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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0468-13T2

RAMON SOBERAL,

Plaintiff-Appellant,

v.

CITY OF MILLVILLE, DEPARTMENT
OF PARKS & PUBLIC PROPERTY,

Defendant-Respondent.

Submitted September 30, 2014 – Decided October 3, 2014

Before Judges Reisner and Haas.

On appeal from Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-378-12.

Jarve Kaplan Granato Starr, LLC, attorneys for appellant (Adam M. Starr and Katherine M. Jarve, on the briefs).

Powell, Birchmeier & Powell, attorneys for respondent (Erin R. Thompson, on the brief).

PER CURIAM

Plaintiff appeals from the September 12, 2013 order of the Law Division granting defendants' motion for summary judgment and dismissing plaintiff's personal injury negligence action against all of the named defendants. After reviewing the record before us, and in light of prevailing legal standards, we agree

with the legal conclusions reached by the motion judge and affirm.

We recite the record in the light most favorable to plaintiff, the non-moving party. Polzo v. Cnty. of Essex, 209 N.J. 51, 56 n.1 (2012) (citing Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995)). On June 1, 2011, plaintiff sustained an injury to his leg while walking through Union Lake Park, a property owned by the City of Millville. In 2007, the City closed the park to the public. The City placed a locked, yellow gate at the entrance road to the park and posted signs stating "no vehicles admitted beyond this point" and "no swimming." It also posted "no trespassing" signs in "the beach area" of the park.

On a weekly basis, the City's safety coordinator went on foot patrols through the park looking for trespassers and safety hazards. He altered the day and time of each weekly inspection. If the coordinator encountered anyone in the park, he would ask them to leave and, if they refused, he would call the police for assistance. The coordinator also checked for safety hazards, particularly along the perimeter of the lake. At his deposition, the coordinator reported that he never observed any holes in the ground during his patrols.

The coordinator testified that, several decades ago, there had been shacks around the lake that were ultimately torn down. There is no evidence in the record as to who was responsible for removing the shacks. Prior to the incident in this case, the coordinator was not aware that any of the shacks had septic tanks buried in the ground or if the tanks were still there. The City had never received any complaints concerning holes in the ground near the lake or any reports of a problem with any buried septic tanks in the area.

At his deposition, plaintiff testified he took daily walks in the park around the lake. On June 1, 2011, plaintiff went to the entrance of the park. He saw the yellow gate at the entrance, but he entered the park "through the opening around the yellow gate." Plaintiff stated he did not see the signs posted at the entrance or throughout the park and, in any event, he could not read either English or Spanish.

Plaintiff testified he walked toward the lake and, "all of a sudden," his right leg went into a hole and he fell to the ground. Plaintiff did not see the hole prior to the incident and he stated there was "grass and sand" on the ground where he was walking. In answers to interrogatories, plaintiff also stated that the hole "was concealed and/or camouflaged by brush and grass." After he fell, plaintiff saw that his leg was cut;

walked home; and told his daughter what had happened. She took plaintiff to the hospital. Plaintiff's injury subsequently became infected, resulting in "serious scarring on the leg due to the surgeries necessary to cure the infections."

Plaintiff filed a complaint against the City and its Department of Parks and Public Property, claiming that his injury was caused by defendants' negligence.[1] After the completion of discovery, defendants moved for summary judgment. In an oral opinion, the motion judge granted defendants' motion and dismissed the complaint. The judge found there was insufficient evidence upon which a jury could reasonably conclude that defendants acted in a palpably unreasonable manner. This appeal followed.

On appeal, plaintiff contends that defendants' "conduct in failing to adequately inspect the beach area of [the park] and failure to eliminate hazards that were known or should have been known to [them] was 'palpably unreasonable[.]'"

Our review of a ruling on summary judgment is de novo, applying the same legal standard as the trial court. Nicholas v. Mynster, 213 N.J. 463, 477-78 (2013). Summary judgment must be granted if "'the pleadings, depositions, answers to

[1] Plaintiff asserted that the hole in the ground was created when an underground septic tank collapsed. However, he presented no expert report supporting this claim.

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.'" Town of Kearny v. Brandt, 214 N.J. 76, 91 (2013) (quoting R. 4:46-2(c)). Thus, we consider, as the motion judge did, 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.'" Ibid. (quoting Brill, supra, 142 N.J. at 540). If there is no genuine issue of material fact, we must then "decide whether the trial court correctly interpreted the law." Massachi v. AHL Servs., Inc., 396 N.J. Super. 486, 494 (App. Div. 2007), certif. denied, 195 N.J. 419 (2008). We accord no deference to the trial judge's conclusions on issues of law and review issues of law de novo. Nicholas, supra, 213 N.J. at 478.

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 [or her] employment created the dangerous condition; or
>
> 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.
>
> 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.]

Thus, liability only attaches if the plaintiff can show

> [1] that the property was in a dangerous condition at the time of the injury; [2] that the injury was proximately caused by the dangerous condition; [3] that the dangerous condition created a reasonably foreseeable risk of the kind of injury that was incurred; and [4] that a public employee created the dangerous condition or that the public entity had notice in time to protect against the condition itself.
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> [Kolitch v. Lindedahl, 100 N.J. 485, 492 (1985).]

In addition, "there can be no recovery unless the action or inaction on the part of the public entity in protecting against the condition was 'palpably unreasonable.'" Id. at 492-93.

In this case, the motion judge found that plaintiff presented sufficient evidence concerning the first four elements of the statutory test to avoid summary judgment. However, the judge found that no reasonable jury could conclude that defendants' actions or inactions in protecting against the condition that caused plaintiff's injury were "palpably unreasonable" and, because plaintiff failed to prove that factor, no recovery was possible. We agree with the judge's analysis.

First, it should be noted that "[a]lthough ordinarily the question of whether a public entity acted in a palpably unreasonable manner is a matter for the jury, in appropriate circumstances, the issue is ripe for a court to decide on summary judgment." Polzo, supra, 209 N.J. at 75 n.12. The "palpably unreasonable" standard is beyond ordinary negligence. "[T]he term implies behavior that is patently unacceptable under any given circumstance." Kolitch, supra, 100 N.J. at 493. Indeed, "for a public entity to have acted or failed to act in a manner that is palpably unreasonable, 'it must be manifest and obvious that no prudent person would approve of its course of action or inaction.'" Ibid. (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)). We have stated that "[t]he test requires consideration of what the [public entity] did in the face of all of the attendant circumstances, including, of course, the extent of the known danger and what it considered to be the need for urgency." Schwartz v. Jordan, 337 N.J. Super. 550, 555 (App. Div.), certif. denied sub nom Schwartz v. Plainsboro Twp., 168 N.J. 293 (2001).

Our courts have frequently addressed this issue. In Polzo, supra, the Court looked at a complaint in the death of a bicyclist who had fallen on "a circular depression" on the shoulder of a county road. Polzo, supra, 209 N.J. at 56-57. Noting that the county was responsible for maintaining an extensive network of roads, including the shoulder where the accident occurred, and that there were no prior complaints about injuries at the site, as well as the fact that the shoulder was generally not intended to be used for regular travel, the Court concluded that the county's failure to locate and fix the depression could not be considered "palpably unreasonable." Id. at 77-78. See also Garrison v. Twp. of Middletown, 154 N.J. 282, 311-12 (1998) (concluding that "[i]n view of the Township's responsibilities for maintaining significant areas of public property," its failure to find and repair a defect in a parking lot was not "palpably unreasonable"); Carroll v. N.J. Transit,

366 N.J. Super. 380, 387-89 (App. Div. 2004) (finding no "palpably unreasonable" conduct when plaintiff did not present proof of inspection standards and there was no history of similar complaints that would suggest a need for more frequent inspections of the area).

Applying these standards, we conclude that plaintiff failed to raise a factual question of whether defendants' actions or inactions were "palpably unreasonable." Polzo, supra, 209 N.J. at 75 n.12. The City closed the park four years before the accident occurred. It placed a locked, yellow gate at the entrance and posted signs warning citizens not to trespass in the area. The City's safety coordinator made weekly patrols through the area looking for hazards; told anyone he found using the park to leave; and called for police assistance when it was necessary to remove individuals from the property. Nothing in the record suggests defendants should have known to check the park more frequently, as plaintiff presented no proof of similar accidents in the area.

Moreover, plaintiff admitted that he did not see the hole because it was "camouflaged by brush and grass." Although plaintiff surmised that the hole was caused by the collapse of an underground septic tank, he presented no expert report to verify this claim or to explain why defendants should have

expected holes to develop in the area. Under these circumstances, we are satisfied, as the motion judge was, that no reasonable jury could find defendants' actions to be palpably unreasonable.

Affirmed.