AUREA SANTIAGO and FELIX SANTIAGO, her husband, Plaintiffs-Appellants,

v.

CITY OF VINELAND, Defendant-Respondent

A-0864-06T2

Superior Court of New Jersey

October 10, 2007

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued September 25, 2007

On appeal from the Superior Court of New Jersey, Law Division, Cumberland County, Docket No. L-614-04.

Gary D. Ginsberg argued the cause for plaintiffs (Ginsberg & O'Connor, attorneys; Brian O'Connor, on the brief).

Robert J. Gillispie, Jr. argued the cause for respondent (Mayfield, Turner, O'Mara, Donnelly & McBride, attorneys; Mr. Gillispie, Jr. and David M. Mayfield, on the brief).

Before Judges Winkelstein and Yannotti.

PER CURIAM

Plaintiffs Aurea Santiago and Felix Santiago appeal from an order entered by the Law Division on January 20, 2006, which granted summary judgment in favor of defendant, City of Vineland (City). For the reasons that follow, we affirm.

On November 23, 2002, plaintiffs drove to 8th Street in the City. They were on their way to attend the christening of their god-daughter. Plaintiffs exited their car and proceeded to cross the street. As they were doing so, a sixty-foot maple tree fell and struck Mrs. Santiago, causing her to sustain severe personal injuries.

Plaintiffs filed an action against the City, alleging that the City was responsible for the care and maintenance of trees on its property; and was negligent, careless and reckless in permitting a dangerous condition to exist on its property. Mrs. Santiago sought damages for the injuries that she sustained in the accident, and Mr. Santiago asserted a claim for loss of his wife's services, society and consortium.

In support of their claims, plaintiffs submitted a report prepared by Russell E. Carlson (Carlson), a master arborist and registered consulting arborist. In his report, Carlson stated that the tree that struck Mrs. Santiago broke at its base, a few inches below the surface of the ground. According to Carlson, the tree did not have a root system sufficient to support the tree. He wrote, "Girdling roots had effectively strangled the tree, resulting in decay of the base of the trunk and inadequate development of the root system."

Carlson stated that "[g]irdling roots form when a root grows in a direction that crosses the trunk of the tree." He explained that ordinarily roots will grow away from the trunk of the tree but when a root meets an obstruction, it will change direction, and may grow around the edges of the planting pit. Carlson stated that eventually, circling roots will come in contact with the growing tree trunk. He wrote:

Initially there is little change, but soon the cells of the bark of both trunk and root are compressed. Growth of the new cells slows. The conduction of sap from the root system to the crown of the tree is reduced. Symptoms of this are a thinning of foliage and reduction of twig growth in the crown, followed by twig and branch dieback.

The bark of the tree also is compressed, and may eventually die above the area of contact. The root usually survives and continues to carry water and nutrients if the trunk is not girdled by other roots above its point of attachment.

In some cases, multiple roots are involved. Any one root may girdle only a portion of the trunk, but numerous roots can simultaneously affect the tree. When this happens the entire tree suffers.

When this girdling condition persists for many years, the roots that normally extend away from the tree may atrophy and eventually decay. Fungal infections that rot the roots invade the base of the tree, [further] weakening the tree. Without adequate support at the base the tree become unstable and susceptible to failure. While healthy trees usually withstand winds over 70 mph, trees that have lost their structural support at the base can topple in much lower winds, and in some cases when there is no wind at all.

Carlson said that girdling roots "can be readily seen" at the soil surface. However, when the roots are below ground level, they cannot be observed directly. Carlson wrote that there are signs that girdling roots may be present. The trunk of the tree goes "straight into the ground, without the normal flare from trunk to roots." Thinning and dieback in the crown also are indications of root problems and "often accompany severe girdling roots."

Carlson opined that the subject tree failed because of girdling roots that encircled the base of the trunk. He

noted that weather conditions were the "determining factor of when the tree would fall, and in what direction it would fall." According to Carlson, at the time of the accident, the wind was blowing about 35 to 40 miles per hour, with gusts up to 45 or 50 miles per hour.

Carlson added, however, that "the wind was only a contributing factor to the accident." He concluded that "[t]he primary cause of the failure was the instability of the tree due to the girdling roots and lack of a supporting root system." Carlson further opined that the "structural defects" in the tree "were apparent [on] general inspection." The girdling roots were "at the surface and easily visible around half the trunk circumference." Carlson stated that "[a]ny arborist should know of the problems caused by girdling roots, and how to determine when they are present. It is a frequent problem in urban and suburban landscapes."

Carlson issued a supplementary report dated April 5, 2006. Carlson again described the effect that girdling roots can have on a tree. He stated that "[d]iagnosis of the problem is relatively simple." He explained:

Casual observation of the base of the tree will indicate whether there is normal development of the root flare. This type of inspection by tree crews can be done quickly and while working at other tasks. If the girdling roots are at the surface they will be readily apparent. This condition may affect only one side of the tree or it may affect the entire circumference, depending on the extent of the girdling. Often simply walking by a tree and observing the base is sufficient to diagnose whether there is a problem of this sort. If the signs are apparent, then additional investigation may be necessary to determine the full extent of the problem.

Carlson stated that excavation of the soil at the base of the tree is "sometimes necessary" to determine the extent of the girdling. This process could take a few minutes, or several hours, depending on the size of the tree, soil conditions, and the extent and depth of the girdling roots. He added:

Once the extent of the problem is known, a decision must be made as to whether the problem can be sufficiently corrected or if the tree must be removed. Correction of the problem involves cutting the root and, if possible, removing it from the trunk. The decision must include consideration of the current and future structural stability of the tree and the risk of failure.

At or about the time of the accident, Steven Nicolato (Nicolato), was employed by the City's Department of Public Works. Nicolato was deposed. He testified that his responsibilities include collecting leaves throughout the City. Nicolato did not participate in the maintenance of trees and he never attended any seminars concerning trees. He was asked if he knew anything about trees and he replied, "[t]rees have leaves, that's about it."

Ernesto Ortiz (Ortiz), was employed by the City's road department at or about the time of the accident. Ortiz testified at his deposition that he participated in the collection of leaves but never attended any seminars concerning tree maintenance. Ortiz stated that until the day of his deposition, he had not heard the term "girdling roots."

Adam Garrastegui (Garrastegui) also was deposed. Garrastequi was employed by the City and his responsibilities include removing dead limbs and taking down trees. Garrastequi testified that the City responds to particular complaints regarding trees. He will remove limbs or, on occasion, take down a tree when it "needs to come down." Garrastequi said that he has attended classes at Rutgers on tree trimming and removal, but he has not received any training on the identification of trees that are diseased or dying. Garrastequi stated that until his deposition, he had not heard the term "girdling roots."

Brian Dunn (Dunn), the general supervisor of streets and roads for the City, stated in a certification that the City's "tree crew" only performs basic tree maintenance and trimming of trees on City property, and picks up leaves in the fall. Dunn notes that the City covers about sixty-nine square miles. It is a largely rural area. He notes:

It would be a hardship both economically and logistically for the City's Department of Public Works to inspect every tree within the City's borders, or even within the City's right of way and on City property, for the multitude of diseases that are capable of causing damage to any or all of the varieties of trees within the City's borders.

Dunn testified that the City does not employ anyone to inspect trees, and consults an arborist only when a particular need arises.

In August 2006, the City moved for summary judgment, arguing that plaintiffs had not presented sufficient evidence to support a claim under the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to 12-3. The City maintained that plaintiffs failed to meet the requirements of N.J.S.A. 59:4-2 because they did not establish that the City had actual or constructive notice of a dangerous condition. The City further argued that plaintiffs had not shown that the City's action or inaction in respect of the alleged dangerous condition was palpably unreasonable.

The trial judge did not determine whether the City had actual or constructive notice that the subject tree constituted a dangerous condition; however, the judge concluded that the City's actions respecting the tree were not palpably unreasonable. The judge entered an order on September 8, 2006, granting the City's motion. This appeal followed.

Plaintiffs argue that the trial judge committed reversible error by granting summary judgment in favor of the City. Plaintiffs argue that the judge erred in determining that a jury could not find that the City's actions were palpably unreasonable under the circumstances presented in this case. Plaintiffs contend that they submitted sufficient evidence to raise a genuine issue of material fact as to whether the City's actions were palpably unreasonable.

The TCA provides that a public entity may be liable for an 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 [*N.J.S.A.*] 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

[*N.J.S.A.* 59:4-2.]

A public entity is deemed to have "actual notice of a dangerous condition" when it had "actual knowledge of the existence of the condition and knew or should have known of its dangerous character." N.J.S.A. 59:4-3a. In addition, a public entity is deemed to have "constructive notice" of a dangerous condition

if the 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.* 59:4-3b.]

However, a public entity will not be liable 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.

Plaintiffs have the burden of showing that the City's action or failure to act was palpably unreasonable. *Muhammad v. N.J. Transit* , 176 N.J. 185, 195 (2003) (citing *Holloway v. State*, 125 N.J. 386, 403 (1991); *Kolitch v. Lindedahl*, 100 N.J. 485, 493 (1985)). Although the term "palpably unreasonable" is not defined in the TCA, it has been interpreted to mean "more than ordinary negligence, and imposes a steep burden on a plaintiff." *Coyne v. New Jersey*, 182 N.J. 481, 493 (2005). "Patently unreasonable" conduct is "patently unacceptable under any given circumstance." *Kolitch*, *supra*, 100 N.J. at 493. "[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.'" *Ibid.* (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)).

"Palpable unreasonableness is a question of fact." *Vincitore v. Sports & Exposition Auth.*, 169 N.J. 119, 130 (2001) (citing *Furey v. County of Ocean*, 273 N.J. Super. 300, 313 (App. Div.), *certif. denied*, 138 N.J. 272 (1994)). However, like any other fact issue, the question of whether a public entity acted in a palpably unreasonable manner "is subject to the court's assessment" of whether that finding "can reasonably be made under the evidence presented." *Black v. Borough of Atlantic Highlands*, 263 N.J. Super. 445, 452 (App. Div. 1993); *seealsoMaslo v. City of Jersey City*, 346 N.J. Super. 346, 350-51 (App. Div. 2002) (noting that "the question of palpable unreasonableness may be decided by the court as a matter of law in appropriate cases").

Here, the trial judge correctly determined that the plaintiffs had not presented sufficient evidence to raise a genuine issue of material fact as to whether the City's actions in this matter were palpably unreasonable. The judge properly noted in his decision from the bench that the City's public works employees were not trained to identify girdling roots or whether a tree was in danger of imminent failure as a result of such condition. The judge also pointed out that the City had not retained an arborist to "go around and inspect trees for girdling roots and perhaps a myriad of other types of similar problems, which would make a tree unsafe." Based on the evidence, the judge correctly found that a jury could not find that the City's failure to have such an inspection program was "patently unacceptable under any given circumstance." *Kolitch*, *supra*, 100 N.J. at 493.

Plaintiffs insist that it is palpably unreasonable for the City to fail to inspect the trees throughout the City for girdling roots when that condition is, as Carlson opined, open and obvious. Plaintiffs assert that if the City's employees had been trained to identify the condition, they would be able to do so in the normal course of their duties when collecting leaves. Plaintiffs contend that routine visual inspection of trees would not require additional manpower or other resources. We disagree.

As we have pointed out, Carlson stated in his report that the presence of girdling roots may be obvious on visual inspection. However, the mere presence of girdling roots is not an indication that an affected tree is in danger of imminent failure. As Carlson recognized, further inspection of the tree is required and, depending on the nature and extent of the problem, such an inspection

could take minutes or hours.

Thus, Carlson's own report makes clear that an inspection program to identify trees that are in danger of imminent failure due to girdling roots would require additional manpower and resources. Furthermore, as the judge pointed out in his decision from the bench, the City is about sixty-nine square miles and there are undoubtedly many hundreds of trees along the City's streets and roadways. It is obvious that a regular program to inspect the City's trees for imminent failure due to girdling roots would require additional manpower and resources.

Plaintiffs additionally argue that the trial court erred by relying upon the decision in *Sims v. City of Newark*, 244 N.J. Super. 32 (Law Div. 1990). In *Sims*, the plaintiffs were injured when a tree limb fell onto the roof of their car. *Id.* at 36. The plaintiffs alleged that the tree was unhealthy and much of it was dead. The city had entered into contracts for tree maintenance but those services had not been performed where the accident occurred. In addition, the city did not have a formal tree inspection program. *Ibid.*

The trial judge in *Sims* concluded that "the city's inspection and maintenance, or lack thereof, of all trees bordering its streets constitutes a discretionary decision and its inaction was not palpably unreasonable." *Id.* at 35. The judge further found that "the city's decision not to allocate resources for inspections of all of its trees was not palpably unreasonable." *Ibid.*

Plaintiffs argue that the facts in *Sims* are distinguishable. Plaintiffs point out that in *Sims* there was no evidence that the city had a tree crew. However, as we have explained, in this case, the City's tree crew only responded to specific complaints regarding particular trees. Moreover, in this matter, as in the *Sims* case, the City elected not to devote its resources to a program for the regular inspection and maintenance of trees throughout the municipality. As the judge in *Sims* persuasively concluded, such a determination is not palpably unreasonable.

Affirmed.