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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0341-16T2

EDWARD A. GOSTKOWSKI and
AMY CAPUANO, his wife,

Plaintiffs-Appellants,

v.

GRAHAM BRYANT and MARY J.
BRYANT,

Defendants,

and

TOWN OF WESTFIELD,

Defendant-Respondent.

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Argued December 5, 2017 – Decided January 18, 2018

Before Judges Hoffman and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-4670-14.

Patrick J. Mangan argued the cause for appellants (Bramnick, Rodriguez, Grabas, Arnold & Mangan, LLC, attorneys; Patrick J. Mangan, on the brief).

Timothy P. Beck argued the cause for respondent (DiFranceso, Bateman, Kunzman, Davis, Lehrer & Flaum, PC, attorneys; Timothy P. Beck, on the brief).

PER CURIAM

This appeal concerns a trip and fall personal injury action under the New Jersey Tort Claims Act (the Act), N.J.S.A. 59:1-1 to 14-4. Plaintiffs Edward Gostkowski and his wife, Amy Capuano,[1] appeal from a July 1, 2016 order granting the summary judgment dismissal of their negligence complaint against defendant Town of Westfield (the Town or Westfield). Plaintiffs also appeal from a September 9, 2016 order denying reconsideration.

Based on the documentary submissions, the Law Division judge held plaintiffs failed to raise an issue of material fact demonstrating Westfield had actual or constructive notice of a dangerous condition under N.J.S.A. 59:4-2(b). We affirm insofar as the Law Division granted defendant's motion for summary judgment; however, we base our affirmance on our determination that no jury could objectively conclude that Westfield's failure to protect plaintiff from the "broken and/or defective sidewalk" that caused his injury constituted "behavior that is patently

[1] In this opinion, we refer to Edward Gostkowski and Amy Capuano collectively as "plaintiffs," and refer to Edward Gostkowski individually as "plaintiff." Amy Capuano sues per quod.

unacceptable under any given circumstance." See Muhammed v. N.J. Transit, 176 N.J. 185, 195 (2003) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)) (applying this well-settled case law definition of palpably unreasonable conduct under N.J.S.A. 59:4-2).[2]

I

On the morning of December 30, 2013, plaintiff was walking his dog on the sidewalk along Dorian Road. According to plaintiffs' complaint, plaintiff sustained his injury in front of the home of Graham and Mary J. Bryant (the Bryants)[3] when he "was caused to slip and fall on some upheaved and/or sunken slabs near an old tree stump [that] had been improperly removed and/or caused the slab['s] upheav[al] or depression." Plaintiff stated that he had walked on this sidewalk infrequently – only "five or less" times – and had never noticed the upheaval previously.

[2] "[W]e review orders and not, strictly speaking, reasons that support them. . . . [A] correct result, even if predicated on an erroneous basis in fact or in law, will not be overturned on appeal." El-Sioufi v. St. Peter's Univ. Hosp., 382 N.J. Super. 145, 169 (App. Div. 2005).

[3] In addition to Westfield, plaintiffs also sued the Bryants. On February 5, 2016, the court granted summary judgment dismissal of plaintiffs' claims against the Bryants; plaintiffs did not appeal from that order.

In October 2012, the Bryants purchased their home, located at the corner of Dorian Road and Westfield Avenue. Westfield concedes the lot is "subject to a right of way," which it possesses.

During negotiations to buy the home, the Bryants learned that the sellers had already obtained an estimate from a contractor regarding needed sidewalk repairs, but the seller did not complete any repairs before the Bryants went to settlement. According to Mr. Bryant, following settlement, their insurance company contacted him and his wife and said "they wanted us to repair the sidewalks." Mr. Bryant then hired a contractor to make the sidewalk repairs; however, after completing the repairs along Westfield Avenue, the contractor was "over budget and ran out of [money]," and did not complete any sidewalk repairs along Dorian Road. Mr. Bryant further testified that, "in the fall of 2013," Westfield cut down a tree in front of his house, along Dorian Road, without notice and left its stump remaining. Pictures taken after plaintiff's accident clearly depict this stump and appear to show this tree likely caused the abutting bluestone sidewalk to lift up.

Mary Bryant testified that she contacted Westfield after plaintiff's accident and inquired into whether the Town would remove the stump; she further said a Town representative told her

that removing the stump was Westfield's responsibility, and the Town would remove it. Moreover, a note dated March 12, 2014, purportedly from Westfield's Department of Public Works, indicates an unnamed resident reported to the Town that the "roots from [the] stump lifted [the] sidewalk."

Kris McAloon, P.E., Westfield's engineer, certified that an ordinance, enacted in 1987, places the burden on the abutting property owners to maintain their sidewalks. Specifically, Chapter 24, Section 28 of the Westfield Ordinances states, in pertinent part:

> Sidewalks and retaining walls located in the public right-of-way shall be constructed, altered, repaired, replaced or removed at the expense of the abutting landowner.
>
> The town engineer may, from time to time, inform the town council that there is need for particular sidewalks or retaining walls to be constructed, altered, repaired, replaced or removed.

McAloon explained that Westfield also has "the responsibility to maintain its own sidewalks." He estimated that Westfield "owns about five miles of its own sidewalks that [the Department of] Public Works still has to clear, repair, clean and maintain[,] in addition to all its other responsibilities for the maintenance of municipal properties, municipal roadways, drainage systems, and all sorts of other tasks."

McAloon stated the Department of Public Works staff would be unable to manage and repair all the residential sidewalks in the Town. Nevertheless, in order to help property owners meet their responsibility, Westfield created a "Sidewalk Replacement Program," which permits property owners to apply to Westfield to have their property included on a list. When the Town receives enough applications, it hires a contractor to make the needed repairs and later assesses the costs against the participating property owners to obtain reimbursement. McAloon's records showed no applications to participate in the program regarding the Dorian Road property where plaintiff's accident occurred.

At deposition, McAloon testified that to his knowledge, the Bryants had not contacted the Town regarding any problems with their sidewalk. He added, "The sidewalk would not be the [T]own's responsibility." McAloon acknowledged the Town later removed the stump after plaintiff's December 2013 accident, but he did not know the removal date. On cross-examination, he acknowledged that Westfield had the responsibility to remove the stump.

Plaintiffs produced photographs of the sidewalk but did not submit an expert report. In applying the Act, the motion judge assumed the uneven sidewalk constituted a dangerous condition, but found plaintiffs' proofs insufficient to create an issue of fact as to actual or constructive notice. Specifically, he concluded

> plaintiffs have adduced no evidence, expert or otherwise, showing how long the condition of the . . . slab had existed prior to the date of the incident. The anonymous complaint filed months after the date of the incident obviously cannot compel an inference regarding the state of the sidewalk for months or more than a year prior. The photographs, which are undated, also plainly cannot justify an inference regarding the state of the sidewalk several months, or longer, prior to the incident.

The motion judge therefore granted Westfield's motion for summary judgment, concluding plaintiffs lacked proof of actual or constructive notice of the alleged dangerous condition to establish liability under N.J.S.A. 59:4-2(b). The judge also denied plaintiffs motion for reconsideration, finding that plaintiffs failed to "identify competent evidence that the court failed to consider or show that a basis for the court's conclusions was palpably incorrect or irrational."

II

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the trial court. See Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We "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 fact[-]finder 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).

Absent immunity, N.J.S.A. 59:4-2 governs a public entity's liability for injuries resulting from dangerous conditions on property it owns or controls, providing:

> 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:
>
> 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.

N.J.S.A. 59:4-1(a) defines a "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." "Whether property

is in a dangerous condition is generally a question for the finder of fact." Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 123 (2001) (citation omitted).

Regarding the Act's notice requirement, plaintiffs argue the motion judge erred in holding they failed to demonstrate a genuine issue of material fact as to whether Westfield had notice of the dangerous condition. On this point, we agree.

Actual notice will be found if a claimant proves the public entity "had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. 59:4-3(a). Constructive notice will be imputed where "the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b).

Viewing the evidence in the light most favorable to plaintiffs, the record contains sufficient evidence that Westfield had actual or constructive notice of the sidewalk's upheaval. In 2012 — approximately one year before plaintiff's accident — the Bryant's insurance company notified them their sidewalks needed repair. This notice only confirmed what the Bryants already knew from the repair estimate provided to them during the contract negotiations to buy their home. Furthermore, shortly before

plaintiff's accident, Westfield, or its contractor, cut down a tree growing close to the sidewalk along Dorian Road, in front of the Bryant's home; significantly, the roots of that tree appear to have caused the bluestone slabs to shift, thus creating the uneven condition that caused plaintiff's accident. Based on this evidence, a jury could conclude that Westfield had actual or constructive notice of the sidewalk's uplifted condition a sufficient time prior to plaintiff's accident to have taken measures to protect against the alleged dangerous condition. See N.J.S.A. 59:4-2(b), 59:4-3.

We conclude the motion judge placed undue reliance on the fact that plaintiffs' photographs — which depict a stump adjacent to an uneven stone sidewalk — lacked specific dates. The record contains no other explanation for Westfield cutting down the tree other than the explanation that the roots of the tree were uplifting the adjacent bluestone slabs, creating an uneven and unsafe sidewalk. Because the removal of this tree occurred before plaintiff's accident, the record clearly contained substantial credible evidence in plaintiffs' favor regarding the issue of notice. Accordingly, a jury could reasonably conclude Westfield had constructive or actual notice of the dangerous condition of the sidewalk.

However, notwithstanding the evidence in plaintiffs' favor on the issue of notice, we affirm the Law Division's grant of summary judgment. Because the motion judge concluded that plaintiffs' claim failed on the issue of notice, he did not address plaintiffs' remaining hurdle under the Act — showing Westfield's action or inaction regarding the tree was "palpably unreasonable." N.J.S.A. 59:4-2.

Apart from proof of notice, to establish liability against a public entity under N.J.S.A. 59:4-2, a plaintiff must establish a prima facie case that the action or inaction of the public entity was "palpably unreasonable." Coyne v. Dep't of Transp., 182 N.J. 481, 493 (2005); see also Carroll v. N.J. Transit, 366 N.J. Super. 380, 386-87 (App. Div. 2004); Maslo v. City of Jersey City, 346 N.J. Super. 346, 349 (App. Div. 2002). The term "implies behavior that is patently unacceptable under any given circumstance." Kolitch, 100 N.J. at 493 (1985). The behavior "must be manifest and obvious that no prudent person would approve of its course of action or inaction." Ibid. (citation omitted).

Whether the public entity's behavior was palpably unreasonable is generally a question of fact for the jury. See Vincitore, 169 N.J. at 130. However, a determination of palpable unreasonableness, "like any other fact question before a jury, is subject to the court's assessment whether it can reasonably be

made under the evidence presented." Maslo, 346 N.J. Super. at 351 (quoting Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993)). Accordingly, "the question of palpable unreasonableness may be decided by the court as a matter of law in appropriate cases." Id. at 350 (citing Garrison v. Twp. of Middletown, 154 N.J. 282, 311 (1998)).

Our courts have upheld summary judgment on the issue of palpably unreasonable conduct in a variety of contexts. In Maslo, we affirmed summary judgment in favor of a city, where the plaintiff had tripped on an uneven public sidewalk having a difference in elevation between two sections of slightly over an inch. Maslo, 346 N.J. Super. at 350-51. Apart from concluding the city had no notice of the tripping hazard, we also held "a rational fact-finder could not resolve the question of palpable unreasonableness in favor of [plaintiff] on this record." Id. at 351. In making that determination, we noted, among other factors, the public policies underlying the Tort Claims Act and the "vast amount" of sidewalks in the city. Ibid.

In Carroll v. N.J. Transit, 366 N.J. Super. 380, 388, 391 (App. Div. 2004), we sustained summary judgment for the defendant in a case where the plaintiff slipped on dog feces deposited on the steps of a public subway. The defendant had a maintenance worker in the vicinity, but the worker had failed to observe or

remove the dog feces before the plaintiff fell. The plaintiff argued that it was palpably unreasonable for the worker to have swept the nearby subway platform before attending to the steps. We rejected that argument as a matter of law, holding that the "claims of palpable unreasonableness presented no jury question." Id. at 391. We found significant that the plaintiff had presented no proofs addressing standards of care for the inspections of subways and rail stations. Id. at 390. The record also was "devoid of any evidence of a history of similar incidents or complaints, or a demonstrable pattern of conduct or practice to suggest the need for a more frequent inspection schedule." Id. at 390-91.

As noted, Westfield's municipal code states: "Sidewalks and retaining walls located in the public right-of-way shall be constructed, altered, repaired, replaced or removed at the expense of the abutting landowner." Westfield, N.J., Streets and Sidewalk Ordinance ch. 24, § 28 (1987). The record reflects that the Bryants and their predecessors in title understood their responsibility to repair the abutting sidewalk, but they failed to address the condition of the sidewalk in sufficient time to avoid plaintiff's accident. But for the unfortunate problem encountered by the Bryants with their initial contractor, the Dorian Road sidewalk repairs would have been completed before

plaintiff's accident. We discern no basis for attributing the problems encountered by the Bryants to any action or inaction by Westfield.

On the record before us, plaintiffs could not prove to a jury "behavior that is patently unacceptable under any given circumstance." Muhammed, 176 N.J. at 195. It is unrealistic to expect that a municipality, having many trees along its miles of sidewalks, should have addressed the sidewalk defects in a different manner that would have prevented plaintiff's accident. Nor does the record contain competent proof that the time interval between Westfield's alleged receipt of notice and the date of plaintiff's accident represented a delay that is "patently unacceptable." Mr. Bryant testified that Westfield removed the tree that appeared to cause the bluestone slab to uplift in autumn 2013, or no more than three months before plaintiff's accident. Such a delay, given the nature of the problem, is not palpably unreasonable. The situation did not bespeak an urgent and immediate need for action by the public entity, such as, for instance, a malfunctioning traffic light at a busy intersection. See Bergen v. Koppenal, 52 N.J. 478 (1968). Westfield's conduct here is no worse than the actions and inactions that were at issue in Muhammed, Maslo, Carroll, and Black, where summary judgment was granted and upheld.

Although Westfield apparently accepts responsibility for removing any trees or stumps that affect sidewalks, the ordinance dictates that it is the responsibility of abutting property owners to repair the sidewalks. We do not find any basis for concluding that Westfield engaged in any palpably unreasonable action or inaction in the manner it addressed the problem of defective sidewalks generally, or the particular sidewalk defect under review. We note that plaintiff asserts he tripped and fell on the upheaved sidewalk, not the stump nor the roots that caused the upheaval. Westfield's ordinance clearly makes the abutting owner responsible for repairing defective sidewalks in the first instance, not the municipality.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION