NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0028-14T2

PATRICIA SHILINSKY and
RICHARD SHILINSKY,

Plaintiffs-Appellants,

v.

BOROUGH OF RIDGEFIELD,

Defendant-Respondent.

Argued December 15, 2015 – Decided April 26, 2016

Before Judges Reisner and Leone.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-6537-12.

David J. Pierguidi argued the cause for appellants (Cerussi & Gunn, attorneys; Mr. Pierguidi, on the briefs).

James M. McCreedy argued the cause for respondent (Wiley Malehorn Sirota & Raynes, attorneys; Mr. McCreedy, of counsel and on the brief; Lauren M. Derasmo, on the brief).

PER CURIAM

Plaintiffs Patricia Shilinsky and her husband Richard Shilinsky appeal from a July 25, 2014 order granting summary judgment on their claims against defendant Borough of Ridgefield

(Ridgefield) under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. We affirm.

I.

We derive the following facts from the documents and deposition transcripts attached to the motions for summary judgment, read in the light most favorable to plaintiffs.[1] At about 6 p.m. on December 11, 2011, plaintiff went to visit her son Sean at his home on Abbott Avenue in Ridgefield. Plaintiff parked her car across the street from Sean's house. As plaintiff was jaywalking across the street, she tripped and fell on a depression in the middle of the roadway. Plaintiff was accompanied by Sylvia Koenigsberg, who also tripped on the depression.

As the responding police officer noted, the depression ran "almost the entire length of the block." The portion of the depression on which plaintiff tripped was at least twenty-eight inches long, at least eight inches wide, and three inches deep.[2] Sean testified that in 2008, he had complained by telephone to

[1] For ease of reference, when we refer to the Shilinskys individually we will refer to Patricia Shilinsky as "plaintiff," and use the first names of her husband, who asserts loss of consortium and other claims, and her son.

[2] Plaintiffs' liability expert reported that other areas of Abbott Avenue were only depressed by between one half and one inch.

Ridgefield's Department of Public Works (DPW) about the unevenness of the roadway.

Plaintiffs presented evidence that the depression had existed in 2009, and was likely seen by DPW Superintendent Nicholas Gambardella before 2011.[3] Gambardella and Brian Conroy, Ridgefield's civil engineer, testified that the depression in the middle of the street would be hazardous to pedestrians crossing the street in that area. Gambardella and Linda Silvestri, Ridgefield's clerk, testified that it was common for homeowners and visitors to park on the street, causing them to have to walk on the street.

After plaintiff fell, she was transported to the hospital where she was diagnosed with a fractured left wrist and an injury to her right knee. Plaintiff underwent surgery to repair her wrist and knee. Following surgery, plaintiff received physical therapy for approximately six months. Plaintiff continued to experience numbness and discomfort in both her wrist and knee.

In August 2012, plaintiffs filed a complaint in the Law Division alleging Ridgefield negligently failed to maintain and repair the area of Abbott Avenue that allegedly caused

[3] Gambardella described the depression as a "crack" or "a seam that opened up."

plaintiff's fall. Ridgefield denied plaintiffs' allegations and asserted their claims were barred by the TCA.

Ridgefield filed a motion for summary judgment, attaching the deposition testimonies, an expert report from a forensic engineer, Paul Stephens, and a certification from its Chief Financial Officer and Qualified Purchasing Agent, Erik Lenander. In February 2014, plaintiffs cross-moved for partial summary judgment on the basis that there was no genuine issue of material fact as to Ridgefield's liability under the TCA. Plaintiffs' cross-motion attached a 2009 grant application in which Ridgefield requested State funds to facilitate repairs to Abbott Avenue, and plaintiffs' expert report from Len McCuen, a civil engineer. After hearing oral argument, Judge John J. Langan, Jr., granted Ridgefield's motion for summary judgment, and denied plaintiffs' cross-motion.

II.

Plaintiffs appeal the grant of Ridgefield's motion for summary judgment and the denial of their cross-motion. Summary judgment must be granted if the court determines "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." R. 4:46-2(c). The court must "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 v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). As "appellate courts 'employ the same standard that governs the trial court,'" we review these determinations de novo, and the "trial court rulings 'are not entitled to any special deference.'" Henry v. N.J. Dept. of Human Servs., 204 N.J. 320, 330 (2010) (citation omitted). We must hew to that standard of review.

III.

In deciding this appeal, "we begin with some basic principles of law governing our roadways." Polzo v. Cty. of Essex, 209 N.J. 51, 70 (2012) [hereinafter "Polzo II"]. "At intersections where traffic is directed by a police officer or traffic signal, no pedestrian shall enter upon or cross the highway at a point other than a crosswalk." N.J.S.A. 39:4-33. "Where traffic is not controlled and directed either by a police officer or a traffic control signal, pedestrians shall cross the roadway within a crosswalk[.]" N.J.S.A. 39:4-34. "[T]hese two sections are aimed at preventing the conduct commonly known as 'jaywalking[.]'" Abad v. Gagliardi, 378 N.J. Super. 503, 507 (App. Div.), certif. denied, 185 N.J. 295 (2005). They "require

pedestrians to walk to an available crosswalk rather than crossing in the middle of a block." Id. at 508.

Here, the alleged injury occurred as plaintiff was jaywalking across the roadway in the middle of the block. Deposition testimony showed that there was a crosswalk about eighty feet away. Plaintiff's illegal jaywalking across the roadway forms the background for our consideration of the TCA.

In 1972, the Legislature adopted the TCA, "which reestablished the rule of immunity for public entities and public employees, with certain limited exceptions." Marcinczyk v. State Police Training Comm'n, 203 N.J. 586, 594-95 (2010); see L. 1972, c. 45. The TCA "declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein." N.J.S.A. 59:1-2. "Public entity" includes any "district, public authority, public agency, and any other political subdivision or public body in the State," such as Ridgefield. N.J.S.A. 59:1-3. Under the TCA, "immunity for public entities is the general rule and liability is the exception." Kemp by Wright v. State, 147 N.J. 294, 299 (1997); accord D.D. v. Univ. of Med. & Dentistry of N.J., 213 N.J. 130, 134 (2013) (describing that rule as "the 'guiding principle' of

the" TCA). The TCA recognizes that "the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done." N.J.S.A. 59:1-2. "Accordingly, the Legislature confined the scope of a public entity's liability for negligence to the prescriptions in the TCA." Polzo II, supra, 209 N.J. at 65.

"A public entity is only liable for an injury arising 'out of an act or omission of the public entity or a public employee or any other person' as provided by the TCA." Ibid. (quoting N.J.S.A. 59:2-1(a)). "In other words, a public entity is 'immune from tort liability unless there is a specific statutory provision' that makes it answerable for the negligent act or omission." Ibid. (quoting Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002)).

"The relevant statutory provision here is N.J.S.A. 59:4-2, which addresses a dangerous condition of public property." Ibid. That section provides:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property was in a 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 subsection 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 <u>the failure to take such action was not palpably unreasonable</u>.

[<u>N.J.S.A.</u> 59:4-2 (emphasis added).]

Thus, under the TCA, plaintiff was required, first, to prove that she suffered an injury meeting the threshold set by the TCA, that her injury was caused by the condition of the roadway, that it was a dangerous condition as defined by the TCA,[4] that it created a reasonably foreseeable risk of that kind of injury, and that Ridgefield had actual or constructive notice with sufficient time to protect against it. <u>Polzo II</u>, <u>supra</u>,

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[4] "'Dangerous condition' means 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." <u>N.J.S.A.</u> 59:4-1(a).

209 N.J. at 66.[5] "Even if plaintiff has met all of these elements, the public entity still will not be liable unless the public entity's failure to protect against the dangerous condition can be deemed 'palpably unreasonable.'" Ibid. (quoting N.J.S.A. 59:4-2). "Plaintiff bears the burden of proving that [Ridgefield] acted in a palpably unreasonable manner." Muhammad v. N.J. Transit, 176 N.J. 185, 195 (2003).

Here, the trial court ruled "that Ridgefield's failure to take action to repair the Abbott Avenue roadway for pedestrians crossing in the middle of the roadway, not in a crosswalk, was not palpably unreasonable" under N.J.S.A. 59:4-2. The court also ruled that the depression on Abbott Avenue was not a dangerous condition as a matter of law, because plaintiff was not crossing at a cross-walk. The court also ruled "that the injuries claimed by the plaintiff do not qualify for relief in accordance with" N.J.S.A. 59:9-2, and that Richard had not provided evidence to support his claim for damages.

We need not reach whether the depression on Abbott Avenue was a dangerous condition, whether Ridgefield had actual or

[5] Plaintiffs do not contend that "a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition." N.J.S.A. 59:4-2(a); see Polzo II, supra, 209 N.J. at 67 ("a public entity does not create a dangerous condition merely because it should have discovered and repaired it within a reasonable time before an accident").

constructive notice of that alleged dangerous condition, or whether it proximately caused plaintiff's alleged injuries or Richard's alleged damages.[6] The TCA

> makes clear that, even if the public entity's property constituted a "dangerous condition;" even if that dangerous condition proximately caused the injury alleged; even if it was reasonably foreseeable that the dangerous condition could cause the kind of injury claimed to have been suffered; and even if the public entity was on notice of that dangerous condition; no liability will be imposed "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."
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> [Polzo v. Cty. of Essex, 196 N.J. 569, 585 (2008) (quoting N.J.S.A. 59:4-2).]

We agree with the trial court that Ridgefield's inaction in repairing Abbott Avenue was not palpably unreasonable. "'Palpably unreasonable'" "'implies behavior that is patently unacceptable under any given circumstance.'" Muhammad, supra, 176 N.J. at 195 (citation omitted). "'[F]or 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."'" Id. at 195-96 (citation omitted). "Although ordinarily the

[6] "[T]he viability of [Richard's claim] is subject to the survival of [his wife's] claim." Sciarrotta v. Global Spectrum, 194 N.J. 345, 350 n.3 (2008).

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 II, supra, 209 N.J. at 75 n.12; see also Black v. Borough of Atlantic Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993).

Here, viewing the evidence in the light most favorable to plaintiffs, it is not "'"manifest and obvious that no prudent person would approve of [Ridgefield's] course of . . . inaction."'" Muhammad, supra, 176 N.J. at 195-96 (citation omitted). In reaching this conclusion, we are guided by our Supreme Court's decision in Polzo II, supra. There, the Court held that "a county [could not] be held liable for a fatal accident that occurred when a person lost control of her bicycle while riding across a two-foot wide, one-and-one-half inch depression on the shoulder of a county roadway." 209 N.J. at 55. The Court ruled "that the County's failure to correct this depression before the tragic accident was [not] 'palpably unreasonable.'" Id. at 56. We find the Polzo II Court's analysis of liability for a bicyclist's use of the shoulder, which is not designed or legal for such use, id. at 70-71, to be equally applicable here to a pedestrian illegally jaywalking across the roadway in the middle of the block.

In Polzo II, our Supreme Court emphasized the "'roadway' is 'that portion of a highway . . . ordinarily used for vehicular travel.'" Id. at 70 (citation omitted). "By the Motor Vehicle Code's plain terms, roadways generally are built and maintained for cars, trucks, and motorcycles," not pedestrians. Id. at 71. Moreover, "[p]otholes and depressions are a common feature of our roadways. However, 'not every defect in a highway, even if caused by negligent maintenance, is actionable.'" Id. at 64 (citation omitted).

The Court in Polzo II, recognized "that many bicyclists may be inclined to ride on a roadway's shoulder to stay clear of vehicular traffic and out of concern for their safety." 209 N.J. at 71. We similarly recognize that many pedestrians may be inclined to jaywalk because it is convenient or because the road happens to be free of vehicular traffic. Jaywalking may be particularly tempting where a person is exiting from the driver's side of a parked car and seeks to cross the street. Nonetheless, "inherent dangers confront [pedestrians who jaywalk] on roadways that are not faced by operators of motor vehicles." Ibid. A "depression . . . that a car would harmlessly pass over" might trip a pedestrian. Ibid.

Plaintiffs failed to show Ridgefield was palpably unreasonable because it did not allocate its limited resources

for the repair of a depression in the middle of the street and of the block so it would be safer for pedestrians to cross there. "Roadways generally are intended for and used by operators of vehicles." Ibid. Thus, it was not palpably unreasonable for Ridgefield to not repair a depression "that a car would harmlessly pass over," to prevent the tripping of a pedestrian who legally could not cross there. "Public entities do not have the ability or resources to remove all [roadway] dangers peculiar to" pedestrians. Ibid. Moreover, "[r]oadways cannot possibly be made or maintained completely risk-free for" pedestrians. Ibid. "Because the roadway is 'that portion of a highway . . . ordinarily used for vehicular travel,' a public entity – in choosing when and what repairs are necessary – might reasonably give lesser priority to" fixing roadway depressions harmless to vehicles. Id. at 77 (quoting N.J.S.A. 39:1-1).

N.J.S.A. 59:4-2 "recognizes the difficulties inherent in a public entity's responsibility for maintaining its vast amounts of public property," and its "discretionary decisions to act or not to act in the face of competing demands should generally be free from the second guessing of a coordinate branch of Government." Id. at 76 (quoting Harry A. Margolis & Robert Novack, Claims Against Public Entities, 1972 Attorney General's

Task Force on Sovereign Immunity, comment on N.J.S.A. 59:4-2 (Gann 2011)).

In its motion for summary judgment, Ridgefield proffered that its failure to fix the depression on Abbott Avenue was the result of allocating limited resources to other high-need areas prior to plaintiff's December 11, 2011 fall. Ridgefield attached a certification of its Assistant Chief Financial Officer and Qualified Purchasing Agent, Erik Lenander. Lenander certified that Ridgefield is "a small municipality of 2.8 square miles, with approximately 11,000 residents." Lenander further certified that Ridgefield was only able to "allocate $150,000 annually to the operating budget of the Department of Public Works in the fiscal years 2010 and 2011," and $148,000 in fiscal year 2012. This operating budget "must cover roadway repair, tree removal, snow and ice removal, and winter preparations among a host of other expenses." For example, "[o]ut of the DPW operating budget, [Ridgefield] designated $25,000 for roadway repair for fiscal year 2012"; however, "[t]he actual amount spent on roadway repair was $45,000."

Conroy testified that Ridgefield has approximately twenty-seven miles worth of roadway. Lenander certified that "it is [Ridgefield's] goal to repair one mile of roadway" annually; however, "the budget and grant money allows only for

approximately one-half mile to be paved" and that it would be "prohibitively expensive" to "repair all roadways as the need arises." As a result, Lenander certified that "[i]n light of these competing demands, [Ridgefield] exercised its discretion in its decision to allocate road repair funds to the most dangerous or high traffic areas," which did not include Abbott Avenue. Lenander's assertions were undisputed in the trial court.

Furthermore, Lenander certified that Ridgefield "depends almost entirely on Community Development and State Local Aid grants for major roadwork projects, such as milling and paving roads." In 2009, Ridgefield applied to the New Jersey Department of Transportation (NJDOT) for a $260,000 grant of State funds to finance the roadway repair of Abbott Avenue.[7] In its grant application, Ridgefield offered to contribute $65,000 to the repair of Abbott Avenue. NJDOT denied Ridgefield's grant application because under all NJDOT's "local funding programs, need far exceeds available funds."

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[7] Ridgefield's grant application stated that the roadway was "in poor condition and in need of a resurfacing. The road has many cracks, patches, depressions, utility trench repairs and areas of pavement failure." The application sought "[r]oadway [r]econstruction," including repair of the roadway base if required, asphalt milling, and resurfacing with hot mix asphalt.

Plaintiffs note that the 2009 grant application stated that Abbott Avenue was a "heavily traveled local collector road" and that Ridgefield's expert's report stated that "heavily traveled roads" in need of repair should be "prioritized." However, plaintiffs have not shown that Abbott Avenue was the highest repair priority among the heavily-traveled roads in Ridgefield, or that Ridgefield had sufficient funds to repair Abbott Avenue given the denial of its grant application.

Plaintiffs argue the depression on Abbott Avenue on the block in front of Sean's house could have been repaired with a half-ton of asphalt for $35, or with a single bag of "cold patch" for $50.[8] However, other than eliciting from Gambardella how much those materials cost, plaintiffs presented no evidence that those materials would have been adequate to patch the depression. Moreover, plaintiffs' estimate omits the cost of labor and other materials needed to patch the depression. Further, plaintiffs did not show that patching this one depression was the appropriate response to the paving problems on all of Abbott Avenue.

Plaintiffs point to Ridgefield's actions after the accident, when it applied asphalt or cold patches to the

[8] "Cold patch" refers to the specific type of asphalt needed to patch potholes during the winter months.

depression on Abbott Avenue. However, plaintiffs' expert criticized Ridgefield's post-accident repairs because "only spot patches were made at the worst points."

> The main problem of the affected band of paving being seriously lower than the normal roadway surface has still not been resolved. Spot patching can be an acceptable method of repair for isolated potholing . . . . However, the extent of the deterioration at issue here requires a full-scale repaving job, at least of the depressed band, for a significant portion of this block.

Ridgefield's grant application similarly asserted that the appropriate response was to mill down and repave Abbott Avenue.

In any event, courts do "not have the authority or expertise to dictate to public entities the ideal form of road inspection [and repair] program, particularly given the limited resources available to them." Polzo II, supra, 209 N.J. at 69. "It is fair to say that in view of [Ridgefield's] considerable responsibility for road maintenance in a world of limited public resources, the depression here . . . might not have been deemed a high priority." Id. at 78-79. This is especially true because, "[e]ven if the . . . road was routinely being used as a [pedestrian crossing], no reports of accidents – other than the one here – were recorded as a result of the depression." Id. at 74. Ultimately, Ridgefield had the discretion to allocate its limited road repair funds to projects that were of higher

priority, or that those funds could actually complete. It was not manifest and obvious that no prudent person would approve of that decision.

Plaintiffs failed to proffer evidence to carry "the heavy burden of establishing that [Ridgefield's] conduct was palpably unreasonable." Russo Farms v. Vineland Bd. of Educ., 144 N.J. 84, 106 (1996). Therefore, the trial court properly granted Ridgefield's motion for summary judgement and denied plaintiffs' request for summary judgment on the issue of liability.

IV.

The trial court also ruled that Ridgefield was "immune from liability pursuant to N.J.S.A. 59:2-3(d)." That section states:

> A public entity is not liable for the exercise of discretion when, in the face of competing demands, it determines whether and how to utilize or apply existing resources, including those allocated for equipment, facilities and personnel unless a court concludes that the determination of the public entity was palpably unreasonable. Nothing in this section shall exonerate a public entity for negligence arising out of acts or omissions of its employees in carrying out their ministerial functions.
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> [N.J.S.A. 59:2-3(d) (emphasis added).]

Under N.J.S.A. 59:2-3(d), "palpably unreasonable" has the same meaning as under N.J.S.A. 59:4-2. Coyne v. Dep't of Transp., 182 N.J. 481, 493 (2005). Under N.J.S.A. 59:2-3(d), as under N.J.S.A. 59:4-2, "'[p]alpably unreasonable' means more

than ordinary negligence, and imposes a steep burden on a plaintiff." Ibid. Here too, a "plaintiff bears the burden of proving that defendant acted in a palpably unreasonable manner." Ibid.

"N.J.S.A. 59:2-3(d) prescribes the circumstances when a public entity can be found liable in instances where the public entity allocates resources." Henebema v. S. Jersey Transp. Auth., 219 N.J. 481, 490 (2014). "[T]he Legislature has recognized that public entities cannot be held liable for their discretionary determinations about allocation of limited resources for duties such as road maintenance." Civalier by Civalier v. Estate of Trancucci, 138 N.J. 52, 69 (1994).

The trial court ruled that "[i]n light of competing demands for the funds that Ridgefield allocates for road repair, tree removal, snow and ice removal, winter preparations, and other expenses," plaintiffs could not show that "Ridgefield's discretionary decision not to repair the road in front of [Sean's home on] Abbott Avenue" was palpably unreasonable. We agree for the reasons set forth above.

The trial court ruled that Ridgefield's decision "was made at the planning-level and discretionary rather than ministerial." Our Supreme Court has characterized "decisions [of] 'whether to utilize the Department's resources and expend

funds for the maintenance of [a] road; whether to repair the road by patching or resurfacing; [and] what roads should be repaired,'" as "discretionary determinations." Coyne, supra, 182 N.J. at 490 (citation omitted). Plaintiffs have not argued otherwise. In any event, "[o]ur conclusion that plaintiff has failed to present a claim under N.J.S.A. 59:4-2" renders Ridgefield immune regardless of whether N.J.S.A. 59:2-3(d) "otherwise immunize[s] [Ridgefield] from liability." Norris v. Borough of Leonia, 160 N.J. 427, 448 (1999); see also Seals v. Cty. of Morris, 210 N.J. 157, 179 (2012).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION