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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0569-16T1

VANCE BANKS,

Plaintiff-Appellant,

v.

KELLY L. GUNDERSON, TOWNSHIP OF WINSLOW, and COUNTY OF CAMDEN,

Defendants-Respondents.

Argued April 16, 2018 – Decided May 30, 2018

Before Judges Sabatino, Ostrer and Rose.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-3027-13.

Jeffrey M. Keiser argued the cause for appellant.

Burchard S. Martin argued the cause for respondent Township of Winslow (Martin, Gunn & Martin, PA, attorneys; Burchard S. Martin, of counsel; Elizabeth Merrill, on the brief).

Howard L. Goldberg, First Assistant County Counsel, argued the cause for respondent County of Camden (Christopher A. Orlando, County Counsel, attorney; William H. Kenney, on the brief).

PER CURIAM

Plaintiff Vance Banks was injured badly after he was struck by a car while walking on a rainy night along a county road in Winslow Township. Plaintiff sued the driver of the car that struck him. In that same lawsuit, he also pled negligence claims under the Tort Claims Act ("TCA"), N.J.S.A. 59:1-1 to 12-3, against the Township and Camden County.

Plaintiff asserted the public entities were liable for allowing a dangerous condition for pedestrians at the accident location, which had no sidewalk or adequate paved shoulder at that portion of the northbound side of the road. According to plaintiff's theory of the case, he was forced to walk in the lane of vehicular traffic in order to avoid stepping into one or more puddles by the edge of the road.

After the parties exchanged expert reports and other discovery, the Township and the County moved for summary judgment. The trial court granted their motions, applying various immunities and defenses under the TCA. Plaintiff settled with the driver.

Plaintiff now appeals the summary judgment order issued in favor of the two public entities. For the reasons that follow, we affirm.

I.

The record reflects the following pertinent facts, which we consider in a light most favorable to plaintiff. W.J.A. v. D.A., 210 N.J. 229, 238 (2012).

In the early morning hours of August 19, 2011, plaintiff took a bus home from his job at Lakeland Hospital. The bus dropped him off at the Winslow "Park and Ride" stop, near his residence on Rose Court in the Township. Walking towards home from the bus stop, plaintiff entered the "Super Wawa" store at the corner of Williamstown Road and Sicklerville Road at 12:35 a.m. He purchased some food there. Security footage revealed that plaintiff left the store at 12:43 a.m. He then walked on the northbound side of Sicklerville Road, with his back to oncoming traffic, towards his home on Rose Court.

Sicklerville Road is a Camden County road located within the Township. The road has a sidewalk and paved shoulder along a portion of plaintiff's route, but not on the northbound side in the area where the impact occurred.

Around this time, defendant Kelly L. Gunderson, a police officer from another municipality, finished dinner with friends and then headed home. She drove her car along Sicklerville Road. Near the intersection with Rose Court, Gunderson's car struck plaintiff, who was walking in the roadway. Gunderson proceeded

home, without stopping or reporting the accident immediately to the Winslow Township police. She did contact police the following day, explaining that she believed she had hit a deer.

Meanwhile, local police were alerted by a passerby of a person lying in a parking lot along Sicklerville Road. Police Officer Joseph DeLaurentis and Patrolman Kathleen Schultz were dispatched to the scene. The person was later identified as plaintiff.

The ensuing investigation concluded plaintiff had been thrown into the parking lot by the impact of the collision. The officers observed plaintiff's sneakers, along with a Wawa bag, which had been thrown from his body. They also found a car bumper insert and a sideview mirror.

Plaintiff was treated by emergency medical technicians, and then transported to a hospital. He was diagnosed with a severe traumatic brain injury. Plaintiff remained in a coma until November 2011. He continues to suffer from ongoing cognitive impairment, and consequently was incapable of being deposed in this case.

As a result of his investigation, Officer DeLaurentis determined that the vehicle that struck plaintiff never left the roadway, as there were no tire marks in the soft sand or grass. The officer noticed the deteriorated condition of the pavement along the side of the road, and observed puddles filled with

rainwater. DeLaurentis saw that, despite these puddles, the victim's sneakers were dry, leading him to conclude that plaintiff had walked into the roadway to avoid the puddles. The officer determined the area of impact to be in the roadway near the puddle.

Further investigation revealed that, many years earlier in May 1986, the Camden County Engineer and the County Freeholder Chairman of Transportation and Public Works had approved and signed plans for the construction of storm drainage in this area of Sicklerville Road. The 1986 plans included certain portions of the road having no shoulder. The plans also called for the construction of underground drainage pipes along the roadway.

Thereafter, in 2003, the Winslow Township Zoning Board of Adjustment and the Camden County Planning Board each approved plans for the expansion of the then-existing Wawa convenience store. Those plans included the installation of sidewalks along the portion of Sicklerville Road in front of the store. Such sidewalk construction is regulated by the Township.

Then, in January 2007, the same land use entities reviewed and approved plans for the Rose Wood residential subdivision, where plaintiff lived. The development is located approximately one-half mile from the Wawa. The plans called for sidewalks to be built within the development, but apparently none along the adjacent Sicklerville Road.

Kevin Becica, the County's engineer, testified at her deposition about the maintenance of this area. Becica explained that the County was "responsible from curb to curb or edge of pavement to edge of pavement." She noted that generally "townships determine where sidewalks ought to be located, even on [C]ounty roads." Becica confirmed the presence of an underground drainage system in this area, which was installed in lieu of sidewalks.

In his own deposition, the County's supervisor of roads, Joseph Esposito, agreed that sidewalk placement in this particular area "is up to the discretion of the [T]ownship[;] the [C]ounty does not handle sidewalk[s]." He added that County responsibility for the roadway extends only to "[t]he edge of the blacktop." With regard to maintenance, Esposito testified there was not a formal inspection routine involved in maintaining County roads, but that "we all keep an eye on the roads . . . ."

The County's public works director, Simeon Martello, stated at his deposition that the County maintained "the traveled portion of the roadway . . . ." He agreed with Esposito's testimony that the Township does not designate one person to inspect the roads on a regular basis, but rather County employees collectively monitor the roads as part of their general responsibilities. In a certification filed in support of summary judgment, Martello stated the County maintains about 1,200 lane miles of roadway, and

dispatches crews to repair any reported damage promptly.

The Township's public works director, Edward McGlinchey, stated in his deposition that the County's maintenance obligation extended to "anything within the right-of-way of the [C]ounty highway . . . ." He explained that area would "not necessarily [be] curb to curb or blacktop to blacktop but right-of-way line to right-of-way line."

The Township retained Walter Wysowaty, P.E., to perform a site inspection and engineering evaluation for this case. His report cited standards published by the American Association of State Highway and Transportation Officials ("AASHTO") in A Policy on the Geometric Design of Highways and Streets (5th ed. 2004), sometimes referred to as the "Green Book." That publication provides guidelines for construction and maintenance of roadways and sidewalks.

Wysowaty observed that "Sicklerville Road is not under the jurisdiction of the Township of Winslow . . . ." He thereby asserted there is no basis to hold the Township responsible for maintaining a County road. He noted, "[p]edestrian sidewalks are not required along all arterial streets." He further opined, "plaintiff should have been walking along the southbound lanes facing approaching traffic." In sum, Wysowaty found that the actions or inactions by the Township "did not cause or contribute

to the subject incident . . . in any way whatsoever."

Plaintiff hired an engineer, John Nawn, P.E., to examine the accident site and determine "the nature and cause of this incident, related to the roadway features . . . ." In his expert report, which plaintiff submitted in opposition to defendants' summary judgment motion, Nawn acknowledged that Sicklerville Road is a County roadway. He found that plaintiff had been walking in the northbound travel lane, which was eleven feet wide, at the time of the accident. He noted that the southbound travel lane, by contrast, was thirteen feet wide and included an additional twelve-foot shoulder.[1] The lanes were separated by a four-inch wide, yellow-colored double stripe, and were bounded on each side by four-inch white striping.

Nawn asserted that, "As a result of the lack of sidewalks, shoulders or any pedestrian accommodation" along the northbound side of the road, together with "the presence of a water filled pothole along the edge of the roadway that blocked pedestrian passage, Sicklerville Road . . . was in an unreasonably dangerous condition" when this accident occurred.

[1] As we discuss, infra, in Part II, the photos of the scene in the motion record show that there was no or minimal northbound paved shoulder. Nawn stated "[t]here was no shoulder, paved or otherwise, along the northbound lane." Also, the photos reveal that the edge of the pavement was crumbling and had deteriorated in spots.

Nawn opined that the roadside's condition "created a foreseeable risk of pedestrians walking in the north bound travel lane." He found the County lacked adequate systems in place to inspect its roadways for damage. He specifically faulted the County for failing to detect and repair the condition in this case, despite work orders that had been issued for pothole repair at unspecified locations along Sicklerville Road.

According to Nawn, the County had constructive notice of the allegedly dangerous condition. In this vein, his review revealed that County public works crews had spent 136 hours filling potholes along Sicklerville Road during the eight months before this accident. He also learned that such pothole patching had occurred in this vicinity two weeks before the accident, on August 5, 2011.

On the whole, Nawn concluded that plaintiff's injuries were "a direct result of the unreasonably dangerous condition . . . ." He postulated that "[h]ad Camden County and/or Winslow Township provided pedestrian accommodation," this accident would not have occurred. In addition, he opined that the actions or inactions of both public entities to address the dangerous condition were "palpably unreasonable."

In his oral opinion granting summary judgment to both the Township and the County, the motion judge relied upon several provisions within the TCA that insulate public entities in New

Jersey from certain negligence claims.

With respect to the Township and plaintiff's theory criticizing the lack of sidewalks at the accident location, the judge relied upon the TCA's discretionary immunity principles, which are codified at N.J.S.A. 59:4-6. The judge also invoked N.J.S.A. 59:2-3 providing for plan or design. Moreover, the judge rejected plaintiff's argument that the Township could be liable under N.J.S.A. 59:4-2 for allowing a dangerous condition on public property. In this regard, the judge concluded that the puddling that plaintiff attempted to avoid was not on Township property. In addition, the judge found no basis for a jury to find the Township's conduct was "palpably unreasonable" as required by N.J.S.A. 59:4-2. As the judge concluded:

> The [T]ownship has no duty to the plaintiff to put in sidewalks. N.J.S.A. 59:2-3, provides immunity for [its] actions or inactions and are discretionary in nature.
>
> No [T]ownship property . . . is involved in this litigation. The lack of sidewalks [is] the decision by the [T]ownship not to put in sidewalks at this location, even though [it] may have put some in down the road, or required them, is not palpably unreasonable. It is part of the design immunity. And [it], also, [has] immunity when it comes to the expenditure of public funds.
>
> So the motion by the [T]ownship will be granted.

With respect to plaintiff's claims against the County, the judge similarly found under N.J.S.A. 59:4-2 that the County had not allowed a "dangerous condition" to persist on its roadway, or that the County's conduct was "palpably unreasonable." Moreover, the judge found the County, like the Township, was immunized by design immunity principles. The judge reasoned as follows:

> The plaintiff['s] claim, here, is that there was a dangerous condition of public property, not [an] affirmative act of negligence by an employee. [N.J.S.A.] 59:4-2. In that case, the plaintiff must show that the [C]ounty was in control of the property where the accident occurred; that there was a dangerous condition at the time of the accident; that the injury was proximately caused by that condition; that it was a foreseeable risk; and that it was, either, created by a [C]ounty employee, or that there was actual or constructive notice of such dangerous condition.
>
> If all of that has been shown there's still no liability on the part of the [C]ounty if its action or inaction was not palpably unreasonable; or if its action or inaction was covered by design immunity.
>
> As I indicated, as the plaintiff went walking down, presumably, on the grass or walking north on Sicklerville Road and got to this puddle, he chose to go left around the puddle into the roadway, rather than go to his right around the puddle and the accident occurred.
>
> It was argued in the papers, although, not mentioned here, that the plaintiff's actions were contrary to the statute when walking on or near a highway. The pedestrian must walk against traffic, not in the same direction as traffic. But we'll put that aside because it

> doesn't matter really.
>
> By statute, the [C]ounty is responsible for the roadway from curb line to curb line, or from paving — end of paving to end of paving where there is no curb.
>
> The right of way, here, extends beyond the roadway. A right of way gives the [C]ounty the option to enter into the right of way and construct or create additional roadway or shoulders, or whatever [it] may want — wish to do.
>
> That was not done here. The plan to [—] this roadway shows the roadway to be the 40 some foot width with the right of way beyond that.[2]

The judge then offered these further observations on the "dangerous condition" issue:

> Also, the property in question, the roadway, here, was not in a dangerous condition if it became dangerous only when used without due care. That is, the plaintiff stepping out into the roadway.
>
> Plaintiff has the affirmative burden to show that he acted with due care. Walking into the street does not do that. The depression — the primary point, however, today, is that the depression — whether it's a declivity or a pothole — I think, is of no moment — the depression is not on [C]ounty property. It is on the property — the driveway of the business that's adjacent to the public road. And repairs of that private — of that property would be that of the owner of the adjoining property and not of the [C]ounty. The [C]ounty has 228 square miles, or 28 highway department members to fix potholes, et cetera.

[2] The judge later corrected this measurement to be twenty-four feet.

> Even if this [were] on the [C]ounty road there is no evidence that it was reported to the [C]ounty and that [it] had any notice or knowledge of it, assuming [it] had a duty to fix it in the first place.
>
> [(Emphasis added).]

Following the court's dismissal of the public-entity defendants, plaintiff settled his claims against co-defendant Gunderson. That settlement disposed of all outstanding issues in the trial court. Plaintiff's present appeal of the summary judgment ruling as to the public entities ensued.

II.

Indisputably, the Township and the County are public entities that are liable for their negligence only to the extent permitted by the TCA. N.J.S.A. 59:1-2; N.J.S.A. 59:1-3; N.J.S.A. 59:2-1(a); see Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 181-82 (2002) (counties and municipalities are public entities that fall within the coverage of the TCA).

As a starting point to our TCA analysis, N.J.S.A. 59:2-1(b) provides that "[a]ny liability of a public entity established by this act is subject to any immunity of the public entity . . . ." Under the TCA, immunity for public entities is generally the rule and liability is the exception. See N.J.S.A. 59:2-1(b); Fluehr v. City of Cape May, 159 N.J. 532, 539 (1999); see also Kolitch v. Lindedahl, 100 N.J. 485, 495-97 (1985) (applying the TCA to

immunize the State in its decision to set a speed limit for a road under N.J.S.A. 59:2-3, its failure to warn of a roadway hazard under N.J.S.A. 59:4-5, and defects in its plan and design of the road under N.J.S.A. 59:4-6).

The requirements for holding a public entity liable for the dangerous condition of public property are set forth in N.J.S.A. 59:4-2 as follows:

> 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.
>
> [N.J.S.A. 59:4-2 (emphasis added).]

Even if a plaintiff establishes these basic elements of a dangerous condition, he or she also must prove the public entity's conduct was "palpably unreasonable." N.J.S.A. 59:4-2 further provides:

> 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.
>
> [(Emphasis added).]

The liability provisions of N.J.S.A. 59:4-2 are also limited by specific immunity sections within Title 59 and under common law. All immunity provisions prevail over liability provisions. See Weiss v. N.J. Transit, 128 N.J. 376, 380-82 (1992); Malloy v. State, 76 N.J. 515, 519 (1978).

In reviewing the trial court's application of these and other substantive principles of liability and immunity under the TCA, we are mindful those rulings were issued in the context of motions for summary judgment. Thus, we apply the familiar standards of Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see also R. 4:46-2(c). The court "must accept as true all the evidence which supports the position of the party defending against the motion and must accord him [or her] the benefit of all legitimate inferences which can be deduced therefrom, and if reasonable minds could differ, the motion must be denied." Brill, 142 N.J. at 535 (alteration in original) (citations omitted). If the evidence "'is so one-sided that one party must prevail as a matter of law,' the trial court should not hesitate to grant

summary judgment." Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). The question of whether a public entity is entitled to immunity may be properly decided on summary judgment. See Ciambrone v. State of N.J. Dep't. of Transp., 233 N.J. Super. 101, 107 (App. Div. 1989) (noting the DOT met its burden of showing no genuine dispute of fact with respect to its immunity).

On appeal, we employ the same standard of summary judgment review that governs the trial court. Henry v. N.J. Dep't. of Human Servs., 204 N.J. 320, 330 (2010). No special deference is warranted to the trial court examining the same summary judgment record. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). Moreover, when reviewing the trial court's ruling on a legal issue in this context, our review is de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

A.

Applying these well-settled principles, we affirm the trial court's grant of summary judgment to the Township. Plaintiff principally argues that the court erred in finding that the Township was entitled to immunity under N.J.S.A. 59:2-3 (discretionary immunity) and N.J.S.A. 59:4-6 (plan or design immunity). We disagree.

As the judge noted, plaintiff's theory of liability under N.J.S.A. 59:4-2 against the Township was that the property was in a dangerous condition because the Township failed to construct a sidewalk along Sicklerville Road, thereby necessitating plaintiff to walk into the roadway to avoid one or more puddles. However, even if plaintiff could satisfy all of the elements of N.J.S.A. 59:4-2, plaintiff's cause of action is barred by the discretionary immunity provision of N.J.S.A. 59:2-3(b), which provides that "[a] public entity is not liable for legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature . . . ."

The discretionary immunity serves to immunize both public employees and public entities for the exercise of discretion within the scope of employment. See Bergen v. Koppenal, 52 N.J. 478, 480 (1968) (holding that high-level policy decisions made by government entities should not be reviewed by a jury); Cobb v. Waddington, 154 N.J. Super. 11, 16 (App. Div. 1977) (holding the selection of barricades in a road construction project was an exercise of judgment, and therefore defendant Department of Transportation was immune from liability).

The Township's decision not to install or require sidewalks near the accident location was based on the discretionary decisions of its legislative and quasi-judicial bodies and is entitled to

immunity under N.J.S.A. 59:2-3(b). No New Jersey case law or statute requires a municipality to install sidewalks. N.J.S.A. 40:65-14 simply states, in discretionary language, that "[a]ny municipality may prescribe by general ordinance in what case curbs and sidewalks shall be constructed, repaired, altered, relaid or maintained at the expense of the abutting landowners . . . ." (Emphasis added). Thus, rather than undertake to install sidewalks itself, the Township's legislative body ceded this obligation to property owners through the Township of Winslow Code § 294-128, which provides that "[e]ach land development shall provide a sidewalk within the road right-of-way." In deciding to defer this task to the property owners who adjoin the road, the Township exercised the discretion conferred by the statute. The failure of an adjoining property owner to install sidewalks, as here, is not attributable to the Township.

Similarly, the Township enjoys discretionary immunity based on N.J.S.A. 59:2-3(b), through its planning board's approval of development plans for the Wawa store and the Rose Court residential neighborhood, which essentially serve as "bookends" for the scene of this accident. The Township deferred to its zoning board, which approved these plans. The zoning board's independent consideration of these plans and the pedestrian traffic along Sicklerville Road, together with the discretion which it exercised

in not requiring connecting sidewalks, entitles the Township to immunity from this lawsuit.

In the alternative, the trial court also found that the Township was entitled to discretionary immunity under N.J.S.A. 59:2-3(d), which provides that:

> A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.

This provision "refers to the public entity's discretion in determining what action should or should not have been taken." Brown v. Brown, 86 N.J. 565, 575 (1981). The applicability of N.J.S.A. 59:2-3(d) "does not per se establish immunity, for immunity is not available if 'a court concludes that the determination of the public entity [regarding a dangerous condition] was palpably unreasonable.'" Id. at 578.

Although the motion judge made only a passing reference to this provision, he implied that the Township's limited resources did not allow for the creation of sidewalks throughout the municipality, when it held that the Township has "immunity when

it comes to the expenditure of public funds." The judge commented further on this aspect of immunity, when he concluded that the Township's decision "not to put in sidewalks at this location" is "not palpably unreasonable."

In a similar case, Mitchell v. City of Trenton, 163 N.J. Super. 287, 289-90 (App. Div. 1978), a municipality declined to repair a certain portion of curbing upon which the plaintiff had been injured. The court found that "[g]iven the many competing demands upon an urban entity for funds, ranging over the areas of public safety, roads, sanitation, public housing, health, education, and others, we hold that the trial judge properly concluded that the city's decision not to allocate resources for the repair of curbing was not 'palpably unreasonable' as a matter of law under N.J.S.A. 59:2-3(d)." Id. at 291-92.

Here, the judge soundly ruled that the Township's decision not to build sidewalks along every roadway within its boundaries, or to compel all property owners to do so, was not palpably unreasonable. The Township faced competing demands. This is evidenced by McGlinchey's testimony that the Township encompasses "60 square miles" which include numerous roads, sidewalks, and other features requiring maintenance. Such a large area, when considered in light of the limited budgets available to municipalities, as illustrated in Mitchell, supports the court's

finding that immunity is proper.

In any event, in addition to discretionary immunity, the court properly found that the Township is also entitled to "[p]lan or design immunity,"[3] under N.J.S.A. 59:4-6. That portion of the statute provides that:

> a. Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

This provision grants public entities complete immunity for injuries resulting from dangerous conditions produced by the plan or design of public property, where such a plan or design has been officially approved by an authorized body. See Thompson v. Newark Housing Auth., 108 N.J. 525, 536-37 (1987) (regarding design immunity as to presence of smoke detectors); Birchwood Lakes Colony Club v. Medford Lakes, 90 N.J. 582, 599 (1982) (regarding design immunity as to discharge of high amounts of phosphate and nutrients

[3] We recognize the judge said "design" immunity in his oral opinion, but he was obviously referring to "plan or design" immunity under N.J.S.A. 59:4-6.

into a lake).

As noted in Manna v. State, 129 N.J. 341, 359 (1992), design immunity "attaches to the [public entity]'s decision regarding how to design a particular feature, and does not turn on explicit consideration of specific options."

The motion judge's application of "design immunity" to the Township here was sound. As we noted, the Township's zoning board reviewed and approved complicated development plans for the Wawa store and the Rose Wood subdivision in 2003 and 2006, respectively. In doing so, the Township, as a planning matter, chose not to require sidewalks connecting the two projects, despite the opportunity to observe and consider the nature of pedestrian traffic on Sicklerville Road.

Plaintiff's argument that the Township failed to consider coordination of these developments reflects the very type of decision contemplated by plan or design immunity, which disallows juror scrutiny of such design decisions. N.J.S.A. 59:4-6. The board, cognizant of the two developments and the road between them, did not elect to require the construction of continuous sidewalks. The planning board's judgment is entitled to deference, and entitles the Township to immunity.

Plaintiff's citations to Thompson, 108 N.J. at 536, Birchwood, 90 N.J. at 602, and Ellison v. Housing Auth. of South

Amboy, 162 N.J. Super. 347, 351-52 (App. Div. 1978), are not persuasive. While these cases do illustrate limits on the scope of plan or design immunity, the Township here satisfied the directives announced in those cases. The Thompson court cited Birchwood and Ellison, and held that "[t]he specific design or plan detail alleged to constitute the dangerous condition must have been given official approval for the immunity to attach." Thompson, 108 N.J. at 536. However, in both Manna, 129 N.J. at 357, and Luczak v. Township of Evesham, 311 N.J. Super. 103, 109 (App. Div. 1998), the courts made clear that the government entity need only show that it considered the general condition involved in a plaintiff's claim, rather than specific design options.

Here, the general design of the roadside between the Wawa and Rose Wood, albeit not Township property, must have been considered in the planning board's determinations. The plans as approved for Wawa and Rose Wood both involved sidewalks within and around each development, but did not mandate immediate construction of connecting sidewalks between the two developments. The Township's code § 294-128 required that "[e]ach land development shall provide a sidewalk within the road right-of-way," which would affect any subsequent development within that corridor. It suggests that the Township duly considered the need for sidewalks. Because the Township's zoning board considered the need for sidewalks within

each of these projects and approved them without a connecting sidewalk, and because it was able to rely on its ordinance as to construction of new sidewalks in this corridor, the board properly considered this detail in its approval.

Plaintiff also relies upon Costa v. Josey, 160 N.J. Super. 1, 10-12, 14 (App. Div. 1978), aff'd, 79 N.J. 535 (1979), rev'd on rehearing, 83 N.J. 49 (1980), in which a trial court initially found that, even if a roadway were dangerous, defendant was immune under N.J.S.A. 59:2-3(a) or N.J.S.A. 59:4-6. On appeal, the Supreme Court clarified that, once the municipality undertook to resurface the roadway in question, it was no longer immune. Costa, 83 N.J. at 55.

Here, however, the Township never undertook to improve the roadside and Costa is thus distinguishable. The Township had no maintenance responsibility for this County roadway. Costa also stands for the proposition that plan or design immunity only applies to policy decisions, rather than operational ones. Ibid. The Township's decision in this case not to require construction of sidewalks was a comprehensive policy decision. This is evidenced by the passage of its sidewalk ordinance requiring individual property owners to construct their own sidewalks. In making this policy decision, the Township shifted the responsibility to individual property owners and is thus entitled

to immunity here.

B.

Plaintiff separately argues that the trial court erred in dismissing his claim against the County for a dangerous condition on public property under N.J.S.A. 59:4-2 and in finding that the County was entitled to plan or design immunity under N.J.S.A. 59:4-6. We discern no such error.

The basis of plaintiff's theory of the County's liability is slightly different than the Township's. The County's alleged negligence is premised on plaintiff's argument that: (1) the puddle(s) located on the side of Sicklerville Road within the County's right-of-way comprised a dangerous condition of property; (2) of which the County was on notice; (3) plaintiff's "injury was proximately caused by the dangerous condition;" (4) "the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred;" and (5) the County's failure to protect against the condition was "palpably unreasonable." N.J.S.A. 59:4-2. The motion judge rightly determined these arguments are unavailing.

As a threshold matter, the trial court found that the roadside puddling was not located on County or Township property, but rather on private property. The judge observed the puddling "is on the property — the driveway of the business that's adjacent to the

public road" and "not on [C]ounty property." In reaching this conclusion, the judge relied on photos in evidence, together with Becica's testimony, which revealed that the [C]ounty is responsible for the roadway "from curb to curb" or from "edge of pavement to edge of pavement," as well as Esposito's testimony that County responsibility for the roadway extends only to "edge of blacktop." That distance was the roughly twenty-four feet of blacktop road surface. The surface constituted only part of the County right-of-way, which is either sixty-six feet wide or forty-nine and a half feet wide, depending on the plans observed.

Viewing, as we must, the record in a light most favorable to plaintiff, it appears the trial court should not have conclusively ruled that the area where the roadside puddling was located was solely over private property within the County's right-of-way. The photos and the testimony of the multiple deponents could reasonably support an inference for plaintiff that a portion of the puddling was located on the roadway, or its crumbling edge. Even so, that factual possibility is inconsequential to a proper analysis of the legal issues.

To be sure, N.J.S.A. 59:4-2 provides in part that "[a] public entity is liable for injury caused by a condition of <u>its property</u> . . . ." (Emphasis added). Notably, N.J.S.A. 59:4-1(c) provides that "[p]ublic property" means real or personal property owned or

controlled by the public entity, but does not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity." Case law has held that roadways and their constituent elements are public property under the TCA. Norris v. Borough of Leonia, 160 N.J. 427, 441 (1999) (citations omitted); see McGowan v. Borough of Eatontown, 151 N.J. Super. 440, 449 (App. Div. 1977).

Significantly, N.J.S.A. 27:16-8 provides that the County "shall maintain every road laid out, opened, taken over, or acquired by it, between the curb lines, and keep it in repair, safe and convenient for travel during all seasons of the year." (Emphasis added). Pursuant to statute, the paved roadway was the limit and extent of the area controlled by the County, unless the County had improved or maintained areas beyond the curb lines. N.J.S.A. 27:16-8. That statutory mandate was supported by testimony from both Becica and Esposito. While the County enjoyed an undeveloped right-of-way beyond the existing roadbed, it did not "own or control" the right-of-way, as it was improved with a private office parking lot.

It is undisputed that a private entity, Clark and Associates, owned the land on which the right-of-way was located. As the court found, that area remained private property. It is similarly undisputed that the County did not control or maintain the property

beyond the roadway, despite its right-of-way. Property "controlled" by a public entity does not mean any property falling within its geographical boundaries. Christmas v. City of Newark, 216 N.J. Super. 393, 398 (App. Div. 1987); Brothers v. Borough of Highlands, 178 N.J. Super. 146, 150 (App. Div. 1981). Instead, "possessory control consistent with property law is necessary." Posey, 171 N.J. at 183. There was no evidence here to suggest that the County exercised any possession or control over the private parking lot here, despite the existence of its right-of-way.

Nonetheless, plaintiff contends that a public right-of-way such as this one, which runs over private land, should be considered public property, citing to Braun v. Township of Mantua, 270 N.J. Super. 404, 413 (Law Div. 1993). However, in that case, the accident occurred on an improved portion of the right-of-way, which was deemed public property. Ibid.

Here, the County had never undertaken to utilize or improve the full extent of its right-of-way, on which the condition in question was completely or at least partially located. Furey v. County of Ocean, 273 N.J. Super. 300, 305 (App. Div. 1994) is instructive on this point. In Furey, we held that the defendant county was responsible for the entire right-of-way, including a shoulder, because the road "in its entire right-of-way is and was

owned, maintained and controlled by the defendant, Ocean County." (Emphasis added). In the present case, the County never undertook to control or maintain the entire right-of-way, but rather only the paved roadway, pursuant to statute and in accord with Becica's testimony. No published case law or statute requires maintenance of an unused portion of a public entity's right-of-way that is otherwise on private property.

The trial court relied on statutory language and credible testimonial evidence from the County's professionals, all of which established the limits of the County's control as being between the edges of the pavement. N.J.S.A. 27:16-8. While Esposito's testimony, on leading questions from plaintiff's attorney, did passingly acknowledge the site of this incident as "the shoulder" — perhaps somehow connoting an area maintained by the County — plaintiff failed to produce any tangible evidence to that effect and Esposito's own direct testimony belied this remark. Further, plaintiff's own expert and the investigating officer both agreed that there was no shoulder at the site of this accident. Only the Township's witness, McGlinchey, opined that the County's maintenance obligation should run from "right-of-way-line to right-of-way-line," but did not offer any statutory or even anecdotal support for that assertion and appears to have merely

expressed his preference in light of his own role with the Township.

Even if plaintiff could establish that the puddling and depression was located, at least in part, on "public property," he did not present sufficient evidence to defeat the motion for summary judgment on issues of liability for a dangerous condition.

The trial judge appropriately found "the roadway, here, was not in a dangerous condition if it became dangerous only when used without due care." The judge concluded that plaintiff's conduct "stepping out into the roadway" does not show due care. The judge also explained that "whether it's a declivity or a pothole — I think, is of no moment . . . ."

As noted, supra, pursuant to N.J.S.A. 59:4-1(a), a "[d]angerous condition" "means 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 often, but not always, a question for the finder of fact. Vincitore v. Sports & Expo. Auth., 169 N.J. 119, 123 (2001) (citations omitted). Just like "any other fact question before a jury, [that determination] is subject to the court's assessment whether it can reasonably be made under the evidence presented." Id. at 124 (alteration in original) (emphasis added)

(quoting Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 452, (App. Div. 1993)).

Instructively, the Supreme Court in Vincitore described the test used under the TCA to determine if property is in a "dangerous condition":

> The first consideration is whether the property poses a danger to the general public when used in the normal, foreseeable manner. The second is whether the nature of the plaintiff's activity is "so objectively unreasonable" that the condition of the property cannot reasonably be said to have caused the injury. The answers to those two questions determine whether a plaintiff's claim satisfies the Act's "due care" requirement. The third involves review of the manner in which the specific plaintiff engaged in the specific activity. That conduct is relevant only to proximate causation, N.J.S.A. 59:4-2, and comparative fault, N.J.S.A. 59:9-4.
>
> [Vincitore, 169 N.J. at 126 (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 292 (1998)).]

Assuming, for the sake of discussion, that at least part of the allegedly dangerous condition was located on County property, the Vincitore test is not satisfied by this record. No reasonable jury could conclude that the area was in what the TCA classifies as an actionable dangerous condition.

Under the first prong of the test, it cannot be said that the roadside was in a dangerous condition, when used as it was

intended. Vincitore, 169 N.J. at 126. The road's main purpose was for vehicular traffic. Nothing in the record suggests that the road was in any way unsafe for that purpose. Unlike the southbound portion of the road, the northbound roadside was not intended for pedestrian or vehicular use, as no sidewalk or shoulder existed there.

Under the second prong of the Vincitore test, plaintiff's hazardous use of the road was so objectively unreasonable that the condition itself cannot be said to have caused the injury. Ibid. Plaintiff was walking in the middle of a dark roadway on a rainy night, with his back to traffic. That was contrary to N.J.S.A. 39:4-34, which provides that "[o]n all highways where there are no sidewalks or paths provided for pedestrian use, pedestrians shall, when practicable, walk only on the extreme left side of the roadway or its shoulder facing approaching traffic."

Although plaintiff's counsel and experts argue that it was impracticable for him to have walked on the opposite side of the road, he attributes his decision only to the inconvenience of having to cross the highway twice. His conduct in walking on the roadway in violation of the statute, is indicative of a lack of due care, precluding a finding that an actionable dangerous condition existed here. Ibid. Plaintiff therefore fails the

first and second prongs of Vincitore, and there is no need to discuss the third prong.

In sum, we find the trial court did not err in determining that plaintiff failed to present sufficient evidence regarding the existence of an actionable dangerous condition.

Plaintiff asserts that it was reasonably foreseeable that pedestrians would walk in this case along Sicklerville Road. Nevertheless, that question is inconsequential. As a result of its findings as to dangerous condition, the court below properly did not reach the foreseeability of this accident. Polzo v. County of Essex, 209 N.J. 51, 66 (2012), makes clear that "[o]nly if plaintiff can prove [the dangerous condition] do we turn to the next step" in an analysis of the N.J.S.A. 59:4-2 claim.

Plaintiff further argues that the court erred in finding that the County did not have actual or constructive notice of this condition, based on the length of time for which the condition existed, and the fact that the County did not have a formal road inspection mechanism in place. Because plaintiff did not establish the other elements of his claim, the court was not required to reach this issue, either. Ibid. In any event, the proofs do not establish such notice.

The motion judge did not find evidence of actual or constructive notice present, reasoning that, "[e]ven if this

[were] on the [C]ounty road there is no evidence that it was reported to the [C]ounty and that [it] had any notice or knowledge of it, assuming [it] had a duty to fix it in the first place." We agree.

Chatman v. Hall, 128 N.J. 394, 418 (1992) (citations omitted), a case cited by plaintiff, notes that the length of time a pothole exists, as well as its alleged size, can create an inference of constructive notice. But, Maslo v. City of Jersey City, 346 N.J. Super. 346, 350 (App. Div. 2002), made clear that a public entity had no actual or constructive notice of an uneven sidewalk, despite plaintiff's expert opinion that the condition existed for at least one year. Further, in Polzo the Court held that the government entity did not have constructive notice of the condition even though it surveyed the roadway in the weeks before the accident. Polzo, 209 N.J. at 56. Polzo also held that constructive notice of a dangerous condition will not be found merely because the government entity did not have a regular inspection routine in place. Id. at 69.

Even assuming the County had a maintenance obligation for the right-of-way area outside the roadway, plaintiff adduced no evidence to show actual notice of a dangerous condition. Plaintiff did not produce any reports as to this particular location prior to the accident, though there were warnings and repairs as to

other conditions along this block of Sicklerville Road. As the County rightly points out, absent more specific evidence, generalized warnings cannot serve as notice of a claimed defect at this particular location. See Norris, 160 N.J. at 447.

Similarly, again presuming for argument's sake that the County had a maintenance obligation at the edge of the northbound pavement, plaintiff provided no credible evidence to suggest constructive notice of a danger. Plaintiff speculates the condition probably existed for at least a few months. That argument is inapposite to Maslo, which made clear that a witness' speculation as to the length of time in which a condition existed is insufficient to show constructive notice. Maslo, 346 N.J. Super. at 249. The argument also runs afoul of Polzo's holding that roadway maintenance in the weeks before an accident does not amount to constructive notice. Polzo, 209 N.J. at 56.

Despite the absence of a formal road inspection protocol for this location, the record reflects that road crews monitored County roadways in conjunction with their other duties. They spent 136 hours repairing this area of Sicklerville Road from January to August 2011. Testimony from Esposito made clear the crews did "keep an eye on the roads" as a regular part of their job responsibilities. There is no evidence any of them reported this particular condition. The County rightly points out that such

crews would not report or repair a condition that they determined to be on private property, outside the County's maintenance responsibility. Moreover, Polzo, 209 N.J. at 69, instructs that courts should not second-guess a government entity's roadway inspection procedures.

Additionally, even if plaintiff had established the elements of dangerous condition liability under N.J.S.A. 59:4-2, the County is nonetheless immune because of plan or design immunity. The court found that design immunity under N.J.S.A. 59:4-6 applied to the County because, based on the 1986 stormwater plans, "[t]he section of the roadway was designed, as they say, without a shoulder or without a curb . . . ." This finding is supported by the record, which demonstrated that the Camden County Planning Board reviewed and approved plans related to the conditions of Sicklerville Road on several occasions. In the 1986 stormwater plans, the County planning board chose not to require sidewalks or a shoulder after studying the general condition of the roadside, instead requiring significant piping for drainage purposes. Similarly, in approving both the Wawa expansion and the Rose Wood subdivision, the County did not elect to modify the roadside along this length of Sicklerville Road. The County apparently was content with the existing sidewalks, which covered approximately 64% of the distance between these two developments while also

deferring to the Township's sidewalk ordinance. These approvals at the County level reflected the exercise of discretion afforded to the planning board, and entitle the County to plan or design immunity. Because this immunity applies, and immunity provisions under the TCA generally prevail over liability provisions, summary judgment was appropriate.

Lastly, we concur with the motion judge that the County was entitled to summary judgment because plaintiff could not realistically prove to a jury that its conduct was "palpably unreasonable," as required under N.J.S.A. 59:4-2. The puddling depicted in the photos, even though they were taken several hours after the accident, does not depict a sufficiently extreme hazard to satisfy this very high burden of proof. "[P]alpably unreasonable" "implies behavior that is patently unacceptable under any given circumstances." Kolitch, 100 N.J. at 493. At most, the County's alleged inattention to the problem was merely negligent. Its conduct does not rise to a level of wrongfulness to be actionable under N.J.S.A. 59:4-2.

C.

To summarize, even if we afford plaintiff all reasonable inferences from the factual record, plaintiff cannot surmount the immunities and stringent requirements of the TCA to make either of these public entities liable for this unfortunate accident.

Those entities properly were granted summary judgment. By contrast, the co-defendant motorist appears to have been the culpable party, at least for the reason she left the scene of the accident with plaintiff on the ground injured and unaided. Having settled with that motorist, plaintiff had no viable claims remaining for a jury to consider.

The remaining arguments presented on appeal lack sufficient merit to warrant discussions. R. 2:11-3(e)(1)(E).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION