SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2264-21

ALYSSA MOLCHO and
RON MOLCHO,

Plaintiffs-Appellants,

v.

TOWNSHIP OF OCEAN,

Defendant-Respondent.

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Submitted January 19, 2023 – Decided August 11, 2023

Before Judges Accurso and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3358-19.

Drazin & Warshaw, PC, attorneys for appellants (Steven L. Kessel, on the briefs).

Rainone Coughlin Minchello, LLC, attorneys for respondent (John F. Gillick, of counsel and on the brief).

PER CURIAM

In this Title 59 matter, plaintiff Alyssa Molcho[1] appeals from the entry of summary judgment dismissing her complaint against defendant Ocean Township. Because we agree summary judgment was properly granted to the Township on the undisputed facts, we affirm.

These are the essential facts, all of which are undisputed. Plaintiff and her adult daughter were riding bicycles on their street, Heath Avenue, in Ocean Township on October 1, 2018, when plaintiff swerved to avoid a car driving toward her cul-de-sac. It was after dark, and plaintiff described the area as "pitch black." She claimed her rear tire went into a "pothole," causing her to fall off her bike and onto the curb, resulting in injuries. Plaintiff has never identified the pothole that caught her bike tire. Indeed, plaintiff has never identified exactly where she fell, testifying "[i]t was somewhere between the turn [on Heath Avenue] and the intersection [of Heath Avenue and Brooke Street], like kind of in the middle."

In April 2018, six months before her accident, plaintiff sent an email to the Township's Director of Public Works, complaining generally about the condition of Heath Avenue. She attached a few photographs of potholes in the

[1] Plaintiff's husband, Ron Molcho, also sued per quod. In referring to plaintiff, we mean Alyssa Molcho.

road, but not of the area where her accident occurred. The email read in pertinent part:

> I have contacted public works several times since I have moved here regarding repaving the street. It has been patched several times but never properly repaved. My property taxes are over $1000 a month and the fact that I can not get my street paved is a disgrace!!!! Please let me know who I need to contact to get this done immediately. I can not sit back any longer and accept this neglect.

Five days later, the Director of Public Works emailed plaintiff a response to her complaint. The Director apologized for not replying sooner but said he "had to find out a few things." He wrote that he'd been unable to download plaintiff's pictures but "believe[d] that [he was] aware of the areas that [she was] referring to." The email continued:

> There is an area at the intersection of Heath Ave. & Brooke St. that is deteriorated and also the bend before entering the cul-de-sac that has deteriorated as well.
>
> These areas are slated for milling and paving under our 2017 road improvement program. This work will be done this year.
>
> Additionally, the intersection of Brook St. & Whalepond will also be milled and paved at the same time.
>
> I hope you find this information helpful.

> Please feel free to contact me if you need anything further.

Apparently satisfied her concerns were being addressed, plaintiff did not communicate further with the Department of Public Works on that occasion. But it wasn't the first time she'd complained about the condition of her street. As she noted in her email, she'd complained several times before. She testified at her deposition that on one occasion, Township workers came out the next day and repaired all the potholes in her cul-de-sac through Heath Avenue's intersection with Brooke Street, but mostly she was simply told "it's not in the budget this year."

Ocean Township has a "road improvement program," through which it selects roads for repaving to be funded out of its budget for capital improvements. The Township engineer prepares an annual list, based on roadway inspections performed by the Department of Public Works, of all the roads in the Township graded on a scale from 0 to 100, "100 being a perfect road, zero being the worst road."

After preparing the list, the engineer would present it to the Township Manager with a recommendation of the roads to repave along with the cost estimates for doing so. The Township Manager would include the estimates in the proposed annual budget for review and approval by the mayor and council.

Once the budget was approved, the Township would put the work out for bid. After the contracts were awarded, the contractor controlled the schedule of the work within the confines of the contract.

The entire process took approximately two years from inspection to repaving. The Department of Public Works performed the roadway inspections and completed the rating forms in late summer and into the fall, in order for decisions to be made in the winter as to the roads to be recommended for repaving. The budget would thereafter be prepared in the spring for approval by the mayor and the council in May. The bid process would thereafter get underway, culminating in contract awards in the fall for work to be performed the following year.

Heath Avenue was rated for inclusion on the repaving list in 2016, for which funds were allocated in 2017, for repaving in 2018. The contracts for the 2018 road work, including the repaving of Heath Avenue, were executed in October and November of 2017. The repaving was done on December 3, 2018, two months after plaintiff's accident.

After hearing oral argument, the trial judge granted the Township's motion for summary judgment in a written opinion, finding plaintiff could not establish the elements of a cause of action under N.J.S.A. 59:4-2. The judge

found plaintiff had failed to adduce any evidence about the pothole she claims caused her to fall off her bike. Plaintiff has never identified the pothole, never described it, there are no photos of it, no measurements, and no evidence "that any person, at any time, saw the pothole in question, either before or after plaintiff's accident." The judge was not convinced plaintiff had "presented a factual basis for a determination by a jury that a dangerous condition with reference to the alleged pothole existed," finding plaintiff's "contention that she was caused to fall while on her bicycle is not enough to establish that a dangerous condition existed."

Nevertheless, for purposes of the motion, the judge assumed plaintiff had presented evidence the road was in a dangerous condition at the time of her accident, that the dangerous condition was the proximate cause of her 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 plaintiff could not establish either actual or constructive notice on the part of the Township of the alleged pothole that caused her fall based on her failure to have ever identified the pothole that caused her accident.

The judge rejected plaintiff's argument that her complaints to the Township about the general condition of her street were sufficient to put the Township on notice — either actual or constructive — of the pothole plaintiff contends caught her tire causing her to fall off her bike. Because plaintiff had never described the pothole or presented evidence of its size, specifically its width and depth, she could not establish the pothole was "of such an obvious nature" and had existed for "a sufficient time" to have allowed the Township, exercising due care, to have discovered and corrected the dangerous condition. N.J.S.A. 59:4-2(b); N.J.S.A. 59:4-3(b). Finally, without actual or constructive notice of the pothole, the judge found plaintiff could not establish the Township's failure to have patched the pothole or to have repaved the road sooner was palpably unreasonable. N.J.S.A. 59:4-2.

Plaintiff appeals, contending the trial court's view that plaintiff had to establish the Township had actual or constructive notice of the particular pothole that caused her fall, instead of the notice it had for months beforehand about the general deteriorated condition of the road in the area in which plaintiff fell, necessitating it being repaved, was an overly restrictive reading of the statute. Plaintiff also contends the "palpably unreasonable" standard of N.J.S.A. 59:4-2 "does not apply" here. She reasons the Township "can hardly

argue simultaneously that it had no notice of a dangerous condition but nevertheless responded reasonably to it." We reject plaintiff's arguments as without sufficient merit to warrant extended discussion in a written opinion. R. 2:11-3(e)(1)(E).

We review summary judgment using the same standard that governs the trial court. 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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 536 (1995)).

N.J.S.A. 59:4-2 of the Tort Claims Act 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:
>
> 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.

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."
>
> [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 reminded that when considering a summary

judgment motion in a TCA case, "[a]pplication of the summary judgment standard . . . must . . . account for the fact that under the TCA, 'immunity [of public entities] from tort liability is the general rule and liability is the exception.'" Id. at 655-56 (alteration in original) (quoting Coyne v. Dep't of Transp., 182 N.J. 481, 488 (2005)).

We agree with the trial judge that it is difficult to see how a plaintiff could prove a public entity's property was in a dangerous condition without identifying specifically the property — here, the pothole that caused plaintiff to fall off her bicycle. The Court has previously explained that "[c]omplaints of neighborhood residents about a dangerous condition may serve to establish actual or constructive notice to a municipality of that condition." Norris v. Borough of Leonia, 160 N.J. 427, 447 (1999). But one neighbor's complaints about a dangerous condition in a particular location "cannot serve as notice of [the same or similar dangerous condition] at a different location" on the same street. Id. at 447-48. The result doesn't change because it was plaintiff and not a neighbor who complained about the condition of another area of the street prior to her accident. Plaintiff's complaint in April putting the Township on notice of alleged dangerous conditions of other parts of her street did not serve as notice of a dangerous condition of the place where she fell.

Plaintiff attempts to avoid the holding of Norris and her failure to have identified the precise location of her fall by arguing "a public entity has notice that its property is in a dangerous condition when it is so full of potholes that any one of them may cause an accident." She contends a street "riddled by potholes is in a dangerous condition," and "does not become less dangerous because the specific pothole that causes an accident is lost in the crowd of potholes that litter the street."

Although we could accept for argument's sake that a residential street would be in a dangerous condition if it had so many potholes that a bicycle rider trying to avoid one would be dashed into another, plaintiff did not establish that Heath Avenue was "riddled with potholes" or that a "crowd" of them "littered the street" at the time of her fall. As the trial judge noted, there wasn't even a description or any pictures of the area where plaintiff claimed she fell. Plaintiff simply failed to "establish[] the existence of an issue of material fact regarding whether there was a dangerous condition" of Heath Avenue in the place where she fell. See Stewart, 249 N.J. at 656. Moreover, even had plaintiff established on summary judgment that the area of Heath Avenue where she fell "constituted a 'dangerous condition;' even if that dangerous condition proximately caused the injury alleged; even if it was

reasonably foreseeable that the dangerous condition could cause the kind of injury claimed to have been suffered; and even if the public entity was on notice of that dangerous condition"; she failed utterly to establish that Ocean Township's act of selecting parts of Heath Avenue for repaving through its road improvement program or its failure to have repaved those parts sooner was "palpably unreasonable." Polzo, 196 N.J. at 585 (quoting N.J.S.A. 59:4-2). In other words, proof that it was "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) (citation omitted), and certainly none sufficient to require submission to a jury, see Brill, 142 N.J. at 536. Plaintiff's argument that the "'palpably unreasonable' [standard] does not apply under the facts of this case" finds no support in the statute or the case law and merits no further consideration here. See R. 2:11-3(e)(1)(E).

Affirmed.