NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5016-13T4

EILEEN BROWN and
CHRISTOPHER BROWN,

Plaintiffs-Appellants,

v.

TOWNSHIP OF PARSIPPANY-TROY
HILLS, THE KNOLL GOLF CLUB,
KNOLL COUNTRY CLUB,

Defendants-Respondents.

Submitted February 1, 2016 - Decided September 6, 2016

Before Judges Lihotz and Higbee.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2929-11.

Marc Chase, attorney for appellants (Joseph A. Bahgat, on the brief).

Horan & Aronowitz, LLP, attorneys for respondents (Mark H. Aronowitz, on the brief).

PER CURIAM

Plaintiff Eileen Brown appeals from a June 20, 2014 Law Division order granting summary judgment in favor of defendant Township of Parsippany-Troy Hills, the owner of Knoll Golf Club

(the country club).[1] Following oral argument, the motion judge granted summary judgment, concluding the record did not show plaintiff could prove a dangerous condition existed on defendant's property for which liability would be imposed as an exception to the general immunity for public entities under the New Jersey Tort Claims Act (the Act), N.J.S.A. 59:1-1 to 59:12-3. We affirm.

"An appellate court reviews an order granting summary judgment in accordance with the same standard as the motion judge." Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). We "must review the competent evidential materials submitted by the parties to identify whether there are genuine issues of material fact and, if not, whether the moving party is entitled to summary judgment as a matter of law." Ibid.; R. 4:46-2(c). We consider all facts in a light most favorable to plaintiff, the non-movant, Robinson v. Vivirito, 217 N.J. 199, 203 (2014), keeping in mind "[a]n issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact." R.

[1] For simplicity we use plaintiff to refer to Eileen Brown with the understanding plaintiff Christopher Brown has alleged a derivative claim for loss of consortium.

4:46-2(c). "The practical effect of this rule is that neither the motion court nor an appellate court can ignore the elements of the cause of action or the evidential standard governing the cause of action." Bhaqat, supra, 217 N.J. at 38.

Since the grant of summary judgment calls for a review of the "trial court's interpretation of the law and the legal consequences that flow from established facts," the trial court's decision is "not entitled to any special deference," and is subject to de novo review. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Guided by these principles, we review the facts comprising the summary judgment record.

On January 16, 2010, as plaintiff walked along a designated path on defendant's property, she encountered steps. Ascending the concrete steps, she "felt something give way beneath her, her ankle collapsed to the side" and she fell. Plaintiff was hospitalized and diagnosed with a sprained ankle. Approximately two months later, she underwent a cartilage transfer procedure known as an OATS procedure.[2]

To support her cause of action, plaintiff relied on the testimony of defendant's head groundskeeper John Zemzicki, who worked at the country club for twenty years. Zemzicki stated he

[2] The record does not elaborate regarding this issue.

is "in charge of the grounds as far as aesthetics," including "the grounds around the clubhouse area." When twice asked whether he had prior knowledge of any problem with the stairway he responded "no." However, during his deposition, he commented on his view of the stairway's "poor design" and also asserted there was an "ongoing argument" regarding the country club caterers' use of nearby water softener salt pellets, instead of the provided calcium chloride, to remove snow and ice. Zemzicki believed the caterers practice "was a safety hazard" and suggested salt would "destroy . . . concrete." Zemzicki also stated he "once or twice" warned the maître d' of the club about the use of salt pellets, including one time "within a couple days" of the January 16, 2010 incident.

Zemzicki was supervised by Pat De Falco, the superintendent of the country club's building structures. During his deposition, De Falco explained the entire staff reported to him on anything needing repair, or which was a concern. When asked whether staff members reported problems with the stairway prior to plaintiff's fall, he answered, "no." He also stated he used the stairway "at least three times a week" during his routine inspections of the premises and insisted he never noticed any kind of problem with the stairs.

John Grady, the golf manager, also testified. He asserted he had no knowledge of a problem with the steps prior to plaintiff's fall.

On appeal, plaintiff argues: "The entirety of this case rests on John Zemzicki's deposition testimony," which she asserts "proves" defendant had actual or constructive notice of the dangerous condition on the steps that caused plaintiff's injury. We disagree.

"The guiding principle of the Tort Claims Act is that 'immunity from tort liability is the general rule and liability is the exception' . . . ." Coyne v. Dep't of Transp., 182 N.J. 481, 488 (2005) (quoting Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998)). Under the Act, "a public entity is 'immune from tort liability unless there is a specific statutory provision' that makes it answerable for a negligent act or omission." Polzo v. Cnty. of Essex, 209 N.J. 51, 65 (2012) (quoting Kahrar v. Borough of Wallington, 171 N.J. 3, 10 (2002)).

N.J.S.A. 59:4-2 subjects a public entity to liability for an injury caused by a "dangerous condition" if the plaintiff establishes: (1) "the property was in [a] dangerous condition at the time of the injury"; (2) "the injury was proximately caused by the dangerous condition"; (3) "the dangerous condition

created a reasonably foreseeable risk of the kind of injury which was incurred"; and (4) either (a) the dangerous condition was caused by the negligence, omission or wrongful act of a public employee acting within the scope of his or her employment or (b) the "public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."[3] The Legislature did not intend to impose liability for a condition merely because danger exists, Levin v. Cnty. of Salem, 133 N.J. 35, 49 (1993), instead it requires a plaintiff prove each of the statute's elements, including the public entity defendant had "actual or constructive notice" and its actions or omissions to prevent injury were "palpably unreasonable." Muhammad v. N.J. Transit, 176 N.J. 185, 194-95 (2003); Polzo, supra, 209 N.J. at 66 ("Unless plaintiff in this case can satisfy the elements of a cause of action set forth in N.J.S.A. 59:4-2, he [or she] does not have a basis for recovery.").

For plaintiff to recover, she must prove the public entity had notice of a dangerous condition within "a sufficient time"

[3] The Act defines "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.

before her accident such that it could have "taken measures to protect against [it]." N.J.S.A. 59:4-2(b). "[T]he mere "[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Polzo v. Cnty. of Essex, 196 N.J. 569, 581 (2008) (quoting Sims v. City of Newark, 244 N.J. Super. 32, 42 (Law Div. 1990)).

In Carroll v. N.J. Transit, 366 N.J. Super. 380, 87 (App. Div. 2004), we held:

> In order to establish that a public entity had actual notice of a dangerous condition for purposes of N.J.S.A. 59:4-2, the public entity must have "had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. 59:4-3(a). Alternatively, a public entity may be charged with constructive notice if 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. N.J.S.A. 59:4-3(b).
>
> [(Emphasis added).]

Plaintiff argues the judge failed to view the evidence most favorable to her and instead "weighed the evidence," erroneously granting defendant summary judgment. Plaintiff maintains Zemzicki was aware "of something" and this knowledge of problems must be imputed to defendant. We reject plaintiff's suggestion.

Here, plaintiff's proofs fail to establish the statutory notice requirements for imposing liability upon the public entity, as delineated in our jurisprudence. She merely proffers Zemzicki's limited and conclusory comment criticizing the steps' design and urges he "was aware of something." Although Zemzicki saw instances when salt was used to melt snow and ice instead of the preferred calcium chloride, such observations alone do not create a factual dispute over whether defendant had actual or constructive notice of a dangerous condition on the country club property.[4] The record is insufficient to establish defendant knew of an obvious condition creating a substantial risk of injury to those who used the stairway prior to the incident. Carroll, supra, 366 N.J. Super. at 387. Cf. Wymbs v. Twp. of Wayne, 163 N.J. 523, 536-37 (2000) (considering prior accidents as constructive notice of dangerous condition). Giving plaintiff all favorable inferences, we conclude Zemzicki's

[4] Zemzicki, in passing, commented without explanation, the steps were "a poor design" and had been fixed at some prior undisclosed time. Even accepting Zemzicki's assertion of a corrected design flaw, nothing in the record supports a conclusion the perceived, unexplained flaw had the obvious character of a dangerous condition or was in any way related to plaintiff's injury. N.J.S.A. 59:4-3. Knowledge of a design flaw and knowledge of a dangerous condition for which liability may be attached in the event of injury are not necessarily interchangeable. We decline to adopt plaintiff's suggestion as Zemzicki's otherwise unsupported opinion reflects mere speculation.

statement is not evidential of actual or constructive notice as required by the Act.

Affirmed.