SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2909-20

PATRICE POWERS-FEIGEL
and STEPHEN FEIGEL,

Plaintiffs-Appellants,

v.

TOWNSHIP OF
WEST MILFORD,

Defendant-Respondent.

———————————————————

Argued February 15, 2023 – Decided April 3, 2023

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Passaic County, Docket No. L-1582-19.

Robert J. De Groot argued the cause for appellants (Robert J. De Groot and Oleg Nekritin, on the brief).

Brian W. Mason argued the cause for respondent (Mason Thompson, LLC, attorneys; Brian W. Mason, of counsel and on the brief).

PER CURIAM

In this slip and fall case, which occurred on the shoulder of a road, plaintiffs Patrice Powers-Feigel and her husband, Stephen Feigel,[1] appeal from the Law Division's April 28, 2021 order granting defendant Township of West Milford's 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 Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, 224 N.J. 189, 199 (2016). While she was walking on the shoulder of Nosenzo Pond Road in West Milford, Patrice slipped on gravel, her foot got caught on the edge of a "pothole" or "uneven pavement," and she tripped and fell onto the street, resulting in serious injuries. Patrice had to walk around the base ring of a construction barrel on the shoulder before she fell. Prior to her fall, Patrice had walked in the same area about twenty-five times before without incident. The parking lot across the street from where Patrice fell was under construction. There was no walkway or sidewalk

[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.

in the area where Patrice fell. Patrice could not identify the exact location where she fell. Patrice underwent two surgeries as a result of injuring her right humerus, biceps tendon, and rotator cuff.

After the fall, plaintiffs retained an engineering expert who opined the crack in which Patrice caught her foot measured two-and one-half inches wide with an elevation of one-and one-quarter inches. Plaintiffs' expert also stated the pavement surface was uneven, had an unsound structural formation, and lacked a physical border to the pavement at the edge of the roadway, causing a tripping hazard.

The expert relied upon standards pertaining to walkways and sidewalks in concluding the shoulder was in a dangerous condition, including the American Society for Testing and Materials (ASTM) "Standard Practice for Safe Walking Surfaces," "The Barrier Free Subcode" Criteria, adopted by our State from the International Code Council/American National Standards Institute (ICC/ANSI) pertaining to accessible and usable buildings, and the New Jersey Department of Transportation (NJDOT) "Pedestrian Compatible Planning and Design Guidelines." Plaintiffs' expert concluded defendant's failure to repair Nosenzo Pond Road—which spans one-half of a mile—was palpably unreasonable. The expert did not cite to any standards for roadway shoulder lanes in his report.

Plaintiffs filed a personal injury complaint against defendant. Stephen asserted a derivative per quod claim as Patrice's spouse and sought compensation for loss of consortium. After a period of discovery, defendant filed a motion for summary judgment. Plaintiffs opposed the motion.

In addition to deposition testimony of the Department of Public Works (DPW) supervisor Paul Mueller, who acknowledged the road was inspected weekly and cracks over one-half inch would require repair, plaintiffs also relied on street signs that read "bicycle route" with drawings of bicycles leading to Nosenzo Pond Road, to support their argument the roadway shoulder could be construed as a bicycle path. With three schools located on Nosenzo Pond Road and the high school track team using the shoulder for practice, plaintiffs asserted recreational activity was not only the shoulder lane's foreseeable use, but its "intended and encouraged" use. DPW employees also testified at depositions that several areas on Nosenzo Pond Road were patched in the weeks before Patrice's fall.

Following oral argument, the court reserved decision. In a comprehensive oral decision rendered thereafter, the court granted defendant's motion and dismissed plaintiffs' complaint with prejudice. The court determined defendant was not liable to plaintiffs under the New Jersey Tort Claims Act, N.J.S.A. 59:4-

2. The court found plaintiffs failed to establish the following necessary dangerous condition elements: (1) that the shoulder lane created a substantial risk of injury when it was used with due care in a reasonably foreseeable manner; and (2) that defendant had actual or constructive knowledge of the shoulder's condition. The court noted the DPW had offices fifty yards south of Nosenzo Pond Road.

With regard to plaintiffs' expert, the court rejected his opinion that the shoulder of a rural roadway must comply with ASTM, ICC/ANSI and NJDOT standards for walkways and sidewalks. The court found plaintiffs' contention that a public entity must maintain shoulder lanes used by pedestrians "to the same degree they would maintain a sidewalk" lacked merit. Citing our Supreme Court's holding in Polzo v. County of Essex (Polzo II), 209 N.J. 51, 56 (2012), the motion court highlighted such a requirement "goes far beyond the 'roving pothole patrols' that the . . . Supreme Court rejected as completely unreasonable."

Here, the court found no evidence in the record that demonstrated the shoulder on Nosenzo Pond Road was considered a "pedestrian walkway" by defendant. The court concluded that the shoulder lane was not dedicated or

intended for pedestrian traffic and no dangerous condition existed on the roadway. A memorializing order was entered. This appeal followed.

II.

On appeal, plaintiffs raise three primary arguments. First, plaintiffs claim the court erred in finding they failed to establish the necessary dangerous condition elements of the shoulder's condition creating a substantial risk of injury when used with due care in a manner that was reasonably foreseeable it would be used. Second, plaintiffs argue defendant had actual or constructive knowledge of the shoulder's condition. Third, plaintiffs assert defendant acted in a palpably unreasonable manner in maintaining the roadway and shoulder. Specifically, plaintiffs claim the court ignored "the nature, character and use of Nosenzo Pond Road," and misapplied our Supreme Court's holding in Polzo II to mean that a roadway shoulder's only foreseeable use is emergency vehicular traffic.

We review a trial court's grant of summary judgment de novo, applying the same standard as the trial court. Conley v. Guerrero, 228 N.J. 339, 346 (2017). Summary judgment must 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." Templo Fuente De Vida Corp., 224 N.J. at 199 (quoting R. 4:46-2(c)).

However, if the evidence is conflicting and there are material facts in dispute that a rational jury could resolve in favor of the non-moving party, the motion must be denied. Mangual v. Berezinsky, 428 N.J. Super. 299, 308-09 (App. Div. 2012). All reasonable inferences must be resolved in favor of the party opposing summary judgment. Mem'l Props., LLC v. Zurich Am. Ins. Co., 210 N.J. 512, 524 (2012).

It is well-settled "the 'guiding principle' of the Tort Claims Act is 'that immunity from tort liability is the general rule and liability is the exception.'" D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 134 (2013) (quoting Coyne v. State Dep't of Transp., 182 N.J. 481, 488 (2005)). Accordingly, "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 II, 209 N.J. at 65 (quoting Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002)). "The mere happening of an accident on public property is insufficient to impose liability upon a public entity." Wilson v. Jacobs, 334 N.J. Super. 640, 648 (App. Div. 2000).

N.J.S.A. 59:4-2 states:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> > a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
> >
> > b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

N.J.S.A. 59:4-1(a) defines a "dangerous condition" as "a condition of property that creates a substantial risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used." To pose a "'substantial risk of injury,' a condition of property cannot be minor, trivial, or insignificant. However, the defect cannot be viewed in a vacuum. Instead, it must be considered together with the anticipated use of the property." Atalese v. Long Beach Twp., 365 N.J. Super. 1, 5 (App. Div. 2003).

The phrase "used with due care" means an "objectively reasonable" use. Garrison v. Twp. of Middletown, 154 N.J. 282, 291 (1998). "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." Ibid.

"Whether property is in a 'dangerous condition' is generally a question for the finder of fact." Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 123 (2001). A court, however, may properly decide whether the property is in a dangerous condition under N.J.S.A. 59:4-1(a), where it determines a reasonable factfinder could not find the plaintiff established the property was in a dangerous condition. Id. at 124.

We have considered plaintiffs' contentions in light of the record, together with the applicable legal principles and are satisfied the court properly granted summary judgment to defendant based on binding case law. Therefore, we affirm substantially for the reasons expressed in the court's oral opinion. We add the following comments.

Cracks in a highway may constitute a "dangerous condition" when the highway's roadway or shoulder are used in a foreseeable manner. See Polzo II, 209 N.J. at 55. A court's "dangerous condition" analysis is two-fold: (1)

"whether the property poses a danger to the general public when used in a normal, foreseeable manner," and (2) "whether the nature of the [injured party's] activity [was] 'so objectively unreasonable' that the condition of the property cannot reasonably be said to have caused the injury." Buddy v. Knapp, 469 N.J. Super. 168, 198 (App. Div. 2021) (first alternation in original) (quoting Vincitore, 169 N.J. at 125).

In Polzo II, where the decedent hit a one-and-one-half-inch depression while riding her bicycle on the shoulder of the roadway and lost control, our Supreme Court noted "not every defect in a highway . . . is actionable." 209 N.J. at 64.

> We begin with some basic principles of law governing our roadways. The "roadway" is "that portion of a highway . . . ordinarily used for vehicular travel," whereas the "shoulder" is "that portion of the highway, exclusive of and bordering the roadway, designed for emergency use but not ordinarily to be used for vehicular travel." A "vehicle" is defined as "every device in, upon or by which a person or property is or may be transported upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks or motorized bicycles." By the Motor Vehicle Code's plain terms, roadways generally are built and maintained for cars, trucks, and motorcycles—not bicycles. . . .
>
> . . . .

> . . . Public entities do not have the ability or resources to remove all dangers peculiar to bicycles. Roadways cannot possibly be made or maintained completely risk-free for bicyclists.
>
> [Polzo II, 209 N.J. at 70-71 (citations omitted) (quoting N.J.S.A. 39:1-1).]

Based on our jurisprudence and viewing the facts most favorably to plaintiffs, we conclude, as did the court, that no reasonable jury could find the pothole or "'long depression' cracks or divots" gave rise to a substantial risk of injury to Patrice. E.g., Wilson, 334 N.J. Super. at 648-49 (upholding summary judgment for the municipality, where there was a noticeable gap between sidewalk pavers because this did not constitute a dangerous condition.) We also agree with the trial court that while Polzo II dealt with a bicyclist's use of a shoulder, the same rationale can apply to a "rural roadway's shoulder being used by an exercising pedestrian." As the court rightly noted, it was plaintiffs' burden to establish the elements outlined under N.J.S.A. 59:4-2, and show defendant was liable for Patrice's injuries and resulting damages. We agree with the court they failed to meet this burden.

Plaintiffs also presented no evidence defendant had actual or constructive notice of the condition of the shoulder at issue prior to Patrice's fall. Therefore, plaintiffs failed to raise a genuine issue of material fact as to whether defendant's

action or inaction was palpably unreasonable. It was unrefuted Patrice traversed the area where she fell twenty-five times before, without noticing anything "dangerous or hazardous" about the shoulder's surface. And, Mueller testified the road was inspected weekly for defects and that he had no concerns about the roadway's "integrity" while construction was in progress, with trucks traversing Nosenzo Pond Road. Furthermore, nothing in the record suggests defendant should have known to check the area where Patrice fell, as plaintiffs presented no proof of similar accidents in the vicinity. Thus, we are satisfied the court correctly found defendants did not have actual or constructive notice of any defect that caused Patrice's fall and its inspection scheme was not palpably unreasonable.

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.