SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2799-16T4

JOAN ARCHACAVAGE and CHESTER ARCHACAVAGE,

Plaintiffs-Appellants,

v.

NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BOARD OF EDUCATION,

Defendants-Respondents.

Submitted March 5, 2018 – Decided May 3, 2018

Before Judges Messano and O'Connor.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2938-14.

Costello Law Firm, attorneys for appellants (Stanley G. Wojculewski, on the brief).

McDowell Posternock Apell & Detrick, PC, attorneys for respondents (Daniel Posternock and Diana R. Sever, on the brief).

PER CURIAM

Plaintiff Joan Archacavage appeals the Law Division's January 20, 2017 order granting summary judgment to defendant Burlington

County Regional School District Board of Education, and dismissing plaintiff's complaint.[1] The facts disclosed by the motion record viewed in a light most favorable to plaintiff, Rule 4:46-2(c), are straightforward.

In the early evening of December 6, 2013, plaintiff attended a play at the high school, along with her future-daughter-in-law, Andrea Tilton. Tilton's daughter, plaintiff's grandchild, who was wheelchair-bound, was performing. After the performance, plaintiff and Tilton left the auditorium and proceeded down a hallway to a backstage area, where they were going to locate the child and escort her home.

A group of volunteer parents historically would assist selling tickets and refreshments, and usher parents and guests. Teacher Valerie Lynn Gargus was in charge of the theater group. She testified at her deposition that it was a long-standing custom for the "helper parents [to] take [an empty coat rack] up into the hallway before a show, . . . put a cloth over it . . . to keep the parents — well, the audience from seeing the students go back and forth between the theater room and the backstage area." The barrier was intended to give the children privacy and keep parents and guests out, however, Gargus was aware that parents and others

[1] The claims of plaintiff's husband, Chester Archacavage, are wholly derivative of plaintiff's claims. For that reason, we use the singular, "plaintiff," throughout the opinion.

in attendance would frequently simply go around the rack. There was usually a laminated sign placed at eye level on the rack, advising people not to go past, however, Gargus testified she did not recall seeing the sign on the rack that evening.

At the next night's production, Gargus checked to make sure the sign was on the rack. Since then, the school abandoned the use of shrouded coat racks and simply placed a "band stand" on each side of the hall, with signs that said "only cast and crew beyond this point." Vice Principal Brandon Bennett testified that he believed the cloth covering the rack reached the floor.

Tilton saw many people in the hallway, parents and children, going around the narrow space between the coat rack and the hallway wall. She proceeded first, followed by plaintiff, who described what happened thereafter:

> As we got walking, there was this thing, I will say sign, but it was covered. There was nothing you could read or anything. It was covered up. So I went to go around that and my toe got caught in the wheel. As far as I can remember, that's what happened. Then I fell.

Plaintiff, seventy years old at the time, suffered serious injuries, including fractures to her patella and humerus, the latter requiring open-reduction surgery.

Plaintiff's expert, Wayne F. Nolte, a licensed professional engineer, concluded the coat rack, as located, presented a

hazardous condition because of "the presence of a low rise trip hazard created by the configuration of the base to the coat rack in a foreseeable pedestrian path in a means of egress." He opined that the conditions failed to comply with the requirements of the BOCA Code, the Uniform Construction Code, and the 2006 International Fire Code. Although the base of the rack was painted a "warning orange," Nolte opined it was not elevated sufficiently to be visible to plaintiff. He further noted that the base of the coat rack projected perpendicularly twelve inches from the cross bar upon which any coat, or the sheet, rested, thereby providing plaintiff with a false impression of possible safe passage. The casters and wheels also projected out from the base of the rack by several inches.

Defendant's expert, David M. Kenney, noted there were exit doors that permitted plaintiff and Tilton to access the back stage area without the need to go around the coat rack. Kenney opined that the orange-painted base was within plaintiff's "visual field," although he never mentioned the sheet that reached the ground covered the rack. Kenney opined that the narrow gap between the coat rack and wall, approximately eighteen inches, made it obvious that pedestrians should not try to pass. He further reasoned that because the rack was on wheels, plaintiff could have rolled the rack to provide a wider lane for passage.

Defendant moved for summary judgment, arguing that plaintiff failed to demonstrate the coat rack was a dangerous condition under the Tort Claims Act (the TCA), specifically, N.J.S.A. 59:4-2, or that its conduct in placing the shrouded rack to partially block the hallway was palpably unreasonable. Ibid. The motion judge reasoned that although Vincitore v. Sports and Exposition Authority, 169 N.J. 119 (2001), stated the existence of a dangerous condition and whether the entity's conduct was palpably unreasonable are generally jury questions, "like any other fact question . . . [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) (quoting Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993)). She granted defendant's motion. In a supplementary statement of reasons submitted pursuant to Rule 2:5-1(b), the judge wrote the evidence failed to demonstrate

> the barrier erected at defendant's property posed a risk to the general public when used in a normal, foreseeable manner. The evidence presented, viewed in a light most favorable to plaintiff as the non-moving party, established that the alleged dangerous condition consisted of a coat rack that stretched the width of a hallway, covered by a sheet that extended to the floor, that was erected to prevent entry of the public from accessing a student dressing area. There was no evidence to suggest that anyone had previously tripped, fallen or even encountered any difficulty relating to the barrier.

> Nothing was presented to the court by plaintiff, or otherwise, to establish that the coat rack barrier was dangerous to foreseeable users when used with due care.
>
> Moreover, . . . it was objectively unreasonable for plaintiff to attempt to maneuver around the barrier that was clearly erected to block the entrance of the public. As such, the condition of the property could not reasonably be said to have caused plaintiff's injury.

Before us, plaintiff essentially argues the evidence presented material disputed facts as to whether defendant created a dangerous condition on its property, and whether that conduct was palpably unreasonable. As a result, summary judgement was improper. We agree and reverse.

We review the grant of summary judgment de novo, applying the same standard used by the trial court. Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). "That standard mandates that summary judgment be granted 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the 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.'" Ibid. (quoting R. 4:46-2(c)). We owe no deference to the trial court's legal analysis or interpretation of a statute. Palisades at Fort Lee Condo. Ass'n v. 100 Old

Palisade, LLC, 230 N.J. 427, 442 (2017) (citing Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995)).

The general rule is that "a public entity is immune from tort liability unless there is a specific statutory provision that makes it answerable for a negligent act or omission." Polzo v. Cty. of Essex, 209 N.J. 51, 65 (2012) (Polzo II). A public entity may be liable for injuries caused by a condition on its property if a plaintiff can establish:

> [1] the existence of a "dangerous condition," [2] that the condition proximately caused the injury, [3] that it "created a reasonably foreseeable risk of the kind of injury which was incurred," [4] that either the dangerous condition was caused by a negligent employee or the entity knew about the condition, and [5] that the entity's conduct was "palpably unreasonable."
>
> [Vincitore, 169 N.J. at 125 (quoting N.J.S.A. 59:4-2).]

"Th[e]se requirements are accretive; if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of public property must fail." Polzo v. Cty. of Essex, 196 N.J. 569, 585 (2008) (Polzo I).

"The [TCA] 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.'" Garrison v. Twp. of

Middletown, 154 N.J. 282, 286-87 (1998) (quoting N.J.S.A. 59:4-1(a)). Whether the property presents a dangerous condition, and whether the public entity's conduct was palpably unreasonable, are generally questions of fact. Vincitore, 169 N.J. at 123, 130.

"A dangerous condition under [the TCA] refers to the 'physical condition of the property itself and not to activities on the property.'" Wymbs v. Twp. of Wayne, 163 N.J. 523, 532 (2000) (quoting Levin v. Cty. of Salem, 133 N.J. 35, 44 (1993)). However, as we said in King v. Brown, 221 N.J. Super. 270, 275 (App. Div. 1987), "application of the dangerous condition standard requires consideration of both the physical characteristics of the public property as well as the nature of the activities permitted on that property. Indeed, the definition of dangerous condition in N.J.S.A. 59:4-1a requires consideration of the reasonably foreseeable use of the property." "[A] condition of public property which is safe for one activity may become a dangerous condition when the property is converted to a different activity." Id. at 274-75.

Here, the judge concluded it was "objectively unreasonable for plaintiff to maneuver around the barrier that was clearly erected to block the entrance of the public." However, as the Court said, "A use that is not objectively reasonable from the community perspective is not one 'with due care.' To this extent,

'used with due care' refers not to the conduct of the injured party, but to the objectively reasonable use by the public generally." Garrison, 154 N.J. at 291. "Thus the standard is whether any member of the general public who foreseeably may use the property would be exposed to the risk created by the alleged dangerous condition." Vincitore, 169 N.J. at 125.

Defendant argues that the motion judge correctly concluded plaintiff's "deliberate disregard" of a known barrier means plaintiff did not use the property with "due care" as a matter of law. We disagree.

In Vincitore, the Court described the "three-part analysis" required by Garrison:

> 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 (emphasis added) (citing Garrison, 154 N.J. at 292).]

The record in this case permits a factual finding that the school intended the coat rack would limit passage beyond, and provide privacy to students passing from the auditorium to the dressing area. To achieve this second purpose, the school covered the coat rack with a sheet that reached the ground. Inferentially on this record, one could find the cloth hid the coat rack's protruding wheels, casters and orange-painted frame from public view. Thus, while it might be reasonable for the school to have erected a barrier for privacy in the hallway, the potential danger of this barrier was obscured, because its contours were hidden.

Moreover, it was reasonably foreseeable that students, parents and guests would avoid the barrier, which, by its very nature, was not intended to and did not block the entire hallway. Indeed, the record permits a finding that students sometimes went around the barrier during performances, and the staff was aware several parents and guests did the same after performances, particularly since there was no sign advising parents and guests not to pass through the eighteen-inch space between the shrouded rack and the wall. We agree with plaintiff that the evidence here presented a jury question.

Additionally, the motion judge found as a matter of law no jury could find defendant acted in a palpably unreasonable manner. "The term 'palpably unreasonable' connotes 'behavior that is

patently unacceptable under any given circumstance.'" Wymbs, 163 N.J. at 532 (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)).

Here, the coat rack was covered to the floor with a cloth. Unlike other occasions, there was no warning sign advising people not to pass, a modest and reasonable attempt to limit the possibility of injury resulting from the device. In addition, the record discloses the subsequent measures taken by the school to dissuade people from going "backstage" which did not involve partially blocking the hall. While we do not determine whether this evidence is admissible at trial, plaintiff was entitled to its consideration for purposes of opposing summary judgment on the issue of palpable unreasonableness. See, e.g., Kane v. Hartz Mountain Indus., 278 N.J. Super. 129, 148 (App. Div. 1994) (citing Apgar v. Hoffman Constr. Co., 124 N.J.L. 86, 90 (E. & A. 1940)) (noting evidence of subsequent remedial measures may be admissible "to show that a feasible alternative for avoiding the danger existed at the time").

Reversed.