SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4795-16T4

KELLY McFARLAND and
JAMES McFARLAND,

Plaintiffs-Appellants,

v.

BOROUGH OF COLLINGSWOOD,

Defendant-Respondent,

and

TRUSTEES OF KNIGHT PARK, NOVA
TREE SERVICE and COLLINGSWOOD
LITTLE LEAGUE,

Defendants.

Submitted April 11, 2018 – Decided May 11, 2018

Before Judges Nugent and Currier.

On appeal from Superior Court of New Jersey, Law Division, Camden County, Docket No. L-2059-15.

Jerry Martillotti & Associates, attorneys for appellants (Gerard J. Martillotti, on the brief).

Mayfield, Turner, O'Mara & Donnelly, PC, attorneys for respondent (Francis X. Donnelly,

of counsel; Robert J. Gillispie, Jr., on the brief).

PER CURIAM

Plaintiff Kelly McFarland was watching a little league baseball game in a park in the Borough of Collingswood when a tree limb broke off from a tree and fell and injured her. Because defendant Borough did not own or control the park, and because plaintiff did not timely establish she suffered a threshold serious injury — requirements to recover pain and suffering damages from a public entity for injuries caused by a dangerous condition of its property — we affirm the summary judgment dismissal of her complaint.

This action's procedural history — to the extent it includes the untimely disclosure of a medical expert's opinion — is relevant to our determination. Plaintiff filed a complaint and later an amended complaint against the Borough and other defendants.[1] The complaint's counts against the other defendants — Trustees of Knight Park, Nova Tree Service, Collingswood Little League, and Sal Scarpata, d/b/a Sal's Services — were dismissed by stipulation or on summary judgment motions, leaving the Borough as the sole remaining defendant.

[1] Plaintiff's spouse filed a claim for consortium. For ease of reference, and because this spouse's claim is derivative, we refer to Kelly McFarland as "plaintiff."

Discovery ended in March 2016. The following month, the Borough filed a summary judgment motion, arguing it did not own or control the park where plaintiff was injured and was therefore not liable under the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3, for maintaining a dangerous condition of public property. The Borough also argued plaintiff had not suffered injuries resulting in a loss of bodily function, permanent disfigurement, or dismemberment, and the TCA therefore precluded her from recovering damages for pain and suffering.

In its opposition, plaintiff submitted a doctor's certification that for the first time contained an opinion plaintiff had suffered a permanent loss of bodily function as well as permanent disfiguring injuries. The trial court declined to consider the certification because plaintiff had not disclosed the doctor's opinions during discovery. The trial court granted the Borough's motion after determining the Borough neither owned nor controlled the park. The court also determined plaintiff had not sustained a threshold injury.

The trial court decided the Borough's summary judgment motion on a record that included the following undisputed facts. The Borough did not own the park. Knight Park was created through a private trust and is operated by trustees. The trustees' president, Michael Brennan, who had previously been the Borough's

mayor for twenty years, explained when deposed that the park's trustees meet annually and give certain reports. Knight Park's only "real source of income [was] what the trust corpus generate[d]," approximately $20,000 to $22,000 each year, which is allocated to the park's expenses. The trustees file tax returns for Knight Park.

Several groups do work at the park. These include the Borough, the Collingswood Little League, and the Board of Education. According to Brennan, at some time the Borough began to cut the grass in the park. The local Board of Education, which used some of the park near the high school for parking, paved a substantial portion of the park. The Little League may have maintained the fields but it performed no inspection or maintenance of the park's trees. Following plaintiff's accident, Brennan told little league personnel, "fellows, you really ought to pay attention to your area here because . . . if we're aware of something we ought to fix it."

Plaintiff's accident occurred in 2013. The park trustees employed no one from 2011 through 2013. In fact, the trustees had employed no one in years. A groundskeeper superintendent once lived in a house in the park. Brennan did not know who hired the groundskeeper superintendent, but the man cut the grass at the park and attempted to maintain the benches. The trustees did not

pay him and they did not charge him rent to live in the house. By the time Brennan was deposed in January 2017, the man had been gone at least ten years.

Brennan could not say the Borough "was assigned this . . . or assumed this responsibility or that responsibility." He could not recall any individuals or contractors being hired to periodically inspect the trees in the park. Brennan explained there was no delineation of duty. He testified, "[i]t's a cooperative small town that if something — people talk and situations get addressed." He presumed the trees in the park were maintained before plaintiff's accident, but there was no program as such.

Following plaintiff's accident, the trustees hired private contractors and decided to "spend some money every year to do the best we can to make sure that this is a safe and operable park." There had been various entities and businesses that had done tree work. Since plaintiff's accident, the Borough had taken down some trees and planted some trees. The Borough and the schools had what Brennan characterized as "a very robust restoration program to plant more trees." According to Brennan, however, "[w]e never had any incidents with trees until [plaintiff's accident]."

Asked if it were fair to say the trustees did not rely on the Borough to conduct inspections or to use public money to provide tree maintenance, Brennan relied:

> No. I think to the contrary. I think the [B]orough is the entity that has, again by default, been the ones who have done some work in the park. Since the incident we have done some things ourselves annually which we think are trying to discharge our fiduciary responsibility. But prior to that time I wouldn't know how else it would happen.

When pressed, Brennan said his belief that tree maintenance was conducted from time to time before plaintiff's accident was based on nothing more than "[t]he fact that it was done." When asked specifically how he knew any tree maintenance had been done before the day of plaintiff's accident, he responded, "I don't specifically know that." As a trustee, he had never made any specific requests of the Borough to periodically inspect or maintain the park's trees, nor did he know of any requests that had been made by any fellow trustee.

Carl Jubb, the Borough's Superintendent of Public Works and the son of the man who had once lived in the park, testified when deposed that the Borough had done work at Knight Park: "More or less cutting grass, emptying trash cans, helping [the]. . . old superintendent . . . . Just little [k]nick[k]nack things, you know, cleaning up tree branches, stuff like that." Jubb had lived

with his father in the house in the park from 1972 to 1996. During that time, Jubb remembered his father taking a tree down or trimming a tree.

From 2000 to 2013, the Borough never cut anything down in Knight Park. If something fell, the Borough would help clean it up. Jubb's father was the guy that would clean up. If his father needed a hand, he would call the Borough, and Borough personnel would help him. His father stopped working as the person in charge of the park in 2010.

In 2013, the Borough had no type of inspection and maintenance program for trees in the park. Jubb was unaware of any such program existing from 2000 through 2013. He said the Borough mostly cut the grass, but would pick up branches on the ground "because, obviously, they're in the way of us trying to cut the grass. Yeah, we'll clean the park if we have to."

Jubb testified it was not the Borough's responsibility to maintain and keep clean and take care of the park. The Borough had no type of inspection or maintenance program for the park's trees. Although the Borough would clean up a fallen tree if either Jubb spotted it or a resident notified the Borough, cleaning up a fallen tree was not the Borough's responsibility. Jubb also testified that the Little League did a Saturday clean-up, that is, they would rake the leaves. The Borough would send trucks to

remove the leaves. Jubb was aware of only one private contractor who had done tree work in the park. According to Jubb, the "biggest things we do [are] the trash and cut grass, that's our biggest thing."

Robert Hastings, a crew chief in the Borough's highway department, was notified shortly after the tree limb fell on plaintiff. He inspected the branch, which he described as a "seven to [ten] foot long, Sycamore limb, void of all moisture, laying on the ground." The tree limb was dead. The end of the branch farthest from the tree trunk fell approximately twenty feet when the branch broke off from the tree.

During the previous ten years that Hastings had worked for the Borough, Hastings did tree work in Knight Park. He first did some type of tree work at Knight Park shortly after he was hired by the Borough in 1994. If a tree was really bad and had to be removed, the Borough would remove it. If the tree needed to be trimmed, the Borough would trim it. Other than that, the Borough cut the grass at the park.

Hastings recalled that contractors had been brought in to do tree maintenance. Deposed on January 19, 2017, he testified contractors had been called in during the previous five years, and during the previous ten years. Although he was somewhat uncertain, he thought the contractors who had worked on the park's trees

included Sal's Services, Reliable Tree Service, Dependable Tree Service, and a company called either C&C or CC Landscaping.

Hastings testified volunteer groups had what he called Saturday Knight Park clean-ups. "We volunteer our time and we go out there and like trim trees up, remove trees if they need to come down or something along that nature." Hastings said he would use "the township's equipment." No one clarified whether by the "township" he meant the Borough's equipment.

Plaintiff retained the services of a tree expert who inspected the tree and photographs of the branch. The expert opined:

> Due to the neglect of proper tree care in a high traffic pedestrian area, it is my expert opinion that the tree branch posed imminent danger to any person or persons visiting the park. As the branch had most likely been dead for at least a year, it should have been promptly removed. Had the tree been pruned and the dead branch removed, Ms. McFarland would have avoided the injuries she sustained.

Plaintiff testified at her deposition that she went to Knight Park with her elderly father on a hot June day in 2013 to watch her son play a little league baseball game. While she was sitting in the shade of a Sycamore tree near the chain link fence separating the playing field from the "outside area," a large dead branch broke off the tree and struck her. Plaintiff heard the

tree limb begin to fall and placed a hand over her head. The branch struck her hand, head, upper body, and leg.

A police officer and emergency medical personnel responded shortly after the accident occurred. According to the police report, upon the officer's arrival plaintiff "was conscious and was breathing normally." The officer observed the tree branch, "which fell from a nearby tree and struck [plaintiff] on the left side of her head, also grazing her right hand and left knee."

According to the Collingswood Fire Department's EMS report, "[plaintiff] denied [loss of consciousness] and stated that she had pain in her head, left hand and arm, right calf, and left knee. Patient also denied neck and back pain." The report further noted plaintiff was experiencing controlled bleeding from a laceration on her left fourth (ring) finger, had an abrasion of the left forearm, and was experiencing additional pain in her left knee and right lower leg.

Emergency medical personnel transported plaintiff to Cooper University Hospital where she presented with injuries to her knee, head, and hand. She gave a history of a tree branch striking her on the back left part of her head and causing abrasions to her left hand, right shin, and left knee. CT scans of her head and cervical spine were negative. X-rays of her left hand, chest, and right leg were also normal, but MRI scans from later that month

disclosed several non-displaced fractures in the bones (metacarpal and proximal phalanx) of her fourth (ring) finger.

MRI scans of plaintiff's cervical spine revealed disc desiccation at the C5-6 level and a bulging disc with an annular tear at the C6-7 vertebral level. An MRI scan of plaintiff's knee revealed a large contusion.

On November 3, 2016, Gerald E. Dworkin, D.O., examined plaintiff. He issued an initial report, in which he noted on examination plaintiff had limited range of motion in her cervical spine, modest pain during the clinical examination of her lumbar spine, and tenderness in her left knee. The doctor also noted "[t]he palm of the left side does show Depuytren's contracture with 75-80% of functionality in the hand and no focal sensorimotor deficits present." The doctor's impression was neck and left arm pain, left hand pain with Depuytren's contracture, and left knee pain. According to the doctor, he had reviewed stabilization exercises for plaintiff's neck pain and recommended injection treatment for the persistent neck and left arm pain. The doctor noted he would see plaintiff again the following month. That did not happen.

When deposed in January 2017, two months after first seeing Dr. Dworkin, plaintiff testified she continued to have pain in her neck, left knee, and hand. The pain in her neck made it difficult

to do anything requiring her to bend her neck and look down. Such activities included reading, folding laundry, and peeling carrots. She explained that if she looked over her shoulder all day, she would typically have some degree of pain, sometimes mild, sometimes "really bad."

Plaintiff said her left hand was sore at all times and she could not use it fully. She could not lay her hand flat. At the end of the day, after typing for a long time at work, she experienced pain in her hand. During the day, while typing, she would repeatedly stretch her hand and by the end of the day it would ache like a toothache.

Plaintiff also testified she would "get more fullness" than pain in her knee. She felt an awkward sensation. Her knee felt loose, not quite right. However, she ran, surfed, and did what she could do.

Dr. Dworkin saw plaintiff again on May 4, 2017, and authored a certification the following week. In his certification, the doctor noted plaintiff's Depuytren's contracture had become worse "reducing her left hand function by twenty-five percent." The doctor commented this was a "permanent reduction and will continue to progress ultimately resulting in a need for surgery." According to the doctor, the condition also "caused plaintiff's left hand

and thumb to become disfigured which is a known complication with Depuytren's contracture."

In his certification's three concluding paragraphs, the doctor stated:

> As a result of the tree striking [plaintiff], I can state within a reasonable degree of medical certainty that she has suffered a severe and permanent injury to her cervical spine that has resulted in the [compromising] of her cervical disc at C4-5 and C5-6 with an annular tear and a permanent loss of movement in her cervical spine. These injuries and reduction of movement coupled with pain associated with the condition makes movement, turning or twisting her neck painful and difficult. These conditions are permanent and are expected to worsen overtime. There is no doubt these conditions are substantially limiting to [plaintiff] on a daily basis.
>
> I can further state that [plaintiff's] Depuytren's contracture has also resulted in a permanent disfigurement to her left thumb and hand. She has a permanent loss of function [in] her left hand and this condition becomes very painful with use of the left hand. It is most likely that she will require a surgery to correct this condition in the future.
>
> Finally I also believe that [plaintiff] has left knee pain however this condition is aggravated with exercise and while limiting it does not meet the criteria of permanent loss of bodily function that you asked me to evaluate her under.

As previously discussed, plaintiff first disclosed the permanency opinions in Dr. Dworkin's certification when she attached the certification to the papers she submitted in

opposition to the Borough's summary judgment motion. For that reason, the trial court did not consider the report.

On appeal, plaintiff argues the Borough was the sole entity that performed essential tree maintenance and service in Knight Park before her accident. She insists the Borough was in control of the dangerous tree branch, and the Borough's failure to remove it before it fell was palpably unreasonable. Additionally, plaintiff argues she suffered severe and permanent injuries resulting in permanent disfigurement and permanent loss of bodily function. She contends photographs of her hand and scars on her knee establish permanent disfigurement.

The Borough contends plaintiff failed to demonstrate it exercised possessory control over Knight Park. Specifically, the Borough undertook no duty and assumed no responsibility for inspecting and maintaining the trees in Knight Park. The Borough argues Knight Park is not public property within the meaning of the TCA. The Borough also contends plaintiff failed to establish she suffered permanent loss of a bodily function, permanent disfigurement, or dismemberment.

The trial court dismissed plaintiff's complaint against the Borough on a summary judgment motion. "Summary judgment is appropriate 'when no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of

law.'" Lee v. Brown, 232 N.J. 114, 126 (2018) (quoting Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 366 (2016) (citing R. 4:46-2(c))). When reviewing an order granting summary judgment, we adhere to the same standards as the trial court. Globe Motor Co. v. Igdalev, 225 N.J. 469, 479 (2016). "Because the dispute here involves the application of the TCA to the facts of this case, we review the determination de novo." Brown, 232 N.J. at 126 (citing State v. Nantanbu, 221 N.J. 390, 404 (2015)).

In enacting the TCA, the Legislature "declared . . . the public policy of this State that public entities shall only be liable for their negligence within the limitations of [the TCA] and in accordance with the fair and uniform principles established [t]herein." N.J.S.A. 59:1-2. Thus, as our Supreme Court has noted, "the history and purpose of the [TCA] suggest that the Legislature intended a chary interpretation of a public entity's exposure to liability." Brooks v. Odom, 150 N.J. 395, 402 (1997). The TCA's "guiding principle" is "that immunity from tort liability is the general rule and liability is the exception." Polzo v. Cty. of Essex, 196 N.J. 569, 578 (2008) (citations omitted). For these reasons, "[c]ourts should be cautious in sanctioning novel causes of action against public entities." Ramapo Brae Condo. Ass'n, Inc. v. Bergen Cty. Hous. Auth., 328 N.J. Super. 561, 571 (App. Div. 2000) (citing Ayers v. Jackson Twp., 106 N.J. 557, 574-

75 (1987); King by King v. Brown, 221 N.J. Super. 270, 276-77 (App. Div. 1987)).

Here, plaintiff seeks to hold the Borough liable for a dangerous condition of its property. The TCA establishes liability for a dangerous condition of public property in N.J.S.A. 59:4-2, which 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:
>
> 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.

As a threshold matter, the term "'[p]ublic property' means 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).

Indisputably, the Borough did not own Knight Park. The question is whether the motion record, viewed in the light most favorable to plaintiff, establishes a triable fact as to whether the Borough "controlled" either Knight Park or the tree. We conclude it does not.

"[P]roperty 'controlled' does not simply mean any property falling within the geographical boundaries of a municipality." Christmas v. City of Newark, 216 N.J. Super. 393, 398 (App. Div. 1987) (citing Brothers v. Highlands, 178 N.J. Super. 146, 150 (App. Div. 1981; N.J.S.A. 59:4-1). Rather, "possessory control consistent with property law is necessary." Posey ex rel v. Bordentown Sewerage Auth., 171 N.J. 172, 183 (2002) (citation omitted). Possession may be actual or constructive. Id. at 184. Constructive possession "is possession implied in fact." Ibid. (citation omitted). Accordingly, "possessory control is satisfied where a public entity treats private property as its own by using it for public purposes." Ibid.

Here, the Borough did not treat Knight Park as its own by using it for public purposes. Rather, the Borough, along with the Board of Education and the Collingswood Little League, assisted

the Knight Park Trustees in maintaining areas of the park. The Borough mostly cut the grass in the park and removed trash. Although it also removed dead tree limbs from the park grounds and occasionally removed trees, the Borough never assumed responsibility for undertaking a program of wholesale inspection and maintenance of the park grounds and trees.

This case is not dissimilar to Farias v. Twp. of Westfield, 297 N.J. Super. 395 (App. Div. 1997). There, Plaintiff was walking under a train trestle when she slipped and fell on accumulated ice concealed by a recent snow fall. The State owned the road abutting the sidewalk where plaintiff fell as well as the railroad trestle located above the sidewalk. Id. at 398. The Township's Superintendent of Public Works and Maintenance insisted the Township was not responsible for the maintenance of the sidewalk under the trestle, but conceded Township employees might clear the sidewalk under the trestle to get to the sidewalk on the other side. In addition, the Township Public Works Department placed trashcans on the sidewalk in the area of the trestle because of the high pedestrian traffic. Id. at 399.

We rejected plaintiff's claim that the Township controlled the area where plaintiff was injured. We explained:

> Plaintiff's assertion of control is based on the fact that the Township may have removed snow in the past and had placed trash cans in

> this area. These incidental acts, offered to support plaintiff's assertion of control by the Township, are insufficient as a matter of law to establish control by the Township of this State-owned property.
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> [Id. at 403 (citation omitted).]

In the case now before us, the Borough did not assume control of the park by assisting the trustees by cutting the park's grass, removing trash, and periodically removing dead trees and fallen limbs. The Borough did not assume a duty to regularly inspect and maintain the park's trees. To hold the Borough liable for failing to undertake a wholesale maintenance and inspection program because of its limited activities would be precisely the type of novel expansion of liability cautioned against by the TCA and the case law interpreting it. For these reasons, we reject plaintiff's argument and affirm the trial court's order dismissing the complaint.

We also agree with the trial court that plaintiff did not establish her injuries fell within a category that entitled her to recover damages for pain and suffering under the TCA. The TCA provides in pertinent part:

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or

> dismemberment where the medical treatment expenses are in excess of $3,600.00.
>
> [N.J.S.A. 59:9-2(d).]

To establish a permanent loss of bodily function, "a plaintiff must satisfy a two-pronged standard by proving (1) an objective permanent injury, and (2) a permanent loss of a bodily function that is substantial." Gilhooley v. Cty. of Union, 164 N.J. 533, 540-41 (2000).

For a scar to be a permanent disfigurement, it "must impair or injure the beauty, symmetry, or appearance of a person, rendering the bearer unsightly, misshapen or imperfect, deforming her in some manner." Id. at 544 (citing Hammer v. Twp. of Livingston, 318 N.J. Super. 298, 308 (App. Div. 1999)). When a court is evaluating a scar to determine whether it has resulted in a permanent disfigurement, factors the court should consider include the scar's appearance, color, size, and shape. Ibid. (citing Hammer, 318 N.J. Super. at 308-09). A court should also consider remnants of the healing process, characteristics of the surrounding skin, and any other cosmetically important matters. Ibid. (citing Hammer, 318 N.J. Super. at 309). The disfigurement must be both permanent and substantial. Ibid. (citing Hammer, 318 N.J. Super. at 308).

Here, plaintiff does not contend the trial court erred by excluding Dr. Dworkin's certification. Notwithstanding its format, Dr. Dworkin's certification contained expert opinions that should have been served during discovery. R. 4:10-2(d)(1); R. 4:17-1(b)(1); Interrogatory Forms, Pressler & Verniero, Current N.J. Court Rules, Appendix II to R. 4:17-1, Form A at Nos. 7 & 23 (2018). Plaintiff having failed to timely amend her interrogatories to include Dr. Dworkin's permanency opinions, the late amendments were required to "be disregarded by the court and adverse parties." R. 4:17-7.

Absent the opinions Dr. Dworkin expressed in his certification, plaintiff was unable to establish she suffered a permanent loss of bodily function. Dr. Dworkin's "initial report" dated November 3, 2016, expressed no opinion that plaintiff's injuries caused by the falling tree limb resulted in permanent loss of a bodily function or permanent disfigurement. The first five sections of the report, which spanned less than a single page, contained a history of her injuries, a section concerning allergies, her past medical history, her social history, and the results of the doctor's physical examination. The sixth section, entitled "Impression," contained three entries: neck and left arm pain, left hand pain with Depuytren's contracture, and left knee

pain. The final paragraph on the second page concerned plaintiff's continuing treatment.

Plaintiff argues on appeal that the condition of her hand and residual scarring on her knees constitute permanent disfigurement. She points to photographs of her hand and knees. However, she did not properly raise these arguments before the trial court. She did not raise any issues about scarring on her knees either in her brief in opposition to the Borough's summary judgment motion or during oral argument. She did argue that the contracture of her left hand caused a permanent disfigurement, but nothing in those reports considered by the trial judge established that her hand was permanently disfigured. Moreover, when the trial court asked plaintiff's counsel at oral argument whether he had provided photographs for the court to review, counsel responded, "I do not think I attached a picture of her hand."

In summary, plaintiff did not establish that the Borough owned or controlled the property on which she was injured, nor did she establish that she suffered a permanent loss of bodily function, permanent disfigurement, or dismemberment. The trial court correctly granted the Borough's summary judgment motion.

Affirmed.