SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1841-21

JEFF VANNOTE,

Plaintiff-Appellant,

v.

HOUSING AUTHORITY OF HOBOKEN, CITY OF HOBOKEN DEPARTMENT OF HEALTH & HUMAN SERVICES, CITY OF HOBOKEN, ROKO SPORTS, LLC d/b/a ABL SPORTS LEAGUES, COUNTY OF HUDSON, and STATE OF NEW JERSEY,

Defendants-Respondents.

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Argued May 24, 2023 – Decided October 18, 2023

Before Judges Accurso, Vernoia and Firko.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-2216-19.

Michael Confusione argued the cause for appellant (Hegge & Confusione, LLC, attorneys; Michael Confusione, of counsel and on the briefs).

Dawn M. Sullivan argued the cause for respondent Housing Authority of Hoboken (Dorsey & Semrau, attorneys; Dawn M. Sullivan, of counsel and on the brief; Fred C. Semrau, on the brief).

Gregory D. Emond argued the cause for respondent City of Hoboken (Antonelli Kantor, PC, attorneys; Jarrid H. Kantor, of counsel and on the brief; Gregory D. Emond and Kourtney L. Cooke, on the brief).

Jodi Anne Hudson argued the cause for respondent Roko Sports d/b/a ABL Sports Leagues (Connell Foley LLP, attorneys; Jodi Anne Hudson, of counsel and on the brief).

The opinion of the court was delivered by

ACCURSO, P.J.A.D.

In this Title 59 and private negligence action, plaintiff Jeff Vannote appeals from the entry of summary judgment dismissing his complaint against defendants Housing Authority of Hoboken, City of Hoboken and Roko Sports, LLC d/b/a ABL Sports Leagues for injuries he suffered sliding into second base playing league softball in Hoboken. Because we agree summary judgment was properly granted to all defendants, we affirm.

These are the undisputed facts, viewed most favorably to plaintiff. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Plaintiff

fractured his ankle on a Sunday evening in August 2018, "going for a double" in a men's softball game at Mama Johnson Field in Hoboken. As he was attempting to slide into second base, the cleats on his right shoe got caught in "a divot" in a six-foot ripped seam in the artificial turf along the base path on the infield side. Plaintiff only noticed the tear after he'd gone down, describing it shortly thereafter as "hidden." Plaintiff had played at the field four to six times before, during that season, and never noticed any problems, imperfections, holes or seams in the turf surface. He also did not know of anyone else ever having had a problem before his accident. Several players from both teams had run the bases that evening and hadn't experienced any problem with the turf.

The field is owned by the Housing Authority. In 2012, the Authority teamed up with the City to upgrade the field. The LandTek Group was awarded a contract to install the artificial turf. The City and the Authority had a shared services agreement in place at the time of plaintiff's accident governing use and maintenance of the field. The Agreement permitted the City to enter the field "at any time to make necessary repairs and improvements as well as to perform any custodial duties the City deems necessary from time-to-time," but did not obligate the City "to pay for any repairs, management, maintenance, operational costs, or improvement costs to

Mama Johnson Field, except . . . for damage directly attributed to the City's approved use of the Field."

The head of the Housing Authority testified at deposition that the Authority had the responsibility for keeping the field clean, which they did by inspecting it "at least a couple of times a week, if not daily" and making minor repairs, but that the City was responsible for maintaining the artificial turf. The Director of Recreation for the City testified at deposition the City's recreation program used the field for youth programming, but the Housing Authority supervised the adult programming in which plaintiff was participating.

The Recreation Director explained that during the season, the City had "many, many eyes on that field," including umpires, referees and parents as well as assigned officials and coaches who inspect the field by walking it "pretty much every day to make sure that the field is fine," including checking for turf tears and debris on the field. He also testified the City employed a seasonal employee assigned to the field who regularly inspected and operated the Housing Authority's turf grooming machine to replenish the turf pellets.

The City also maintained a maintenance contract with LandTek for the Mama Johnson Field. Once a year LandTek would conduct an overall field analysis to look for seam separation, infill migration, wear spots, drainage

problems, paint conditions, edging conditions and UV degradation. The field would then be brushed, aerated, raked, swept, deep groomed, de-compacted and vacuumed. High traffic areas (inclusive of sliding areas for baseball and softball) would be examined for divots and filled with additional infill. The field would then be swept with a tow magnet to remove any metallic debris with the turf. G-Max testing would be done to evaluate the shock absorbing properties of the field and any field repairs within the warranty would be completed.

The Recreation Director testified the City had originally contracted with LandTek for two such visits per year but reduced it to one visit in consultation with LandTek at a savings of $5,400 annually. The Director claimed the City had undertaken preventative maintenance repairs to the field but none arising from a complaint. Both the Director and the head of the Housing Authority testified that neither the City nor the Housing Authority had ever received a complaint about the turf before plaintiff's complaint, and that there had never been a reported injury arising from the condition of the field.

Defendant RoKo Sports operates ABL Sports Leagues, a United States Specialty Sports Association sanctioned league based in Hoboken. ABL runs adult sports leagues, including the recreational softball league in which plaintiff played at the time of his injury. The League director testified at

deposition that ABL used the Mama Johnson Field every Sunday and Monday night during its April through November season pursuant to a permit with the Housing Authority and the City. Plaintiff's league played during July and August.

The director of the League claimed the Housing Authority was responsible for its own maintenance but someone from the League, either the umpire, the statistician, or the director if he was at the game, would inspect the field prior to the start of play. The director testified he'd confirmed with the umpire of the game at which plaintiff was injured that the umpire inspected the field before every game. The director also noted the umpires would walk the baselines when they placed the bases on the field.

Plaintiff's expert inspected the field more than two months after plaintiff's accident, concluding "the field showed signs of excessive wear, especially at the seams where panels met." He noted "the area where [plaintiff] was injured while sliding into 2nd base showed seam separation and a hole."[1] The expert concluded the Housing Authority failed to "follow the instructions or procedures provided [it] by the builder of the synthetic field as required to properly inspect and maintain the field." Plaintiff's expert further

[1] No measurements of either were included in the report.

concluded the City "allowed employees and coaches to perform maintenance work on the synthetic turf despite those employees not being properly trained or educated as to accepted industry standards related to proper maintenance of a synthetic turf field."

The expert maintained both the Housing Authority and the City failed to "educate or train [their] employees . . . to properly inspect, maintain and manage the synthetic turf" and "to properly maintain the field," thereby "creat[ing] a dangerous condition that increased the risk of injury to [plaintiff]." In the expert's opinion, "a palpably unreasonable condition existed" on the field, "due to [defendants'] failure to inspect and monitor the field in accordance with industry standards," which "caused [plaintiff's] fall and subsequent injury."

Plaintiff's expert also concluded the "ABL League did not educate or train its employees to properly inspect the synthetic turf at Mama Johnson Field and created a dangerous condition that increased the risk of injury to [plaintiff]."

After hearing oral argument, the judge granted the municipal defendants' motions for summary judgment in an opinion from the bench, finding plaintiff could not establish the elements of a cause of action under N.J.S.A. 59:4-2.

Viewing the undisputed facts on the motion in the light most favorable to plaintiff, the judge found that even though plaintiff did not see any six-foot tear or seam or any hole before he fell, his sworn testimony that he saw it afterwards was enough to warrant "submission of the dangerous condition issue to a jury." The judge explained if "plaintiff were able to establish," as he testified at his deposition, "that there was a hole or tear or seam at least six feet long that caused his injury . . . that might be considered a dangerous condition of public property." Thus, for purposes of the motion, the judge was satisfied plaintiff had presented evidence the field was in a dangerous condition at the time of his fall, that the dangerous condition was the proximate cause of his injuries, and "that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred." N.J.S.A. 59:4-2.

The judge found, however, that the evidence in the record was insufficient to establish the Housing Authority or the City had actual or constructive notice of the alleged dangerous condition of the field. The judge found plaintiff had not adduced any evidence that either of the municipal defendants had actual notice of the condition, noting plaintiff's own testimony established "the condition was hidden."

The judge further found the undisputed facts did not establish that alleged dangerous condition of the field "was so open and obvious that the

public entities should have seen it in enough time prior to . . . plaintiff's injury" to have rectified the problem. See N.J.S.A. 59: 4-3(b); Grzanka v. Pfeifer, 301 N.J. Super. 563, 574 (App. Div. 1997). The judge noted plaintiff testified he hadn't noticed any problem previously, although he'd already played several games at the field that season and hadn't even noticed the alleged six-foot tear or hole on the night he was injured until after he'd fallen. The judge found there was no evidence in the motion record that the defect in the turf "existed for any period of time prior to . . . plaintiff's fall," noting the few photographs in the record included in plaintiff's expert's report were taken two months later.

Finally, the judge concluded that having failed to establish either actual or constructive notice of the alleged tear in the turf on the part of the municipal defendants, plaintiff could not establish they were palpably unreasonable in failing to correct the problem, especially in light of the City's maintenance contract with LandTek and the testimony by representatives of the Housing Authority, the City and ABL about the regular inspections conducted of the field.

As to ABL, the judge found plaintiff was relying on his expert to establish the League's liability arising out of its failure "to properly educate and/or train its employees to inspect the synthetic turf at Mama Johnson Field," which "created a dangerous condition that increased the risk of injury

to [plaintiff]." The judge concluded, however that the expert failed to set forth the standard of care for the League as "[t]he standard set forth in the report appl[ies] per the expert to owners and operators of athletic sports facilities," of which the League is neither.

Moreover, the judge found the expert failed to establish the facts on which he relied to conclude ABL had failed to educate or train its employees on inspecting artificial turf. The judge found it was undisputed that someone from the League inspected the field before the start of play. She found, however,

> [t]here are no other facts in the entire motion record as to what was done during the inspection, what wasn't done during the inspection, what should have been done during the inspection or should not have been done to possibly substantiate an opinion that [ABL] did not train or educate its employees properly with regard to inspection. In fact, the record is completely devoid of any facts with regard to the training of any [ABL] employees or lack thereof with respect to the inspection.

Finally, the judge concluded the expert's failure to have set forth in his report the standard of care applying to ABL or the facts to demonstrate the unidentified standard was breached, made an N.J.R.E. 104 hearing inappropriate.

Plaintiff appeals, arguing the judge misapplied the summary judgment standard by refusing to submit the issue of the municipal defendants' and ABL's liability to the jury. We reject his arguments.

We review summary judgment using the same standard that governs the trial court.[2] Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). Thus, we consider "'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007) (quoting Brill, 142 N.J. at 536).

N.J.S.A. 59:4-2 addresses a dangerous condition of public property and provides as follows:

> 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:

[2] Because we apply the same standard as the trial judge and review questions of law de novo without deference to interpretive conclusions we believe mistaken, see Nicholas v. Mynster, 213 N.J. 463, 478 (2013), Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995), we need not address plaintiff's argument that the trial judge misapplied the summary judgment standard.

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

Thus

> to impose liability on a public entity pursuant to that section, 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 ex rel. Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 125 (2001) (quoting N.J.S.A. 59:4-2).]

Our Supreme Court has recently reiterated that "[t]hese elements are 'accretive; if one or more of the elements is not satisfied, a plaintiff's claim against a public entity alleging that such entity is liable due to the condition of

public property must fail.'" Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 656 (2022) (quoting Polzo v. Cnty. of Essex, 196 N.J. 569, 585 (2008)). The Court has also again reminded that when considering a summary judgment motion in a Title 59 case, "[a]pplication of the summary judgment standard . . . must . . . account for the fact that under the [Tort Claims Act], 'immunity [of public entities] from tort liability is the general rule and liability is the exception.'" Id. at 655-56 (last alteration in original) (quoting Coyne v. Dep't of Transp., 182 N.J. 481, 488 (2005)).

Plaintiff claims the judge's constructive notice analysis was flawed because she ignored plaintiff's expert's report and failed to construe the expert's opinion that the tear was longstanding in the light most favorable to plaintiff. The judge, however, did not ignore the expert's conclusions. She expressly noted the photographs appended to the expert's report, which he claimed showed seam separation, were taken more than two months after plaintiff was injured.

More important, the expert failed to set forth any facts for the judge to construe in plaintiff's favor. Plaintiff's expert concluded based on his inspection of the field only that "the seam separation" in the area in which plaintiff was injured, "plus other areas of the infield, were there at the time of his injury." The expert, however, offered no facts to support his opinion,

stating only that "[s]eams on a synthetic field should never be seen, much less separated and exposed to users of the field." The expert nowhere explains exactly what he means by "seam separation," how seam separation occurs, how long it takes to occur or become noticeable and whether visible seams pose any risks to users of the field. Like the expert's report in Polzo, "it can be said to present solely a bald conclusion, without specifying the factual bases or the logical or scientific rationale that must undergird that opinion," and is thus "insufficient to sustain plaintiff's burden of establishing that the public entity was on constructive notice of a dangerous condition." Polzo, 196 N.J. at 583-84.

We further reject plaintiff's assertion that the municipal defendants "created" the condition by failing to inspect or maintain the field. As the Court made clear in Polzo II, "a public entity does not create a dangerous condition merely because it should have discovered and repaired it within a reasonable time before an accident," as plaintiff charged here. Polzo v. Cnty. of Essex, 209 N.J. 51, 67 (2012). As Justice Albin explained, "[i]f failing to discover a dangerous defect on public property were the equivalent of creating the defect, the Legislature would have had no need to provide for liability based on actual or constructive notice." Id. at 67-68 (citing N.J.S.A. 59:4-2(a) and (b)).

The only "maintenance" plaintiff's expert identified as necessary was the "regular inspection" of the "seams and joints where panels or any field markings are joined together," because "[o]pen joints can create a tripping hazard and should immediately be repaired." As any claim based on the expert's report relies entirely on the municipal defendants' having notice of the condition, plaintiff cannot succeed on his claim that either the Housing Authority or the City "created" the condition by failing to have discovered and repaired the "seam separation and a hole" near the second base line.

And although it is certainly true, as plaintiff asserts, that a jury could disbelieve the testimony of defendants' witnesses about their regular inspections of the field, that hope is insufficient to stave off summary judgment. See O'Loughlin v. Nat. Comm. Bank, 338 N.J. Super. 592, 606-07 (App. Div. 2001) (noting opponent of summary judgment must do more than show some "metaphysical" doubt as to the material facts). In order to defeat summary judgment, plaintiff needed to come forward with competent facts a reasonable jury could find sufficient to cast doubt on the testimony, as "it is evidence that must be relied upon to establish a genuine issue of fact." Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014).

Plaintiff's failure to establish that either the Housing Authority or the City had actual or constructive notice of the alleged dangerous condition of the

field resulted in his failure to establish a prima facie case against the municipal defendants. See Stewart, 249 N.J. at 656. We are also satisfied that even had he been able to get over that hurdle, the facts in the motion record do not establish the inspections and field maintenance the municipal defendants performed through their employees and the City's third-party contractor LandTek, the entity that installed the turf, constituted "palpably unreasonable" behavior — that is, behavior "patently unacceptable under any given circumstance," making it "'manifest and obvious that no prudent person would approve of its course of action or inaction.'" Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985) (quoting Polyard v. Terry, 148 N.J. Super. 202, 216 (Law Div. 1977), rev'd on other grounds, 160 N.J. Super. 497 (App. Div.1978), aff'd o.b., 79 N.J. 547 (1979)). See also Black v. Borough of Atlantic Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993) (noting "like any other fact question" whether a public entity acted in a palpably unreasonable manner "is subject to the court's assessment whether it can reasonably be made under the evidence presented").

We also agree with the trial court that plaintiff's expert did not identify the standard of care a league such as ABL owed to its players participating in games on a municipal field the League neither owned nor operated or point to any facts in the motion record to support his opinion that ABL failed to

"educate or train its employees to properly inspect the synthetic turf at Mama Johnson Field." We cannot find the judge misapplied her considerable discretion in concluding an N.J.R.E. 104 hearing could not cure the defects in the expert's report as to ABL. See Townsend v. Pierre, 221 N.J. 36, 55 (2015) ("A party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record."). The point requires no further discussion. See R. 2:11-3(e)(1)(E).

Affirmed.