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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4478-12T2

MAUREEN A. PORTMANN and WILLIAM
PORTMANN, her husband,

Plaintiffs-Appellants,

v.

BOROUGH OF SPRING LAKE,[1]

Defendant-Respondent,

and

COUNTY OF MONMOUTH and STATE OF NEW
JERSEY,

Defendants.

Argued January 27, 2014 - Decided March 4, 2014

Before Judges Parrillo and Harris.

On appeal from the Superior Court of New
Jersey, Law Division, Monmouth County,
Docket No. L-1243-11.

Robert A. Morley argued the cause for
appellants (Shebell & Shebell, L.L.C.,
attorneys; Thomas F. Shebell, III, of
counsel; Mr. Morley, on the briefs).

[1] Originally improperly pled as Borough of Spring Lake Public
Works Department and Borough of Spring Lake Code Enforcement
Department.

Mark J. Semeraro argued the cause for respondent (Kaufman Semeraro & Leibman, L.L.P., attorneys; Mr. Semeraro and Clay D. Shorrock, on the brief.)

PER CURIAM

Plaintiff Maureen Portmann appeals from the summary judgment dismissal of her personal injury negligence lawsuit against defendant Borough of Spring Lake,[2] for failure to satisfy the requirements of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 14-4 (Act). We affirm.

Because this matter comes to us from the motion court's grant of summary judgment in favor of defendant (the moving party), we view the evidence in the light most favorable to plaintiff. Polzo v. Cnty. of Essex, 209 N.J. 51, 56 n.1 (2012).

On May 30, 2010, plaintiff tripped and fell on the Spring Lake Boardwalk, fracturing her hip. Immediately before the accident, plaintiff had been walking near the north end pool and public restrooms, and near a concrete walkway that extended from the public sidewalk to the boardwalk. While on the boardwalk, near a beach badge station and next to a bench, plaintiff tripped on a single board, which she claimed was raised one-half inch.

[2] Plaintiff's husband, William Portmann, also claimed loss of consortium as a result of his wife's injuries.

At the time she fell, plaintiff did not see any defect or hazard in the boardwalk and, in fact, did not even identify the particular board on which she tripped. Instead, several months later, on September 22, 2010, plaintiff returned to the boardwalk with William Poznak, a professional engineer, to examine the area where she fell. She noticed a raised board and identified it as the site of her injury.

Poznak noted that the boardwalk was constructed from six-inch wide composite decking boards and found that the "individual deck board has warped, with the surface of same being approximately one-half inch higher than the adjacent board." According to Poznak,

> [c]lose observation revealed[] that said condition has existed for quite some time. There is a great deal of scuff marks and small cuts on raised edge of this board[,] [i]n addition to raised edge of board adjacent to same. Further, on the boardwalk area near this section in question, many boards have been replaced, some single and in other areas multiple boards.

He concluded that the raised edge was located such that people walking over it "could be easily caused to stumble and fall. It thus presents a hazardous impediment . . . ."

To support his conclusion, Poznak relied on the provisions from ASTM International (formerly known as the

American Society for Testing and Materials)[3] F 1637-95, "Standard Practice for Safe Walking Surfaces," which include, in relevant part

> 4.1.1 – Walkways shall be stable, planar, flush, and even to the extent possible.
>
> 4.7.1.2 – Exterior walkway conditions that may be considered substandard and in need of repair include conditions in which the pavement is broken, depressed, raised, undermined, slippery, uneven or cracked to the extent that pieces may be readily removed.
>
> 4.7.2 – Exterior walkways shall be repaired or replaced where there is an abrupt variation in elevation between surfaces.

Poznak's conclusion was disputed by defendant's expert, Dr. Wayne F. Nolte, who noted that defendant had not adopted the ASTM standard for conditions and repairs to the Spring Lake Boardwalk. But even more fundamentally, Dr. Nolte opined that the boardwalk's composite decking material "is easily scratched and gouged and that it expands in both directions when exposed to heat. The boardwalk went through a summer that [plaintiff] described as hot with pedestrian, bicycle and stroller traffic before [Poznak] made his inspection and measurement." The expert concluded that "a condition at the fall site at the time

[3] The ASTM is an organization that sets industry standards for product quality and safety. See www.astm.org.

of the fall was never identified as the cause of the fall[,]" and so "it has not been established that an elevation differential existed on the boardwalk where [plaintiff] fell on the day of the accident."

In this regard, Frank Phillips, the Spring Lake Superintendent of Public Works, acknowledged that the surface of the boardwalk would occasionally become discontinuous due to the condition of the ground below, and so Borough employees routinely inspect the boardwalk by running their foot along the surface in order to determine whether their foot will catch on it. Upon viewing photographs of the area in question, Phillips stated "it's not something we would react to," maintaining that the condition was "acceptable." He also said that there was no set criteria in terms of how much of a differential would trigger a need to replace a board; instead the standard was "if we can trip on it, somebody else can." Phillips noted that although there is no set inspection schedule, the boardwalk is inspected at least three times per week.

As noted, plaintiff sued defendant, alleging that the raised board constituted a "substantial risk of injury," that defendant knew or should have known it was a danger to pedestrians on the boardwalk, and, thus, defendant was liable under the Act.

Following discovery, defendant filed a motion for summary judgment, which the court granted, finding that, although plaintiff's risk of injury created by the one-half inch height differential on the public walkway was "foreseeable," it was not "substantial":

> [w]hile the cases cited by [defendant] to support [its motion] are either unpublished or federal cases which are not binding on this Court to support its contention, they are persuasive. In <u>McCarthy v. Township of Verona</u>, the Appellate Division held that a one and one-half inch horizontal gap and a one and one-quarter inch vertical height difference between concrete sidewalk slabs could not rationally be found to have created a substantial risk of injury, 2001 WL 1917169 at *2. In <u>Cordy v. Sherwin Williams Co.</u>, the United States District Court for the District of New Jersey found that "no reasonable juror could conclude that the existence of the railroad track crossing the county road on an essentially level plane with [seven-eights] of an inch of the elevation of the road surface presents a dangerous condition." 975 <u>F. Supp.</u> 639, 643-44 (1997).
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> <u>Charney v. City of Wildwood</u>, 732 <u>F. Supp.</u> 2d 448, 454 (D.N.J. 2010); <u>Mendelsohn v. Ocean City</u>, 2004 WL 2314819 at *1-2 (D.N.J. 2004); and <u>Barnabei v. City of Ocean City</u>, 2006 WL 2933902 at *2 (App. Div. 2006) are all cases involving trips and falls on boardwalks wherein the courts have concluded that the plaintiff failed to prove the existence of a dangerous condition. All of these cases held that the plaintiff had failed to establish that the defect gave rise to a substantial risk of injury.

Thus, the motion court determined that no reasonable fact-finder could conclude that the elevated board constituted a "substantial risk of injury" and thus a "dangerous condition" under the Act.

Additionally, the motion court found that defendant had not engaged in "palpably unreasonable" conduct in not discovering and fixing the board before plaintiff's fall:

> [i]n order to recover under the TCA, a plaintiff must prove that the public entity's conduct or omission was palpably unreasonable. Palpable unreasonableness connotes a more obvious and manifest breach of duty than mere negligence and implies "behavior that is patently unacceptable under any given circumstance" and that "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). Here the Plaintiff failed to present any evidence suggesting that the [defendant's] failure to repair a [one-half] inch height differential and failure to monitor the Borough's boardwalk for such [one-half] inch height differentials was palpably unreasonable.

In subsequently denying plaintiff's motion for reconsideration, the court distinguished the case of Atalese v. Long Beach Twp., 365 N.J. Super. 1 (App. Div. 2003), relied on by plaintiff, noting

> However, Atalese is readily distinguishable from the within matter. First, the height differential of three-quarters of an inch occupied a substantial portion of a bike lane that spanned an entire block. Id. at

> 6. Here, the alleged differential was a mere one-half inch and comprised a single board on the boardwalk. Second, the basis of liability in that case was a negligent act of a public employee and not the existence of a dangerous condition by the municipality. Finally, and perhaps most importantly, Plaintiffs' own expert does not even opine that the condition was a dangerous condition. Therefore it is clear that the Court did not overlook persuasive authority in reaching its decision . . . .

On appeal, plaintiff argues

> I. THE COURT ERRED IN FINDING NO DANGEROUS CONDITION OF PUBLIC PROPERTY WHEN IT COMPARED CONDITIONS DESCRIBED IN OTHER CASES, WITHOUT EXAMINING THE CONDITION ITSELF.
>
> II. PLAINTIFF'S EXPERT DESCRIBES A CONDITION OF PUBLIC PROPERTY THAT PRESENTS A FACTUAL ISSUE ABOUT THE EXISTENCE OF A SUBSTANTIAL RISK OF INJURY.
>
> III. THE CONDUCT OF THE BOROUGH OF SPRING LAKE DOES NOT PRESENT SUCH A ONE SIDED ISSUE REQUIRING THE COURT TO FIND THE ABSENCE OF PALPABLY UNREASONABLE CONDUCT.

We find no merit in these arguments.

We review the "grant of summary judgment relief de novo" and are governed by the same standard governing the motion court under Rule 4:46-2(c). Khandelwal v. Zurich Ins. Co., 427 N.J. Super. 577, 585 (App. Div.), certif. denied, 212 N.J. 430 (2012). Thus, the "'trial court's interpretation of the law and the legal consequences that flow from established facts are not

entitled to any special deference . . . .'" McDade v. Siazon, 208 N.J. 463, 473 (2011) (quoting Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 382 (2010)).

We start our substantive review with N.J.S.A. 59:4-2, which establishes several elements that must coalesce before a public entity will be held liable for a dangerous condition of its 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 (emphasis added).]

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." Kolitch v. Lindedahl, 100 N.J. 485, 492 (1985). "Additionally, 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.

The Act 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." N.J.S.A. 59:4-1(a) (emphasis added). We have defined "substantial risk" as "one that is not minor, trivial or insignificant." Kolitch, supra, 100 N.J. at 493; see also, Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 458 (2009). Thus, even if the risk is foreseeable, it still may not rise to the threshold of dangerousness required to satisfy this requirement.

As a threshold matter, before we even reach the issue of "dangerousness," we note that plaintiff did not even establish that the condition existed as of the date of her injury in May 2010, but rather only demonstrated that it existed in September 2010 when the expert examined the area for the first time. The dangerous condition, however, must exist at the time of the injury for it to be actionable. N.J.S.A. 59:4-2. Here, plaintiff did not notice and could not point out a specific hazard at the time of her fall. And Poznak's statement that the defective board was scuffed and marked simply did not establish a timeline, nor did he even definitively opine that it existed at the time of the injury.

Even assuming its existence at time of injury, we nevertheless conclude, as did the motion judge, that no reasonable jury could find the one-half-inch height differential gave rise to a substantial risk of injury. We have previously examined what constitutes a "substantial risk of injury" in the context of pedestrian hazards on public sidewalks and roadways. See Atalese, supra, 365 N.J. Super. at 3-6 (finding a substantial risk of injury where "a significant rectangular portion of the pavement in the bike lane [was] depressed for a distance of approximately one block"); Wilson v. Jacobs, 334 N.J. Super. 640, 648-49 (App. Div. 2000) (upholding summary

judgment for municipality where there was a noticeable gap between sidewalk pavers but no elevation because this did not constitute a dangerous condition).

In Atalese, supra, the plaintiff tripped and fell while walking in a bike lane, where "a significant rectangular portion of the pavement in the bike lane [was] depressed for a distance of approximately one block." 365 N.J. Super. at 3. We determined that the height differential of three-quarters of an inch posed a substantial risk of injury, given the one-block distance this condition spanned as well as the intended use of the affected area by bicyclists and pedestrians. Id. at 6. Moreover, in that case, the plaintiff's expert concluded that the defect was the result of the faulty application of tar during a repaving of the road, i.e., the negligent act of a municipal employee. Id. at 4.

In contrast here, the alleged defect was a one-half-inch rise in a single board on the boardwalk. Moreover, there was no evidence that the condition was caused by any action on the part of the Borough or any of its employees. Most significantly, plaintiff's own expert did not opine that the condition created a substantial risk of injury to pedestrians such as plaintiff.

In considering whether the conditions of walkways or road surfaces are "dangerous" within the meaning of the Act, courts

typically review measurements of the gap, crack or other surface defect claimed to have caused the plaintiff's injury. However, the mere existence of a gap or an elevation is not sufficient, in itself, to find a substantial risk of injury. Under present circumstances, viewed most favorably to plaintiff, we conclude that no reasonable jury could find that such a slight change in elevation as a one-half-inch rise on a single board in a long stretch of boardwalk creates a substantial risk of injury to the public.

But even if it did, plaintiff can still only prevail under the Act if she can show that "the action or inaction on the part of the public entity in protecting against the condition was 'palpably unreasonable.'" Kolitch, supra, 100 N.J. at 492-93; N.J.S.A. 59:4-2 ("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."). If plaintiff cannot prove this factor, no recovery is possible.

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; see Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002); Black v. Bor. of Atl. Highlands, 263 N.J. Super. 445, 451-52 (App. Div. 1993); Wooley v. Bd. of Chosen Freeholders, 218 N.J. Super. 56, 62 (App. Div. 1987).

The "palpably unreasonable" standard is beyond ordinary negligence. "[T]he term implies behavior that is patently unacceptable under any given circumstance. As one trial court has suggested, 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.'" Kolitch, supra, 100 N.J. at 493 (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)); see also Muhammad v. N.J. Transit, 176 N.J. 185, 195 (2003). 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 that was two feet in diameter reaching a depth of approximately one-and-one-half inches," on the shoulder of the road. 209 _N.J._ at 56-57. Noting that Essex 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 is generally not intended to be used for regular travel, the Court concluded that fixing the depression "might not have been deemed a high priority" and that this conclusion could not be considered "palpably unreasonable." _Id._ at 77-78. _See also_ _Garrison v. Twp. of Middleton_, 154 _N.J._ 282, 311-12 (1998) (Stein, J., concurring) (concluding that "[i]n view of the Township's responsibilities for maintaining significant areas of public property, we reasonably may infer, absent other evidence in the record, that the one inch to one and one-half inches declivity must necessarily be viewed as a maintenance item of low priority," and thus failure to repave such in a parking lot could not be "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); Maslo, supra, 346 N.J. Super. at 349-51 (concluding that it was not "palpably unreasonably" for the municipality to have not repaired a one-inch rise between pavers in the sidewalk).[4]

Here, plaintiff has simply failed to raise a factual question of whether defendant's action or inaction was "palpably unreasonable." Phillips testified that defendant's public works department was "constantly" checking the boardwalk. Specifically, the maintenance employees would "take a walk and check the boardwalk." In fact, the boardwalk was inspected at least three times per week, and nothing in the record suggests defendant should have known to check the area more frequently, as plaintiff presented no proof of similar accidents in the area.

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[4] By contrast, in Posey v. Bordentown Sewerage Auth., 171 N.J. 172, 191 (2002), the Court concluded that a jury could find that it was "palpably unreasonable" for an entity not to warn the public about a "dangerously deep pond" where it had notice that children frequently played in the area and that the pond itself was a hazard. See also Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 265 (App. Div. 2011) (holding that a jury could find defendant's conduct "palpably unreasonable" when it failed to ensure a sidewalk was free of snow and ice at a time when it was highly likely to see a large volume of pedestrian traffic), certif. denied, 209 N.J. 98 (2012).

The fact that defendant did not set rules concerning the size of the gap or elevation required before a board would be replaced does not render defendant's conduct unreasonable, much less palpably so. Phillips noted that the method of inspection involved the individual worker making a determination about whether he or she could trip over a defect, because if "we can trip on it, somebody else can." Thus, even if there were a written policy, such a policy would not necessarily favor the replacement of a one-half-inch raised board. On the contrary, Phillips, an experienced municipal employee of thirty-two years, admitted that he would not consider the alleged defect at issue to be in need of replacement. Like in Polzo, supra, here defendant is responsible for prioritizing maintenance on the boardwalk and elsewhere in the Borough. A difference of one-half inch between boards on the boardwalk might not necessarily qualify as a priority for fixing. As the Court in Polzo found that this kind of prioritizing was not "palpably unreasonable," so too is the calculus here one of which a "prudent person" could approve. Thus, we conclude that defendant's de facto inspection scheme was not palpably unreasonable even if it did not require replacement of boards with only slight or minor warping.

In sum, we conclude that no reasonable jury could find that the alleged defect was "a dangerous condition" in that it posed a substantial risk of injury to the pedestrian public. And even if it did, we further find that no reasonable jury could find defendant's response or lack thereof to be palpably unreasonable.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION