NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4255-11T1

CONSTANCE CHILDS-ABDULLAH
and MIKAL ABDULLAH,

Plaintiffs-Appellants,

v.

CITY OF SOMERS POINT,

Defendant-Respondent.

Submitted February 26, 2013 - Decided July 16, 2013

Before Judges Messano and Ostrer.

On appeal from the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-4872-09.

Goldenberg, Mackler, Sayegh, Mintz, Pfeffer, Bonchi & Gill, attorneys for appellants (Mark Pfeffer, on the brief).

Law Offices of Neil Stackhouse, attorneys for respondent (Thomas G. Smith, of counsel and on the brief).

PER CURIAM

Plaintiffs Constance Childs-Abdullah and her husband Mikal Abdullah appeal from the trial court's grant of summary judgment to defendant, the City of Somers Point, dismissing with prejudice their complaint seeking damages arising out of physical injuries Childs-Abdullah suffered when she stepped into

a sinkhole in the parking lot of the municipal complex. Plaintiffs argue they presented sufficient evidence for a jury to determine that the City was on notice of the sinkhole and its actions in response were palpably unreasonable. Having considered plaintiffs' arguments in light of the facts and applicable law, we reverse.

I.

We discern the following facts from the record, viewed in a light most favorable to plaintiffs as the non-moving parties. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Plaintiffs arrived at the municipal complex at around 9:00 p.m. on New Year's Day, 2008. They were there to post bail for their grandson. Abdullah was driving their Toyota Highlander, an SUV-type vehicle. Childs-Abdullah sat in the front passenger seat. Abdullah pulled, front end first, into a stall in the parking lot.

Childs-Abdullah's exit from the vehicle was uneventful. She stepped out, walked toward the front of the vehicle, and to her left, accompanying her husband into the building.

When plaintiffs returned, they walked around the rear of the vehicle, from the driver's side to the passenger's side. Abdullah walked ahead and opened the door for his wife. As she attempted to enter the vehicle, she stepped into a depression in

the pavement. She did not fall because she "grabbed hold of the top of the car and [Abdullah] grabbed hold of me." Childs-Abdullah suffered a fractured left foot and a spinal injury.

Photographs that Abdullah took the next day reflect that the pavement depression was equal in diameter to the length of a passenger car door. Abdullah testified the indentation was "maybe four inches or more" deep. It was the same color asphalt as the surrounding pavement.

A supervisor of the City's public works department, Guy Martin, described the indentation as a "sinkhole." He testified that the sinkhole Childs-Abdullah stepped into had been repaired at least once previously by public works employees. He testified that sometime before January 1, 2008, the deputy city clerk had informed him there was a sinkhole in the municipal complex parking lot. In response, "A couple of our guys went down there, saw it was a sinkhole, cut the sinkhole out, filled it in with some dirt and then with some crushed concrete and tamped it down and then put asphalt on top of it again and repaired it."

Martin testified that the sinkhole re-emerged, requiring repairs at least two more times, but he was unsure if it was repaired more than five times. Martin testified the deputy clerk reported the re-emergent sinkhole when she walked past it,

as she parked in that lot. Martin agreed the sinkhole that Childs-Abdullah stepped in was a dangerous condition that required prompt repair. He said that public works employees repaired the sinkhole within twenty-four hours after being informed it had reappeared, although the clerk stated in a certification that the repairs occurred "most times within twenty four hours" of her reporting it. (Emphasis added). However, no warning signs or cones were placed on or near the sinkhole between the time the clerk reported the condition, and public works staff arrived to address it. Martin said the public works staff also inspected each of the City's five municipal lots on a rotating, monthly basis; so, the parking lot would have been inspected at most three times a year.

Each time public works staff repaired the sinkhole, the same repair method was utilized. When asked why he continued to use the same method, Martin explained that in the past, he succeeded in remedying a sinkhole after resorting to only a second repair.

> Q. Is there any reason why when you repaired it the second time you didn't at least try to think of something different so that it wouldn't happen again?
>
> A. Well, a sinkhole you would not know what you would come across or how it formed. It's an act of Mother Nature for one thing. I mean it could have stopped a second time

and it could be done. That's been in the past.

Q. So based on past experience you were hoping that even though the problem had recurred, that you were hopeful that a second time it wouldn't happen again, right?

A. Correct.

[(Emphasis added).]

Martin was unable to say how long it took before a sinkhole, like the one Childs-Abdullah stepped into, emerged after a fresh repair. He said, "Sometimes it was days when it sunk again and sometimes it was weeks." He suggested that the longevity of the repair depended on the weather and "how many tires hit it." He said, "I mean because it would happen once in a while and once in a while it didn't . . . we would go by and check on it periodically."

Plaintiffs filed suit claiming that Childs-Abdullah's personal injury and their resulting damages were caused by the City's negligence. After a period of discovery, the City moved for summary judgment, which the court granted by order entered March 20, 2012, having found there was insufficient evidence upon which a jury could reasonably conclude (1) that the City had actual or constructive notice of the sinkhole that Childs-Abdullah stepped into; and (2) the City acted in a palpably unreasonable manner.

On appeal, plaintiffs raise the following point for our consideration:

> POINT I
>
> The Plaintiff Adduced Sufficient Proofs On The Summary Judgment Record Below to Present A Jury Question As To Whether The Failure To Repair Or Warn Of The Pothole Was Palpably Unreasonable.

II.

We review the trial court's grant of summary judgment de novo, Lapidoth v. Telcordia Tech., Inc., 420 N.J. Super. 411, 417 (App. Div.), certif. denied, 208 N.J. 600 (2011), and apply the same standard as the trial court. Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Pursuant to Rule 4:46, we "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, supra, 142 N.J. at 540.

The issue before us is whether plaintiffs presented sufficient evidence to enable a rational jury to find the City liable for Childs-Abdullah's accidental injury. Consequently, we review the predicates for dangerous-condition liability of a

public entity under the Tort Claims Act, N.J.S.A. 59:1-1 to 12-3.

N.J.S.A. 59:4-2 prescribes when a public entity may be liable for a dangerous condition on public property:

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

The Act also defines actual and constructive notice:

> 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.
>
> [N.J.S.A. 59:4-3.]

Defendant does not challenge the sufficiency of evidence pertaining to the elements of dangerous condition, proximate cause, and reasonably foreseeable risk. Defendant argues that plaintiffs presented insufficient evidence for a jury to determine that the City had "actual or constructive notice" of the dangerous condition, and acted in a "palpably unreasonable manner." We disagree.

We first address the issue of notice. We recognize there is no evidence to establish how long the re-emerged sinkhole existed before Childs-Abdullah stumbled. Plaintiff presented no expert testimony, for example, that it would have taken more than a day or two for the sinkhole to re-emerge, within which time a municipal employee would, or should, have noticed it.[1] We

[1] Martin testified sometimes it would be days, in other cases weeks, before the sinkhole re-emerged. But, the record does not (continued)

also recognize that Childs-Abdullah's accident occurred at 9:00 p.m. on a public holiday, when most public employees presumably were not present in the municipal complex to see the sinkhole.

However, in defining the dangerous condition, the City focuses too narrowly on the actual re-emergence of the pavement depression. Fairly understood, the dangerous condition was the instability of the ground beneath the parking lot pavement. Of that, the City indisputedly had actual notice. Giving plaintiffs all favorable inferences, the City also had constructive notice that, even after the City repaired the pavement depression in the parking lot, it remained a dangerous condition because it was susceptible to subsidence again at any time.

Martin testified that in one prior instance, a sinkhole required two repairs before the remedy lasted. As it turned out, the parking lot sinkhole required not two repairs — as in Martin's past experience — but at least three, perhaps more. Consequently, a jury could reasonably conclude that Martin knew or should have known that it was fairly likely the initial repair of the parking lot sinkhole would not work, and that a dangerous depression might re-emerge. Thus, the dangerous

---

(continued)
reflect how long it took for the sinkhole to fully re-emerge once the process of re-emergence began.

condition was not the re-emerged depression, but the instability of the repair and the risk of a re-emerged depression. A jury could conclude that Martin was aware of that risk from the moment the repair was complete.

In order to demonstrate the City acted in a palpably unreasonable manner, "'it must be manifest and obvious that no prudent person would approve of its course of action or inaction.'" Holloway v. State, 125 N.J. 386, 403-04 (1991) (quoting Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985)). In other words, the term implies behavior that is "patently unacceptable under any given circumstance." Lindedahl, supra, 100 N.J. at 493.

We recognize that the determination of palpable unreasonableness "'like any other fact question before a jury, is subject to the court's assessment whether it can reasonably be made under the evidence presented.'" Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002) (quoting Black v. Borough of Atl. Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993)). However, "ordinarily the question of whether a public entity acted in a palpably unreasonable manner is a matter for the jury." Polzo v. Cty. of Essex, 209 N.J. 51, 75 n.12 (2012); see also Wooley v. Bd. of Chosen Freeholders, 218 N.J. Super. 56, 62-63 (App. Div. 1987) (reversing grant of

summary judgment, holding issue of palpable unreasonableness was for the jury); Shuttleworth v. Conti Constr. Co., 193 N.J. Super. 469, 474 (App. Div. 1984) (reversing summary judgment).

In our view, a jury could reasonably find that it was patently unacceptable for the City not to warn the public of the potential that the pavement would subside near the area the repair was performed. Martin admitted the sinkhole into which Childs-Abdullah stumbled was a dangerous condition. It was a car-door-length in diameter and four inches or more deep.

Martin's experience with another sinkhole was that the success of his repair method was not predictable. It had failed once, requiring a second repair, before the problem was solved. He said that the cause of a sinkhole was difficult to ascertain; it was a product of Mother Nature. It could re-emerge if a tire hit it the wrong way. Or, weather could cause it to return. He provided no detailed basis to conclude that the repairs, which repeatedly failed, were ultimately the reason the sinkhole stopped recurring. In any event, the repeated repairs of the sinkhole demonstrate the unreliability and unpredictability of the City's repair method.[2]

---

[2] In referring to subsequent repairs of the sinkhole in this case, we discern no conflict with N.J.R.E. 407, which bars "[e]vidence of remedial measures taken after an event . . . to prove that the event was caused by negligence or culpable (continued)

A jury could conclude the City's "action . . . to protect against the condition," N.J.S.A. 59:4-2, was to repair, wait to see if someone reported that the repair had failed, and then to repair it again the same way – without providing the public any warning of the intervening risks. Notwithstanding the promptness with which the City responded once notified the sinkhole returned, a jury could conclude that it was palpably unreasonable for the City not to place a cone or sign near the area of the repair, given the potential of a re-emergent depression in the pavement. Given our disposition, we need not reach the issue whether the City's method of repair was itself negligent and palpably unreasonable. See Daniel v. State Dept. of Transp., 239 N.J. Super. 563, 573-74 (App. Div.) (holding State liable for negligent repair of dangerous road condition), certif. denied, 122 N.J. 325 (1990).

Reversed and remanded. We do not retain jurisdiction.

(continued)
conduct." We do not refer to evidence of subsequent repairs as evidence of a "remedial measure" – that is, as a remedy for the lack of notice, or, to use the clarifying language of Fed. R. Evid. 407, a measure "that would have made an earlier injury or harm less likely to occur." Rather, we refer to the subsequent repairs as evidence that, given the nature of the repair method, it was susceptible to repetition.