NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1652-15T2

FRANCES GREEN,

Plaintiff-Appellant,

v.

MONMOUTH UNIVERSITY,

Defendant-Respondent,

and

PRESS COMMUNICATIONS, LLC,
d/b/a THUNDER 106, and
AEG WORLDWIDE,

Defendants.

APPROVED FOR PUBLICATION

January 8, 2018

APPELLATE DIVISION

Argued January 10, 2017 - Decided January 8, 2018

Before Judges Fisher, Ostrer, and Leone (Judge Fisher dissenting).

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-2538-14.

Stewart M. Leviss argued the cause for appellant (Berkowitz, Lichtstein, Kuritsky, Giasullo & Gross, LLC, attorneys; Stewart Leviss, on the brief).

John N. Kaelin, III argued the cause for respondent (Haddix and Associates, attorneys; John N. Kaelin and Jonathan T. Woy, on the brief).

The opinion of the court was delivered by

LEONE, J.A.D.

Plaintiff Frances Green appeals the December 1, 2015 order granting summary judgment to defendant Monmouth University on the ground of charitable immunity. We affirm.

I.

The following facts are undisputed or are drawn from documents provided to the court. Defendant Monmouth University, formerly Monmouth Junior College (collectively "the University"), is a non-profit educational institution located in West Long Branch. Plaintiff is a resident of Long Branch in Monmouth County. She had been on the University's campus twice for job-related conferences.

On December 9, 2012, plaintiff allegedly fell on unsafe stairs at the University's Multipurpose Activity Center (MAC) while attending a concert by Martina McBride, whom plaintiff refers to as a "country music star." The McBride concert was the result of the following contractual relationships.

For 2010-2012, the University entered into an exclusive booking agreement with Concerts East, Inc. Concerts East agreed to act as the University's "agent for live music entertainment services of artistic performers on behalf of [the University]" for shows at the MAC. Concerts East had the exclusive rights to

book concerts, which "shall adhere to the University's established policies and procedures, and be subject to the University's prior written approval." Concerts East was "entitled to retain the proceeds from such events, including ticket sales, ticket rebates, and sponsorship revenues," but paid the University a $10,000 "rental fee for the use of the Facility," and split with the University the artist merchandise commissions and any facility fee added to the ticket price for "improvements, maintenance or repayment of debt of the [MAC]."

In 2012, with the consent of the University, Concerts East assigned its rights and obligations under the exclusive booking agreement to Thoroughbred Management, Inc. (TMI). Separately, AEG Live NJ, LLC (AEG) agreed with TMI to co-promote the events at the MAC, and to share equally in the revenues and losses.

On December 5, 2012, TMI entered into an event license agreement with the University to use the MAC for the December 9 McBride concert. The University agreed to handle the over-the-counter advance ticket sales at the MAC box office, but TMI otherwise managed and controlled the ticketing, with tickets to be sold through Ticketmaster. TMI agreed to pay the $10,000 rental fee, and to split a facility fee of $3.00 per ticket.

Maryann Nagy, the University's vice-president for student life and leadership engagement, testified in her deposition that

neither she nor anyone else from the University requested that McBride perform at the University. The University did not hire, pay, or contract with McBride. Nagy did not believe the University on its own ever requested a specific music performer to play at the MAC. Students had to purchase a ticket to attend McBride's concert.[1]

The event license agreement described the concert as "Thunder 106's Winter Thunderland: Martina McBride: The Joy of Christmas Tour." Plaintiff submitted the printout of a website indicating the tour had sixteen concerts including "W. Long Branch, N.J./MAC at Monmouth." The other fifteen concerts were in venues outside of New Jersey.

Plaintiff learned of McBride's concert on the "Thunder 106" radio station, and purchased tickets to the concert from Ticketmaster. The tickets stated the concert was at the "MAC at Monmouth University."

[1] Because we must consider the evidence favorable to plaintiff, we do not consider Nagy's testimony that: it was part of the University's mission "to bring cultural activities and events, not only to the members of the University community, but also to the general public"; that she worked with the University's "concert partner to bring the concert to the campus for our students, faculty, staff and the broader community"; and that the University sought to bring "a diverse range of music genre" and "events to the public that they may not ordinarily have the opportunity to attend" if there were no university in the area.

After her fall, plaintiff filed a complaint against the University, alleging she was a business invitee and that the University breached its duty of care. On December 1, 2015, Judge Katie A. Gummer denied plaintiff's summary judgment motion and granted the University's summary judgment motion. Plaintiff appeals the grant of summary judgment.[2]

II.

Summary judgment must be granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." R. 4:46-2(c). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). "[T]he court must accept as true all the evidence which supports the position of the party defending against the motion and must accord [that party] the

[2] Plaintiff also sued AEG as well as Press Communications, LLC, which did business as the Thunder 106 radio station. Plaintiff has not appealed the trial court's grant of their unopposed motions for summary judgment.

benefit of all legitimate inferences which can be deduced therefrom[.]" Id. at 535 (citation omitted).

An appellate court "review[s] the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016). We must hew to that standard of review.

III.

The trial court granted summary judgment to the University under the Charitable Immunity Act (Act), N.J.S.A. 2A:53A-7 to -11. "[W]e consider the trial court's determination de novo because [the University's] asserted right to charitable immunity under the statute raises questions of law." Komninos v. Bancroft Neurohealth, Inc., 417 N.J. Super. 309, 318 (App. Div. 2010).

The Act provides in pertinent part:

> No nonprofit corporation, society or association organized exclusively for religious, charitable or educational purposes or its trustees, directors, officers, employees, agents, servants or volunteers shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society or association; provided, however, that such

> immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society, or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society or association.
>
> [N.J.S.A. 2A:53A-7(a) (emphasis added).]

"By the plain meaning of N.J.S.A. 2A:53A-7(a), 'an entity qualifies for charitable immunity when it "(1) was formed for nonprofit purposes; (2) is organized exclusively for religious, charitable or educational purposes; and (3) was promoting such objectives and purposes at the time of the injury to plaintiff who was then a beneficiary of the charitable works."'" Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 95 (2006) (citations omitted).

Plaintiff concedes the University satisfies the first two prongs of the charitable immunities standard because it is a "nonprofit corporation . . . organized exclusively for . . . educational purposes." N.J.S.A. 2A:53A-7(a). However, she disputes the third prong: that the University "was promoting such objectives and purposes at the time of the injury to plaintiff who was then a beneficiary of the charitable works." Hardwicke, 188 N.J. at 95. She contends the McBride concert was not an "educational" event.

The Legislature has instructed the Act "shall be deemed to be remedial and shall be liberally construed so as to afford immunity . . . from liability as provided herein in furtherance of the public policy for the protection of nonprofit corporations" organized for educational purposes. N.J.S.A. 2A:53A-10. "In the context of colleges and universities, courts have adhered to the liberal construction requirement in analyzing the scope of educational purposes covered by the Act. Thus, 'the term "educational" has been broadly interpreted and not limited to purely scholastic activities.'" Orzech v. Fairleigh Dickinson Univ., 411 N.J. Super. 198, 205 (App. Div. 2009) (citation omitted).

Indeed, providing concerts open to the public is one of the stated purposes of the University. In a 1956 resolution amending its certification of incorporation, the University's Board of Trustees stated:

> The purposes of this corporation are:
>
> To establish, maintain, and conduct an institution of learning for the purpose of promoting education; and especially an institution of learning of high educational standards, known as a college or community college, for the instruction of students in the various branches of technological, professional, vocational, and general cultural education . . . ;
>
> To provide for the holding of meetings and events open to the public, including

> classes, conferences, lectures, forums, exhibitions, conventions, plays, motion pictures, concerts, and athletic contests, all calculated, directly or indirectly, to advance the cause of education and wholesome recreation; . . . .
>
> [(emphasis added).]

"[C]onsidering an organization's stated purpose is useful as a factor," though "not conclusive." DeVries v. Habitat for Humanity, 290 N.J. Super. 479, 485 (App. Div. 1996), aff'd o.b., 147 N.J. 619 (1997). The University's stated goals include promoting general cultural education and providing concerts open to the public which are directly or indirectly calculated to advance the cause of education and wholesome recreation. "[A] non-profit corporation may be organized for 'exclusively educational purposes' even though it provides an educational experience which is 'recreational' in nature." Roberts v. Timber Birch-Broadmoore Athletic Ass'n, 371 N.J. Super. 189, 194 (App. Div. 2004) (citation omitted).

Those stated goals were served by McBride's "Joy of Christmas" concert. That is illustrated by the very similar case of Lax v. Princeton Univ., 343 N.J. Super. 568 (App. Div. 2001). In Lax, the university rented its auditorium to the Princeton Chamber Symphony to perform concerts of classical music. Id. at 569. The university charged the chamber symphony approximately $5000 per concert. Ibid. The chamber symphony

"hires professional musicians to perform symphonic concerts of classical music for members of the general public," and "the persons who attend concerts [pay] admission charges[.]" Id. at 571. One member of the general public who paid to attend a concert fell and sued. Id. at 570.

We held in Lax that, "[a]lthough the concerts performed by the Chamber Symphony may be viewed as a form of entertainment or recreation, these activities are clearly 'educational' and 'charitable' within the intent of the Charitable Immunity Act." Id. at 571. "A performance of classical music provides a cultural and educational experience for patrons of this form of artistic production." Id. at 572.

Although not a classical musician, McBride is an American country music performer. The website printout states McBride's "Joy of Christmas" concerts would likely include Christmas music. Whether classical, country, or Christmas, music is an art, and McBride is a musical artist. Thus, McBride's concert was "a cultural and educational experience for patrons of this form of artistic production." Ibid.[3]

[3] By accepting that all music is an art and that McBride is an artist regardless of whether she writes or performs classical, country, or Christmas music, we avoid our dissenting colleague's "rabbit hole of determining what it means to be 'an artist.'" Post at 3-4 n.3. We do not require "judges (or juries) to determine whether a performance is or isn't 'artistic.'" Ibid.
(continued)

In Lax, we further held: "It is also clear that plaintiff was a direct 'beneficiary' of this educational and charitable endeavor when she was injured while attending one of the Chamber Symphony's concerts. The fact that she was required to pay an admission charge to obtain this benefit does not affect her status as a beneficiary." Ibid. (citation omitted); see Bieker v. Cmty. House of Moorestown, 169 N.J. 167, 176 n.2 (2001). Here, plaintiff was similarly a beneficiary even though she, like Lax, was a member of the general public who paid an admission charge. See Loder v. St. Thomas Greek Orthodox Church, 295 N.J. Super. 297, 302 (App. Div. 1996) (finding a non-member of a church eating food at the church's festival was a beneficiary even though he paid for his food).

Plaintiff notes that in Lax, the Princeton Chamber Symphony was itself a non-profit corporation which we ruled had charitable immunity. 343 N.J. Super. at 569. However, we also

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(continued)
Rather, it is our dissenting colleague who falls into that rabbit hole by expressing his "personal view" that only some writers and singers of country-western music are artists, and claiming a "question of fact was presented as to whether McBride is 'an artist' or . . . was engaged in an 'artistic' performance." Post at 3-5 nn.3, 4. In any event, plaintiff never disputed that country music is art, that McBride is an artist, and that her concert was an "artistic production" within the meaning of Lax. The dissent concedes that, other than the genre of music, "there is little to distinguish" this case and Lax. Post at 5.

held "the Charitable Immunity Act bars plaintiff's claim against [Princeton] University." Id. at 572.

We found immunity for the university though it had rented its auditorium to an outside performer for the concert. First, we cited the Act's provision that "the buildings and places actually used for colleges" or "auditoriums," "when so operated and maintained by any such nonprofit corporation . . . shall be deemed to be operated and maintained for a . . . charitable [or] educational . . . purpose." Id. at 570 (quoting N.J.S.A. 2A:53A-9) (alteration in original). Under N.J.S.A. 2A:53A-9, "[t]he immunity bestowed by the [Act] extends to the buildings and other facilities actually used for the purposes of the qualifying organization[.]" Kuchera v. Jersey Shore Family Health Ctr., 221 N.J. 239, 248 (2015). Here, the MAC was being used for educational purposes, namely a musical concert.

Second, we reasoned that renting its auditorium to outside performers served the university's educational goal. "Theatrical productions, concerts, and other artistic performances are an integral part of the educational life of a university." Lax, 343 N.J. Super. at 573.

> Thus, if the University presented its own chamber music production of classical music at [the] Auditorium, there would be no doubt such a production would be considered part of its educational program, and that if a person attending a performance were injured,

> the University would be entitled to immunity. We see no reason why the result should be different simply because the University rents its facilities to another non-profit corporation to present a program similar to what the University itself could present.
>
> [Ibid.]

Similarly, McBride's Joy of Christmas concert was part of the educational life of the University, and served its stated goal of presenting concerts open to the public directly or indirectly calculated to advance the cause of education. The University would have been immune if it presented such a concert itself, and it was no less immune because it rented out its facilities to the outside entities who presented the concert. That those entities were for-profit corporations affects their ability to claim immunity, but does not affect the University's immunity as an educational institution.

Indeed, even an organization "organized exclusively" for "charitable" purposes, N.J.S.A. 2A:53A-7, may be immune when it rents its facilities to for-profit entities. In Bieker, the Supreme Court held a charity could be entitled to charitable immunity even though it rented its meeting rooms and athletic facilities not just to non-profit entities but also to "for-profit entities, and the general public." 169 N.J. at 170-71. The Court first held that a non-profit corporation's rental of

its facilities to the general public for activities such as piano recitals, dance classes, sporting contests, weddings, and birthday parties serves "important social and recreational needs of the community" and thus is related "to an appropriate charitable purpose." Id. at 177. Here, the concert served the educational, social, and recreational needs of both the University and the community. See Lax, 343 N.J. Super. at 572.

The Court in Bieker noted rentals to "[f]or-profit entities present a different issue" for a charitable institution. 169 N.J. at 178-79. That does not mean, however, that "income from some limited noncharitable activity would prevent a corporation not otherwise ineligible from obtaining immunity under the Act." Id. at 179. If the "for-profit use is substantial, a question is raised whether the 'dominant motive [of the charitable entity] is charity or some other form of enterprise.'" Id. at 178 (quoting Parker v. St. Stephen's Urban Dev. Corp., 243 N.J. Super. 317, 325 (App. Div. 1990)). "Only when those non-charitable activities become the 'dominant motive' of the organization do we have 'some other form of enterprise' such that the organization will lose its immunity under the statute." Id. at 171 (quoting Parker, 243 N.J. Super. at 325); see Lax, 343 N.J. Super. at 573.

We need not make that determination here, because the University is an educational institution. Our Supreme Court has distinguished charitable entities from religious and educational institutions. "Entities seeking the shelter of the Act by proving that they are 'organized exclusively for charitable purposes' must engage in the traditional factual analysis of Parker, including a source of funds assessment." Ryan v. Holy Trinity Evangelical Lutheran Church, 175 N.J. 333, 346 (2003). By contrast, "[e]ntities that can prove they are organized exclusively for educational or religious purposes automatically satisfy the second prong of the charitable immunity standard," and thus "no further financial analysis is required." Ibid. (citing O'Connell v. State, 171 N.J. 484 (2002) (holding that Montclair State University automatically met the second prong)). Thus, the University, which plaintiff concedes satisfied the second prong, did not have to undergo a financial analysis under Parker or show whether rentals to for-profit entities have become the dominant motive under Bieker; those tests for charitable institutions are "not relevant to [the] analysis" of an educational institution. Ibid.

In any event, there was no evidence the MAC's dominant use was rental to for-profit entities. Although Concerts East and its assignee TMI had an exclusive booking agreement for "live

music entertainment" by outside performers, the agreement made clear "such exclusivity shall not preclude MU from booking student events, non-musical concerts, athletic competitions and exhibitions, or events booked by [the University]'s Student Activities Board."

Further, plaintiff does not contend the University sought to profit from the concert. TMI retained the proceeds of the concert, and the University received only a $10,000 "rental fee for the use of the Facility," and $1.50-per-ticket facility fee for "improvements, maintenance or repayment of debt of the [MAC]." There was no evidence those figures equaled or exceeded market rate for renting a facility such as the MAC, or constituted a profit over the University's costs. Plaintiff certainly did not show that the "for-profit use [of the MAC] is substantial" and "became the 'dominant motive'" of the University. See Bieker, 169 N.J. at 178 (quoting Parker, 243 N.J. Super. at 325).

Nonetheless, our dissenting colleague argues we must assume "that [the University's] sole interest . . . was to offer its premises for a monetary profit," that "the University saw a way to generate income," that it booked performers for "a piece of the action," and that "the University was promoting nothing but the best interests of its bottom line." Post at 1-2, 5.

However, plaintiff does not make any such claims. Moreover, no evidence was proffered to support such assumptions. On a motion for summary judgment, a court may draw only "legitimate inferences [from the evidence] favoring the non-moving party." R. 4:46-2(c). The dissent's assumptions are not "reasonable and favorable inferences that the record can support." Thiedemann v. Mercedes-Benz USA, LLC, 183 N.J. 234, 240 (2005).

For all these reasons, the University did not lose its charitable immunity by renting the MAC to host the McBride concert. Nonetheless, plaintiff disputes that the University "was engaged in the performance of the charitable objectives it was organized to advance." Ryan, 175 N.J. at 350 (citations omitted).

Plaintiff notes the University did not select McBride or ask she perform a concert any different than her tour concerts in other venues. However, the contract reserved a right of approval to the University, and the University specifically signed an agreement authorizing McBride's concert. In any event, we are unaware of any principle that bars an educational institution from allowing musical providers, such as the chamber symphony in Lax, to select the performers and music performed. See Roberts, 371 N.J. Super. at 195 (finding an athletic association could be immune for an injury at the concession

stands even though it contracted vendors to run them) (citing Lax, 343 N.J. Super. at 571).

Plaintiff also argues she was not a knowing participant in any cultural or educational event of the University. However, she does not dispute she knew the concert was being held at the University's MAC, as stated both on the website and the ticket. Nor does she claim she was unaware the University was an educational institution. By attending, she and the other members of the audience were a beneficiary of an educational offering by the University. It is irrelevant whether she viewed it as such.

"To be deemed a beneficiary, plaintiff need not . . . have intended or understood the entity's goals." Auerbach v. Jersey Wahoos Swim Club, 368 N.J. Super. 403, 414 (App. Div. 2004). As the late Judge King stated, a "plaintiff's subjective motivations should not control determination of status as a beneficiary under the statute." DeVries, 290 N.J. Super. at 485. "A more objective standard is required. The test generally should be whether the injured person was at the time bestowing benefactions upon the charity or receiving them." Id. at 485. Thus, in DeVries we held a volunteer worker doing electrical work at a construction project run by Habitat for Humanity "conferred a benefit on Habitat and received no benefit

in return other than personal satisfaction [and thus] was not a 'beneficiary' under N.J.S.A. 2A:53A-7." Id. at 481.[4]

Plaintiff does not claim she "actually confer[red] a benefit to the charity rather than receive[d] one." Kain v. Gloucester City, 436 N.J. Super. 466, 481 (App. Div. 2014). Plaintiff was not a volunteer or employee performing work on a charity's premises. Cf. Mayer v. Fairlawn Jewish Ctr., 38 N.J. 549, 553-54 (1962); Glowacki v. Underwood Mem'l Hosp., 270 N.J. Super. 1, 12 (App. Div. 1994). Rather, as in Lax, plaintiff was simply a member of the audience for the concert the University hosted. 343 N.J. Super. at 572.

"In assessing who is a beneficiary of the works of a charity, that notion is to be interpreted broadly, as evidenced by the use of the words 'to whatever degree' modifying the word 'beneficiary' in the statute. Those who are not beneficiaries

[4] Habitat argued its volunteer workers were beneficiaries because its certificate of incorporation listed one of its purposes as "aid[ing] Christians and others by providing them with opportunities to volunteer their time and efforts." DeVries, 290 N.J. Super. at 484. We held listing workers as beneficiaries was not "dispositive," otherwise "every non-profit corporation could unilaterally insulate itself from tort liability merely by setting forth a comprehensive list of beneficiaries sufficiently broad to include all possible claimants." Ibid. Contrary to plaintiff's claim, we do not regard the University's purpose of providing concerts open to the public as similarly infirm, as plaintiff and other audience members were solely beneficiaries and not providing services to the University.

must be 'unconcerned in and unrelated to' the benefactions of such an organization." Ryan, 175 N.J. at 353 (finding a member of an outside organization was a beneficiary of a church where the organization held its meeting for a fee) (quoting Gray v. St. Cecilia's Sch., 217 N.J. Super. 492, 495 (App. Div. 1987)). We reject plaintiff's claim she was "unconcerned in and unrelated to and outside of the benefactions of" the University in hosting the concert. N.J.S.A. 2A:53A-7(a).

Next, plaintiff claims she was not "a direct recipient of those good works." Ryan, 175 N.J. at 350. However, it is "clear that plaintiff was a direct 'beneficiary' of this educational and charitable endeavor" because she was a member of the audience for whom the concert was performed. Lax, 343 N.J. Super. at 572.

In any event, "beneficiary status does 'not depend upon a showing that the claimant personally received a benefit from the works of the charity.'" Loder, 295 N.J. Super. at 303 (quoting Anasiewicz v. Sacred Heart Church, 74 N.J. Super. 532, 536 (App. Div. 1962) (finding a wedding guest is a beneficiary of the church)). Whether "the injured party is a direct recipient of the charity's good works 'or accompanies a beneficiary to the event,' the charitable immunity defense is available." Kain, 436 N.J. Super. at 480-81 (finding a group's chaperone is a

beneficiary of the educational institution hosting a group's event) (quoting Roberts, 371 N.J. Super. at 196); see, e.g., Bieker, 169 N.J. at 180 (citing Anasiewicz and finding a "child was plainly a recipient of [a charity]'s 'benefactions,' even if only as a companion of his father and a spectator at his father's basketball game" hosted by the charity); Gray, 217 N.J. Super. at 495 (finding a mother picking up her child from school was a beneficiary of the school). See Ryan, 175 N.J. at 351-54 (citing Anasiewicz with approval).

Plaintiff also asserts claims she could not be a beneficiary unless she had a further "relationship" with the University. Auerbach, 368 N.J. Super. at 414-15. Charitable "immunity recognizes that a beneficiary of the services of a charitable organization has entered into a relationship that exempts the benefactor from liability." Kuchera v. Jersey Shore Family Health Ctr., 221 N.J. 239, 247 (2015). However, as the cases cited above have held, that relationship is not restricted to students, worshipers, or members of a charity, but includes others, including persons paying to attend concerts and similar events hosted by educational and religious institutions. See Auerbach, 368 N.J. Super. at 414-15 (citing Lax and Loder). A non-student or "non-member can be a beneficiary of the non-

profit works of an educational entity." Roberts, 371 N.J. Super. at 196.

Plaintiff cites Kasten v. Y.M.C.A., 173 N.J. Super. 1 (App. Div. 1980). In Kasten, the Y.M.C.A. operated a ski resort whose profits helped underwrite Y.M.C.A. charitable programs. Id. at 4. "We conclude[d] that N.J.S.A. 2A:53A-7 was not intended to immunize eleemosynary organizations from claims by fee-paying nonmembers arising from commercial activities geared to generate profit for the organization's charitable purposes." Id. at 7. We stressed the Y.M.C.A. was "engage[d] in commercial activities bearing no substantial and direct relationship to its general purpose[.]" Id. at 9. By contrast, the University was not a charity engaged in commercial activity to generate profit. Rather, it was an educational institution hosting a concert, which bore a substantial and direct relationship to its educational purpose.

In Kasten, the Y.M.C.A. charged non-members like Kasten higher fees to use the resort than it charged Y.M.C.A. members. Id. at 4-5, 7, 10-11. We found: "At best, the ski operation was a mixed commercial and charitable operation; commercial for nonmembers and charitable for members." Id. at 7. As "a member-user would be barred by N.J.S.A. 2A:53A-7," and "a non-Y.M.C.A. member . . . [who] paid a higher tow or lift fee than

defendant's user-members . . . is not barred by N.J.S.A. 2A:53A-7," we ruled the "[p]laintiff's particular relationship to the defendant charity controls." Id. at 8, 11. By contrast, the University and the entities it contracted with charged students and members of the general public attendees the same for tickets, so both were equally beneficiaries regardless of their relationship with the University. More importantly, unlike skiing in Kasten, the concert here served the educational purposes of the University.

Plaintiff also cites Book v. Aquth Achim Anchai, 101 N.J. Super. 559 (App. Div. 1968), where the Catholic plaintiff went to a synagogue for the sole purpose of playing bingo. Id. at 561. We found she was not a beneficiary primarily because "the operation of bingo games for profit was not one of the purposes for which the defendant synagogue was organized." Id. at 563. "[T]he bingo-for-profit in Book is . . . quite distinguishable from" the University renting out the MAC for the concert which served its educational purpose. See Bixenman v. Christ Episcopal Church Par. House, 166 N.J. Super. 148, 152 (App. Div. 1979) (distinguishing Book where a church rented out its facilities to serve religious goals). "Contrary to the circumstances in Book, we are dealing with activities that bear a 'substantial and direct relationship' to [the University]'s

'general purpose.'" See Loder, 295 N.J. Super. at 302-03 (distinguishing Book because, in holding a festival, the church "was engaged in the performance of the charitable objectives it was organized to advance") (quoting Kasten, 173 N.J. Super. at 9); see also Roberts, 371 N.J. Super. at 194-95 (distinguishing Kasten and Book because concession stands were "integral to the [athletic association's] charitable purpose" of teaching sportsmanship).

This case resembles Lax far more than it resembles the cases plaintiff cites. Accordingly, as in Lax, we hold that the university hosting the concert is immune to plaintiff who tripped at the concert. Plaintiff's remaining arguments lack sufficient merit to warrant discussion. R. 2:11-3(e)(1)(E).[5]

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION

[5] We need not rely on the University's assertion that McBride donated $5 per ticket to a New Jersey charity. Nor need we rely on the information on the University's website.

FISHER, P.J.A.D., dissenting.

I cannot join my colleagues' endorsement of the summary judgment entered in favor of defendant Monmouth University. There is, at the very least, a genuine, disputed question whether the University established the third prong of the charitable immunity analysis established by our Supreme Court.

In interpreting the requirements of the Charitable Immunity Act, N.J.S.A. 2A:53A-7 to -11, our Supreme Court has held that an entity is entitled immunity when it: (1) was "formed for nonprofit purposes"; (2) was "organized exclusively for religious, charitable or educational purposes"; and (3) was "promoting such objectives and purposes at the time of the injury to plaintiff who was then a beneficiary of the charitable works." O'Connell v. State, 171 N.J. 484, 489 (2002); see also Ryan v. Holy Trinity Evangelical Lutheran Church, 175 N.J. 333, 342 (2003).

I concur with the majority's determination that the first two prongs of this test were met. My disagreement is with the majority's conclusion that there was no genuine dispute about the third. If, as my colleagues correctly insist, we are to hew to the Brill standard,[1] then assuming the truth of plaintiff's

[1] Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

factual assertions and viewing those facts in the light most favorable to her, requires an assumption that the University's sole interest or involvement in the Martina McBride concert at which plaintiff was injured was to offer its premises for a monetary profit.[2] Even though support for the conclusion reached by my colleagues can be found in our earlier decisions — most notably Lax v. Princeton University, 343 N.J. Super. 568 (App. Div. 2001) — I see no educational purpose or endeavor here. The factual record suggests that the University saw a way to generate income on occasions when its Multipurpose Activity Center was left unused for whatever its original purposes might have been. As described in the majority opinion, the University contracted with one or more entities — which, as best as I can tell from the record, weren't formed for educational purposes — to book entertainers to perform on campus in exchange for the University's receipt of a $10,000 rental fee and a piece of the action. Only through a continuation or, arguably, a further expansion of our decisions in this field — epitomized by Lax, which I find inconsistent with the Charitable Immunity Act as

[2] The majority opinion refers to the deposition testimony of the University's vice-president for student life and leadership engagement that the University did not seek or request McBride's performance. And like any other member of the public, such as plaintiff, a student interested in attending would have to purchase a ticket.

interpreted by our Supreme Court — can it be said that the charitable-immunity test's third prong was met by the University letting its facility to a booking agent to sell tickets for the performance of a country western singer.[3] If we apply the test

[3] Lax linked the immunity determination to a requirement that the injury occur while the plaintiff attended an "artistic" performance. 343 N.J. Super. at 573 (finding the third prong was met when the plaintiff tripped and fell while attending a performance of chamber music because "artistic performances are an integral part of the educational life of a university" (emphasis added)). In adhering to this approach, the majority finds McBride to be "an American country music performer"; based only on this, my colleagues advance the proposition that McBride is an "artist" through this syllogism: "Whether classical, country, or Christmas, music is an art, and McBride is a musical artist." Ante at 10. To be sure, there are writers and singers of country western music — Willie Nelson and Lucinda Williams come to mind — who well deserve the "artist" label. But I'm not willing to leap to a conclusion that all music is art and all singers are musical artists. More importantly, I don't think we should fall into the rabbit hole of determining what it means to be "an artist," nor should the process required by O'Connell and envisioned by the Charitable Immunity Act turn on the answer to the age-old question: What is art? In responding to that question in his book of the same name, Tolstoy wrote: "To evoke in oneself a feeling one has experienced, and . . . then, by means of movements, lines, colors, sounds or forms expressed in words, so to transmit that feeling — this is the activity of art." Leo Tolstoy, What Is Art? 51 (1897). As elegant as the great novelist's description may be, it offers only a confoundingly personal definition, which if applied — and it is as good a definition as any other — would suggest each immunity decision turns on the factfinder's personal view of the artistic worth of the performance at which the plaintiff was injured? This could lead to unexpected results. Tolstoy viewed Shakespeare as "an insignificant, inartistic writer." (He was not alone, as George Bernard Shaw, Voltaire, and Samuel Pepys expressed similar disdain for Shakespeare's works). If we accept and apply Tolstoy's definition, will an educational institution be deprived of immunity if a patron trips and falls at a (continued)

described in O'Connell and the Supreme Court's other decisions, and not the unwarranted expansion found in our decisions, such as Lax, it cannot in my view be said the University was "promoting" educational "objectives and purposes" when plaintiff was injured, nor can it be said that plaintiff was "a beneficiary" of these so-called educational "objectives and purposes."[4] To reach a contrary conclusion is to engage in a

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performance of Hamlet? The task proves even more difficult if we look for a definition of "art" elsewhere; in rejecting the adage "art is truth," Picasso said art is "a lie that makes us realize truth." How would that definition work if applied to determining whether McBride's performance was "artistic"? Because what constitutes "art" and what represents an "artistic" endeavor defy the type of description or definition we should strive to apply in ascertaining an educational institution's entitlement to immunity, I find myself unable to adhere to Lax, among other similar decisions emanating from this court, and today's decision as well. I cannot imagine the Legislature intended the Charitable Immunity Act would be given such a gloss or that it would evolve into a form that requires judges (or juries) to determine whether a performance is or isn't "artistic." Legal principles entitled to society's acceptance are those that provide greater predictability than this; individuals and entities are entitled to order their business and personal affairs with reasonable comfort about the likely outcome of future disputes. See, e.g., Washington v. Heckler, 756 F.2d 959, 968 (3d Cir. 1985) (Aldisert, C.J., concurring). The charitable-immunity test as it has devolved in this court's prior decisions, upon which the majority relies, offers only an ad hoc system largely, if not entirely, dependent on a factfinder's personal view of the performance the injured plaintiff attended. I cannot add my voice to furthering this misguided approach.

[4] Even if our earlier decisions defined the proper approach for the third prong and even if those decisions might be found consistent with O'Connell and the Charitable Immunity Act, I (continued)

fiction neither the Charitable Immunity Act nor our Supreme Court's prior holdings will bear. The facts presented here, when examined through the Brill prism, permit only an assumption that the University was promoting nothing but the best interests of its bottom line.[5]

I recognize the motion judge may have properly applied Lax — to which she was bound — in granting summary judgment. Other than the fact that in Lax the plaintiff attended a classical music performance, and here plaintiff attended a country western performance, there is little to distinguish between the two cases. We, however, are not bound to Lax or our other earlier decisions, see, e.g., David v. Gov't Employees Ins. Co., 360 N.J. Super. 127, 142 (App. Div. 2003); we are bound only to the

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would conclude here — at this particular procedural stage — that a disputed question of fact was presented as to whether McBride is "an artist" or whether, on the night in question, she was engaged in an "artistic" performance. The genuine, factual dispute about the University's educational purpose and the artistic worth of the concert in question, in my view, barred the summary judgment under review.

[5] The majority asserts "no evidence was proffered to support [this and other] assumptions" expressed in this dissent. Ante at 17. I disagree. The nature of the undertaking was spelled out in the moving and opposing papers and discussed both in the majority opinion and here. Indeed, the contractual circumstances that led to the performance plaintiff attended seem undisputed. A fair inference — I think the only reasonable inference — permitted by those facts is that which I have drawn: the University's interest was financial, not educational.

Supreme Court's holdings, and I find nothing in the Court's earlier opinions that would require such a broad view of what constitutes an educational purpose or what it means to be a beneficiary of an educational institution's works as advanced in Lax and today's decision. Consequently, I would reverse the summary judgment entered in the University's favor.[6]

I hereby certify that the foregoing is a true copy of the original on file in my office.
CLERK OF THE APPELLATE DIVISION

[6] I would lastly dispute the majority's argument that I've expressed a "personal view," ante at 10-11 n.3, that not all country western performers are "artists" and, as a result, I've fallen into the very rabbit hole I cautioned against. I don't see this as a personal view; it seems obvious that not everyone who dons a cowboy hat and boots and elicits a sound from a guitar is an artist. And, if we are to require proof along these lines, pursuant to Lax, it then must be the defendant's burden to show the artistic nature of the performance. My central thesis, however, is that this is not the standard by which we should be assessing an educational institution's claim of immunity. I'm also unwilling to assume from the record on appeal that plaintiff has admitted the performer in question is an "artist." Defendant asserted in its statement of material facts — but only in a footnote — that "Martina McBride is a country music artist" (emphasis added). I guess, because plaintiff didn't directly dispute this assertion, the majority has concluded McBride's alleged artistry has been conceded. But I don't see anything in Rule 4:46-2(a) to suggest an opponent of a summary judgment motion must respond to footnotes appended to a statement of material facts; indeed, the Rule arguably excludes the use of footnotes by obligating the movant to set forth a statement of material facts in "separately numbered paragraphs." Without falling into another unwelcomed rabbit hole about what was or wasn't admitted or conceded here, I would again point out that the matter was disposed of by way of summary judgment, where greater caution is required and doubts are resolved in the opponent's favor. Moreover, my greater concern is not just with this case but also future cases that might be adjudicated through the standard continued here.