusion also precludes the imposition of liability upon the Township on that basis. Furthermore, the issuance of the occupancy permits may have been negligent, but, like the Township's other permitting actions, the actions were not shocking to the conscience.

b. *Failure to Train Employees.*

The trial judge found that the Township was liable under Section 1983 on the basis of its failure to train its employees in certain respects. The judge determined that the Township was aware that its employees were involved in the sale of tax sale certificates for property within the municipality, and they might face situations in which tax sale certificates were being sold for contaminated property.

The judge found that the Township knew that the dangers from selling tax sale certificates could be lessened if the employees were trained or instructed to consult the files of its OEM, which included information on contaminated sites. The judge determined that the Township's failure to train its employees in this respect was, at a minimum, reckless indifference, if not willful blindness.

To impose liability under Section 1983 on this basis, plaintiffs were required to establish that the Township's failure to train its employees in a particular manner constituted deliberate indifference to the constitutional rights of persons affected thereby, such that the failure could be considered an actionable policy or custom; and the failure to train was the proximate cause of the injuries sustained. *City of Canton, Ohio v. Harris,* 489 *U.S.* 378, 388–92, 109 *S.Ct.* 1197, 1204–06, 103 *L. Ed.*2d 412, 426–29 (1989); *Thomas v. Cumberland Cnty.,* 749 *F.*3d 217, 222 (3d Cir.2014). Deliberate indifference is a very high standard to satisfy, and it usually requires proof of "[a] pattern of similar constitutional violations by untrained employees." *Connick v. Thompson,* 563 *U.S.* 51, 62 131 *S.Ct.* 1350, 1360, 179 *L. Ed.*2d 417, 427 (2011); *Thomas, supra,* 749 *F.*3d at 223.

***16** We are convinced that the evidence does not support the legal conclusion that the Township acted with deliberate indifference to the possibility that a tax sale certificate could be issued for a contaminated site and create an unconstitutional state-created danger. As we noted previously, when the tax sale certificates were issued for the Accutherm property, the Township notified the potential purchasers that industrial sites may have environmental cleanup responsibilities.

Moreover, under the Tax Sale Law, the burden is on the purchaser to familiarize itself with potential environmental hazards that could affect the value of the property. *Navillus, supra,* 422 *N.J.Super.* at 183, 27 A.3d 973. In addition, there was no evidence that any prior sale of a tax sale certificate in the Township resulted in the use or occupancy of a contaminated site.

Thus, the evidence does not support the trial judge's legal conclusion that the Township acted with deliberate indifference to any potential constitutional violation arising from a failure to train its employees to consult the OEM files for evidence of contamination before issuing a tax sale certificate.

c. *Unlawful Policy or Custom.*

The trial judge determined that the Township was liable under Section 1983 for maintaining an unlawful policy or custom with regard to the sale of tax sale certificates on contaminated sites. The judge found that the Township maintained a policy or custom of failing to check its OEM files to determine if a site was contaminated before issuing tax sale certificates relating to that property.

The judge also determined that the Township maintained a policy or custom of issuing general tax sale notices that merely mentioned that industrial property might be contaminated. We are convinced the judge erred as a matter of law by imposing liability on the Township for these reasons.

A municipality may not be held vicariously liable under Section 1983 for the unconstitutional acts of its employees, unless the acts are the result of a municipal policy or custom. *Monell v. Dep't of Soc. Servs.,* 436 *U.S.* 658, 690–91, 98 *S.Ct.* 2018, 2035–36, 56 *L. Ed.*2d 611, 635–36 (1978); *Loigman v. **Twp**. Comm. of Middletown,* 185 *N.J.*

566, 590, 889 A.2d 426 (2006). A municipal employee's unconstitutional act will be considered an act of official government policy if the employee had final policy-making authority, or if the employee's unconstitutional act was ratified by an employee with final policy-making authority. *Id.* at 590–91, 889 A.2d 426; *Plemmons v. Blue Chip Ins. Servs., Inc.*, 387 *N.J.Super.* 551, 571, 904 A.2d 825 (App.Div.2006).

However, a plaintiff may establish a custom "by showing that a given course of conduct, although not specifically endorsed or authorized by law, is so well-settled and permanent as virtually to constitute law." *Watson v. Abington* ***Twp.***, 478 *F.*3d 144, 155–56 (3d Cir.2007) (citations omitted). Thus, "custom may be established by proving knowledge of, and acquiescence to, a practice ." *Id.* at 156.

***17** Plaintiffs have not shown that the Township's issuance of the tax sale certificates with regard to the Accutherm site were unconstitutional acts. These acts did not constitute a state-created danger, and they were not the result of an actionable failure-to-train.

We accordingly conclude that the trial judge erred by finding the Township and Errera liable under the TCA and Section 1983. We therefore reverse the judgment entered against these parties and the order awarding plaintiffs attorney's fees pursuant to 42 *U.S.C.A.* § 1988.

We note that, in their appeal, the Township and Errera also argue that the trial court erred by relying upon its prior decision in the *Navillus* case, and by misapplying the legal standard for establishing a medical monitoring fund. Because the judgment against the Township and Errera is reversed, we need not address these issues.

C. *Plaintiff's Cross–Appeal.*

In their cross-appeal, plaintiffs argue that the trial court erred by denying their motion to enforce a settlement with the Township. Plaintiffs' arguments on this issue are without sufficient merit to warrant extended discussion. *R.* 2:11–3(e)(1)(E). We affirm the denial of plaintiffs' motion to enforce the purported settlement substantially for the reasons stated by the motion judge on the record on March 14, 2012.

We note that the motion judge had ordered the parties to participate in post-trial mediation. *R.* 1:40–4. Communications in a mediation session are not subject to discovery unless permitted by the New Jersey Uniform Mediation Act, *N.J.S.A.* 2A:23–1 to –13. *See R.* 1:40–4(c). Here, there was no settlement agreement signed by the parties in mediation, and no waiver of the privilege applicable to mediation communications. We are therefore convinced the motion judge correctly determined that plaintiffs' motion to enforce the purported agreement should be denied.

Plaintiffs further argue that the motion judge erred by applying the collateral source doctrine to the Sullivan/Baughman settlement monies, and by refusing to award them attorney's fees pursuant to the TCA. In view of our decision setting aside the judgment entered against the Township under the TCA, these issues are moot.

Accordingly, on the appeal, we reverse the judgment entered against the Township and Errera and the order awarding plaintiffs attorneys' fees pursuant to 42 *U.S.C.A.* § 1988(b). On the cross-appeal, we affirm the denial of plaintiffs' motion to enforce the purported settlement with the Township, and dismiss the remainder of the cross-appeal.

III.

We turn to the DEP's appeal from the final judgment holding it liable under the TCA for its actions or omissions with regard to the Accutherm property, and to plaintiffs' cross-appeal.

The trial judge found the DEP liable for: (1) changing the classification of the subject property from one of an immediate environmental concern to one awaiting assignment; (2) failing to place warning signs restricting access to the property until the site was cleaned up; and (3) failing to notify the DOH of the contamination so that a license would not be issued for use of the property as a daycare center.

***18** The judge held the DEP liable under *N.J.S.A.*

59:2–2(a), concluding that the acts of its employees were ministerial and that no immunities applied. The judge stated that the DEP "failed to properly expose and act upon knowledge that [it] had regarding the contamination of the Kiddie **Kollege** site prior to and after its opening as a daycare center."

On appeal, the DEP argues that the trial court erred as a matter of law because it is immune from liability under the TCA with regard to its actions or omissions regarding the Accutherm site. We agree. We are convinced that, even if the DEP's actions were negligent, and those actions were a proximate cause of any harm to plaintiffs, the DEP is immune from liability in this matter.

As we have explained, the DEP took various actions to address the environmental contamination at the Accutherm site. It inspected the property to determine if any security measures were necessary, but determined that none were required at that time because the property was not occupied and the building was locked. The DEP also sought remediation by the property owner and assistance with remediation from the EPA.

In addition, the DEP placed the property on the Known Contaminated Site List pending the availability of funds necessary for remediation, although it later removed the property from the list. The DEP ranked the property against other contaminated properties in the State to prioritize the expenditure of public funds. The DEP also provided accurate information about the property to the Sullivans and to Errera in response to their inquiries.

Under the TCA, a public entity may be liable for injuries proximately caused by the negligence of its employees acting within the scope of their employment. *N.J.S.A.* 59:2–2(a). However, as noted previously, any such liability is subject to the immunities set forth in the TCA. *N.J.S.A.* 59:2–1(b). *Tice, supra,* 133 *N.J.* at 355–56, 627 A.2d 1090; *Turner, supra,* 430 *N.J.Super.* at 283, 63 A.3d 1233. Here, the DEP is immune from liability for actions that constitute nonfeasance, *N.J.S.A.* 59:1–2; any failure to enforce the law, *N.J.S.A.* 59:2–4 and 59:3–5; any failure to inspect or negligent inspection, *N.J.S.A.* 59:2–6; and for discretionary activities, *N.J.S.A.* 59:2–3.

The trial judge concluded that the DEP voluntarily assumed responsibility for remediation of the Accutherm site, thereby creating a duty of care as to how the department handled the property pending remediation. However, under the Spill Act, the duty to clean up the site rested at all times with those responsible for the contamination and its remediation. *Navillus, supra,* No. A–4726–13 (slip op. at 29). The DEP also took regulatory actions regarding the property, as permitted by law, but such actions did not impose upon the DEP a duty of care for the property pending its remediation.

We also reject plaintiffs' contention that the DEP can be held liable for maintaining or creating a dangerous condition on the Accutherm property. The property at issue was never owned or controlled by the DEP. *Posey, supra,* 171 *N.J.* at 183–84, 793 A.2d 607. There also is no evidence that the DEP created the danger presented by the contamination of the property. We therefore conclude that the judgment entered against the DEP must be reversed.

***19** In their cross-appeal, plaintiffs argue that the trial judge erred by applying the collateral source doctrine to the Sullivan/Baughman settlement funds. In view of our determination that the judgment against the DEP must be reversed, that issue is moot.

Accordingly, we reverse the judgment against the DEP and dismiss plaintiffs' cross-appeal.

IV.

We next consider the appeal by the Sullivan defendants from the trial court's order dismissing their fraud and negligence claims against the Township and the DEP.

The following facts and procedural history inform our decision on this appeal. Plaintiffs' class action complaints were filed in October and November 2006 and detailed information and documentation in the Township's and DEP's possession regarding the Accutherm site, dating back to the 1980s. With their answers, the Sullivan defendants filed cross-claims against their co-defendants, including the Township and DEP, but only for contribution and indemnification.

Meanwhile, in October 2006, the Sullivans filed their action, to vacate the tax sale foreclosure judgment. The named defendants in that litigation were Accutherm, Giuliano, the DEP, and the Township. In their complaint, the Sullivans detailed information in the possession of the Township and the DEP, dating back to the 1980s, regarding contamination at the Accutherm site. That litigation proceeded through discovery and a bench trial on February 18, 2009, with the trial court's opinion being issued on April 28, 2009. *See Navillus, supra,* 422 *N.J.Super.* at 175–76, 27 A.3d 973.

In September 2009, the Sullivan defendants filed a motion in this litigation, for leave to file cross-claims against the Township, and third-party claims against the DEP, for monetary damages for negligence and fraud. By written opinion dated April 19, 2010, and order dated May 5, 2010, the judge granted that motion and also ruled that the Sullivans' proposed negligence and fraud claims would be severed and litigated after plaintiffs' class action claims.

In so doing, the judge rejected defendants' argument that the proposed claims should have been filed in the *Navillus* tax foreclosure litigation, and therefore should be deemed barred under the entire controversy doctrine. The judge also rejected defendants' argument that the claims were barred for failure to comply with the notice provisions of the TCA. However, the denial of defendants' motion was "without prejudice."

The Sullivans did not participate at trial because they settled the class action claims on October 19, 2010. They indicated they intended to pursue their affirmative claims against the Township and DEP after trial. The Sullivans did not, however, file their proposed cross-claims and third-party claims until after trial.

At a post-trial hearing on October 26, 2011, the motion judge permitted the cross-claims and third-party claims "to be reinstated ." The judge indicated that, "once served," these claims could be subjected to motions to dismiss, or for summary judgment.

***20** On November 29, 2011, the Sullivan defendants filed their negligence and fraud claims against the Township and the DEP. The basis of their claims was the Township's and DEP's alleged failure to warn them that the property was contaminated, and provide documentation regarding the contamination, thereby inducing them to unwittingly acquire the property and transform it into a daycare center.

The judge denied the Township's and DEP's motions to dismiss but granted their motions for summary judgment. In her written opinion, the judge ruled that the claims were time-barred. The judge alternatively found that the negligence and fraud claims failed as a matter of law.

On appeal, the Sullivans argue that the judge erred by granting summary judgment to the Township and the DEP because discovery on its claims was not complete. We disagree. As a general matter, summary judgment should not be granted before the completion of discovery. *Velantzas v. Colgate–Palmolive Co.,* 109 *N.J.* 189, 193, 536 A.2d 237 (1988). However, a party opposing summary judgment on the ground of incomplete discovery "must show, with some specificity, the nature of the discovery sought" and that the missing discovery would provide necessary information relating to a missing element of the case. *Mohamed v. Iglesia Evangelica Oasis De Salvacion,* 424 *N.J.Super.* 489, 498, 38 A.3d 669 (App.Div.2012).

As we have explained, the asserted basis for the Sullivans' negligence and fraud claims is that the Township and the DEP did not provide them with all documents and information in their possession relating to the Accutherm property. However, the record reflects that at the time the Township and the DEP moved for summary judgment, the Sullivans had obtained all relevant documents and information from the Township and the DEP, through discovery in this and other litigations. Therefore, the judge did not rule prematurely on the motions for summary judgment.

The Sullivans further argue that the judge erred by ruling that their negligence and fraud claims were barred by the two-year statute of limitations in the TCA. Again, we disagree. We affirm the trial court's determination that the claims were time-barred substantially for the reasons stated by the motion judge in her written opinion of December 10, 2012.

As the judge determined, the two-year statute of

limitations applied to the Sullivans' claims, and the Sullivans failed to assert those claims within two years of their accrual, as required by the TCA. The judge also correctly rejected the Sullivans' assertion that their claims related back to the answers they filed in the class action litigation in January 2007, in which they asserted cross-claims for contribution and indemnification.

The Sullivans' cross-claims for contribution and indemnification were substantially different from the claims of negligence and fraud asserted in November 2011. The contribution and indemnification claims were based upon co-defendants' alleged liability to plaintiffs, whereas the negligence and fraud claims were premised upon the Township's and the DEP's alleged liability to the Sullivans. New claims will not be deemed to relate back where, as here, they are otherwise time-barred. *Molnar v. Hedden*, 138 *N.J.* 96, 104, 649 A.2d 71 (1994).

***21** In any event, by the time the Sullivans filed their fraud and negligence claims in November 2011, the contribution and indemnification claims had been settled. Accordingly, there were no existing claims to which the new claims could relate back. *Id.* at 104–05, 649 A.2d 71 (amended pleading cannot relate back to earlier filing once case has been settled).

Since we have determined that the motion judge correctly found that the Sullivans' claims against the Township and the DEP were time-barred, we need not consider whether the Township and the DEP were entitled to summary judgment on other grounds.

We have considered the other arguments raised by the Sullivan defendants in their appeal. We conclude that they are without sufficient merit to warrant discussion. *R.* 2:11–3(e)(1)(E).

Accordingly, we affirm the orders granting judgment to the Township and the DEP on the Sullivans' claims for negligence and fraud.

In A–3587–12, reversed on the appeal; affirmed in part and dismissed in part on the cross-appeal. In A–3732–12, reversed on the appeal; the cross-appeal is dismissed. In A–2995–12, affirmed. The matter is remanded to the trial court for entry of an order consistent with this opinion. We do not retain jurisdiction.

All Citations

Not Reported in A.3d, 2016 WL 3004855

Footnotes

1 These parties are referred to herein collectively as the Sullivan defendants or the Sullivans.