

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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March 22, 2016

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RE: ***Sandra Sarko & Frank Sarko v. City of Rehoboth Beach***
C.A. No.: S15C-11-013 RFS

Submitted: January 11, 2016
Decided: March 22, 2016

Defendant's Motion to Dismiss in Lieu of an Answer.
Granted.

Dear Counsel:

Plaintiff Sandra Sarko ("Plaintiff") tripped and fell while walking on the boardwalk in Rehoboth Beach, Delaware. Plaintiff sued Defendant City of Rehoboth Beach (the "City") for negligence for failing to inspect and fix the boardwalk. The City filed a Motion to Dismiss in Lieu of an Answer based on its immunity from suit pursuant to the County and Municipal Tort Claims Act (the "Act").¹

¹ 10 *Del. C.* §§ 4010-4013.

On May 24, 2014, Plaintiff alleges that she was walking on the boardwalk and, as a result of the City's negligence, tripped over a raised plank, fell, and sustained personal injuries. The City argues that it is immune under § 4011(b)(6) of the Act:

(b) Notwithstanding § 4012 of this title, a governmental entity shall not be liable for any damage claim which results from:

(6) Any defect, lack of repair or lack of sufficient railing in any highway, townway, sidewalk, parking area, causeway, bridge, airport runway or taxiway, including appurtenances necessary for the control of such ways including but not limited to street signs, traffic lights and controls, parking meters and guardrails.

Plaintiff argues that § 4011(b)(6) is inapplicable to the facts at bar because the statute lacks an explicit reference to boardwalks. Instead, Plaintiff relies on an exception to immunity listed in § 4012:

A governmental entity shall be exposed to liability for its negligent acts or omissions causing property damage, bodily injury or death in the following:

(2) In the construction, operation or maintenance of any public building or the appurtenances thereto, except as to historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation.

The City's argument for immunity is twofold. First, the City asserts that the term "sidewalk" in § 4011(b)(6) must include a "boardwalk" because both terms, according to the Merriam-Webster Online Dictionary, are defined as a walk for pedestrians. Second, even if boardwalk does not fall within the definition of a sidewalk, the City is immune nonetheless under § 4012(2) because the boardwalk is a "structure . . . designed for use primarily by the public in connection with public outdoor recreation."

The Court does not agree with the City's argument that sidewalk in § 4011(b)(6) includes a boardwalk. It is well-established Delaware law that undefined code terms must be construed using their common and approved usage.² Also, words in a statute should not be construed as surplusage if there is a reasonable construction which will give them meaning.³ Therefore, the

² *Moore v. Wilmington Hous. Auth.*, 619 A.2d 1166, 1173 (Del. 1993).

³ *Oceanport Indus., Inc. v. Wilmington Stevedores Inc.*, 636 A.2d 892, 900 (Del. 1994).

construction of the term sidewalk should be driven by the ordinary dictionary meaning of the term.

As noted in the City's Motion, the Merriam-Webster Online Dictionary defines sidewalk as "a usually paved walk for pedestrians at the side of a street."⁴ A boardwalk is defined as "a walk constructed of planking" or "a walk constructed along a beach."⁵ Notably, each definition contains a prepositional phrase that modifies the walk's location. Since a sidewalk is adjacent a street and a boardwalk is adjacent to a beach, the Court is not convinced that the two terms are so readily interchangeable. This construction is buttressed by the Rehoboth Beach Municipal Code, which draws a distinction between sidewalks and boardwalks in several of its ordinances.⁶

Determining whether a boardwalk is a "public building," as set forth in § 4012(b)(2), requires the same common and approved usage analysis detailed above. The Merriam-Webster Online Dictionary defines a building as "a structure (such as a house, hospital, school, etc.) with a roof and walls that is used as a place for people to live, work, do activities, store things, etc."⁷ A boardwalk has neither a roof nor walls nor is it an enclosed area like a building. Furthermore, § 4012(2) excepts "historic sites or buildings, structures, facilities or equipment designed for use primarily by the public in connection with public outdoor recreation."

A structure is defined in the Merriam-Webster Online Dictionary as "something (such as a house, tower, bridge, etc.) that is built by putting parts together and that usually stands on its own."⁸ Because the legislature included the term structure in § 4012(2), it must be constructed to avoid surplusage. In light of the boardwalk's proximity to the beach and its lack of an enclosed area, the Court is satisfied that the boardwalk is a structure designed for use primarily by the public in connection with public outdoor recreation pursuant to § 4012(2). Therefore, the City is immune from suit.

⁴ MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sidewalk> (last visited February 16, 2016).

⁵ MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/boardwalk> (last visited February 16, 2016).

⁶ *See, e.g.*, §§ 74-16, 92-18.

⁷ MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/building> (last visited February 16, 2016).

⁸ MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/structure> (last visited February 16, 2016).

Defendant's Motion to Dismiss in Lieu of an Answer is **GRANTED**.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office