SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0220-15T2

SALLY PINNELLA,

Plaintiff-Appellant,

v.

MEDFORD TOWNSHIP PUBLIC SCHOOL DISTRICT,

Defendant/Third Party Plaintiff-Respondent,

v.

YMCA CAMP OCKANICKON, INC.,

Third-Party Defendant.

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Argued May 30, 2017 – Decided July 11, 2017

Before Judges Nugent and Geiger.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-338-13.

Joel R. Rosenberg argued the cause for appellant (Stark & Stark, P.C., attorneys; Mr. Rosenberg, of counsel; Mr. Rosenberg and Dominic A. Speziali, on the briefs).

Timothy J. Schipske argued the cause for respondent (Salmon, Ricchezza, Singer &

Turchi, LLP, attorneys; Mr. Schipske, of counsel and on the brief).

PER CURIAM

Plaintiff Sally Pinnella appeals from the summary judgment order that dismissed the personal injury action she filed under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 59:12-3. She contends the trial court erred when it granted summary judgment to defendant Medford Township Public School District (the District), because she established a prima facie case that a dangerous condition of the District's property — a wet cafeteria floor — caused her slip and fall accident and resulting injuries.

To establish a prima facie case of a tort claim alleging a dangerous condition of public property, a plaintiff must prove, among other elements, that the action the public entity took to protect against the condition was palpably unreasonable. N.J.S.A. 59:4-2. Here, the District positioned warning signs to warn people entering the cafeteria of the wet floor. Such action was not palpably unreasonable. For this reason, we affirm the summary judgment order.

Plaintiff commenced this action by filing a complaint in February 2013. The District answered and filed a third-party complaint against the YMCA seeking indemnification, but the District dismissed the third-party complaint shortly thereafter.

Plaintiff and the District undertook discovery. On May 1, 2015, the District moved for summary judgment. The motion record discloses the following facts.

Plaintiff worked as a camp counselor for a YMCA Camp. The YMCA entered into an agreement with the Medford Township Board of Education (the Board) to operate before and after school programs at certain locations in certain schools, including the cafeteria of Taunton Forge Elementary School (Taunton). The agreement between the YMCA and the Board required the Board to provide space for the YMCA to host its programs. The rental fee for the space was one dollar for the two-year term of the agreement beginning on July 27, 2011. The agreement required the Board to maintain the rental space in good condition and provide janitorial services.

Plaintiff slipped and fell on Taunton's cafeteria floor on May 1, 2012. Taunton's Head Custodian (the custodian), who mopped the floor each day, testified at her deposition that the last group of students left the cafeteria each afternoon at approximately 1:20 p.m. The custodian would then begin to sweep the cafeteria floor before she began mopping. Before beginning to mop, she would place two cones at the cafeteria's entrance doorways. One cone, a "fold-up type," came to her knee. The other cone came to her waist. Both had warnings in English and

Spanish stating, "Caution: Wet Floor." She usually finished mopping at approximately 1:45 p.m. or 1:50 p.m.

On the afternoon of May 1, 2012, between 1:50 p.m. and 2:20 p.m., plaintiff arrived at the Taunton cafeteria to set up for her program activities. The custodian testified that plaintiff arrived while she, the custodian, was still mopping the floor. When plaintiff entered the cafeteria, the custodian told her "she was early and the floor is still wet." Plaintiff replied, "[i]t's okay."[1] The custodian observed plaintiff walk by a wet floor warning cone, step onto the wet floor, and begin preparing for her afternoon program.

Plaintiff admitted she saw warning cones, but alleged they "were always up every day whether the floors were wet or not." In addition, plaintiff testified the floors were mopped every day, and "some days they were very wet. Some days they were a little wet. Some days they were [not]." Plaintiff asserted "there were still puddles and slippery spots" on the floor "many times" when the children arrived for their after-school programs. She also

[1] In her deposition, the custodian testified she recalled that conversation with plaintiff. In plaintiff's response to defendant's statement of material facts, plaintiff admitted the custodian recalled that conversation. However, when deposed, plaintiff denied anyone ever warned her, upon her arrival at the Taunton cafeteria, that the floor was wet.

asserted, "everybody in the school knew" the floors were wet when the after-school programs started.

A few minutes before she fell, plaintiff asked another camp counselor to see if the outdoor playground was too wet for the children, as it had been raining. As the other counselor left to check the playground, plaintiff told her "to be careful on the floor because . . . they had just mopped." When the counselor returned, plaintiff had fallen.

Plaintiff recalled she had been in the cafeteria approximately twenty minutes when she slipped in a puddle while walking to get snacks. She sustained serious injuries, including factures to both wrists.

Following plaintiff's fall, the school nurse came to her aid. Although the floor did not appear wet to the nurse, she nevertheless paid close attention to the floor because the custodian "installed the fear of God into [everyone] walking on her floors because she did [not] want any[one] to get hurt. This was not just the after-school people. It was anybody that would have to go in the cafeteria."

Emergency medical personnel arrived at approximately 3:25 p.m., treated plaintiff, and transported her to a local hospital. A Medford Township police officer also arrived at Taunton. The

officer noted "some of the [cafeteria] floor was still wet with water in some areas."

The District's Director of Operations and Technology, whose duties included facilities maintenance and custodial services, testified the cafeteria could not be cleaned at night. Rather, the cafeteria was required to be cleaned immediately following lunches to remove any food products on the floor.

The motion record was devoid of any evidence of a previous slip and fall accident on the cafeteria floor. Plaintiff could not recall any complaints made to the District. The YMCA's Child Care and Day Care Director testified that at no time before May 1, 2012, the date of plaintiff's accident, was she ever informed of any concerns about the condition of the cafeteria when camp counselors arrived for the "School's Out" program. Further, an outside company's employee, who had been in charge of the cash register systems for school lunches for approximately six years, testified she never heard of anyone other than plaintiff falling in the cafeteria on an allegedly wet floor.

In support of its summary judgment motion, defendant submitted a civil engineer's expert report in which the engineer concluded the cafeteria floor was "safe, slip-resistant and suitable for use by the YMCA for child care programs." The expert asserted plaintiff "knowingly chose to walk on the cafeteria floor"

and "disregarded wet floor signage warning her the flooring was wet." The expert opined plaintiff's leather-soled loafers generally "provide reduced traction characteristics in the presence of flooring contaminants." Ultimately, the expert concluded "[t]he most reasonable scientific explanation for this incident . . . relates directly and solely to [plaintiff's] own unsafe actions and conduct."

Plaintiff countered with her own expert, a Director of Transportation and School Safety for an Indiana public school district. Plaintiff's expert opined the District violated the Occupational Safety Health Act of 1970 (OSHA) by failing to meet its statutory requirements to keep its workplace free from dangers. The expert further opined the "system" the District "had in place to clean the cafeteria floor was not in keeping with OSHA regulations or the New Jersey Public Employee Safety and Health Plan, as it did not provide a clean, dry surface for YMCA employees." Lastly, the expert opined the District's response to plaintiff's injury was flawed, "as first responders were not contacted in a timely manner."

On appeal, plaintiff argues defendant "readily admitted that its cafeteria floor was in a 'dangerous condition' on May 1, 2012." Plaintiff further argues it was reasonably foreseeable that she would be in the cafeteria fifteen minutes before class was

dismissed; and, the court erred by granting summary judgment in the face of genuinely disputed material facts demonstrating the District created the dangerous condition. Lastly, plaintiff contends there are genuinely disputed issues of material fact as to whether the measures the District took to guard against the dangerous condition were palpably unreasonable.

The trial court granted defendant's summary judgment motion. The court could not find that "putting signs up and mopping a cafeteria floor . . . creates a dangerous condition." Further, even if such activity created a dangerous condition, "people would be on notice and aware of the fact that there was water on this floor. And certainly that is not conduct that can be criticized and that can be called palpably unreasonable." The trial court concluded this was "a situation where . . . plaintiff is not able to meet her burden of proof with regard to a dangerous condition, due care, and palpably unreasonable conduct[.]"

Plaintiff moved for reconsideration. The trial court denied the motion. Plaintiff filed this appeal.

We review the trial court's grant of summary judgment under well-known standards. "[W]e apply the same standard governing the trial court — we view the evidence in the light most favorable to the non-moving party." Nicholas v. Mynster, 213 N.J. 463, 478 (2013) (citation omitted). If "the record reveals 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,' then a court should grant summary judgment." Ibid. (quoting R. 4:46-2(c)).

"[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995). Rather, "once the moving party presents sufficient evidence in support of the motion, the opposing party must 'demonstrate by competent evidential material that a genuine issue of fact exists.'" Globe Motor Co. v. Iqdalev, 225 N.J. 469, 479-80 (2016) (quoting Robbins v. Jersey City, 23 N.J. 229, 241 (1957)). Thus, a reviewing court must decide "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." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014) (citation omitted).

When reviewing an order dismissing a tort claim against a public entity, we bear in mind that public entities are liable "only . . . within the limitations of [the TCA] and in accordance with the fair and uniform principles established [t]herein." N.J.S.A. 59:1-2. The TCA was "designed to reestablish the immunity

of public entities while relieving some of the harsh results of the doctrine of sovereign immunity." Alston v. City of Camden, 168 N.J. 170, 176 (2001) (citation omitted). Consequently, "the approach of the [TCA] is to broadly limit public entity liability." Ibid. (quoting Harry A. Margolis & Robert Novack, Claims Against Public Entities, comment to N.J.S.A. 59:1-2 (2001)). "As the Comment to N.J.S.A. 59:2-1 . . . states, courts should employ an analysis that first asks 'whether an immunity applies and if not, should liability attach.'" Bligen v. Jersey City Hous. Auth., 131 N.J. 124, 128 (1993). Courts should also exercise restraint in accepting novel causes of action against public entities. Attorney General's Task Force on Sovereign Immunity -- 1972, Comment to N.J.S.A. 59:2-1; Ayers v. Twp. of Jackson, 106 N.J. 557, 574 (1987).

A public entity's liability for an injury occurring on its property is circumscribed by N.J.S.A. 59:4-2:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
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> > a. a negligent or wrongful act or omission of an employee of the public entity within the scope of

> his employment created the dangerous condition; or
>
> b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.
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> [N.J.S.A. 59:4-2.]

Thus, a plaintiff must prove the following elements: "(1) the [property] was in dangerous condition; (2) the dangerous condition created a foreseeable risk of, and actually caused, injury to plaintiff; (3) [the public entity] knew of the dangerous condition; and (4) the action taken by [the public entity] to protect against the dangerous condition was palpably unreasonable." Muhammad v. N.J. Transit, 176 N.J. 185, 194 (2003).

Palpably unreasonable behavior is behavior "patently unacceptable under any given circumstance . . . ." Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 459 (2009) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)). For behavior to be "palpably unreasonable," "it must be manifest and obvious that no

prudent person would approve of [the] course of action or inaction." Ibid. (citation omitted). As we have explained:

> the legislative intention was to allow sufficient latitude for resourceful and imaginative management of public resources while affording relief to those injured because of capricious, arbitrary, whimsical or outrageous decisions of public servants. We have no doubt that the duty of ordinary care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff.
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> [Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979).]

Although the issue of whether a public entity's conduct was palpably unreasonable usually presents a fact question for a jury, Vincentore v. Sports & Expo. Auth., 169 N.J. 119, 130 (2001), the issue may be ripe for disposition on a summary judgment motion. Polzo v. Cty. of Essex, 209 N.J. 51, 75 n.12 (2012); see also Muhammad, supra, 176 N.J. at 199-200. The case now before us is ripe for disposition on summary judgment. Even assuming plaintiff's evidence and expert report established the partially wet cafeteria floor constituted a dangerous condition, the trial court correctly determined the District's conduct in placing cones or signs to warn of the wet floor was not palpably unreasonable.

Plaintiff argues the issue of palpable unreasonableness was a jury question for several reasons. First, the warning cones were placed regardless of whether the floor was being mopped or whether it was wet, thus rendering the presence of the warning cones useless and negating any "notice" or "awareness" the warnings otherwise would have conveyed to individuals walking on the cafeteria floor.

Second, setting up an afternoon program in the cafeteria soon after the floor had been mopped, and failing to dry the floor, mop it at night, or use a different cleaning method was palpably unreasonable. In support of her second assertion, plaintiff cites the testimony of Kyle Francis, a camp counselor, who opined the school should have mopped the floor at a different time. Plaintiff also cites the testimony of the school's custodian, who testified in response to a leading question that there was nothing preventing a custodian from mopping the cafeteria floor at night.

Lastly, plaintiff asserts a jury could have determined it was palpably unreasonable for the District not to require its custodians to use a dry mop or fans to expedite the drying process after the floor was mopped.

We reject plaintiff's arguments for several reasons. First, the camp counselor's opinion about when the floor should have been mopped, and the custodian's response to a leading question implying

there was nothing to prevent custodians from mopping the floor at night, are irrelevant. Many outsiders who come into contact with various organizations, if asked, might volunteer opinions about why the organization's operations should be other than what they are. Such outsider opinions are relatively meaningless in determining whether an organization has been negligent, and particularly whether a public entity's conduct is palpably unreasonable. As to the latter issue, the decisions of public employees charged with operational supervision and discretionary decision-making are the relevant persons whose opinions must be evaluated in the context of the TCA. Here, the Director of Operations testified the cafeteria had to be cleaned immediately following lunch to remove any food products on the floor. Had that not be done, and had a child been injured after slipping on food, the District would likely be criticized or sued for not cleaning the floors after lunch.

Insofar as the custodian is concerned, the response to the leading question, "is there anything that prevents a custodian from mopping the cafeteria floor at night," is meaningless due to its vague nature. The absence of "anything preventing" such activity does not mean there were no countervailing reasons to mop the floor when it was mopped. Besides, the custodian was not the Director of Operations.

Plaintiff's remaining arguments are unsupported by the record or constitute little more than hindsight criticism. For example, the argument the signs were rendered useless because they were placed regardless of whether the floor was wet is contrary to the evidence. The record establishes the custodian placed the signs before she began to mop. Depending upon numerous factors, the time it took for the floor to dry varied. There is no competent evidence the signs were placed at times when the floor was not mopped. To the extent plaintiff's claim is one that the floor typically dried before the signs were removed does not render the placement of the sigs palpably unreasonable.

Plaintiff's argument that the District should have used fans or dry mops — apparently to assure the floors were perfectly dry — are bald assertions without any consideration of how long such procedures would have taken, how many employees it would have taken to implement them, and whether they could have been completed in time for the after school program.

The question the trial court was required to answer was not whether the District could have taken every conceivable measure or, in hindsight, taken extraordinary steps to guard against the wet floor. Rather, the question was whether the action the District did take — placing warning cones where they were plainly visible to all who entered the cafeteria — was palpably

unreasonable. In other words, was it manifest and obvious that no prudent person would approve of such course of action; was the action taken capricious, arbitrary, whimsical or outrageous? We conclude that the issue — whether placing cones that warned of a recently mopped floor, still in the process of drying, was palpably unreasonable — was properly decided by the trial court on summary judgment. We agree with the trial court that the action the District took did not create a jury question as to palpable unreasonableness. Accordingly, we affirm the trial court's order granting summary judgment to the District and dismissing the complaint with prejudice.

Affirmed.