SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2919-20

SHEILA ALLEN,

Plaintiff-Appellant/
Cross-Respondent,

v.

JERSEY CITY BOARD OF EDUCATION,

Defendant-Respondent/
Cross-Appellant.

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Argued January 19, 2023 – Decided February 17, 2023

Before Judges Mayer, Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-4526-19.

William L. Gold argued the cause for appellant/cross-respondent (Bendit Weinstock, PA, attorneys; William L. Gold, on the briefs).

Diego F. Navas argued the cause for respondent/cross appellant.

PER CURIAM

In this personal injury action, plaintiff Sheila Allen appeals from the May 28, 2021 order granting summary judgment to defendant Jersey City Board of Education (Board) and dismissing her case with prejudice for failure to satisfy the requirements of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to -14.4. Plaintiff also challenges a second May 28 order denying her motion for summary judgment on the issues of proximate cause and non-economic damages. Additionally, she appeals from an April 30, 2021 order denying her motion for summary judgment and to strike defendant's affirmative defenses.

In its protective cross-appeal, defendant contends the trial court erred in denying the Board's motion for summary judgment regarding plaintiff's permanent injury claims. Because we affirm both May 28 orders, we need not address defendant's cross-appeal nor plaintiff's appeal from the April 30 order.

I.

We take the facts from the summary judgment record, viewing them in the light most favorable to plaintiff. Angland v. Mountain Creek Resort, Inc., 213 N.J. 573, 577 (2013) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995)). On March 21, 2019, at approximately 2:30 p.m., plaintiff entered the Dr. Maya Angelou Elementary School[1] in Jersey City to pick up her

[1] The school also is known as P.S. 20.

neighbor's son, just as she had for the three months prior. At that time, it was "pouring down raining," so the school had students wait in the cafeteria to be picked up. Plaintiff entered the school and noticed security guards "standing around." As she reached for the cafeteria door, she slipped and fell into a puddle of water. Plaintiff did not know how long she was on the floor or how long the puddle existed.

During her deposition, plaintiff was asked what caused her fall. She answered, "I don't know. . . . I didn't see the water until I fell, and it was gray, muddy water." Plaintiff stated she would not have kept walking if she had seen the water on the floor, and explained she was looking "straight ahead" before she fell. Additionally, plaintiff testified she fell "backwards . . . feet first," and landed "straight on her back," causing her right arm to strike the ground. Although plaintiff did not lose consciousness, she recalled being "in shock and dazed" when she saw her right arm "hanging out." Plaintiff heard someone mention an ambulance and another person say, "get maintenance," while she was still on the ground.

Plaintiff declined medical assistance and was able to stand back up with help before picking up her neighbor's son and walking six blocks back home. She then took a bus to pick up her granddaughter at a different school. Hours

later, plaintiff went to the hospital via ambulance and was treated in the emergency room. X-rays of her right arm confirmed plaintiff's wrist was fractured. Her arm was placed in a cast, and about eight weeks later, the cast was removed. According to plaintiff's expert, Dr. Alan E. Schultz, plaintiff suffered a "[c]omminuted intraarticular fracture with displacement of the right distal radius," a "[f]racture ulnar styloid," "[m]alunion right distal radius and ulna," and "[p]ost traumatic restricted range of motion" in her right wrist.

Plaintiff declined surgery and did not receive injections or undergo physical therapy for her injuries. After her cast was removed, she reported feeling pain in her right arm and wrist "at least six hours per day," causing her to take ibuprofen twice a day and wrap the area around her wrist. During her deposition, plaintiff testified she had difficulty with daily activities, stating:

> I can't do my hair. I have to use my right hand to wash my dishes, so that takes . . . two or three hours. I cannot use it to pick up anything, like a frying pan or anything like that. I can't use my oven. I can't wash up with it. I have to use my left hand to . . . wipe myself. . . . I . . . cannot put on my shoes.

Plaintiff also stated she had meals delivered.

Following Dr. Schultz's orthopedic evaluation of plaintiff, he reported that her "fracture was healing, [but] there remained displacement and angularity of the intraarticular fracture" and "[s]urgery was . . . advised." Further, the doctor

concluded plaintiff "suffered significant and permanent injury" and "[h]er right arm ha[d] not returned to function normally nor w[ould] the right upper extremity return to function normally with further time and treatment." Dr. Schultz also opined the nature of plaintiff's fracture would accelerate "the normal wear and tear process and . . . the onset of osteoarthritis" in her wrist.

When Dr. Schultz was deposed, he acknowledged finding plaintiff had "no restrictions of movement, pain, or limitations from the shoulder, the upper arm, or the elbow" on her left and right sides. Moreover, he testified "neurologically her hands and wrists and fingers" appeared "intact" and he saw no signs of atrophy after considering "the dimensions of [plaintiff's] two arms."

Defendant's expert, Dr. Arnold T. Berman, also examined plaintiff and reviewed her medical records. He concluded:

> there was no right significant radial deviation or prominence of the ulna. In addition, there was excellent range of motion and no pain on full range of motion. There was shortening of the distal radius noted; however, this was not significant with no reduction in range of motion or strength. . . . [Plaintiff] can participate in all activities of daily living. No restrictions of activity are indicated. She does not require any further orthopedic medical treatment. [Plaintiff] did not sustain any permanent injury and has no disability as a result of the accident.

Hani Ileya, the school principal, was present on the day of plaintiff's accident but did not witness it. He testified during his deposition that he was unsure "exactly where [plaintiff] fell" but there was a large carpet at the school's entrance where plaintiff entered the building, and it was "constantly there." Ileya stated there were no eyewitnesses to plaintiff's fall, and no one from the school knew whether there was anything wet on the floor where plaintiff fell.

In describing the school's procedure for cleaning the floor, Ileya testified that typically, a school worker would notify a custodian if there was water on the floor, and if custodians were not attending to other emergent matters, they had to "come and clean [the water] right away." Ileya added, "[w]e never had an accident before [plaintiff] falling or even after [her] falling. . . . [N]obody ever fell except her, so the procedure that's been in place has been pretty good."

When asked about signage, Ileya testified the school used triangular warning signs "[w]hen the floors are wet, . . . and people . . . bring [water] in and stuff of that nature." Ileya believed these signs were not used the day plaintiff fell.

Emanuel Holmes, the school's security supervisor, also was deposed. He testified he was present on the day of the accident but did not see plaintiff fall.

Further, he stated he did not notice anything wet on the floor where she fell. In Holmes's incident report about the accident, he stated:

> At approximately 2:55 p.m. on 3/21/19, I . . . noticed [plaintiff] on the floor. She . . . appeared as if she had fallen. As I approached her to investigate, . . . Dan Marck[2] . . . was also approaching [plaintiff]. She said she did fall, and Mr. Marck and myself helped her up. We both . . . asked [plaintiff] if she wanted medical assistance. She refused two times. She was adamant about not wanting medical assistance, and she left the building saying she was okay. No further investigation pending.[3]

According to Holmes, prior to plaintiff's fall, he "did not observe any water on the floor nor anything slippery or hazardous" and was "walking about the first floor of the school building between the two entrances." Also, Holmes did not receive "any complaints about water on the floor or any hazardous substances on the floor" on the day of the accident and did not "recall anyone requesting a custodian" to clean up water or other materials on the floor. Additionally, Holmes stated he did not look for anything on the floor after

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[2] Daniel Marck, a teacher at the Dr. Maya Angelou school, testified during his deposition that he saw plaintiff on the floor after her fall, she did not appear to be in pain but had difficulty getting up. He was unaware if anyone witnessed plaintiff's fall.

[3] Holmes later certified he did not mention any water condition on the floor in the incident report because no one notified him water was present or that it played any part in plaintiff's fall.

plaintiff fell because plaintiff "never indicated . . . she had slipped and fell due to water or any liquid." Moreover, during his tenure at the school, he did not recall any other reports of someone falling. He noted the school had custodians "on duty at all times." Holmes also confirmed the school had permanent large mats, measuring approximately eleven by seventeen feet, to absorb moisture at "both the front and side entrances" of the school.

II.

In November 2019, plaintiff filed a single-count complaint alleging defendant was negligent. In March 2021, she moved for partial summary judgment and asked to strike defendant's affirmative defenses. In response, defendant cross-moved for leave to file a late amendment to its interrogatory answers. Defendant also separately moved for summary judgment, and plaintiff countered with a cross-motion, seeking partial summary judgment on the issues of proximate cause and non-economic damages.

After hearing argument on plaintiff's partial summary judgment motion on April 30, 2021, the judge orally denied it. Accordingly, defendant withdrew its cross-motion. The judge issued a conforming order that day.

On May 28, 2021, the judge heard argument on defendant's summary judgment motion and plaintiff's cross-motion for partial summary judgment.

During the hearing, counsel for defendant stipulated that for purposes of the summary judgment motions only, defendant did not dispute: there was a dangerous condition in the area where plaintiff fell; her injury was proximately caused by the dangerous condition; and the dangerous condition created a reasonably foreseeable risk of the kind of injury plaintiff sustained. However, defendant disputed it had notice of the dangerous condition on March 21, 2019, or that its conduct that day was palpably unreasonable.

Based on defendant's position, the motion judge asked plaintiff's counsel how a jury could "reasonably infer how long the water had been on the floor" and whether plaintiff had any evidence to show the water "was not brought there ten seconds before [plaintiff] slipped." Plaintiff's counsel argued a reasonable jury could infer water was present on the cafeteria floor for a period of time because the water "was brown[,] gray . . . and dirty." The judge responded that a person "bringing water from outside during a rainstorm" could also result in the water being "dirty and gray." Next, the judge rejected plaintiff's argument that because "someone yelled 'get maintenance'" after plaintiff's fall, this was proof defendant had notice of the dangerous condition. The judge explained that an individual "could have said, 'get maintenance' [be]cause a bulb was out on the wall."

Plaintiff's counsel also argued defendant "created the dangerous condition" by "inviting people into the building" who were dripping water and that defendant's actions were palpably unreasonable because it directed people into "a condition that may be dangerous." He further contended the condition was "simple to . . . remedy," because defendant could have "put up a sign, which [it] had on hand," mop up the water, and "have something in place to prevent people from falling."

In his oral decision, the judge stated:

> I'm going to grant . . . defendant's motion and I'm going to explain why. We all agree that the first three prongs of the dangerous condition analysis do not apply. We deal with constructive notice. We deal with palpable unreasonableness, and we deal with the side question of whether . . . defendant . . . created [the dangerous condition].

Finding no rational jury could conclude defendant had notice of the dangerous condition, the judge stated:

> I do not think that a rational objective jury can reasonably infer from some unidentified parent yelling out after the slip and fall, that we needed maintenance . . . how long the water, which defendant admits was there at the time of the fall, had been there before the fall.
> I don't think any rational objective jury . . . could draw a reasonable inference that because the water was a little . . . muddy . . . would mean that [it] was there for any significant period of time before the fall.

> By . . . plaintiff's own arguments and testimony, it had been raining. People were going into the cafeteria with shoes. I'm sure the shoes weren't clean. I'm sure the rain when it hits the ground outside the school is not clear, . . . and therefore, . . . in all probability, . . . if you walked . . . in, after a rainstorm outside, on the ground, sidewalks, dirt, streets, into the cafeteria, and your shoes are wet, and they were used shoes, the water will not be clear even if it's there for two seconds. So there's no way that that would create a genuine issue of material fact as to how long the water might have been there. . . . [Be]cause that's what . . . plaintiff would have to prove, that the water had been there for a[] significant period of time.
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> So [as to] the constructive notice argument, I find . . . the facts do not support any rational jury possibly concluding . . . the water had been there for any period of time. . . .
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> You know, it's just as equally possible . . . plaintiff herself . . . tracked that water in[,] causing her to slip and fall, based upon the motion record that I have in front of me.

Next, although the judge recognized he did not have to address whether defendant's actions on the day of the accident were palpably unreasonable, given his findings on the issue of notice, the judge concluded plaintiff failed to demonstrate there was a genuine issue of material fact regarding whether defendant's acts or omissions were palpably unreasonable. Moreover, he found "the best . . . plaintiff c[ould] prove . . . is simple negligence," which was

insufficient for her to defeat summary judgment, considering the more stringent standard for proving liability under the TCA. Further, he found "[i]nviting people in from the rain to a cafeteria . . . [is] by definition not negligent."

Additionally, the judge noted, "just for the record," that had he permitted plaintiff's case to proceed, "there were enormous questions of proximate cause, . . . for the jury." But he added, "I think there's genuine issues of material facts as to . . . plaintiff's injuries that would have survived the summary judgment challenge by defendant." Based on these findings, the judge stated defendant's motion was "granted in part . . . [be]cause [he] didn't give [defendant] everything [it] wanted," and plaintiff's cross-motion was denied. The judge entered two conforming orders that day: one denying plaintiff's partial summary judgment motion, and the second granting defendant summary judgment and dismissing plaintiff's complaint with prejudice.

III.

On appeal, plaintiff argues the May 28 orders were entered in error because there were genuine issues of material fact regarding whether, on March 21, 2019, defendant had notice of the dangerous condition in the school, and whether its response to the dangerous condition was palpably unreasonable. Further, she argues she was entitled to partial summary judgment as to proximate

cause and non-economic damages. Additionally, in challenging the April 30 order, plaintiff argues the judge erred in denying her motion to strike defendant's unsupported affirmative defenses. Because none of plaintiff's contentions regarding the May 28 orders are persuasive, we need not reach her argument regarding the April 30 order.

We review a trial court's grant or denial of summary judgment de novo. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). A motion for summary judgment must 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).

"To decide whether a genuine issue of material fact exists, the trial court must 'draw[] all legitimate inferences from the facts in favor of the non-moving party.'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (alterations in original) (quoting Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016)). The key inquiry is whether the evidence presented, when viewed in the light most favorable to the non-moving party, "[is] sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill,

142 N.J. at 540. "[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Id. at 529.

When reviewing an order dismissing a tort claim against a public entity, we bear in mind that public entities are liable "only . . . 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. The TCA was "designed 'to reestablish the immunity of public entities while relieving some of the harsh results' of the doctrine of sovereign immunity." Alston v. City of Camden, 168 N.J. 170, 176 (2001) (citation omitted). Consequently, "the approach of the [TCA] is to broadly limit public entity liability." Ibid. (quoting Harry A. Margolis & Robert Novack, Claims Against Public Entities, cmt. to N.J.S.A. 59:1-2 (2001)).

A public entity's liability for an injury occurring on its property is circumscribed by N.J.S.A. 59:4-2:

> 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:
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> > 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.

Stated more plainly, a plaintiff bringing an action under the TCA must prove: "(1) the [property] was in dangerous condition; (2) the dangerous condition created a foreseeable risk of, and actually caused, injury to plaintiff; (3) [the public entity] knew of the dangerous condition; and (4) the action taken by [the public entity] to protect against the dangerous condition was palpably unreasonable." Muhammad v. N.J. Transit, 176 N.J. 185, 194 (2003).

A plaintiff bears a "heavy burden" to prove these elements. Foster v. Newark Hous. Auth., 389 N.J. Super. 60, 65-66 (App. Div. 2006). That is because "[the]se requirements are accretive; if one or more of the elements is not satisfied, a plaintiff's claim [that] a public entity . . . is liable due to the condition of public property must fail." Polzo v. Cnty. of Essex, 196 N.J. 569, 585 (2008) (Polzo I).

The Legislature did not intend to impose liability on a public entity for a condition merely because danger may exist. See Levin v. Cnty. of Salem, 133 N.J. 35, 49 (1993). Thus, N.J.S.A. 59:4-1(a) 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." To pose a "'substantial risk of injury[,]' a condition of property cannot be minor, trivial, or insignificant." Atalese v. Long Beach Twp., 365 N.J. Super. 1, 5 (App. Div. 2003).

Also, as noted, a plaintiff cannot prevail under the TCA absent proof the entity had actual or constructive notice of the dangerous condition. In that regard, N.J.S.A. 59:4-3 provides:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 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 within the meaning of subsection b. of section 59:4-2 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.

"[T]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Polzo I, 196 N.J. at 581 (citation omitted). Therefore, 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).

Palpably unreasonable behavior is behavior "patently unacceptable under any given circumstance." Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 459 (2009) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)). For behavior to be "palpably unreasonable, it must be manifest and obvious that no prudent person would approve of [the] course of action or inaction." Ibid. (citation omitted). As we have explained:

> the legislative intention was to allow sufficient latitude for resourceful and imaginative management of public resources while affording relief to those injured because of capricious, arbitrary, whimsical or outrageous decisions of public servants. We have no doubt that the duty of ordinary care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff.
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> [Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979) (emphasis added).]

Although the issue of whether a public entity's conduct was palpably unreasonable usually presents a fact question for a jury, Vincitore v. N.J. Sports & Exposition Auth., 169 N.J. 119, 130 (2001), the issue may be ripe for disposition on a summary judgment motion. Polzo v. Cnty. of Essex, 209 N.J. 51, 75 n.12 (2012) (Polzo II); see also Muhammad, 176 N.J. at 199-200.

Governed by these standards, we are satisfied this case was ripe for disposition on summary judgment. Further, we agree with the judge that plaintiff's reliance on the fact she saw discolored water on the floor when she fell, and that someone yelled, "get maintenance" after her fall, failed to create a genuine material dispute over whether defendant knew or should have known of the dangerous condition. As the judge correctly observed, it was "just as equally possible that plaintiff herself" tracked the discolored water in from the outdoors. Additionally, the equivocal remark from a bystander to "get maintenance," did not demonstrate defendant knew of the dangerous condition or that it "had existed for such a period of time and was of such an obvious nature that [defendant], in the exercise of due care, should have discovered the condition and its dangerous character." N.J.S.A. 59:4-3(b).

Our conclusion that there were no genuine material facts in dispute regarding notice is further bolstered by the lack of evidence in the record

showing defendant's employees created or contributed to water being on the floor. Moreover, it is uncontroverted there were no falls reported to school officials before or after plaintiff's accident, and plaintiff did not notice there was water on the floor until after she fell.

Next, we concur with the judge's finding that plaintiff failed to establish defendant's acts or omissions on the day of the accident were palpably unreasonably, and "the best . . . plaintiff [could] prove . . . [was] simple negligence." As we have mentioned, absent actual or constructive notice, a public entity cannot be found to have acted in a palpably unreasonable manner. Maslo, 346 N.J. Super. at 350-51.

Also, to the extent plaintiff argues defendant should have checked and mopped the area around the cafeteria, or placed warning signs in the vicinity, such contentions presume, without proof, defendant created or had actual or constructive notice of the dangerous condition. Thus, her arguments amount to nothing more than speculation. Further, her arguments ignore the undisputed facts that the school kept large mats at the school's entrances to absorb moisture and, as the principal testified, the school ensured custodians were prepared to clean up spills if they became aware of an incident.

To the extent we have not addressed plaintiff's remaining arguments regarding the May 28 orders, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). In light of our decision, we dismiss as moot defendant's protective cross-appeal from the May 28 order.

Affirmed in part and dismissed in part.