SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1395-21

LUIS CUELLO and
GRACUELLA CUELLO,

Plaintiffs-Appellants,

v.

EDUARDO RAMOS, Individually,
and CRISTEL CHAVEZ,
Individually,

Defendants-Respondents.

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Submitted February 8, 2023 – Decided February 22, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-3113-19.

Goldman Davis Krumholz & Dillon PC, attorneys for appellants (Kristen W. Ragon and Paula M. Dillon, on the briefs).

Law Offices of Bobbi J. Vilachá, attorneys for respondents (Jeffrey A. Savage, on the brief).

Britcher, Leone & Sergio, LLC, attorneys for amicus curiae New Jersey Association for Justice (E. Drew Britcher, on the brief).

PER CURIAM

In this residential sidewalk slip-and-fall case, plaintiffs Luis Cuello and his wife, Gracuella Cuello,[1] appeal from the Law Division's December 13, 2021 order granting defendants' motion for summary judgment and dismissing their complaint with prejudice. Having considered plaintiffs' contentions in light of the record and the applicable law, we affirm.

I.

We derive the following facts from the summary judgment record and view them in the light most favorable to plaintiffs. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). While he was walking on the sidewalk in front of defendants' home in Kearny Township, Luis caught his foot on a raised section of the sidewalk and fell. He injured his back, neck, and left shoulder, and after a year of treatment underwent a cervical fusion and discectomy. After the fall, plaintiffs retained an expert who opined that the roots of a tree abutting the sidewalk raised two of the concrete slabs by five to six

[1] Because plaintiffs share the same surname, we refer to them by their first names to avoid confusion. In doing so, we intend no disrespect.

inches causing a tripping hazard, and defendants failed to properly maintain the sidewalk under the New Jersey Uniform Construction Code, N.J.A.C. 5:23-2.1(d), and provisions of ASTM International F-1637-10, "Standard Practice for Safe Walking Surfaces."

Defendant co-owners Eduardo Ramos and his mother, Cristel Chavez, purchased the property adjoining the sidewalk in 2015 or 2016 and were aware prior to their purchase that the tree's roots had raised the sidewalk. Further, prior to Luis' fall, defendants had asked the town to inspect the tree as it "was lifting up the sidewalk" and Kearny Township records reveal the tree was inspected and found in "good condition." After Luis fell, the township removed the tree and defendants replaced the defective sidewalk.

At the time of the incident, Ramos and his family lived on the second floor of the home, his sister and her family resided on the first floor, his brother occupied the attic, and Chavez lived in the basement. According to Ramos, neither he nor Chavez profited from any rent collected from their family members, as all funds were used to offset the expenses of home ownership, including their mortgage, taxes, and insurance.

Luis filed a personal injury complaint against defendants. Gracuella asserted a derivative per quod claim as Luis' spouse and sought compensation

for loss of consortium. After the end of the discovery period, defendants filed a motion for summary judgment. Plaintiffs opposed the motion.

In addition to deposition testimony in which defendants admitted they had actual notice of the defective sidewalk, plaintiffs relied upon a Kearny Township ordinance, which provided property owners are "liable for the maintenance of the sidewalks and driveway entrances" abutting their property and obligated to immediately repair the walkways "in the event that the whole or any part of the sidewalks and driveway entrances becomes dangerous or hazardous to pedestrian travel."

Following oral argument, the trial judge granted defendants' motion and dismissed plaintiffs' complaint with prejudice. In an oral decision, the judge concluded defendants were not liable to plaintiffs based on this State's long-settled principles of common law immunity from sidewalk liability for residential property owners. The judge also found defendants did not negligently construct or repair the sidewalk prior to the date Luis fell and determined the municipal ordinance did not impose upon defendants a duty of care to plaintiffs. This appeal followed.

II.

On appeal, plaintiffs raise two primary arguments. First, they urge us to "clarify the duty of a residential property owner to remedy and repair defective sidewalks" when a residential property owner has knowledge of the defective condition. In essence, plaintiffs effectively ask us to overrule Stewart v. 104 Wallace Street, 87 N.J. 146, 153 (1981). They also challenge the holdings in numerous published decisions addressing sidewalk liability for residential homeowners, including Deberjeois v. Schneider, 254 N.J. Super. 694, 703 (Law Div. 1991), characterizing the rationale for imposing liability upon a property owner for a defective sidewalk based upon a "natural" versus "artificial" distinction as "anachronistic."

Plaintiffs also rely on Grijalba v. Floro, 431 N.J. Super. 57 (App. Div. 2013), and argue the court erred in granting summary judgment because the distinction between commercial and residential property has "blurred" and "to continue defining sidewalk liability in these terms is archaic and futile," particularly under the circumstances here where defendants lived in a multi-family home and received rent from family members. Plaintiffs contend upon "reconsideration of . . . residential property sidewalk liability law," the motion record "warrants an imposition of a duty upon" defendants as landowners

because they possessed notice of the dangerous condition and unreasonably permitted the condition to continue unabated.

Second, plaintiffs assert the court erred when it concluded the Kearny Township municipal ordinance did not impose a duty on defendants to maintain their sidewalk. On this point, they rely on Carrino v. Novotny, 78 N.J. 355, 358-59 (1979), Fielders v. North Jersey Street Railway Company, 68 N.J.L. 343, 352 (E. & A. 1902), and Hoagland v. Gomez, 290 N.J. Super. 550, 553-54 (App. Div. 1996), and contend the Kearny Township ordinance at issue was "enacted in the exercise of the police power to impose duties on some class of persons for the benefit of the public or some category of its members" and thus imposes upon defendants a duty of care.

Amicus curiae New Jersey Association for Justice (NJAJ) joins in plaintiffs' argument that we should revisit Stewart and its progeny and impose a duty on residential landowners to maintain sidewalks abutting their property, as (1) the current state of the law is in conflict with the imposition of such a duty and (2) "many of the rationales offered by the Court in Stewart to support its holding that commercial property owners owe a duty to maintain sidewalks abutting their property equally apply to residential landowners."

Amicus also request that we adopt Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 54 (American Law Institution 2009 and 2012), which imposes "liability on residential property owners for hazardous conditions on sidewalks abutting their property when the owner knew of the risk or when the risk was obvious." Finally, and in the alternative, amicus requests that should we decline to conclude residential landowners have a duty to maintain their defective sidewalks abutting their premises, we "must permit [p]laintiffs to establish liability on the part of the [township] by way of the New Jersey Tort Claims Act [(TCA)], N.J.S.A. 59:1-1 [to :12-13]."

III.

In ruling on a summary judgment motion, a trial court must "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 factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. An appellate court reviews a grant of summary judgment de novo, using the same standard as the trial court. Turner v. Wong, 363 N.J. Super. 186, 198-99 (App. Div. 2003). Thus, we must determine whether a genuine issue of material fact is present and, if not, evaluate whether

the trial court's ruling on the law was correct. See Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167-69 (App. Div. 1998).

We have considered plaintiffs' contentions in light of the record and applicable legal principles and are satisfied the trial judge properly granted summary judgment to defendants based on binding case law. We affirm substantially for the reasons expressed in the trial judge's oral opinion. We add the following comments.

Fundamentally, we reject plaintiffs' and amicus' requests to alter the well-established law pertaining to sidewalk liability. "[O]ur role as an intermediate appellate court is to follow the dictates of the Supreme Court . . . ." RSB Lab. Servs., Inc. v. BSI, Corp., 368 N.J. Super. 540, 560 (App. Div. 2004). Our restraint is particularly warranted when it comes to the adoption of a "new cause of action," Tynan v. Curzi, 332 N.J. Super. 267, 277 (App. Div. 2000), or expansion of "established law," Rodriguez v. Cordasco, 279 N.J. Super. 396, 405 (App. Div. 1995).

In Rodriguez, the plaintiff argued, as plaintiffs do here, that we "should extend the Stewart rule to residential landowners." Ibid. As we stated then, "[t]his court is bound by the decisions of our Supreme Court. Such a drastic

change in the law is a matter for that Court or the Legislature and we decline the invitation to institute a change in established law." Ibid.

In addition, amicus attempts to inject a new issue into this appeal: whether we should "permit [p]laintiffs to establish liability on the part of the [township] by way of the [TCA]." "[A]s a general rule an amicus curiae must accept the case before the court as presented by the parties and cannot raise issues not raised by the parties." Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 48-49 (1982). Plaintiffs did not, based on the record before us, file a notice under the TCA or sue Kearney Township for negligence related to Luis's fall, and it is therefore improper to raise that issue for the first time before us.

Under this State's sidewalk liability law, plaintiffs have asserted no basis upon which defendants can be held liable for Luis' alleged injuries. It is well established that "absent negligent construction or repair," residential property owners like defendants do "not owe a duty of care to a pedestrian injured as a result of the condition of the sidewalk abutting the landowner's property." Mohamed v. Inglesia Evangelica Oasis De Salvacion, 424 N.J. Super. 489, 492 (App. Div. 2012) (citing Stewart, 87 N.J. at 153). Here, there was no evidence in the motion record that defendants made any repairs or otherwise created a

dangerous condition on the sidewalk outside their home prior to Luis's fall. See Luchejko v. City of Hoboken, 207 N.J. 191, 210 (2011) (stating that absent competent evidence establishing they "create[d] or exacerbate[d] a dangerous sidewalk condition[,]" residential landowners do not owe a duty to pedestrians to maintain the sidewalks abutting their property). Under such circumstances, defendants enjoyed "blanket immunity" from sidewalk liability. Lodato v. Evesham, 388 N.J. Super. 501, 507 (App. Div. 2006).

We reject plaintiffs' reliance on Deberjeois, 254 N.J. Super. at 703. In that case, the court addressed a homeowner's planting of a tree whose roots uplifted their sidewalk and caused it to become uneven resulting in injuries to the plaintiff. Ibid. The Law Division denied the defendant homeowners' summary judgment motion and founded liability on the "positive act — the affirmative act — of the property owner in the actual planting of the tree" that caused the issue with the sidewalk, rather than the "natural process of the growth of the tree roots," ibid., and we affirmed the denial of the defendants' summary judgment motion, Deberjeois v. Schneider, 260 N.J. Super. 518, 519 (App. Div. 1992).

Here, it was undisputed defendants did not plant the tree in question or take any other affirmative act to cause plaintiffs' injuries. The motion record is

devoid of any evidence to connect defendants to the tree, such as how and when the tree was planted. In light of the well-established sidewalk liability law in this State, we see nothing "anachronistic" about requiring a plaintiff to establish a residential homeowner created a dangerous condition before imposing a duty of care. See Stewart, 87 N.J. at 152.

We also reject plaintiffs' suggestion defendants' use of their home as a multi-family dwelling qualifies the property as commercial under Stewart. In Grijalba v. Floro, 431 N.J. Super. 57, 73 (App. Div. 2013), we listed the following factors as relevant in determining whether property was primarily residential or commercial:

> (1) the nature of the ownership of the property, including whether the property is owned for investment or business purposes; (2) the predominant use of the property, including the amount of space occupied by the owner on a steady or temporary basis to determine whether the property is utilized in whole or in substantial part as a place of residence; (3) whether the property has the capacity to generate income, including a comparison between the carrying costs with the amount of rent charged to determine if the owner is realizing a profit; and (4) any other relevant factor when applying "commonly accepted definitions of 'commercial' and 'residential' property."
>
> [Ibid.]

There is no evidence in the motion record defendants utilized the property for any purpose other than to house themselves and their family members nor that defendants generated profits by doing so. Indeed, according to Ramos, any rent collected contributed solely to housing expenses. In sum, we are satisfied the summary judgment record established the nature and purpose of defendants' owner-occupied property was primarily residential, not commercial. See Borges v. Hamed, 247 N.J. Super. 295, 296 (App. Div. 1991) (holding a three-unit home in which defendants lived in one unit, rented the other two units to family members, and where there was no evidence defendants generated a profit from rent, was not a commercial property under Stewart).

Finally, we reject plaintiffs' argument that the Kearney Township municipal ordinance imposed a duty on defendants to replace the sidewalk and reject the authorities plaintiffs rely on in light of our Supreme Court's decision in Luchejko. In that case, the Court reaffirmed the longstanding precedent that "breach of an ordinance directing private persons to care for public property" does not render defendants liable to third parties. 207 N.J. at 200. As the Court explained, such breaches are:

> remediable only at the instance of the municipal government . . . and . . . there shall be no right of action to an individual citizen especially injured in consequence of such breach. The most conspicuous

> cases of this sort are those that deny liability to private suit for violation of the duty imposed by ordinance upon abutting property-owners to maintain sidewalk pavements or to remove ice and snow from the walks.
>
> [Ibid. (first alteration in original) (emphasis omitted) (quoting Fielders, 68 N.J.L. at 352).]

Thus, even if defendants violated the municipal ordinance, that breach could not provide the basis for liability in this sidewalk slip-and-fall case. Plaintiffs' reliance on Carrino, Fielders, and Hoagland is misplaced, as none of those cases considered municipal ordinances pertaining to sidewalk liability to be within the class of ordinances "passed in the exercise of the police powers of the municipality." Fielders, 68 N.J.L. at 352. In fact, as noted in Luchejko, Fielders explicitly reached a contrary conclusion and categorized such ordinances as those passed "for the benefit of the municipality as an organized government." Ibid.

To the extent we have not specifically addressed any of plaintiffs' arguments, it is because we consider them sufficiently without merit to require discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.