SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0325-16T1

JOSEPH PISANO,

Plaintiff-Appellant,

v.

AAS REALTY HOLDINGS, INC.,

Defendant-Respondent.

Argued November 28, 2017 – Decided April 20, 2018

Before Judges Leone and Mawla.

On appeal from Superior Court of New Jersey, Law Division, Union County, Docket No. L-0948-15.

Daniel J. Williams argued the cause for appellant (John J. Pisano, attorney; Mr. Pisano, on the brief).

Robert J. Gallop argued the cause for respondent (O'Toole Fernandez Weiner Van Lieu, LLC, attorneys; Mr. Gallop, of counsel and on the brief; Max S. Sverdlove, on the brief).

PER CURIAM

In this trip-and-fall case, plaintiff Joseph Pisano appeals an August 19, 2016 order granting summary judgment to defendant AAS Realty Holdings, Inc., and dismissing Pisano's personal injury

complaint, and a September 16, 2016 order denying reconsideration. We affirm.

I.

Plaintiff was deposed and testified as follows. On February 15, 2015, around noon, plaintiff was outside his home. He saw Gavin, a friend of plaintiff's son, park his vehicle in the parking lot of a doctor's office located across the street.

Plaintiff walked across the street to talk to Gavin. Plaintiff crossed the sidewalk and entered the parking lot. As he approached and was talking to Gavin, he stepped into a partly-uncovered drain. He described it as "a sewer grate that goes . . . across the driveway," covered by ten-inch-square grates, one of which was missing. He tripped and fell. It was a clear day, the grate was "open and obvious," his view was not blocked, but he did not look at the grate or notice the square that was missing. If plaintiff had looked at the area as he was walking, he would have seen that a square was missing and avoided stepping into it.

Plaintiff was not a patient at the doctor's office and was not attempting to go to the doctor's office. As it was a Sunday, the doctor's office was closed. When asked why Gavin parked his vehicle on defendant's lot, plaintiff stated, "I think the kids just pull in there and everybody from the other bar right there too, everybody uses that parking lot on the weekends." Plaintiff

filed a complaint against defendant, the owner of the property containing the doctor's office and its parking lot. The complaint alleged defendant was negligent in failing to maintain the drainage cover, causing plaintiff's fall and his resulting severe and permanent injuries.

Following the conclusion of discovery, defendant filed a motion for summary judgment. The trial court found that plaintiff was a trespasser and therefore would only be owed a duty to warn of artificial conditions on the property that posed a risk of death or serious bodily injury. Further, the court found defendant owed plaintiff no duty because he had not presented any evidence that defendant knew or should have known about the alleged uncovered drain on its property, or that people were parking in the doctor's office parking lot on weekends while they patronized other area businesses. Plaintiff appeals.

II.

Summary judgment must be granted if the court determines "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). The court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a

rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). An appellate court "review[s] the trial court's grant of summary judgment de novo under the same standard as the trial court." Templo Fuente De Vida Corp. v. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016).

III.

"Premises liability is a subset of general negligence law." Pequero v. Tau Kappa Epsilon Local Chapter, 439 N.J. Super. 77, 88 (App. Div. 2015). Our courts "have long held that it is ordinarily a plaintiff's burden to prove negligence, and that it is never presumed." Khan v. Singh, 200 N.J. 82, 91 (2009). "To sustain a cause of action for negligence, a plaintiff must establish four elements: '(1) a duty of care, (2) a breach of that duty, (3) proximate cause, and (4) actual damages.'" Townsend v. Pierre, 221 N.J. 36, 51 (2015) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 584 (2008)).

"A prerequisite to recovery on a negligence theory is a duty owed by defendant to plaintiff." Strachan v. John F. Kennedy Mem'l Hosp., 109 N.J. 523, 529 (1988). "The duty owed by a premises owner . . . depends in general upon the application of well-established categories through which the status of the injured party is used to define both duty and foreseeability."

Estate of Desir ex rel. Estiverne v. Vertus, 214 N.J. 303, 316 (2013). "When a person alleges that a landowner has acted negligently, the existence of a duty by a landowner to exercise reasonable care to third persons is generally governed by the status of the third person — guest, invitee, or trespasser — particularly when the legal relationship is clearly defined." Robinson v. Vivirito, 217 N.J. 199, 209 (2014).

Under the common law, a landowner owes the highest duty to a business invitee, a person that "has been invited on the premises for purposes of the owner that often are commercial or business related." Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 433 (1993). "The landowner is liable to an invitee for failing to correct or warn of defects that, by the exercise of reasonable care, should have been discovered." Monaco v. Hartz Mountain Corp., 178 N.J. 401, 414-15 (2004). "That includes making reasonable inspections of its property and taking such steps as are necessary to correct or give warning of hazardous conditions or defects actually known to the landowner." Id. at 414 (citing Hopkins, 132 N.J. at 434).

A licensee is a person who was "'not invited but whose presence is suffered'" by the landowner. Desir, 214 N.J. at 316 (citation omitted). A social guest is considered a licensee rather than an invitee because, despite being literally invited onto the

premises, their "purposes for being on the land may be personal as well as for the owner's benefit." Hopkins, 132 N.J. at 433. "To the social guest or licensee, the landowner . . . does not have a duty actually to discover latent defects when dealing with licensees, [but] the owner must warn a social guest of any dangerous conditions of which the owner had actual knowledge and of which the guest is unaware." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 44 (2012) (quoting Hopkins, 132 N.J. at 434); see Handleman v. Cox, 39 N.J. 95, 103 (1963).

A trespasser is a person "who has no privilege to be on the land" of another, whether by invitation or permission. Hopkins, 132 N.J. at 433. "The owner owes a minimal degree of care to a trespasser," even where there is "a dangerous condition" on the property. Ibid.[1] "The duty owed to a trespasser is relatively slight. A landowner, under most circumstances, has a duty to warn

[1] We assume without deciding that the absence of the grate square was an "artificial condition[] on the property that pose[d] a risk of death or serious bodily harm to a trespasser." Hopkins, 132 N.J. at 434. In the absence of such a dangerous artificial condition or activity, traditionally possessors of land owed "'no duty of care other than to refrain from willful and wanton injury toward trespassers.'" Vega by Muniz v. Piedilato, 154 N.J. 496, 501 (1998) (citation omitted). Because of our assumption, that standard is inapplicable here. See Imre v. Rieqel Paper Corp., 24 N.J. 438, 445 (1957) ("The general rule of liability to trespassers for acts willfully injurious given in the Restatement, section 333, is qualified by the exceptions formulated in sections 334 to 339" for dangerous conditions and activities).

trespassers only of artificial conditions on the property that pose a risk of death or serious bodily harm to a trespasser." Rowe, 209 N.J. at 44 (quoting Hopkins, 132 N.J. at 434).

This duty is very similar to the duty to constant trespassers imposed by Section 335 of the Restatement (Second) of Torts (Am. Law Inst. 1965):

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of the land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if (a) the condition (i) is one which the possessor has created or maintains and (ii) is, to his knowledge, likely to cause death or seriously bodily harm to such trespassers and (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

"The rule stated in this Section applies only where the artificial condition is one which the possessor has knowingly created or maintained and which he realizes or should realize as involving a risk of death or serious bodily harm." Id., § 335 at cmt. d.

A.

Here, the trial court properly found plaintiff was a trespasser because he had no connection to the doctor's office, he did not intend to visit the closed office, and he had no invitation or consent to enter the property. See Robinson, 217

N.J. at 214-15 (finding the plaintiff was a trespasser where she had not been invited onto school property, was "a stranger to the mission of the school," and "had no right or license and certainly no consent to use school grounds as a short-cut").

The trial court also properly concluded defendant had not breached the duty to a trespasser. The court noted there was no evidence defendant knew the grate square was missing. Thus, there was no evidence to show defendant "knowingly created or maintained" the absence of the grate square. Restatement (Second) of Torts, § 335 at cmt. c; cf. id. at § 335 illus. 1. Without such knowledge, defendant could not have "knowledge [the absence of the grate square] was likely to cause death or serious bodily harm," and could not warn trespassers of the condition and the risk involved. Id., § 335; see Rowe, 209 N.J. at 44.

Moreover, liability arises only if the condition "is of such a nature that [the possessor of land] has reason to believe that such trespassers will not discover it." Restatement (Second) of Torts, § 335. "The possessor is entitled to assume that trespassers will . . . be on the alert to observe the conditions which exist upon the land." Id., § 335 at cmt. f. Even if the unsafe condition is "unusual" or is "due to carelessness in the maintenance of those conditions which are necessary to the use of the land," the possessor is liable only "if the conditions are not

readily observable by the attention which the trespasser should pay to his surroundings." Ibid. Here, it is undisputed plaintiff was not alert to or observant of the absence of the grate square, which was readily observable. Ibid.

Therefore, applying the well-established rules applicable to trespassers, summary judgment was appropriate.

B.

It is undisputed that plaintiff did not enter defendant's land as a business invitee. Defendant was not a patient of that doctor's office, and he was not entering defendant's parking lot in order to seek medical services at the doctor's office.

Instead, Plaintiff argues he held the status of a licensee on defendant's land. He cites his unsupported statement in his deposition that "everybody [from the adjacent bar] uses that parking lot on weekends," and the absence of evidence defendant made any effort to prevent that use.

Plaintiff notes that "[p]revailing customs often determine whether a possessor of land is willing to have a third person come thereon. They may be such that it is entirely reasonable for one to assume that his presence will be tolerated unless he is told otherwise." Snyder v. I. Jay Realty Co., 30 N.J. 303, 312 (1959) (citing Restatement of Torts, § 330, cmt. d (1934)). However, both the Restatement and Snyder are referring to "customs" in the

sense of social customs. E.g., Restatement of Torts, § 330 at cmt. d ("a traveler who is overtaken by a violent storm or who has lost his way, is entitled to assume that there is no objection to his going to a neighboring house for shelter or direction"); Snyder, 30 N.J. at 312-13 ("visiting an employee at his place of employment, where a hazardous activity is not being conducted in the area visited, does not go beyond generally accepted modes of behavior or custom."). Here, there was no evidence of "customs prevailing in the community," "local custom," or "a custom in a particular town" that landowners were allowing the public to park in their lots when their businesses were closed. Restatement of Torts, § 330 at cmt. d; accord Restatement (Second) of Torts, § 330 at cmt. d.

The Restatement distinguishes such social customs from the mere occurrence of trespassing, as alleged here. A possessor of land has very limited duties to trespassers "although from past experience or otherwise the possessor has every reason to realize that there is a strong probability that trespassers will intrude upon his land." Restatement (Second) of Torts, § 333 & cmt. a; see id. at cmt. b ("the possessor [is] privileged to ignore the actual probability that others will trespass upon his land"). As set forth above, the duties are quite limited even if the possessor "knows, or from facts within his knowledge should know, that

trespassers constantly intrude upon a limited area of the land." Id., §§ 334, 335. The duties are increased if the possessor "knows or has reason to know of the presence of another who is trespassing on the land" because he actually sees the trespasser may be endangered or "sees an object or hears a sound which causes him to realize that there is a substantial chance that the trespasser may be actually" endangered. Id., § 336 & cmt. b, § 337; see Gonzalez v. Safe & Sound Sec. Corp., 185 N.J. 100, 122-23 (2005).

As the trial court pointed out, there was no evidence that defendant knew that persons were parking in its lot on Sundays or other times when the business was closed. Nor was there any evidence that defendant, "from facts within [its] knowledge, should know." Restatement (Second) of Torts, § 335. "[F]rom facts within his knowledge" means "that the possessor is required only to draw reasonably correct conclusions from data known to him, and is not required to exercise a reasonable attention to his surroundings or to make any inspection or investigation in regard to them." Id., § 334 at cmt. c. In any case, if defendant knew, or from facts within its knowledge should have known, that trespassers "constantly" were parking in the lot of its closed business on Sundays, defendant would only have the quite limited duty owed to "trespassers," which was not violated. Id., § 335.

Moreover, if there was a social custom which as a courtesy allowed persons to park in parking lots of businesses which were closed, only those who parked their cars would become licensees. "[I]f there is a local custom for possessors of land to permit others to enter it for particular purposes, residents in that locality and others knowing of the custom are justified in" believing they can enter for those purposes. Id., § 330 at cmt. e. However, persons entering for other purposes remain trespassers.

Plaintiff did not enter defendant's parking lot to park. Instead, he admittedly walked onto the parking lot to talk with Gavin. There was no evidence of a social custom for persons to congregate on parking lots of closed businesses to hold social gatherings. Indeed, there is no evidence that the individuals who parked in defendant's lot on the weekends were also using the lot to host social meetings, much less that defendant was aware of that usage. As such, there is no evidence that defendant impliedly acquiesced to the presence of individuals like plaintiff in their parking lot during weekends. Thus, even if Gavin was a licensee parking on defendant's lot because of a social custom allowing such parking, we agree with the trial court that defendant was a trespasser.

C.

In any event, even if plaintiff was on the parking lot as a licensee, his claim was doomed by the lack of evidence that defendant had knowledge of the absence of the grate square. Again, "[t]o the social guest or licensee, the landowner . . . does not have a duty actually to discover latent defects when dealing with licensees, [but] the owner must warn a social guest of any dangerous conditions of which the owner had actual knowledge and of which the guest is unaware." Rowe, 209 N.J. at 44 (emphasis added) (quoting Hopkins, 132 N.J. at 434). Here, there was no evidence defendant had actual knowledge.

Section 342 of the Restatement imposes a limited duty to warn a licensee if the owner has "reason to know" of a condition:

> A possessor of land is subject to liability for physical harm caused to licensees by a condition on the land if, but only if, (a) the possessor knows or has reason to know of the condition and should realize that it involves an unreasonable risk of harm to such licensees, and should expect that they will not discover or realize the danger, and (b) he fails to exercise reasonable care to make the condition safe, or to warn the licensees of the condition and the risk involved, and (c) the licensees do not know or have reason to know of the condition and the risk involved.
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> [Restatement (Second) of Torts, § 342 (emphasis added).]

Our Supreme Court has adopted Section 342's standard that a landowner who "knows or has reason to know" of a dangerous condition has a duty to warn licensees. Parks v. Rogers, 176 N.J. 491, 494, 498-99 (2003) (citing Section 342); see Rowe, 209 N.J. at 38, 47-48 (citing Parks).

The Restatement explains that "has reason to know" requires more knowledge than "should know":

> The words "has reason to know" differ from the words "should know" in that the person whose conduct is in question in the first case is under no duty of inspection or investigation until some fact known to him apprises him of the necessity therefor. On the other hand, the words "should know" indicate that the person whose conduct is in question is under a general duty to be attentive to his surroundings and to make investigations irrespective of whether any fact within his knowledge indicates a peculiar necessity for his so doing.
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> [Id., § 334 at cmt. c (emphasis added).]

There was no evidence defendant knew a fact which apprised it of the need to investigate to see if the grate square was missing.

In any event, even if defendant had a duty to warn plaintiff of a dangerous condition of which it should have known, there is no evidence defendant knew or should have known the grate square was missing. There was no evidence of accident reports or complaints. There was no evidence of how long the grate square was missing, and by extension, the amount of time defendant had

to discover and remedy the situation. See Drazin, New Jersey Premises Liability § 6:4 (2018).

Even an invitee "must prove, as an element of the cause of action, that the defendant had actual or constructive knowledge of the dangerous condition that caused the accident." Nisivoccia v. Glass Gardens, Inc., 175 N.J. 559, 563 (2003); see Prioleau v. Ky. Fried Chicken, Inc., 223 N.J. 245, 257 (2015). "[T]he mere existence of a dangerous condition does not, in and of itself, establish actual or constructive notice." Prioleau v. Ky. Fried Chicken, Inc., 434 N.J. Super. 558, 571 (App. Div. 2014), aff'd as modified, 223 N.J. 245, 258 (2015). "A defendant has constructive notice when the [dangerous] condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.'" Troupe v. Burlington Coat Factory Warehouse Corp., 443 N.J. Super. 596, 602 (App. Div. 2016) (citation omitted). The absence of such notice "is fatal to plaintiff's claims of premises liability." Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013).

IV.

Defendant argues the trial court erred by analyzing defendant's duty under the common law classifications, rather than using the more general inquiry utilized in Hopkins. We disagree.

As set forth above, defendant and plaintiff were landowner and trespasser. "When a person alleges that a landowner has acted negligently, the existence of a duty by a landowner to exercise reasonable care to third persons is generally governed by the status of the third person—guest, invitee, or trespasser—particularly when the legal relationship is clearly defined." Robinson, 217 N.J. at 209.

"In spite of our continued adherence to this traditional status-based approach, we have also recognized that it is not always possible to fit a particular plaintiff precisely into one of these established categories." Desir, 214 N.J. at 317. "When the legal relationships are not clearly defined, other factors may influence the recognition of a duty of care by property owners to protect third parties from harm, such as the knowledge of circumstances that may cause harm to another[.]" Robinson, 217 N.J. at 209.

Hopkins was an instance where the legal relationships were not clearly defined. The defendant was a realtor conducting an open house at a third-party's residence, and the plaintiff was a visitor injured while attending the open house. 132 N.J. at 432. Thus, the defendant was neither the owner nor the regular occupant of the premises, but a commercial entity using the home temporarily as a place of business. Id. at 442-444.

As the legal relationship between the parties did not fit the traditional categories, the Hopkins Court considered "the relationship of the parties, the nature of the attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Id. at 439. This Hopkins "full duty analysis" assesses "whether in light of the actual relationship between the parties under all of the surrounding circumstances the imposition on the [defendant] of a general duty to exercise reasonable care in preventing foreseeable harm to [plaintiffs] is fair and just." Rowe, 209 N.J. at 45.

The Court has applied this more general analysis when it was hard to place the parties in the traditional categories. See, e.g., Olivo v. Owens-Illinois, Inc., 186 N.J. 394, 399-402 (2006) (declining to apply the traditional test where the plaintiff was a spouse who developed mesothelioma from laundering the asbestos-laden clothes of her husband, a worker at a defendant's facility she never entered); Brett v. Great Am. Rec., 144 N.J. 479, 488-89, 508-09 (1996) (declining to characterize the plaintiffs as trespassers at the defendant ski resort when some had skied there earlier and all were staying at a condominium that was adjacent to the ski trail and that had a relationship to the resort); cf. Vega, 154 N.J. at 499, 503-10 (distinguishing Brett and applying the Restatement (Second) of Torts).

However, the Supreme Court has since made clear that this "full duty analysis" applies only "[w]here the status of the plaintiff, vis-à-vis a landowner, does not fall into one of the pre-determined categories," as in Hopkins. Rowe, 209 N.J. at 44.

> The common law categories are a shorthand, in well-established classes of cases, for the duty analysis; they, too, are based on the relationship of the parties, the nature of the risk, the ability to exercise care, and considerations of public policy. The only difference is that, through the evolution of our common law, the duty analysis has already been performed in respect of invitees, licensees (social guests), and trespassers. In furtherance of the goal of a 'reasonable degree of predictability[,]' those standards continue to guide us.
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> [Id. at 45 (quoting Snyder, 30 N.J. at 312) (emphasis added).]

Therefore, the trial court properly analyzed defendant's duty to plaintiff under the traditional classifications whether plaintiff was a licensee, as he argues, or a trespasser, as the trial court found, because both statuses "fall into one of the pre-determined categories." Id. at 44.

In any event, performing Hopkins's more general analysis does not change our determination that defendant was properly granted summary judgment. Plaintiff and defendant had no relationship other than landowner and trespasser. Plaintiff testified that: he was not at the time, nor had he ever been a patient of the

doctor who occupied the office building on defendant's property; he did not enter defendant's parking lot for the purpose of visiting the doctor's office; and, he knew that the doctor's office was closed at the time, because it was a Sunday. Defendant extended no invitation to plaintiff, implied or otherwise, to enter onto his grounds. Moreover, defendant derived no benefit from plaintiff's presence.

The nature of the risk due to the absence of the grate square was simply that someone would trip and fall. See, e.g., Desir, 214 N.J. at 324; Jerkins v. Anderson, 191 N.J. 285, 296 (2007). The missing ten-inch square posed a similar risk of injury as other simple trip-and-fall scenarios.

The opportunity and ability to exercise care by each party is also similar to many trip-and-fall cases addressed under the traditional categories. As the landowner, defendant had the ability to exercise care in covering the storm sewer, as when the grate squares were originally installed. However, defendant's opportunity and ability to exercise care regarding the absence of a grate square depended on whether it knew the grate square was missing. As set forth above, there was no evidence that defendant knew or had any reason to know it was missing, or that it had been missing long enough for defendant to discover its absence.

Defendant's opportunity also depended on whether it knew persons would be walking on the business's parking lot on Sunday when the business was closed. Again, there was no evidence defendant had knowledge or any reason to believe plaintiff as a trespasser would be walking onto the parking lot. Even if patrons of a nearby bar parked in defendant's parking lot on weekends, there was no evidence they would walk near where the square was missing to go between the bar and defendant's parking lot. In any event, plaintiff was not one of those patrons and was not parking. Neither representatives of defendant nor its tenant business was present that Sunday.

Plaintiff's opportunity and ability to exercise care was more direct, as he was present and could have looked where he was going. He admitted that it was "open and obvious" the grate square was missing, that nothing was blocking his view, and that if he looked at the area, he would have seen the grate square was missing and could have walked around the uncovered part of the storm drain.

Finally, there is no obvious public interest in plaintiff's desired solution of making a landowner liable when a trespasser has failed to exercise due care to avoid an obvious trip-and-fall hazard. Landowners are neither omnipresent nor omniscient. Landowners cannot know when a trespasser will trespass, and cannot prepare the property for his or her arrival, especially when the

business is closed. Nor do we believe they should be required to do so, as the trespasser has no right or business on the property.

Whether analyzed under the traditional common law categories, or under Hopkins's more general analysis, plaintiff failed to establish duty. Thus, the trial court properly granted summary judgment.

Affirmed.