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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2431-12T2

ANDREW J. BUTERBAUGH,

Plaintiff-Appellant,

v.

TOWNSHIP OF READINGTON,

Defendant-Respondent.

Submitted May 6, 2014 – Decided July 21, 2014

Before Judges Espinosa and Koblitz.

On appeal from Superior Court of New Jersey, Law Division, Hunterdon County, Docket No. L-757-10.

Martin Kane & Kuper, L.L.C., attorneys for appellant (John F. Gillick, of counsel and on the brief).

Bevan, Mosca, Giuditta & Zarillo, P.C., attorneys for respondent (Michael J. Parlavecchio, of counsel and on the brief; Gabrielle A. Figueroa, on the brief).

PER CURIAM

Plaintiff was injured in a one-car accident after the car he was driving skidded on a patch of ice and collided with trees on the opposite side of the road. He appeals from an order that granted summary judgment to defendant Township of Readington

(the Township), dismissing his complaint as barred by the immunity provisions of the New Jersey Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. We affirm.

On January 6, 2009, at approximately 9 p.m., plaintiff was traveling southbound on Rockaway Road in Readington Township. The weather conditions included freezing rain, and the Township had begun treating the roads with salt or grit beginning at 8:35 p.m. As plaintiff was negotiating a right curve in the road two-tenths of a mile north of Taylors Mill Road, the car he was driving slid on a patch of ice and collided with trees on the shoulder of the northbound side of the road. Plaintiff suffered a significant fracture and some permanent injury to his left arm.

Plaintiff filed this complaint against the Township,[1] alleging that it was liable for his injuries due to a dangerous condition that existed on the roadway.

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[1] The complaint also named the Township of Tewksbury and Hunterdon County as defendants. The complaint against the County was dismissed with prejudice by order dated April 20, 2011, and the complaint against the Township of Tewksbury was dismissed without prejudice by plaintiff's stipulation on March 23, 2012. An amended complaint was filed, adding Trap Rock Industries Inc. and Asphalt Industries Inc. as defendants. The complaint was dismissed as to those two defendants on August 8, 2012. Plaintiff has not appealed from the orders that dismissed his claims against these defendants.

Plaintiff submitted an expert report by Alexander J. Litwornia, P.E., P.P., that identified the "causative factors" for the accident. Litwornia described the icy conditions on the roadway as "the primary cause of" the accident and contributed to its severity. He stated that, "[t]o encounter ice on a curve is not reasonably foreseeable, and not apparent on a winding road." Litwornia opined that the accumulation of ice at the accident site was caused in part by a "low spot in the southeastern travel lane" and the lack of a "crown" in the road, which caused water to drain "down the roadway as opposed to flowing from the center -- normally crowned area -- to the edges of the road." The other causative factors identified by Litwornia were the Township's failures to: spread salt or cinders; provide proper signage regarding the curve and proper speed; and warn regarding icy conditions. Litwornia stated further that the Township had adequate resources to address these factors.

Litwornia added that the Township had notice of a potential icing problem where the accident occurred, based on the fact that ice on the road had contributed to a January 19, 2007 accident "in the same approximate location." That 2007 accident, according to the police report, occurred on Rockaway

Road, 150 feet west of Taylors Mill Road -- approximately 1000 feet from the site of plaintiff's accident.

The Township's expert, William J. Meyer, P.E., found "no 'low area' on the roadway where water would be expected to collect" and "that the road surface was crowned and provided with drainage in a manner that was reasonable and appropriate and consistent with expectations." According to Meyer's report, the roadway was reasonably maintained but that in the weather conditions at the time of the accident, ice would have formed in spite of proper drainage and reasonable maintenance. Meyer also concluded that "lack of roadway signage was not a contributing factor of the subject accident."

The motion judge granted the Township's summary judgment motion and set forth his reasons in a written decision. The judge found the competing expert reports presented a fact question as to whether a dangerous condition existed but that, even if the factual question was resolved in plaintiff's favor, plaintiff failed to show that defendant had actual or constructive notice of the dangerous condition or that the Township's failure to adequately protect against the alleged dangerous condition was "palpably unreasonable" as required by N.J.S.A. 59:4-2. The court also further concluded that there was no genuine issue of fact as to whether the Township was

immune from liability under N.J.S.A. 59:4-7, which immunizes a public entity where the plaintiff's injury is "caused solely by the effect on the use of streets and highways of weather conditions." Although a factual issue had been raised as to a dangerous condition that caused the injury here, the motion judge also considered the application of the weather immunity provision of the TCA, N.J.S.A. 59:4-7, and concluded, "The record before this Court does not indicate that this particular accident would have occurred in the manner that it did had there been no inclement weather."

In this appeal, plaintiff argues that the trial court erred in concluding he had failed to establish the Township had notice of the dangerous condition at issue; in finding that the Township's actions were not palpably unreasonable; in failing to address plaintiff's "failure to warn" claims; in finding the weather immunity applied; and in failing to allow additional discovery.

In reviewing a summary judgment decision, we apply the same standard as the trial court. Murray v. Plainfield Rescue Squad, 210 N.J. 581, 584 (2012). Viewing the evidence "in a light most favorable to the non-moving party," we determine "if there is a genuine issue as to any material fact or whether the moving party is entitled to judgment as a matter of law." Rowe v.

Mazel Thirty, LLC, 209 N.J. 35, 38, 41 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)). We review questions of law de novo, State v. Gandhi, 201 N.J. 161, 176 (2010), and need not accept the trial court's conclusions of law. Davis v. Devereux Found., 209 N.J. 269, 286 (2012).

The TCA provides general immunity for all governmental bodies except in circumstances where the Legislature has specifically provided for liability. See N.J.S.A. 59:1-2 and 59:2-1; see also Bell v. Bell, 83 N.J. 417, 423 (1980). "Under the Act, immunity is the norm, unless liability is provided for by the Act." Davenport v. Borough of Closter, 294 N.J. Super. 635, 637 (App. Div. 1996).

Plaintiff seeks to impose liability upon the Township here based upon the liability provision of N.J.S.A. 59:4-2, which provides in pertinent part:

> 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
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> . . . .
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> b. a public entity had actual or constructive notice of the dangerous condition under [N.J.S.A.] 59:4-3 a sufficient time prior to the injury to have

> taken measures to protect against the dangerous condition.

N.J.S.A. 59:4-2 provides further that liability may not be imposed for a dangerous condition "if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable."

Affording plaintiff the benefit of favorable inferences, we need not consider whether a dangerous condition existed and turn to the sufficiency of his proof to establish a genuine issue of fact that the Township had adequate notice that a dangerous condition existed at the location of the accident prior to the accident.

N.J.S.A. 59:4-3 defines actual and constructive notice for TCA purposes as follows:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of [N.J.S.A.] 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
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> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of [N.J.S.A.] 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.

Plaintiff's proof of notice relies upon the assertion in his expert's report that ice on the road had contributed to a January 19, 2007 accident "in the same approximate location." That accident, however, occurred about two years earlier and approximately one thousand feet from the site of plaintiff's accident. In addition, the record shows no evidence of complaints or other accidents related to icing caused by poor drainage in the area of plaintiff's accident either before or after the 2007 accident. Even if there were complaints regarding the site of the 2007 accident, complaints about a dangerous condition at one location "cannot serve as notice of a [dangerous condition] at a different location." Norris v. Borough of Leonia, 160 N.J. 427, 447-48 (1999).

In the absence of other supporting evidence, a single ice-related accident two years earlier in a different location is insufficient to establish that the alleged dangerous condition, poor roadway drainage, "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(b). Since the Township lacked adequate notice of a dangerous condition, it is unnecessary to assess its actions to determine whether they were "palpably unreasonable."

Plaintiff also alleges that liability should attach due to the Township's failure to adequately warn the public that a dangerous condition existed. To the extent that this argument can survive plaintiff's failure to show the Township had sufficient notice of a dangerous condition, it seeks to impose liability based upon the Township's failure to post signage as suggested in Litwornia's report. This argument must also fail in light of the immunity provided by N.J.S.A. 59:4-5, which states that a public entity is not liable "for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices."

In sum, summary judgment was proper here because plaintiff failed to show that a genuine issue of fact existed regarding notice to the Township and therefore failed to show liability could be imposed upon the Township pursuant to N.J.S.A. 59:4-2. In light of this conclusion, we need not address plaintiff's argument that the weather immunity provision of the TCA, N.J.S.A. 59:4-7, does not apply.

Plaintiff also argues the trial court should have allowed additional discovery based on plaintiff's request made at oral argument on the motion for summary judgment. This argument lacks sufficient merit to warrant discussion in a written opinion, Rule 2:11-3(e)(1)(E), beyond the following. At the

time of plaintiff's request, the discovery period had ended and an arbitration date had been set. Pursuant to Rule 4:24-1(c), "No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown." There were no exceptional circumstance here and plaintiff's request was properly denied.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION