2015 WL 7429375
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Superior Court of New Jersey, Appellate Division.

Andrea DiMATTEO and Richard DiMatteo, Plaintiffs–Appellants,
v.
TOWNSHIP OF EAST BRUNSWICK, Defendant–Respondent.

Argued Oct. 19, 2015.
|
Decided Nov. 10, 2015.

Synopsis

Background: Parent of participant in soccer game at township park brought action against township, seeking damages for injuries sustained when parent tripped and fell. The Superior Court, Law Division, Middlesex County, granted summary judgment in favor of township. Parent appealed.

Holdings: The Superior Court, Appellate Division, held that:

[1] hole in hill was not dangerous condition on public property;

[2] failure to repair hole was not palpably unreasonable; and

[3] grade of hill was consistent was approved design for park.

Affirmed.

West Headnotes (3)

[1] Municipal Corporations
Parks and Public Squares and Places

Hole in hill at township park was not dangerous condition of public property, and therefore township was entitled to design immunity in action by parent of participant in soccer game at park who tripped and fell in hole. N.J.S.A. 59:4–6.

Cases that cite this headnote

[2] Municipal Corporations
Parks and Public Squares and Places

Township's failure to fill or re-seed hole in township park was not palpably unreasonable, and therefore township was entitled to design immunity in action by parent of participant in soccer game at park who tripped and fell in hole; bare spots in grass athletic fields and park lands were ubiquitous. N.J.S.A. 59:4–6.

Cases that cite this headnote

[3] Municipal Corporations
Parks and Public Squares and Places

Grade of hill in township park was consistent with approved design for terraced athletic fields, and therefore township was entitled to design immunity in action by parent of participant in soccer game at park who tripped and fell in hole on hill. N.J.S.A. 59:4–6.

Cases that cite this headnote

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L–612–13.

Attorneys and Law Firms

Steven D. Cahn argued the cause for appellants (Cahn & Parra, LLC, attorneys; Mr. Cahn, on the brief).

Anthony P. Pasquarelli argued the cause for respondent (Sweet Pasquarelli, PC, attorneys; Mr. Pasquarelli and Kenneth C. Ho, on the brief).

Before Judges SABATINO and ACCURSO.

Opinion

PER CURIAM.

***1** In this Title 59 matter, plaintiff Andrea DiMatteo appeals from the entry of summary judgment dismissing her complaint against defendant Township of East Brunswick. [1] Because we agree that summary judgment was properly granted to the Township on the undisputed facts, and the court did not abuse its discretion in denying reconsideration, we affirm.

Plaintiff went to East Brunswick's Dideriksen Park to watch her daughter play soccer in an age ten-and-under game. The park consists of several terraced soccer fields. [2] The field plaintiff's daughter was playing on is a smaller field designed for younger children and located at the bottom of a short, grassy hill. Plaintiff estimated she had navigated the hill twenty times in order to get to the field. Walking down the hill on the day in question, she injured her ankle when she "tripped and ... [her] sneaker got stuck" in a hole in the grass.

The parties describe the spot where plaintiff fell in different ways. Plaintiff refers to it as a "hole," her expert called it a "depression/hole/rut" and East Brunswick's Director of Recreation says it is a "washout area from the topography of the hill." He testified at deposition that the Township has brought "in topsoil or some fill dirt" to address the bare patches on the slope but acknowledges it was "pretty much a losing battle, because of the topography, it will wash out again."

Plaintiff's liability expert measured the "downhill distance" of the slope to be sixteen-and-a-half feet long having a twenty-seven-degree grade. The expert specifically noted that "the slope present/measured is consistent with the area grading plan prepared for this facility and is, thus, a known and contemplated feature/structure within this facility." He concluded that because

> the slope of the walking surface utilized by [plaintiff] ... was several times the maximum allowable slope for safe pedestrian use of such areas as defined by [the 2009 International Building Code] ... this massively sloped defined walking surface was extremely dangerous. This would be true even if the walking surface was slip-resistant. In this case, however, we know that grass surfaces are not slip-resistant (in fact they are slip-prone). Further, numerous known but unaddressed/improperly addressed and dangerous depressions/holes, etc., were present in the grass surfaces which further obstructed use of the area and which, when combined with the steep slope present, exacerbated the already massively dangerous condition represented by the slope itself.

The expert opined that "what is needed is a safe ingress/egress system for [the soccer field] which would, most likely, include (at a minimum) proper walkways and a safe stairway down the slope to the playing field." He concluded:

> the lack of a safe defined pedestrian pathway for soccer field use and the designed/intended pedestrian use of a dangerously steep and inadequately maintained (with improperly addressed depressions/holes, etc.) walking surface slope at the accident site, as well as the lack of mitigative measures (such as directional and warning signs, barricades, etc.), all ... presented a very dangerous condition and obstruction to pedestrian passage.

***2** The expert did not measure either the area or depth of the dirt patch where plaintiff fell and provided no standard or other authority for his opinion that the "depressions/holes, etc." were "dangerous."

After discovery, East Brunswick sought summary judgment based on design immunity, relying on the site plan approval granted by the East Brunswick Planning Board in 1982 for the park's athletic fields. The trial judge granted the motion finding plaintiff could not succeed on her dangerous condition of public property claim because East Brunswick was entitled to design immunity under *N.J.S.A.* 59:4–6, [3] relying on *Seals v. Cty. of Morris*, 210 *N.J.* 157, 162 (2012). The judge further found that plaintiff could not prove that the "hole" into which she tripped and caught her foot was a dangerous condition. The judge reasoned that

> [t]his is a hilly lawn area. The holes that [plaintiff's counsel] refers to are not actual holes in the ground below the surface of the ground, like Mickey Mantle stepped into in the early

> 1960's at Yankee Stadium while trying to catch a fly ball. The holes he's talking about are lack of grass. They're relatively small holes. They're less wide than the tree trunk shown in the photograph that he provided to me.
>
> I don't think I can assume that this is anything but a plan or design immunity case. I can't say it's a lack of maintenance. It's not that dirt spilled over from a storage area or anything like that. It is not a lack of maintenance case as I view it.

I'm satisfied, therefore, that whether on the basis of plan or design immunity or general dangerous condition/palpably unreasonable analysis[,] the defendant in this case is entitled to summary judgment.

[1] Plaintiff appeals, contending that the trial court erred in failing to view the evidence, specifically plaintiff's testimony that "the hole that [she] tripped over should be considered a dangerous condition" in a light most favorable to her and in concluding "that this was a design case and not a maintenance case." We disagree.

We review summary judgment using the same standard that governs the trial court. *Murray v. Plainfield Rescue Squad*, 210 *N.J.* 581, 584 (2012). Thus, we consider "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A.*, 189 *N.J.* 436, 445–46, 916 A.2d 440 (2007) (quoting *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 536, 666 A.2d 146 (1995)).

N.J.S.A. 59:4–2 addresses a dangerous condition of public property and provides as follows:

> 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:
>
> ***3** 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.

Thus "to impose liability on a public entity pursuant to that section, a plaintiff must establish the existence of a 'dangerous condition,' that the condition proximately caused the injury, that it 'created a reasonably foreseeable risk of the kind of injury which was incurred,' that either the dangerous condition was caused by a negligent employee or the entity knew about the condition, and that the entity's conduct was 'palpably unreasonable.' " *Vincitore v. N.J. Sports & Exposition Auth.*, 169 *N.J.* 119, 125, 777 A.2d 9 (2001).

As defendant did not dispute that plaintiff injured her ankle in her fall, and East Brunswick admitted knowing of the washouts on the slope, the focus on the motions was whether the slope was in a dangerous condition, whether the failure to correct it was palpably unreasonable and whether the Township was entitled to design immunity. The Tort Claims Act, *N.J.S.A.* 59:1–1 to 12–3, 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.* 59:4–1a. "Thus the standard is whether any member of the general public who foreseeably may use the property would be exposed to the risk created by the alleged dangerous condition." *Vincitore, supra*, 169 *N.J.* at 125, 777 A.2d 9.

Here, plaintiff's expert, although acknowledging that the grade of the slope was consistent with the area grading plan approved by the Planning Board for these fields, determined that the slope was "extremely dangerous." As for the depression or hole in which plaintiff caught her sneaker, the expert found only that it "further obstructed use of the area and which, *when combined with the steep slope present, exacerbated the already massively dangerous condition represented by the slope itself.*" (Emphasis added). Although he measured the slope, the expert never measured the area or depth of the dirt patch where plaintiff fell,[4] and never offered any standard or authority for his opinion that such unspecified holes or depressions in the grass were themselves a dangerous condition.[5] The lack of any foundational basis for his opinion that the depression in the

grass on the Township's terraced athletic fields represents "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.* 59:41, is fatal to plaintiff's claim. [6] *See Polzo v. Cty. of Essex*, 209 *N.J.* 51, 68 n. 8, 74 (2012).

***4** **[2]** Even were plaintiff able to somehow establish that these "holes," "depressions" or "washouts," unspecified by any measurements, themselves constituted a dangerous condition, she has provided no proof that the Township's failure to fill or re-seed them was palpably unreasonable, that is patently unacceptable under the circumstances. *See Kolitch v. Lindendahl*, 100 *N.J.* 485, 493, 497 A.2d 183 (1985). Bare spots in grass athletic fields and park lands are ubiquitous. Not every imperfection in a lawn surface, even one caused by negligent maintenance, is actionable. *Cf. Polzo, supra*, 209 *N.J.* at 64. Surely our courts have no place dictating to a Township that "what is needed is a safe stairway down the slope to the playing field," as plaintiff's expert recommends. *See id.* at 56 ("hold[ing] that the Appellate Division erred in suggesting that public entities may have to employ the equivalent of roving pothole patrols to fulfill their duty of care in maintaining roadways free of dangerous defects").

[3] Finally, even were plaintiff able to carry her prima facie burden of establishing that the depression in the grass combined with the steep slope created a dangerous condition that not repairing would be palpably unreasonable, which we do not find, there was no dispute that the grade was consistent with the approved design for these terraced athletic fields. As the Township is entitled to immunity for any injury caused by the design approved by the Planning Board under *N.J.S.A.* 59:4–6, and there appears no dispute that the washout area where plaintiff fell was caused by the topography of the hill, we cannot find the court erred in granting summary judgment to the Township. *See Manna v. State*, 129 *N.J.* 341, 356, 609 A.2d 757 (1992) (holding design immunity applies regardless of changed condition caused by deterioration of original structure).

Affirmed.

All Citations

Not Reported in A.3d, 2015 WL 7429375

Footnotes

1 Andrea DiMatteo's husband, Richard DiMatteo, sued per quod. We refer solely to Andrea DiMatteo as plaintiff here.

2 Plaintiff's counsel expressed his understanding to the trial court that the athletic fields are terraced to facilitate drainage across the large expanses of level ground.

3 *N.J.S.A.* 59:4–6 provides:

> a. Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

4 Plaintiff's expert's failure to provide any measurements of the breadth and depth of the depression into which plaintiff fell led to her being unable to establish that it was a "hole" as she claimed, as opposed to a "depression," as her expert claimed or a "washout" as the Township claimed.

5 We note the obvious nature of the dirt patches on the slope would make it difficult for plaintiff to recover against an owner without statutory immunities, that is had she been a guest on private property when the injury occurred. *See Tighe v. Peterson*, 356 *N.J.Super.* 322, 326, 812 A.2d 423 (App.Div.) ("Where a guest is aware of the dangerous condition or by a reasonable use of his [faculties] would observe it, the host is not liable." (internal quotation marks omitted) (quoting *Endre v. Arnold*, 300 *N.J.Super.* 136, 142, 692 A.2d 97 (App.Div.), *certif. denied*, 150 *N.J.* 27, 695 A.2d 670 (1997))), *aff'd o.b.*, 175 *N.J.* 240, 814 A.2d 1066 (2002).

6 Because the expert's conclusions as to the depression in which plaintiff fell are not supported by factual evidence or other data, the "net opinion" rule would forbid admission of the report. *See Townsend v. Pierre*, 221 *N.J.* 36, 55 (2015).