SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0747-21

ERCILIA ROJAS and
JOSE ROJAS, w/h,

Plaintiffs-Appellants,

v.

AC OCEAN WALK, LLC d/b/a
OCEAN RESORT CASINO,
CASINO REINVESTMENT
DEVELOPMENT AUTHORITY,
and ACOWRE, LLC,

Defendants,

and

CITY OF ATLANTIC CITY,

Defendant-Respondent.

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Argued October 18, 2022 – Decided November 10, 2022

Before Judges Messano and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. 1404-20.

Matthew E. Gallagher argued the cause for appellants (Swartz Culleton, PC, attorneys; Christopher J. Culleton and Matthew E. Gallagher, on the briefs).

Daniel J. Gallagher argued the cause for respondent.

PER CURIAM

In August 2018, while walking on the boardwalk in Atlantic City, plaintiff Ercilia Rojas tripped and fell over a raised board. Paramedics arrived, but plaintiff refused care and went to the pool at the Ocean Resort and Casino for a couple of hours with her husband, plaintiff Jose Rojas, and their friends. Plaintiff later purchased some over-the-counter medication for shoulder pain, but, two days later, unable to sleep, she sought treatment at a hospital near her home in Pennsylvania.

Plaintiff began physical therapy in September 2018. On October 5, plaintiff underwent an MRI, which revealed a full-thickness tear of her left rotator cuff. She continued physical therapy and scheduled arthroscopic surgery to repair her shoulder for April 2019, after her return from a planned vacation. However, plaintiff never underwent surgery upon her return from vacation in Mexico and has not since had the surgery. She also discontinued physical therapy.

Plaintiff and her husband filed suit against the City of Atlantic City (the City) alleging negligence.[1] Following discovery, the City moved for summary judgment, which plaintiff opposed. In a thorough written opinion, the Law Division judge reasoned that plaintiff failed to satisfy the elements of N.J.S.A. 59:4-2, that provision of the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, which permits a finding of liability against a public entity for a dangerous condition on its property. The judge also concluded plaintiff failed to establish that she suffered a permanent loss of a bodily function that was substantial. See Brooks v. Odom, 150 N.J. 395, 406 (1997) (holding that to satisfy N.J.S.A. 59:9-2(d), "a plaintiff must sustain a permanent loss of the use of a bodily function that is substantial"). The judge entered an order dismissing plaintiff's complaint and this appeal followed.

Before us, plaintiff argues that she marshaled sufficient evidence to overcome summary judgment, both as to the dangerous condition on public property and the substantial, permanent loss of a bodily function. We disagree and affirm.

[1] Because Jose Rojas' per quod claim is derivative of his wife's claim, we use the singular "plaintiff" throughout the opinion to refer to Ercilia. All other defendants have since been dismissed from the lawsuit.

We review de novo the grant of summary judgment to defendant applying the same standard as the motion judge. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021) (citing Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 611 (2020), and Townsend v. Pierre, 221 N.J. 36, 59 (2015)). That standard requires us to "determine whether '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)).

Generally, "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. Cnty. of Essex (Polzo II), 209 N.J. 51, 65 (2012) (quoting Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002)).

> [I]n order to impose liability on a public entity pursuant to [N.J.S.A. 59:4-2], a plaintiff must establish the existence of a "dangerous condition," that the condition proximately caused the injury, that it "created a reasonably foreseeable risk of the kind of injury which was incurred," that either the dangerous condition was caused by a negligent employee or the entity knew about the condition, and that the entity's conduct was "palpably unreasonable."
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> [Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 125 (2001) (quoting N.J.S.A. 59:4-2); accord

Polzo v. Cnty. of Essex (Polzo I), 196 N.J. 569, 578–79 (2008).]

"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 I, 196 N.J. at 585.

"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)). Plaintiff's friend took a photo of the raised board shortly after she fell. The photo is in the appellate record, which, like the record before the motion judge, is otherwise devoid of any indication, estimate or measurement of the height differential.

However, plaintiff deposed Dennis McReynolds, the supervising mason for the City's Department of Public Works, Beach, and Boardwalk Division. McReynolds examined the photograph and agreed it presented a "tripping hazard" of the type he specifically addressed on his patrols of the boardwalk. The motion judge concluded plaintiff demonstrated the existence of a dangerous condition, and, for the purpose of this opinion, we accept that conclusion and,

also, that the dangerous condition presented a reasonably foreseeable risk of injury and proximately caused plaintiff's injury.

However, "[t]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Polzo I, 196 N.J. at 581 (second alteration in original) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)). The TCA requires that to demonstrate a public entity was on constructive notice, a plaintiff must raise a material factual dispute "that 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) (emphasis added). Plaintiff does not allege the City had actual notice of the raised board that caused her fall, nor did she establish that the raised board existed for any appreciable period of time before her fall. In fact, McReynolds said a board might become raised overnight.

Instead, plaintiff simply contends the City failed to exercise due care to discover the dangerous condition and, therefore, should be charged with constructive notice. Plaintiff's argument segues seamlessly into her further contention that the City's conduct was palpably unreasonable. We explain.

McReynolds testified that to conduct his inspections of the boardwalk, he divided it into seven zones and each day he selected a half mile section to visually inspect on foot. He would then do a visual inspection of the remainder of the boardwalk while driving. McReynolds further described his duties:

> If I see a raised board, I screw it back down and make it level. If I see a high nail or a high screw, I remove it if possible. If not, I beat it down with a hammer and put a second screw next to it to secure the board.
>
> I[] also[] look for any other tripping hazards such as trash cans tipped over, benches that are moved, anything that could obstruct people from walking safely on the boardwalk.

When McReynolds was out sick or on vacation, no one performed his inspection duties. McReynolds said his last visual inspection of the portion of the boardwalk at issue was on August 9, 2018, three days before plaintiff's fall; McReynolds left for vacation on August 10.

As we understand plaintiff's argument, she contends the City had constructive notice of the dangerous raised board because had it exercised "due care"—inspected this particular section of the boardwalk within the three days prior to plaintiff's fall—it would have discovered the problem. She notes that after the accident, several raised boards were discovered and addressed. In this

regard, plaintiff also argues the failure to conduct an inspection while McReynolds was on vacation was palpably unreasonable.

Plaintiff misreads the requirements for constructive notice under the TCA. She was required to demonstrate the dangerous condition "had existed for such a period of time and was of such an obvious nature" that had the City exercised due care, the raised board would have been detected. N.J.S.A. 59:4-3(b). McReynolds conducted daily walking inspections on seven different sections of the boardwalk. He inspected the section where plaintiff fell on August 9, and we can presume that even if he were at work in the following days, his walking inspections would have been on other sections of the boardwalk. Plaintiff is not entitled to the benefit of demonstrating constructive, as opposed to actual, notice of a dangerous condition by speculating that it existed "for such a period of time" and was actually present when the City's reasonable inspection program would have detected the problem.

Even if we were to assume plaintiff demonstrated constructive notice, she failed to raise a disputed fact proving the City's conduct was "palpably unreasonable." The term "palpably unreasonable"—as used in N.J.S.A. 59:4-2—"implies behavior that is patently unacceptable under any given circumstance." Muhammad v. N.J. Transit, 176 N.J. 185, 195–96 (2003)

(quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)). When a public entity acts in a palpably unreasonable manner, it should be "obvious that no prudent person would approve of its course of action or inaction." Ibid. (quoting Kolitch, 100 N.J. at 493).

Here, the City had an organized inspection program that addressed dangerous conditions, including raised boards, on its boardwalk. No reasonable factfinder could conclude that the City's conduct was palpably unreasonable simply because the inspections did not take place between August 9 and August 12, and this raised board—among thousands of boards on the boardwalk—was not detected in advance of plaintiff's accident. See Polzo II, 209 N.J. at 75–78 (explaining the county's road inspection and maintenance program was not palpably unreasonable for "failing to 'protect'" against a small declivity in the shoulder that led to a bicyclist's fatal accident).

For the sake of completeness, we also agree with the motion judge that plaintiff failed to demonstrate she suffered a substantial, permanent loss of a bodily function. Plaintiff likens her situation to that of the plaintiff in Kahrar. She notes in Kahrar, the plaintiff, who also suffered a torn rotator cuff in a fall, did not immediately seek medical attention, yet, the Court held the plaintiff had met the threshold set by N.J.S.A. 59:9-2(d). 171 N.J. at 5–6. What plaintiff

fails to mention, however, is that the plaintiff in Kahrar actually underwent surgery which, because of the severity of the plaintiff's injury, could not be done arthroscopically, required the removal of a portion of the bone in her shoulder, and left the plaintiff with significant restrictions on her range of motion. Id. at 6–9. The argument requires no further discussion. 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