SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1774-22

ELIZABETH A. PATTERSON, and GERALD ROBERT PATTERSON,

Plaintiffs-Appellants,

v.

CAMDEN COUNTY, CAMDEN COUNTY DEPARTMENT OF PUBLIC WORKS, THE HADDON TOWNSHIP SHADE TREE COMMISSION, ASPHALT PAVING SYSTEMS, INC.,

Defendants,

and

TOWNSHIP OF HADDON, and SUZANNE SCANLON,

Defendants-Respondents.

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Argued April 16, 2024 – Decided June 14, 2024

Before Judges Gooden Brown and Puglisi.

On appeal from the Superior Court of New Jersey, Law Division, Camden County, Docket No. L-1296-21.

Tommie Ann Gibney argued the cause for appellants (Stark & Stark, PC, attorneys; Tommie Ann Gibney, of counsel and on the brief).

John M. Palm argued the cause for respondent Township of Haddon (Law Office of John M. Palm, LLC, attorneys; John M. Palm, on the briefs).

Steven Greenberg argued the cause for respondent Suzanne Scanlon (The Law Office of Debra Hart, attorneys; Emma Kristine Bradley, of counsel and on the briefs).

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

PER CURIAM

Plaintiffs Elizabeth A. Patterson and Gerald Robert Patterson appeal from the Law Division's orders dated November 4, 2022 and February 3, 2023, granting summary judgment to defendant Township of Haddon (the Township) and defendant Suzanne Scanlon, respectively, and dismissing plaintiffs' complaint with prejudice. We affirm.

On May 27, 2019, plaintiff[1] tripped over the sidewalk in front of Scanlon's residence in the Township. Plaintiff fell and fractured her arm, which required surgery to correct. She filed a complaint seeking damages for her injuries, and the following facts were adduced during discovery.

The sidewalk where plaintiff tripped and fell was present when Scanlon purchased and moved into the home in 1969. Scanlon never had any issues with "ponding, puddling or flooding" on the sidewalk or street in front of her property and she did not repair or replace any portion of the sidewalk. However, while shoveling snow "at least as early as 2011," Scanlon discovered a height differential of approximately one inch in the sidewalk where plaintiff tripped.

Scanlon's home already had a drainage system installed when she purchased it. The system routed rainwater from the gutters on the house to a downspout into the ground, through a pipe buried in the front lawn and out a circular drain hole cut into the vertical face of the curb facing the street. Camden County's engineer testified that these "very old" drainage systems could be "made out of terra cotta that is broken and/or clogged and no longer functioning," which he did not consider to be in "good condition." He further stated a sidewalk slab could settle for many different reasons.

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[1] This opinion utilizes the singular plaintiff to refer to Elizabeth.

The day of plaintiff's accident, a private contractor had been working on an ongoing drainage and improvement project, which included the replacement of curbing on Scanlon's street. If a residence had an active roof drain system "in good condition and still working," the contractor installed a sleeve through the new curb, allowing the water to drain as it did before. If a drain system did not appear to be properly functioning, as was the case for Scanlon's residence, the contractor installed a solid curb to replace the old curb containing the drain hole.

Plaintiff's expert conducted an engineering safety analysis and site inspection in which he excavated the drainage system under the sunken sidewalk slab. He noted an elevation differential of one and five-eighths inches on the street side and one inch on the lawn side. He opined the sidewalk slab settled from water accumulation under it, which

> soften[ed] the ground and reduc[ed] the bearing capacity of the soil to support the weight of the concrete slab. This result[ed] in an elevation differential until the sidewalk reache[d] stability where the soil c[ould] re-support the slab. This slab settled until it reached the level of the terracotta pipe which acted as a foundation to limit further settlement.

The expert further determined the drainage system had been incorrectly installed in reverse, with the bell end of each section of the drainage pipe

installed facing the street in the direction of the water flow. This error allowed water to flow out the end of each pipe section, resulting in further ground softening. Plaintiff's expert found the sidewalk "was not in a proper state of repair and created a hazardous condition of an elevation differential."

Although Scanlon was aware of the condition of the sidewalk for approximately eight years prior to the accident, the Township had no notice of it until plaintiff filed her notice of tort claim. Township employees had been to Scanlon's residence in December 2002 for a "sewer plunge out," which entailed opening the metal sewer grate adjacent to the sidewalk slab at issue; and had also plowed snow, removed leaf and heavy brush, swept the street and fixed minor potholes. However, there was no record of any complaint or problem with the sidewalk at issue.

Township code addressed maintenance obligations for abutting, commercial, and residential property owners:

> RESPONSIBLE PERSON - Any person, corporation or other entity who or which, alone or with others, has possession or control of any path, sidewalk, walkway, access road, driveway, parking lot or other area required for the public health, safety and welfare or regularly used by the public.
>
> DUTY TO MAINTAIN - A responsible person shall repair all holes, depressions, cracks, projections, obstructions or other dangerous conditions existing in

> any paths, sidewalks, walkways, steps, access roads, driveways, parking lots and other areas required for the public health, safety and welfare or regularly used by the public, to permit the safe passage of persons or vehicles, as the case may be, within a reasonable time after such conditions have been discovered by the responsible person or brought to the attention of the responsible person, his agents, servants or employees.
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> [Haddon Township, N.J., Code § 203-8 to -9.]

In addressing the Township's motion for summary judgment, the trial court rejected the Township's claim it did not own the sidewalk, but found plaintiff's claim unsustainable because the Township was not on actual or constructive notice of the condition or defect of the sidewalk pursuant to the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to :12-3. Therefore, the court determined the Township was not liable to plaintiff.

As to Scanlon's motion for summary judgment, the court found "the law is very clear. Absent negligent construction or repair, a homeowner does not owe a duty of care to a pedestrian injured as a result of a condition of a sidewalk abutting the homeowner's property." The court further held:

> [I]t is very clear from Stewart[2] that neither a breach of an ordinance directing private persons to care for public property, nor a property owner's failure to clear snow and ice from public sidewalks can be considered a breach of a duty owed to an injured plaintiff unless

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[2] Stewart v. 104 Wallace St., Inc., 87 N.J. 146 (1981).

> through the owner's own negligence they contributed to a new element . . . causing an unsafe use of the sidewalk.

Because neither defendant was liable for plaintiff's injury, the court dismissed the complaint in its entirety.

This appeal follows, in which plaintiff raises the following issues for our consideration: (1) the Township or Scanlon should be held liable for plaintiff's injuries; (2) in order for the Township's ordinance to impose liability on Scanlon, this court must "revisit and expand" the holding in Stewart; (3) the rationale our Supreme Court provided in Stewart with respect to placing a duty on commercial property owners to maintain sidewalks abutting their property also applies to residential landowners, such as Scanlon; (4) the Township should not be permitted to avoid liability by transferring the duty to maintain and repair a sidewalk to a residential property owner; and (5) New Jersey must adopt § 54 of the Restatement (Third) of Torts to ensure that unintended immunities are not created by municipal sidewalk ordinances.

We begin with our standard of review, which dictates we consider "a ruling on summary judgment de novo, applying the same legal standard as the trial court." Birmingham v. Travelers N.J. Ins. Co., 475 N.J. Super. 246, 255 (App. Div. 2023) (citing Townsend v. Pierre, 221 N.J. 36, 59 (2015)). The court

must decide whether "there is no genuine issue as to any material fact" when the evidence is "viewed in the light most favorable to the non-moving party." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 405-06 (2014) (first quoting Rule 4:46-2(c); and then quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)).

Summary judgment should 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." R. 4:46-2(c).

We first address plaintiff's claims against the Township, which are governed by the TCA. Public property is defined as "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." N.J.S.A. 59:4-1(c).

The TCA further provides:

> 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:
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> 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
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> 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.
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> 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.
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> [N.J.S.A. 59:4-2.]

A public entity has actual notice of a dangerous condition "if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. 59:4-3(a). A public entity has constructive notice of a dangerous condition "if the plaintiff establishes 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).

The record here reflects the Township had neither actual nor constructive notice of the sidewalk condition. Although Scanlon knew of it, nothing in the

record indicated she or any other individual notified the Township. Township employees also performed a sewer plunge out and maintenance on the street, but this work did not directly involve the sidewalk at issue. Although the condition had been in existence for eight years, the differential caused by the settling was negligible. We agree with the trial court's determination plaintiff could not demonstrate the settling was of such an obvious nature that the Township, in the exercise of due care, should have discovered it. Therefore, we are persuaded the Township was entitled to summary judgment.

As to Scanlon, the trial court considered binding caselaw that dictated the outcome of the motion. Our Supreme Court in Hayden v. Curley held "[a]n abutting property owner is not liable for injuries suffered by a pedestrian from a defective sidewalk unless the owner or his predecessors in title created the defect." 34 N.J. 420, 428 (1961). Here, plaintiff's expert attributed the sidewalk's settling to the accumulation of water underneath it, which was exacerbated in part by the incorrect installation of the drain system. It is undisputed that the drain system was in place when Scanlon purchased the house; she neither installed it nor made any alterations to the sidewalk. Thus, we agree with the trial judge's determination Scanlon was not liable to plaintiff for her injuries.

Faced with the outcome dictated by precedent, plaintiffs and amicus New Jersey Association for Justice (NJAJ) urge us to extend Stewart by placing a duty on residential landowners like Scanlon to maintain sidewalks abutting their property, consonant with the duty our Supreme Court imposed on commercial property owners in that case. However, that decision is not ours to make. We previously held in Liptak v. Frank,

> As we read Stewart, . . . the Court expressly declined, despite the persuasive concurring opinion of Justice Schreiber, 87 N.J. at 160, then to overrule the non-liability rule in respect of abutting residential owners. It may well be that on its next consideration of the issue the Court will extend the Stewart liability rule to residential property owners. Nevertheless, we, as an intermediate appellate court, are not free to deviate from what we regard as the Supreme Court's presently articulated view, and as of this point that view does not encompass the liability of abutting residential property owners.
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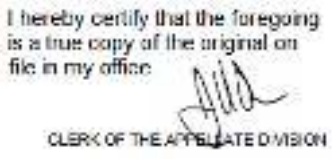
> [206 N.J. Super. 336, 338-39 (App. Div. 1985).]

Likewise, plaintiffs and the NJAJ ask us to apply the standards of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 54 (Am. Law Inst. 2012). However, our Supreme Court to date has not issued an opinion adopting or repudiating this section. In the absence of contrary guidance from our State's highest Court, we accordingly continue to apply the Second Restatement standards.

Affirmed.


I hereby certify that the foregoing
is a true copy of the original on
file in my office
CLERK OF THE APPELLATE DIVISION