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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0707-16T4

EDWARD J. HALL and DEBRA HALL,

Plaintiffs-Appellants,

v.

COUNTY OF BERGEN and TILCON NEW YORK, INC.,

Defendants,

and

TOWNSHIP OF LYNDHURST,

Defendant-Respondent.

Argued January 30, 2018 – Decided February 13, 2018

Before Judges Fisher and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Bergen County Docket No. L-20348-14.

Amos Gern argued the cause for appellants (Starr, Gern, Davison & Rubin, PC, attorneys; Renee C. Rivas and Amos Gern, on the brief).

R. Scott Fahrney argued the cause for respondent (Kaufman, Semeraro & Leibman, LLP,

attorneys; Mark J. Semeraro and R. Scott Fahrney, on the brief).

PER CURIAM

In this New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, case involving a trip and fall over a discarded construction barrel-base rubber ring (a donut), Edward J. Hall and Debra Hall (plaintiffs) appeal from an October 7, 2016 order dismissing their complaint and granting summary judgment to the Township of Lyndhurst (defendant). Edward sustained serious personal injuries due to the accident, and Debra brought a per quod claim. We reverse and remand for a trial.

When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Liu, 431 N.J. Super. 493, 497 (App. Div. 2013). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Plaintiffs argue that there exists genuine issues of material fact as to whether a dangerous condition existed and whether defendant had constructive notice of it. We agree.

Generally speaking, "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. Cty. of Essex, 209 N.J. 51, 65 (2012) (quoting Kahrar v. Borough

of Wallington, 171 N.J. 3, 10 (2002)). A public entity may be liable if "a negligent or wrongful act or omission of [its] employee . . . create[s] the dangerous condition" or, if it "had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." N.J.S.A. 59:4-2(a), (b). As the Court has repeatedly stated,

> 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).]

The law is settled as to what constitutes a dangerous condition under the TCA. 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." N.J.S.A. 59:4-1(a). "A dangerous condition under [the TCA] refers to the 'physical condition of the property itself and not to activities

on the property.'" Wymbs v. Twp. of Wayne, 163 N.J. 523, 532 (2000) (quoting Levin v. Cty. of Salem, 133 N.J. 35, 44 (1993)).

Here, Edward walked across the street and tripped over the donut, which had been located in the center island of the crosswalk. The black donut was difficult to see due to the dark surroundings during the early evening. Plaintiffs' engineering liability expert reviewed photographs of the donut located on the pedestrian walkway and opined that a dangerous condition existed, and he concluded that defendant acted in a palpably unreasonable manner, which caused the dangerous condition. Plaintiffs' expert opined that the presence of the black donut created a reasonably foreseeable risk of injury to any pedestrian. He also concluded that Edward acted reasonably when he legally crossed the street at the designated pedestrian crossing in the early evening and failed to see the black donut. Looking at the facts in the light most favorable to plaintiffs, we conclude a disputed issue of fact exists as to whether a dangerous condition existed.

The law is also settled as to what constitutes constructive notice of a dangerous condition under the TCA. N.J.S.A. 59:4-3 provides:

> a. A public entity shall be deemed to have 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.

> b. A public entity shall be deemed to have constructive notice of a dangerous condition . . . only 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.

However, "[t]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013) (second alteration in original) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)). It follows that absent actual or constructive notice, the public entity cannot have acted in a palpably unreasonable manner. Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002).

Here, the construction donut had previously been left at the location of the accident site and remained there for at least nine months. Photographs of the donut showed its existence for this timeframe. Photographs taken both nine months and two months before the date of the accident also revealed the donut stayed in the same location. Three months before the incident, a significant public works project, involving repaving and restriping, occurred in the area around the accident site. And photographs of that project showed the donut had not been moved. Although not determinative, we note that defendant did not inspect the area at

the time of the repaving and restriping, and even if it did, the donut remained in its location for many months after the accident. Looking at the facts in the light most favorable to plaintiffs, we conclude a disputed issue of fact exists as to constructive notice.

Palpably unreasonable conduct "means 'behavior that is patently unacceptable under any circumstance' and that it must be 'manifest and obvious that no prudent person would approve of [the public entity's] course of action or inaction.'" Pandya v. State, Dep't of Transp., 375 N.J. Super. 353, 372 (App. Div. 2005) (alteration in original) (quoting Holloway v. State, 125 N.J. 386, 403-04 (1991)). In most circumstances, "[p]alpable unreasonableness is a question of fact." Vincitore, 169 N.J. at 130. As noted, the uncontested opinion testimony from plaintiffs' liability expert sufficiently addressed the issue of palpable unreasonableness in his report, which created a fact issue for the jury.

Reversed and remanded.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION