SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0962-16T2

ANTHONY SCAFIDI,

Plaintiff-Appellant,

v.

TOWNSHIP OF LYNDHURST,

Defendant-Respondent.

Argued March 20, 2018 - Decided April 20, 2018

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5943-15.

Matthew H. Mueller argued the cause for appellant (Clemente Mueller, PA, attorneys; Matthew H. Mueller, on the briefs).

Renee F. McCaskey argued the cause for respondent (Botta Angeli, LLC, attorneys; Natalia R. Angeli, of counsel and on the brief; Renee F. McCaskey, on the brief).

PER CURIAM

Plaintiff Anthony Scafidi appeals from an October 14, 2016 order granting summary judgment in favor of defendant Township of

Lyndhurst (Township). Plaintiff argues there were genuine issues of material fact that precluded the entry of summary judgment. We disagree and affirm.

On September 30, 2013, plaintiff visited a friend who lived on Stuyvesant Avenue in the Township. Plaintiff left his friend's house around 7:30 p.m., intending to walk home. As he got to the sidewalk along Stuyvesant Avenue, plaintiff accidentally dropped his house keys onto the street. Plaintiff stepped off the sidewalk with his right foot to retrieve his keys. Plaintiff then placed his left foot on the road surface into a pothole, causing plaintiff to fall.

After falling, plaintiff walked home. Later that evening, plaintiff went to the hospital for an x-ray of his left foot. According to the x-ray, plaintiff's foot had a "fracture in the proximal aspect of the fifth metatarsal."

On October 8, 2013, plaintiff underwent surgery that included the placement of a permanent screw in his left foot. Plaintiff had several follow-up visits and wore a boot on his foot until January 2014. Plaintiff did not require any additional surgery or treatment for his foot.

Approximately one year after plaintiff's injury, plaintiff's expert inspected the pothole. At that time, the pothole measured four and one-quarter inches deep. No measurement of the width or

length of the pothole was recorded. Plaintiff's expert opined that the pothole formed over "a period of several years" and, specifically, that the "total time for the subject pothole formation occurred within a [three to five] year duration."

On June 15, 2015, plaintiff filed a complaint alleging the Township was liable for his injuries. The Township filed an answer, asserting plaintiff's claims were barred by the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. Following the completion discovery, the Township filed a motion for summary judgment contending it was entitled to immunity under the TCA.

After reviewing the parties' written submissions and hearing oral argument, the judge granted the Township's motion. The judge found the Township was entitled to immunity under the TCA because plaintiff failed to prove that: the pothole was a dangerous condition; the Township had actual or constructive notice of the condition; the Township's actions with respect to the pothole were palpably unreasonable; or plaintiff suffered a permanent injury.

On appeal, plaintiff contends there were genuine issues of material fact that precluded the entry of summary judgment. According to plaintiff, the genuine issues of material fact to be resolved by the jury included whether the pothole was a dangerous condition, whether the Township had notice of the pothole, whether

the Township's actions were palpably unreasonable, and whether plaintiff suffered a permanent injury.

We review a grant of summary judgment de novo, applying the same standard as the trial court. Henry v. N.J. Dep't of Human Servs., 204 N.J. 320, 330 (2010). Summary judgment shall 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). Considering the evidence "in the light most favorable to the non-moving party," we must determine whether it would be "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, 540 (1995). The "trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The TCA "reestablished the rule of immunity for public entities and public employees, with certain limited exceptions." Marcinczyk v. State Police Training Comm'n, 203 N.J. 586, 594-95 (2010). Under the TCA, "immunity for public entities is the

general rule and liability is the exception." Wright ex rel. Kemp v. State, 147 N.J. 294, 299 (1997). "A public entity is only liable for an injury arising 'out of an act or omission of the public entity or a public employee or any other person' as provided by the TCA." Polzo v. Cty. of Essex, 209 N.J. 51, 65 (2012) (quoting N.J.S.A. 59: 2-1(a)). "In other words, 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." Ibid. (quoting Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002)).

Chapter 4 of the TCA provides that a public entity is liable if a plaintiff establishes: (1) the public "property was in [a] dangerous condition at the time of the injury"; (2) "the injury was proximately caused by the dangerous condition"; (3) "the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred"; and (4) the "public entity had actual or constructive notice of the dangerous condition." N.J.S.A. 59:4-2. Additionally, there is no liability against a public entity "for a dangerous condition of its public property if . . . the failure to take . . . action was not palpably unreasonable." Ibid. If a plaintiff is unable to satisfy each element, then the public entity is entitled to immunity under the

TCA. Carroll v. N.J. Transit, 366 N.J. Super. 380, 386 (App. Div. 2004).

The judge found plaintiff failed to satisfy each of the elements of the TCA necessary to pursue his claims against the Township. We need not address each element as we agree that summary judgment was appropriate because plaintiff is unable to prove that the Township's failure to repair the pothole was palpably unreasonable.

The term palpably unreasonable "implies behavior that is patently unacceptable under any given circumstance." Muhammad v. N.J. Transit, 176 N.J. 185, 195 (2003) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)). "[F]or a public entity to have acted or failed to act in a manner that is palpably unreasonable, 'it must be manifest and obvious that no prudent person would approve of its course of action or inaction.'" Id. at 195-96 (quoting Kolitch, 100 N.J. at 493). "Potholes and depressions are a common feature of our roadways. However, 'not every defect in a highway, even if caused by negligent maintenance, is actionable.'" Polzo, 209 N.J. at 64 (quoting Polyard v. Terry, 160 N.J. Super. 497, 508 (App. Div. 1978) aff'd o.b., 79 N.J. 547 (1979)). Additionally, "[r]oadways cannot possibly be made or maintained completely risk-free." Id. at 71.

Whether the public entity's behavior was palpably unreasonable is generally a question of fact for the jury. Brown v. Brown, 86 N.J. 565, 580 (1981). However, a determination of palpable unreasonableness, "like any other fact question before a jury, is subject to the court's assessment whether it can reasonably be made under the evidence presented." Maslo v. City of Jersey City, 346 N.J. Super. 346, 351 (App. Div. 2001) (quoting Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993)). "[T]he question of palpable unreasonableness may be decided by the court as a matter of law in appropriate cases." Id. at 350 (citing Garrison v. Twp. of Middletown, 154 N.J. 282, 311 (1998)).

Plaintiff failed to carry "the heavy burden of establishing that defendant['s] conduct was palpably unreasonable." Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 106 (1996). Based on the evidence presented in connection with the Township's motion for summary judgment, we find that the Township's inaction in repairing a pothole located in a parking spot was not palpably unreasonable. Plaintiff would not have stepped into the road in the area of the parking spot had he not dropped his keys. The pothole would not have been evident if a car had been parked in the spot. Moreover, a car would have driven over the pothole without incident, whereas a pedestrian stepping into that area of

the road, not designated as a pedestrian crosswalk, may have stumbled. Under these circumstances, we agree that the Township's conduct was not manifestly or obviously without reasonable basis or patently unacceptable.

Plaintiff claims that the Township's Municipal Code requires a pothole inspection program, and the Township lacks such a program. Plaintiff relies on the Township's Municipal Code provision entitled, "Inspection of Sidewalks; Causes of Repair Due to Tree Roots; Costs Assumed by Township" in support of his argument. The provision cited by plaintiff pertains to sidewalks. In making road repairs, the Township relies on complaints from the public. Since there is no requirement that the Township inspect for potholes, the lack of a pothole inspection procedure does not render the Township's conduct palpably unreasonable.

In this case, plaintiff alleged that the Township's conduct was contrary to N.J.S.A. 59:4-2. Plaintiff never raised the allocation of resources provision of the TCA in his complaint or in opposition to summary judgment. Nor did plaintiff present any evidence that the Township's allocation of resources for pothole repairs was palpably unreasonable. To the contrary, plaintiff's counterstatement of material facts and his expert's report acknowledged "there [has] never been an issue with the

Township . . . not having adequate resources or manpower in order to mitigate pothole hazards."

Following full discovery and in response to the motion for summary judgment, plaintiff failed to demonstrate that the Township's conduct regarding the pothole was palpably unreasonable under the circumstances.

Affirmed.