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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0083-22

DAVID ENGLANDER,

Plaintiff-Appellant/
Cross-Respondent,

v.

ACADEMY BUS, NEW
JERSEY TRANSIT and
STATE OF NEW JERSEY,

Defendants,

and

NEW JERSEY TURNPIKE
AUTHORITY,

Defendant-Respondent/
Cross-Appellant.

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Submitted March 13, 2024 – Decided June 28, 2024

Before Judges Accurso and Vernoia.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket No. L-3147-19.

Levinson Axelrod, PA, attorneys for appellant/cross-respondent (Christopher A. DeAngelo, on the briefs).

Chiesa Shahinian & Giantomasi PC, attorneys for respondent/cross-appellant (Christopher R. Paldino, on the briefs).

PER CURIAM

In this Title 59 action, plaintiff David Englander appeals from a jury verdict in favor of the New Jersey Turnpike Authority finding he failed to establish the concrete bus shelter pad from which he fell and injured his wrist was in a dangerous condition. The Turnpike Authority cross-appeals from the denial of its summary judgment motion, asserting it should have prevailed on the issue of palpable unreasonableness. We agree with the Authority it was entitled to summary judgment. We thus reverse the decision on the cross-appeal and remand for the entry of summary judgment in favor of the Turnpike Authority and dismiss plaintiff's appeal from the jury verdict as moot.

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). The accident happened at the Park and Ride off exit 109 on the Garden State Parkway in Lincroft. Plaintiff had been commuting on the bus from Lincroft to New York City five days a week for over six months at the time of his fall in February 2019. There are two outdoor bus shelters in the parking lot. Plaintiff claimed

he was not often dropped off at the one where he fell; he usually departed from that one in the morning and was returned to the other one in the evening.

Nevertheless, plaintiff did not dispute that his regular commute had made him familiar with the bus shelter where he was let out the night of the accident. The shelter, which plaintiff's expert measured to be a little over fourteen feet wide, is a metal and plexiglass structure with a bench inside affixed to a twenty-foot-wide concrete pad. The pad is ten feet deep and situated between the sidewalk and curb abutting the street where the bus pulled up, and the commuter parking lot. Photographs included in the summary judgment record depict a worn path from the sidewalk to the parking lot, running alongside the concrete pad where plaintiff fell. Plaintiff's expert described the surface of the ground alongside the pad as "uneven and consist[ing] of dirt, gravel, and weeds" not suitable for pedestrians.

On the night plaintiff fell, the bus had pulled into the Park and Ride around 7:00 p.m. Although it was dark out, plaintiff admitted there was enough light from light poles in the parking lot to allow him to see where he was going. Several passengers got off the bus ahead of him and successfully made their way to their cars. Plaintiff stepped from the bus onto the concrete pad and walked "straight forward" towards the parking lot where his father was

waiting to pick him up. As he stepped off the back of the pad into the parking lot, he fell and fractured his wrist.

Plaintiff knew he was walking on a raised concrete pad that was higher than the asphalt parking lot, and admitted it was "possible" he'd previously stepped off the pad before. He acknowledged nothing about the shelter or the pad had changed in the time he'd been commuting to New York. He also admitted he'd never seen anyone else falling or tripping in the area he fell and didn't have any knowledge of anyone doing so.

The crew manager responsible for maintenance operations on that part of the Parkway, who'd inspected the pad himself after receipt of the notice of claim, testified at his deposition that plaintiff's was the first complaint the Authority had received about a potential trip hazard at that location. He confirmed he'd never heard of anyone ever falling off either platform, and there had been no change in the condition of the pad from which plaintiff fell for at least two years prior to the accident. He also testified at deposition that although nothing prevented bus passengers from stepping off the back of the pad into the parking lot, passengers "normally walk alongside of the bus shelter to get back to their vehicles."

Following the crew manager's inspection of the site after plaintiff's accident, he concluded no alterations or repairs were necessary. According to the crew manager, there were no regular safety inspections of the commuter lot or bus shelters at the Lincroft exit, but he had a crew out there every day doing litter patrol that would pick up any lose debris and report "something that needs to be addressed."

Plaintiff's expert, an architect and professional engineer, issued a report concluding that although the concrete pad was only six inches high, an inch lower than the State's Uniform Construction Code allowed, "[t]here was a large drop-off" from where the pad "met the parking lot." According to the expert, "the ground dropped off sharply for at least another four inches at a rate far in excess of any standard for maximum allowable walkway slope," resulting in a ten-inch change of grade from the pad "to the point where one's lead foot would plant." He also claimed the parking lot at that point was "an irregular surface of dirt and gravel, which would provide little slip resistance when stepped on." The expert noted that in addition to the inherently dangerous condition of the pad and surrounding ground, there was a "publications rack," a plastic newspaper honor box, on the pad outside the shelter, between the

metal supports and the edge of the concrete, which he described "as an encroachment that obstructed [plaintiff's] route" to the parking lot.

On summary judgment, the Authority argued plaintiff had failed to establish the concrete pad was in a dangerous condition. Specifically, the Authority argued that plaintiff's expert conceded the pad was only six inches high and not in violation of any code. The Authority argued the expert could only say the step was too high at ten inches by "tack[ing] on his slope measurement to the actual height of the pad." The Authority contended, however, that the expert didn't describe "any standards for slope measuring," explain "how he actually measured the slope," or "identify any standard that allows slope of an adjoining roadway to be tacked onto the measurement of a curb or a pad for purposes of determining how high that pad is."

The Authority also complained the expert's conclusions as to the alleged slip resistance of the asphalt parking lot surface, the inadequate lighting and lack of warning were simply net opinions with no factual support in the record. Finally, in addition to arguing plaintiff had failed to establish causation or notice, the Authority maintained there was nothing in the record to support a finding that the Authority's actions or failures to act were palpably unreasonable. Plaintiff opposed the motion, contending there was evidence in

the record to support his expert's opinions and the Authority's failure to discover the problem through "routine inspections" and either correct or warn against it made the issue of palpable unreasonableness a jury question.

The court denied the Authority's motion. Although concluding that some of the opinions offered by plaintiff's expert were without factual support in the record, the court found that not all of them were net opinions, and thus summary judgment was inappropriate. The court specifically found a factual dispute over whether the place where plaintiff fell was a step down from the bus shelter's concrete pad to the parking lot, as the photos in the record suggested, or whether it was a "walkway with a single step" as plaintiff's expert contended.

Although the court indicated the expert's opinions as to the slip potential of the surface of the parking lot where plaintiff stepped down, the appropriate slope ratio, that is how much vertical drop is permitted over a specific distance over the ground, whether the lighting was sufficient, the lack of maintenance as having created the condition, and the need for a warning were likely net opinions inadmissible at trial, it found it could not conclude that the route traveled by plaintiff "was not a 'walkway' and the height standards for a 'step'" on which plaintiff's expert relied do not apply.

The court, however, did not address the Authority's argument that plaintiff had failed to establish the required element of palpable unreasonableness. On the Authority's motion for reconsideration on that basis, the court expressed the opinion that the case was a difficult one for plaintiff but fell back on plaintiff's expert's testimony that there was an excessive ten-inch drop from the top of the pad to where plaintiff's foot struck the ground.

In the court's view, the issue came down to a factual dispute over whether plaintiff was on a "walkway," for which plaintiff's expert opined that single steps are difficult for a pedestrian to perceive and negotiate and thus should be eliminated or made obvious with, for example, the addition of a handrail. The court reasoned if the only way to get to the parking lot was to step off the back of the pad — there was "a chain link fence on either side," for example — and the drop was ten inches, then the concrete on either side of the shelter might constitute a "walkway," and the platform may have been in a dangerous condition, and the Authority's failure to discover it could have been palpably unreasonable. Because the court found the information it would need to resolve whether the Authority's action or inaction was palpably unreasonable was not in the summary judgment record, the court denied the Authority's motion.

We review the grant or denial of summary judgment de novo, applying 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, 142 N.J. at 536). Although "all legitimate inferences from the facts" are drawn in favor of the non-moving party, R. 4:46-2(c); Globe Motor Co. v. Igdalev, 225 N.J. 469, 480 (2016), "[s]ummary judgment should be granted, in particular, 'after adequate time for discovery . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial,'" Friedman v. Martinez, 242 N.J. 449, 472 (2020) (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986)).

To impose liability on a public entity for a dangerous condition of its property pursuant to N.J.S.A. 59:4-2,

> 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)).

In our view, the error on the motion was the court having held the lack of information in the summary judgment record on the issue of palpable unreasonableness against the Authority rather than against plaintiff. See Vincitore, 169 N.J. at 125 (explaining that in order to impose liability on a public entity under N.J.S.A. 59:4-2, a plaintiff must establish "the entity's

conduct was 'palpably unreasonable'"). "Proof that the entity was unreasonable is part of plaintiff's prima facie cause of action." Margolis and Novack, Claims Against Public Entities, cmt. to N.J.S.A. 59:4-2, at 156 (2024).

Thus, in order to stave off summary judgment, a plaintiff must be able to establish that the public entity's behavior was "patently unacceptable," under the circumstances, 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)). If a Title 59 plaintiff fails to make a showing on the motion sufficient to establish the public entity's acts or failure to act were palpably unreasonable, summary judgment must go against him. See Friedman, 242 N.J. at 472; Coyne v. DOT, 182 N.J. 481, 493 (2005) ("'Palpably unreasonable' means more than ordinary negligence, and imposes a steep burden on a plaintiff.").

Plaintiff conceded on the motion that the Authority was without actual knowledge of the allegedly dangerous drop off, acknowledging that the Turnpike had never received a complaint about a trip hazard at the bus shelter,

notwithstanding the hundreds of passengers that got on and off busses there daily. To establish the Authority's constructive notice and palpably unreasonable inaction, plaintiff relied, as he does on the Authority's cross-appeal, on the testimony of the crew manager that there were no regular inspections conducted of the commuter lot or the bus shelters and the opinion of his expert that "[t]hose responsible for safety and maintenance at the Exit 109/Lincroft Park & Ride facility should have noticed the hazardous conditions long before the date of the accident and would have under normal, routine inspection and maintenance procedures."

Plaintiff's expert opined that "[s]tandard accepted facility management practice would call for regularly scheduled safety checks of the property as part of both routine and preventative maintenance programs including periodic inspection of important components such as the bus stops and associated walkways." Based on the testimony of the crew manager, the expert concluded the Authority's "inspections were sporadic, poorly documented, and lacking in any coherent plan for taking corrective action when needed," and there was "no evidence that the personnel who performed these inspections, on the random occasions they did occur, had sufficient expertise to recognize fall hazards."

Giving plaintiff the benefit of all favorable inferences that can be drawn from the facts in the summary judgment record, we agree with the trial court that, for purposes of the motion, plaintiff presented evidence that the concrete pad and surrounding area was in a dangerous condition at the time of his fall owing to the ten inch drop his expert measured from the top of the pad to where plaintiff would plant his lead foot, 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 facts in the record, however, are plainly insufficient to establish either constructive notice of that drop on the part of the Authority or that the failure to take action to correct it was palpably unreasonable.

In addition to the Authority having never been presented with a complaint about the step off from the back of the pad, although the condition has persisted for years and a maintenance crew visited the lot daily, plaintiff himself had never noticed any problem with the pad or the surrounding area before he fell, notwithstanding he boarded the bus from that shelter five days a week for over six months and even conceded it was possible he'd stepped off the back of the pad before. He'd also never seen anyone else fall there, and the

several people who got off the bus ahead of him on the night he fell got safely to their cars.

Most significant perhaps is the expert's opinion that Authority personnel who inspected the area needed "sufficient expertise to recognize fall hazards." Leaving aside our Supreme Court's strong admonition that our courts do "not have the authority or expertise to dictate to public entities the ideal form" of an inspection program for their often vast properties, "particularly given the limited resources available to them," Polzo v. County of Essex, 209 N.J. 51, 69 (2012), it's hard to imagine a dangerous condition being sufficiently obvious so as to provide the Authority constructive notice of its existence, and palpably unreasonable for having failed to correct it, if only an expert in fall hazards would have recognized it, see N.J.S.A. 59:1-2 (declaring that government's "power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done").

Even were we to find the Authority had constructive notice that the ground dropped off sharply from where it met the pad to the parking lot, amounting to a ten-inch change in grade to the place plaintiff would have planted his lead foot, plaintiff simply failed to carry his burden to adduce facts to establish the Authority's failure to take action to "protect against" the

condition was "palpably unreasonable," N.J.S.A. 59:4-2 — especially as there had never been any complaints or reports of injuries about the stepdown and there was a path without any stepdown adjacent to the concrete pad that the Authority's crew manager asserted, without contradiction, that most riders took to their cars. See Polzo, 209 N.J. at 75-77 (explaining how in the absence of prior complaints or injuries, an alleged dangerous condition might reasonably "be viewed as a maintenance item of low priority") (citing Garrison v. Twp. of Middletown, 154 N.J. 282, 311 (1998) (Stein, J. concurring)).

Because we conclude plaintiff failed to establish an element essential to his case on which he would bear the burden of proof at trial, we conclude summary judgment should have been entered in favor of the Authority, see Friedman, 242 N.J. at 472, and reverse the denial of its motion on its cross-appeal. Although our disposition of the cross-appeal renders plaintiff's appeal from the entry of the no cause verdict in favor of the Authority moot, we add the following for completeness.

We find no merit in plaintiff's arguments that the trial court abused its discretion in allowing defendant to introduce evidence of the absence of prior complaints at trial. Whether the Authority had received prior complaints or reports of injuries goes to the "obvious nature" of the dangerous condition,

essential to establishing constructive notice, as well as to whether the failure to correct the problem was palpably unreasonable. See Polzo, 209 N.J. at 65, 75-77. The court delivered a clear limiting instruction explaining the jury's use of the evidence was confined to those two issues and could not be used in considering whether the pad was in a dangerous condition.

We likewise find no error in the court barring evidence of the subsequent repaving of the commuter lot, including the area around the bus shelter under N.J.R.E. 407, the purpose of which is "to encourage, rather than discourage the taking of immediate steps after an unfortunate event for the purpose of preventing future harm." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, cmt. on N.J.R.E. 407 at 358 (2024).

We also do not find the court erred in barring plaintiff from offering evidence that the Authority should have had a more proactive inspection program that would have allowed it to discover the alleged dangerous condition. We reject plaintiff's argument that Polzo should be limited to its facts. Polzo is not a case about potholes; it's a case instructing the trial court and this court in how to apply the Tort Claims Act. The Court has been unequivocal in stating that "[w]hether a public entity is on actual or constructive notice of a dangerous condition is measured by the standards set

forth in N.J.S.A. 59:4-3(a) and (b), not by whether 'a routine inspection program' by the [public entity] . . . would have discovered the condition," Polzo, 209 N.J. at 68, a point already long established in the case law interpreting the statute, see Sims v. City of Newark, 244 N.J. Super. 32, 43 (1990) (noting that "[e]xistence of an alleged dangerous condition is not constructive notice of it," and rejecting claim that the City should have had a program for inspecting "all trees bordering its streets").

The trial court's rulings barring the expert from testifying about the lack of maintenance and warnings are closer questions. The law is clear, however, that "[a]n expert may not provide an opinion at trial that constitutes 'mere net opinion,'" and "a trial court may not rely on expert testimony that lacks an appropriate factual foundation and fails to establish the existence of any standard about which the expert testified." Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 410 (2014) (quoting Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 373 (2011)). And, of course, "[t]he admission or exclusion of expert testimony is committed to the sound discretion of the trial court," which we review only for an abuse of discretion. Townsend v. Pierre, 221 N.J. 36, 52-53 (2015).

Having reviewed the trial transcripts, we are confident there was no error here that may have affected the jury's verdict. Willner v. Vertical Reality, Inc., 235 N.J. 65, 79 (2018). At trial, plaintiff's expert could not reference any authority for what he referred to as the ten-inch "true height" of the six-inch concrete pad, measured "from the surface of the platform down to the ground where a person stepping off, their foot would land." And in addition to failing to justify "true height" as a viable measurement, the expert failed to document the spot from which he took the measurement, at one point stating it was "three or four inches out from the face" of the pad and at another that it was "twelve inches out, where you can step."

Undisputed testimony also established that, in addition to the worn path alongside the concrete pad where plaintiff fell, which plaintiff's expert opined was "not safe" owing to "the broken-up asphalt, the gravel, and the tree roots," there was an asphalt ramp to the parking lot on the other side of the bus shelter and the entrance to the parking lot was located only twenty yards away providing plaintiff multiple routes from the bus to the parking lot that did not involve squeezing past the newspaper box and walking off the back of the platform. When the Authority's counsel asked plaintiff on cross-examination why he walked off the back of the concrete pad instead of taking the path

alongside it, he answered "Because that's the way humans should walk as opposed to walking through the dirt." Evidentiary error, which we do not find in any event, would not appear to be the reason the jury concluded plaintiff failed to prove by a preponderance of the evidence that the bus shelter platform was in a dangerous condition at the time of his accident. Defendant's remaining arguments, to the extent we have not addressed them, lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

We reverse the denial of defendant's summary judgment motion on its cross-appeal and remand for entry of summary judgment dismissing plaintiff's complaint. We dismiss plaintiff's appeal from the jury's verdict in favor of defendant as moot. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION