31-2-6698

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-2210-99T2

MARIE MC CARTHY, and
DANIEL MC CARTHY, her husband,

Plaintiffs-Appellants,

v.

TOWNSHIP OF VERONA,

Defendant-Respondent,

and

PUBLIC SERVICE ELECTRIC AND
GAS COMPANY,

Defendant.

Argued March 28, 2001 - Decided

Before Judges Baime and Carchman.

On appeal from Superior Court of New Jersey, Law Division, Essex County, L-14102-97.

Robert M. Rich argued the cause for appellant.

Virginia E. Hughes argued the cause for respondent (Timins, Beacham & Hughes, attorneys; Ms. Hughes on the brief).

Plaintiff appeals from a summary judgment dismissing her complaint against defendant for injuries sustained when she tripped on a public sidewalk. In her affidavit in opposition to defendant's motion, plaintiff claimed that the sidewalk was

defective because there was a slight gap between the concrete slabs, and one slab was raised approximately an inch and a quarter. Although plaintiff admitted that she was not looking down when she fell, she noted that a street light cast a shadow upon the alleged defective condition of the sidewalk on the night of the incident. Based on the documentary submissions and photographs of the scene of the accident, the Law Division judge held that no reasonable trier of fact could find that the sidewalk presented a dangerous condition under N.J.S.A. 59:4-2. We affirm essentially for the reasons expressed by Judge Brown.

I.

The underlying accident occurred on a sidewalk adjacent to a municipal pool on Fairview Avenue in the Township of Verona. At approximately 11:00 p.m., plaintiff was walking with her husband and son when she tripped over a slab of concrete sidewalk that was raised approximately one and one-quarter inches. Plaintiff stated that the street light illuminates all parts of the sidewalk except for the raised area, over which a shadow is cast. Plaintiff admitted that she walked along this sidewalk two or three times previously but never noticed the pavement. Plaintiff sued the Township for her injuries, alleging that the Township had negligently allowed a dangerous condition to exist, and that the condition caused her injury. The Township moved for summary judgment. Ultimately, the Law Division judge granted defendant's motion, concluding that as a matter of law plaintiff

failed to establish that the alleged defect in the sidewalk constituted a dangerous condition of public property as defined by the Tort Claims Act, N.J.S.A. 59:4-2.

II.

The applicable principles are well-settled. Under the Tort Claims Act "immunity from tort liability is the general rule and liability is the exception." Garrison v. Township of Middletown, 154 N.J. 282, 286 (1998); Bombace v. City of Newark, 125 N.J. 361, 372 (1991). To recover under the Act, a plaintiff must prove, among other things, that at the time of the injury the public entity's property was in a dangerous condition, that the condition created a foreseeable risk of the kind of injury that occurred, and that the condition proximately caused the injury. N.J.S.A. 59:4-2. "Dangerous condition" is defined under the Act 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. 59:4-1a (emphasis added). A substantial risk is one that "is not minor, trivial or insignificant." Polyard v. Terry, 160 N.J. Super. 497, 509, aff'd o.b., 79 N.J. 547 (1978). Even where a dangerous condition is found to exist, the Act imposes no liability on a public entity if "the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable." Ibid. A public entity's action or inaction is "palpably unreasonable" where the circumstances

make it manifest and obvious that no prudent person would approve of its course of action or inaction. See Holloway v. State, 125 N.J. 386, 403-404 (1991); Furey v. County of Ocean, 273 N.J. Super. 300, 312-13 (App. Div. 1994).

In certain circumstances, the question of a "dangerous condition" must be resolved by the court as a matter of law, in order that the "legislatively-decreed restrictive approach to liability" is enforced. Cordy v. Sherwin Williams Co., 975 F. Supp. 639, 643 (D.N.J. 1997); Polyard v. Terry, 160 N.J. Super. at 508. Thus, the pertinent inquiry here is whether reasonable minds could differ as to whether the condition of the sidewalk was "dangerous" as defined in the Act.

While we have found no reported opinion directly on point, the facts of Wilson v. Jacobs, 334 N.J. Super. 640 (2000), are substantially similar to those presented in this case. In Wilson, the plaintiff sued the Township of Hazlet for injuries she sustained when she tripped on a sidewalk. The plaintiff claimed that a space between two concrete blocks "where some grass [was] growing" constituted a dangerous condition under the Act. Id. at 648. After examining color photographs of the sidewalk, the Law Division judge granted summary judgment in favor of the defendant. The judge found that there was "no obvious defect in the elevation of that particular sidewalk" and that the condition of the sidewalk was not one which any finder of fact would conclude created a dangerous condition. Ibid. We

affirmed, concluding that the plaintiff had failed to present any evidence of "potential public entity liability." Id. at 648-49.

In the present case, as in Wilson, the Law Division judge examined color photographs of the allegedly defective sidewalk. The judge noted that the photographs "clearly indicate[d] that there is a separation of approximately one to one and one-half inches and a raised sidewalk of somewhere between one-half to one and one-quarter inch." The judge concluded as a matter of law that the sidewalk did not constitute a dangerous condition that created a substantial risk of injury. He also concluded that the failure of the Township to attempt to correct the condition was not palpably unreasonable.

Plaintiff contends that the pictures did not accurately depict the condition of the sidewalk because they were taken during the day and plaintiff fell at night. Plaintiff claims that the configuration of the lamp post and the raised slab of sidewalk caused a shadow to be cast over the area where she fell. However, plaintiff stated in her deposition that she was not looking down at the sidewalk as she was walking.
Therefore, it is abundantly plain that the existence of a shadow is not material to the determination of whether the sidewalk contained a defect presenting a dangerous condition. We thus focus solely on the raised and separated portion of the sidewalk in resolving this question.

The "mere happening of an accident on public property is

insufficient to impose liability upon a public entity." Wilson, 334 N.J. Super. at 648. The condition of the property must pose a substantial risk of injury. N.J.S.A. 59:4-1. In this case, the slightly elevated sidewalk slab could not rationally be found to have created a substantial risk of injury. See N.J.S.A. 59:4-1a. Such minor irregularities are commonplace on sidewalks. See, e.g., Polyard v. Terry, 160 N.J. Super. at 509. Therefore, we conclude that the plaintiff failed to present evidence establishing public entity liability, and thus failed to present a genuine issue of material fact. See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67 (1954). We also agree with Judge Brown that the Township's failure to fix the sidewalk cannot be viewed as "palpably unreasonable." N.J.S.A. 59:4-2.

Affirmed.

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

Clerk