**CHANTAL BAUDOUIN, individually and as Guardian ad Litem on behalf of CASSANDRA BAUDOUIN and RACHELLE BAUDOUIN, minor children, Plaintiffs-Appellants,**

**v.**

**THE NEW JERSEY TURNPIKE AUTHORITY, THE GARDEN STATE PARKWAY c/o THE NEW JERSEY TURNPIKE AUTHORITY, Defendant-Respondent,**

**and**

**TOWNSHIP OF BLOOMFIELD, COUNTY OF ESSEX, STATE OF NEW JERSEY, their respective agents, servants and employees, and ELITE TREE SERVICE, Defendants.**

**JOSEPH F. O'CONNELL, III, ESQ., as Administrator of the Estate of JOEL BAUDOUIN, and EDOUARD BAUDOUIN and EDOUARD BAUDOUIN as Administrator of the Estate of MARIE A. VERNET, Plaintiffs-Appellants,**

**v.**

**THE NEW JERSEY TURNPIKE AUTHORITY, THE GARDEN STATE PARKWAY c/o THE NEW JERSEY TURNPIKE AUTHORITY, Defendant-Respondent,**

**and**

**TOWNSHIP OF BLOOMFIELD, COUNTY OF ESSEX, STATE OF NEW JERSEY, their respective agents, servants and employees, and ELITE TREE SERVICE, Defendants.**

**No. A-3903-13T2**

**Superior Court of New Jersey, Appellate Division**

**May 1, 2017**

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued October 21, 2015 [1]

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket Nos. L-01368-10 and L-10198-10.

James A. Plaisted argued the cause for appellants (Walder Hayden, attorneys; Mr. Plaisted, of counsel; Thomas J. Spies and Steven D. Grossman, on the brief).

Bruce D. Ettman argued the cause for respondent (Chiesa, Shahinian & Giantomasi, attorneys; Mr. Ettman and Lauren R. Tardanico, on the brief).

Before Judges Fuentes, Koblitz and Gilson.

FUENTES, P.J.A.D.

Just after midnight on December 25, 2 008, Joel Baudouin was driving his 2006 Volkswagen Passat on the southbound lane of the Garden State Parkway (Parkway). His mother, Marie A. Vernet, sat next to him, while his two daughters, Cassandre and Rachele, who were thirteen and eight years old respectively, sat in the backseat. At approximately 1:13 a.m., a hickory tree, measuring eighty feet in height and twenty-one inches in diameter, fell across the three southbound lanes of the Parkway and crushed the front passenger compartment of the Passat. The tree was located approximately sixteen to nineteen feet from the guardrail, near milepost 151.5 of the Parkway, in the Township of Bloomfield.

Mr. Baudouin and Mrs. Vernet were pronounced dead at the scene. The children, who were initially trapped inside the backseat area of the vehicle, were removed from the wreckage by first responders and taken to the University of Medicine and Dentistry Medical Center. The eight-year-old girl sustained a fracture to her right leg; her older sister was treated for "minor bruises and abrasions" to her face.

On February 5, 2 010, the mother of the minor children filed a three-count civil complaint on her own behalf and as guardian ad litem, seeking compensatory damages for the children's physical injuries, suing for negligent infliction of emotional and psychological trauma under *Porteev.Jaffe*, 84 N.J. 88 (1980), and requesting recovery of damages under the Survivor's Act, N.J.S.A. 2A:15-3. On December 6, 2010, the Estates of Joel Baudouin and Marie A. Vernet filed their own civil actions for wrongful death pursuant to N.J.S.A. 2A:31-1 to -6 and related negligence claims. Although both causes of action originally named other public entities and one private contractor as defendants, plaintiffs have withdrawn or settled all claims against those parties.

The only remaining defendant is the New Jersey Turnpike Authority (Turnpike Authority), a public entity established in 2 003 to operate, manage, and maintain the New Jersey Turnpike and Garden State Parkway. *See* N.J.S.A. 27:23-3(A).[2] Plaintiffs alleged the Turnpike Authority, as the State agency responsible for operating and maintaining the Parkway, negligently failed to "properly maintain,

remove, inspect, secure or otherwise properly care for the rotting, falling, dead and decaying trees adjacent to the roadway in the area of the accident[.]"

After extensive discovery, the trial court granted the Turnpike Authority's motion for summary judgement and dismissed the plaintiffs' claims as barred under N.J.S.A. 59:4-2(b) of the Tort Claims Act (TCA), N.J.S.A. 59:1-1 to N.J.S.A. 59:12-3. The judge found plaintiffs failed to produce legally competent evidence demonstrating that the Turnpike Authority had: (1) "actual or constructive notice" of the tree's deteriorated condition, as defined under N.J.S.A. 59:4-3; and (2) "a sufficient time prior to the injury to have taken measures to protect against this dangerous condition." N.J.S.A. 59:4-2(b).

We review a trial court's decision to grant or deny a motion for summary judgement de novo. *TemploFuenteDeVidaCorp.v.Nat'lUnionFireIns.Co.ofPittsburgh*, 224 N.J. 189, 199 (2016). We apply the same standard used by the trial court. *Ibid.* Summary judgment should be granted only if the record presented to the court, viewed in the light most favorable to the nonmoving party, shows there are no genuine issues of material fact in dispute and the moving party is entitled to judgment or order as a matter of law. *Brillv.GuardianLifeIns.Co.ofAm.*, 142 N.J. 520, 540 (1995); R. 4:46-2(c).

Applying these standards to the record before us, we are satisfied plaintiffs have not presented competent evidence showing the Turnpike Authority had actual or constructive notice of the tree's seriously deteriorated condition. The trial court properly dismissed the complaints against this public entity under N.J.S.A. 59:4-2(b).

I

The motor vehicle incident report prepared by the New Jersey State Police (NJSP) noted the accident scene featured "broken branches and two large sections of a tree in the roadway." The incident report included the following description of the tree shortly after the accident.

The base of the tree was located approximately 20 feet west of the roadway. Upon observing the tree it appeared to the undersigned that the tree was in an unknown state of decay. The lower portion of the fallen tree was approximately 45 feet long and was observed laying across the grass, right shoulder, and into the right lane of travel. Additionally, the upper portion of the fallen tree was approximately 36.5 feet long and was observed laying across the right lane of travel, just south of the lower portion. Inspection of the upper portion revealed evidence of contact with [the Passat]. Specifically, there were shards of glass from the front windshield pushed into the wood, as well as there being paint transfer wedged into the bark. *Inspectionofthelowerportion'sbaserevealedalargeholeinthecenterofthetreeanditappearedtoberotted*.

[(Emphasis added).]

According to the report, the weather that evening had "consisted of freezing rain and subsequent ice accumulation on the roadway and surrounding trees[.]" However, "[a]t the time of the accident, the weather was clear and the road surface was wet." The report noted that the National Weather Center had issued "two weather warnings" about icy conditions for the evening of December 24, 2008. The NJSP report stated the weather station posted in Newark by "DTN/Meteorlogix, a national weather data collector, reported a westerly wind at a constant speed of 24 MPH (miles per hour) with gusts up to 38 MPH." Ultimately, the NJSP concluded "the cause of the accident can be limited to the apparent physical condition of the tree prior to the crash as well as the environmental conditions present prior to the time of the crash."

*DiscoveryIssues*

In 2008, Ernest Dell'Osso was the Turnpike Authority's landscape supervisor for the northern area of the Parkway where the accident occurred. He investigated the scene and arrived while the victims were still in the car. His priority then was to secure the area and open the roadway within hours of the accident. Dell'Osso worked for the Parkway for over thirty years and retired in 2 009. However, his participation in this wrongful death/personal injury case is complicated by the fact he sued the Turnpike Authority over an employment matter around the time he retired. Dell'Osso and the Turnpike Authority eventually settled, but the record does not reveal when they did so. Plaintiffs' counsel took Dell'Osso's deposition on April 30, 2012.

The trial judge entered a consent case management order dated March 22, 2013, granting plaintiffs' request to extend discovery until July 31, 2013. The judge struck a preprinted section of the order that provided for another case management conference and replaced it with a handwritten notation at the bottom of the order that states: "This is *final* extension!" On November 8, 2013, the Turnpike Authority filed this motion for summary judgment. The case was scheduled for trial on July 21, 2014.

On December 10, 2013, approximately five months after the discovery end date (DED) agreed upon in the consent order, counsel for the adult plaintiffs subpoenaed Google Inc., seeking to authenticate photographs taken fourteen months before the accident that purportedly depict the tree at issue fully standing. On December 31, 2013, adult plaintiffs' counsel filed a motion to extend discovery. In his certification in support of the motion, counsel apprised the judge that the parties had voluntarily continued to engage in

discovery beyond the court imposed DED of July 31, 2013. As an example of this extrajudicial arrangement, counsel noted that he allowed defense counsel to depose plaintiffs' experts on October 9, 2013 and November 1, 2013.

Counsel emphasized that the motion related only to two discrete discovery issues he claimed remained outstanding: (1) the "authenticity" of photographs, obtained through Google, that allegedly depict the condition of "hazardous trees 14 months prior to the accident, " and (2) records maintained by the Turnpike Authority and the law firm that represented Dell'Osso in the employment-related litigation and subsequent settlement agreement.

Counsel characterized Dell'Osso as a "central witness whose conduct is at issue in the case." Counsel expected Dell'Osso to testify that the Turnpike Authority "blew it as to the hazardous condition of the subject tree that fell and caused the accident." However, counsel believed Dell'Osso's "credibility may be at issue" because "witnesses suggested Dell'Osso might have engaged in malfeasance." Finally, adult plaintiffs' counsel conceded that Dell'Osso had provided certifications and deposition testimony in this case long before the DED reflected in the consent order.

On January 13, 2014, while his extension of discovery motion was pending before the trial judge, adult plaintiffs' counsel subpoenaed the law firm that represented Dell'Osso in the employment-related suit, asking the firm to produce, "[w]ith the exception of documents protected by attorney client and attorney work product privileges, your complete paper and electronic file for Ernie Dell'Osso's litigation with the New Jersey Turnpike/Garden State Parkway." The Turnpike Authority moved to quash the subpoena.

That matter was heard before a different Civil Division Judge. The attorney who represented Dell'Osso in the employment litigation submitted a certification in support of the motion to quash, stating:

The [Turnpike] Authority and Mr. Dell'Osso have settled the litigation and, as part of the settlement, we agreed that we would not discuss the substance of the claims asserted to people not involved with it. Pursuant to the settlement of the case, Mr. Dell'Osso agreed not to discuss the substance of the litigation publicly. The claims and defenses in the matter I handled are personal and should be of no concern to anyone else. I am not authorized to ignore the agreement we made or to make any confidential file available to strangers whose intentions and interest in the matter are unclear.

The judge granted the Turnpike Authority's motion and quashed the subpoenas in an order dated February 18, 2014. The order contains a handwritten notation from the judge which states: "Reasons on record 2/14[/2014]." The appellate record does not include a transcript containing the judge's reasons.

On March 14, 2 014, the trial judge heard argument on the Turnpike Authority's motion for summary judgment. In an order dated that same day, the motion judge granted Turnpike Authority's summary judgment motion and dismissed plaintiffs' complaints with prejudice. In a separate order dated that day, the judge denied as moot plaintiffs' motion to extend discovery until June 9, 2014.

*TreeInspectionProtocol*

At the time of the accident, Gary DeFelice was employed by the Turnpike Authority as a "Landscape Specialist." He has a Bachelor of Science Degree in Ornamental Horticulture from Delaware Valley College of Science and Agriculture, and has attended and completed "many" post-graduate seminars and training courses related to his field, "including those in hazard tree identification, hazard tree detection and management, . . . and landscape Integrated Pest Management." DeFelice was hired in 1986 by the New Jersey Highway Authority, the Turnpike Authority's predecessor, to make policies and procedures and to manage and maintain the landscaping along the Parkway. He provided "technical support" and developed "landscaping projects and maintenance programs related to landscaping." DeFelice carried out his duties without incident for the past thirty-one years.

The Turnpike Authority submitted DeFelice's certification and his deposition testimony in support of its motion for summary judgment. DeFelice assisted the Turnpike Authority in the formulation, development, and implementation of the "Hazard Tree Inspection Program." The first step to understanding the challenges and limitations of this program is to examine its magnitude and scope. "The Parkway is 172 miles long and is tree-lined over much of its length both northbound and southbound and in the median . . . [and] has more than [3]00 tree-lined 'shoulder miles' to inspect."

The Hazard Tree Inspection Program "consists of making periodic 'windshield inspections' of the trees that can impact the roadway." DeFelice inspected the trees while seated in the front passenger-seat of a car that drove at approximately ten to fifteen miles per hour along the shoulder of the Parkway. He and other inspectors visually examined trees located close to the highway that would potentially cause accidents if they or their branches fell. DeFelice certified:

At the time of the incident, windshield inspections were conducted in early winter, after the leaves had fallen, to get a full view of the trunk of the tree facing the roadway.

If something was spotted that indicated a potential serious

problem with a tree, the driver was directed to stop the vehicle so that the tree could be inspected further. At that point, a determination would be made as to what, if anything, had to be done with the tree and at what priority based on the seriousness of the problem.

After completing this initial triage, DeFelice would then record the location of the potentially problematic trees, note "any description necessary to identify the tree, " state what needs to be done, and assign priority to the trees and locations in a hazard dead-tree inventory. As part of his certification, DeFelice attached a document he drafted entitled "Garden State Parkway Hazardous Tree and Overhang Inventory, January-2007[, ] Southbound." This document used the following tree-rating triage protocol: four asterisks (****) indicated an immediate priority; three asterisks (***) indicated high priority; two asterisks (**) indicated medium priority, and one asterisks (*) indicated "Low Priority/Monitor."

Of the 554 trees listed in the January 2007 Hazard Tree Inventory, only five trees were identified in the *vicinity* of Parkway milepost 151.5, where the accident occurred. The mileposts, however, describe a range rather a precise point. None of the five trees were located at Parkway milepost 151.5. Three trees were identified as three asterisks (***) or high priority and two were marked with four asterisks (****) or immediate priority. The inventory format provided a space, labeled "Remarks, " for inspectors to record any relevant information about the trees, such as their genus. No remarks were included to help identify these five trees.

In his deposition testimony, DeFelice explained the difference between inspections of areas used for parks and recreation and inspections of highways spanning hundreds of miles.

Q. Now, in your courses, they did recommend individual inspections of large trees that were large enough to hit the target[, ] correct?

A. Yes. The one thing that I have to point out about this manual, this manual was designed for Parks and Recreations.

We utilized this manual as a resource on supporting identification of defects, and the true definition of the defects.

In a case where you have a park, you have a target that could be a campsite, it could be a picnic area, it could be a bench. In that case, it's very easy to go to that area and easily make an inspection.

Again, we're talking 172 miles of road or 300-plus shoulder miles of tree line.

These logistical and environmental differences compelled DeFelice to adopt the windshield inspection protocol as the principal triage method for monitoring and cataloguing the trees located along the sides of this 172-mile Parkway. DeFelice nevertheless acknowledged the inherent limitations of the protocol.

Q. And the only way one could determine if a tree had substantial rot at the base is by getting close enough to look at it[, ] correct?

A. That's correct.

Q. And the only way one could tell if there was any kind of a root problem is to get close enough to tell[, ] correct?

A. In our . . . course of action on the roadway, we go out and inspect the road when it's in full canopy, or doing the growing season, particularly later in the summer.

We look at most of the tree conditions. You see a symptom that's exhibited by a tree that gives an indication that there could be a condition that's causing the tree to fail, we then get out and make the physical walk-around inspection.

There are . . . cases of rot or decay or root rot that's not always evident based on the tree canopy, or the tree doesn't always show a condition, which, unfortunately, in this case, is how and why we did not get out and make a physical inspection on that tree.

Q. And you would agree, would you not, the only way to tell if there is rot on the back half of the tree that's not facing the Garden State Parkway is to get out and look at the back half[, ] correct?

[Defense counsel] Objection to form.

A. Yes.

[(Emphasis added).]

The record also includes a Hazard Dead Tree Inventory list compiled from a windshield inspection dated January 10, 2002, nearly six years before the accident. The list features a single (*) to the right side (RS) of milepost 151.55. This indicates that a tree or group of trees with problem(s) of "Low Priority" requiring monitoring was located there.

*ExpertTestimony*

The day after the accident, the adult plaintiffs' counsel engaged certified tree expert[3] John D. Linson to investigate the site. In an undated report, Linson noted that the base of the tree was hollow and had a visible hole on the west side of the tree that faced the woods, not the Parkway.

On March 1, 2012, the attorney representing the children and their mother retained certified tree expert Michael Kopas to inspect the site and opine on what caused the tree to fall. Kopas submitted his report on March 2, 2013, more than five years after the accident. He based his observations on Linson's photographs and the NJSP's incident report. Kopas criticized DeFelice's failure to adhere to the recommendations and standards contained in a manual tiled "How to Detect, Asses and Correct Hazard Trees in Recreational Areas, " published by the Minnesota Department of Natural Resources.

Both experts opined that a walk-around with a 360-degree close visual inspection of individual trees was the only method sanctioned by the industry, as evidenced by the Minnesotan manual. The experts did not directly address DeFelice's testimony discussing the inapplicability of an individualized walk-around to a six-lane highway that spans 172 miles and has approximately 300 miles of shoulder space.

The Turnpike Authority retained J. David Hucker, who identified himself as an "RCA, " which we presume stands for "Registered Consulting Arborist."[4] Hucker authored a report for defense counsel dated August 1, 2013 that refutes plaintiffs' experts' opinions regarding what should be the appropriate tree-inspection protocol for highways like the Parkway.

Hucker visited the site on March 14, 2013, more than four years after the date of the accident. Despite this delay, he was able to inspect the stump of the fallen tree. He then "walked the wood line for a short distance both north and south of this site." Hucker also examined the lower section of the trunk that had been removed from the scene and stored in a maintenance yard operated by the Turnpike Authority.

Hucker noted that both of plaintiffs' tree experts "suggest that a walking, 360[-degree] visual inspection is set forth as an adopted standard in industry literature." However, he stated that in his "40 years performing tree assessments for many clients, including the Delaware Department of Transportation and PECO Energy Company, I know of no utility or highway department that expends the time and resources necessary to perform a 360 degree walk-around of every tree that could possibly impact a roadway."

Hucker opined that the windshield inspection protocol established by DeFelice here was consistent with similar practices adopted by public entities charged with monitoring trees abutting long highways or other public landscapes.

Driving windshield inspections are a common and accepted industry practice when large numbers of trees or great distances are involved. In my professional experience, it is typical and reasonable for departments of transportation and utility companies who have an interest in maintaining trees along roadways to utilize windshield inspections coupled with more detailed inspections if problems are noted. For many if not most departments . . ., a detailed walking inspection of all trees along a roadway is practically and financially unreasonable.

After personally assessing and examining the remains of the tree that caused this tragic accident, Hucker opined that, prior to and at the time of the accident, the Turnpike Authority had a hazard tree inspection policy in place "that was consistent with standard industry practices. This policy called for a driving windshield inspection which would incorporate walking inspections if a specific concern was noticed." Furthermore, the policy required Turnpike Authority employees who traveled the Parkway "on a regular basis" to report any specific hazard tree issues. This protocol applied even if the employee was off duty at the time.

With respect to the particular tree that caused this tragic accident, Hucker opined it "was significantly decayed . . . the majority of [which] was internal." Hucker also noted the tree "was in leaf the season before the accident and was alive at the time of failure." Hucker emphasized there was no evidence to suggest that "the tree was leaning or displaying any specific symptoms or sign of impending failure which an inspector, during windshield inspection or routine observation of the roadside, should have noticed."

The record also includes the report of a certified arborist retained by Elite Tree Service, a private contractor hired by the Turnpike Authority that was originally named as a defendant by both sets of plaintiffs. We decline to consider this report because Elite is not part of this appeal.

II

*TheTortClaimsAct*

The magnitude of the tragedy here requires no elaboration. The banality of the core facts that caused such a tragedy is equally self-evident. However, the legal questions before us must be considered against the well-established public policy of the TCA. The Legislature intended the TCA "to serve as 'a comprehensive scheme that seeks to provide compensation to tort victims without unduly interfering with governmental functions and without imposing an excessive burden on taxpayers.'" *Parsonsexrel.Parsonsv.MullicaTwp.Bd.ofEduc*, 226 N.J. 297, 308 (2016) (quoting *Bernsteinv.State*, 411 N.J.Super. 316, 331 (App. Div. 2010)). The purpose of the TCA is to shield public entities from liability, subject only to the TCA's specific liability provisions.

*Smithv.FireworksbyGirone,Inc.*, 180 N.J. 199, 207 (2004). Thus, when a court is required to balance the liability and immunity provisions of the TCA, "immunity is the rule and liability the exception." *Ibid.* (quoting *Poseyexrel.Poseyv.BordentownSewerageAuth.*, 171 N.J. 172, 181-82 (2002)); *seealso* N.J.S.A. 59:2-1a (stating "[e]xcept as otherwise provided by this act, a public entity is not liable for an injury").

In support of the trial court's decision dismissing plaintiffs' complaint as a matter of law, the Turnpike Authority argues that given the length of the Parkway and the number of trees involved, the windshield inspections protocol it established is a reasonable, customary, and acceptable method of inspecting trees. The internal decay that caused this particular tree to fall was a latent defect that could not have been detected using the windshield inspections protocol. The Turnpike Authority maintains that the forensic examination of the base of the tree revealed it was alive when it fell. Plaintiffs' experts conceded that the only way to determine whether a tree may be in a serious state of decay is to conduct a close-up, 360-degree visual inspection of the tree, a facially impractical method under these circumstances.

Even if the Google Earth and Pictometry photographs are considered as competent evidence for this limited purpose, the Turnpike Authority argues the photographs did not show the tree was in serious distress or in need of immediate attention. Finally, the photographs did not provide any information that DeFelice would not have been able to discover through the windshield inspection protocol.

Plaintiffs respond by challenging DeFelice's credibility with respect to his account of the Turnpike Authority's efforts to address the trees identified as in need of attention by the 2002 and 2007 survey reports. Plaintiffs rely on the observations of the fallen tree made by their tree expert Linson the day after the accident. According to Linson, the stump of the tree had visible external decay. Plaintiffs claim the observations Dell'Osso made shortly after the accident corroborate Linson's description of the stump.

Plaintiffs also dispute the Turnpike Authority's claim that the governing standard should be whether a tree's condition constitutes an imminent risk. Plaintiffs argue the Turnpike Authority's own "Best Management Practices, Tree Risk Assessment" exhibit states that visual assessments were to be performed to identify "*imminent* and/or *probable* likelihood of failure." Plaintiffs cite a presentation given by tree experts to Turnpike Authority employees, including DeFelice, that stated: "Trees which are leaning are not hazardous in and by itself. When associated with decay, a lean adds considerable stress on the stem and increases the 'likelihood of failure[.]'"

Against this evidentiary backdrop, plaintiffs argue the efficacy and competency of the Turnpike Authority's hazardous tree inspection protocol and remediation program are matters for a jury to decide. They also argue that this matter is not ripe for summary judgment under *Rule* 4:46-2(c) because Dell'Osso and Linson's conflicting accounts of the tree's condition when it fell constitute disputed material facts.

In addition to the standards established in *Brill*, *supra*, 142 N.J. 520, and codified in *Rule* 4:46-2(c), N.J.S.A. 59:4-2 governs whether a matter is ripe for summary judgment under the TCA. To avoid summary judgment, plaintiffs must show:

> [(1)] the property was in 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 . . . either: [(4)](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;[5] or [(4)](b) a public entity had *actualorconstructivenoticeofthedangerous* 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 (emphasis added).]

The TCA 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.

In granting defendant's summary judgment motion, the motion judge found the tree constituted "a dangerous condition" when it fell. In the judge's view, the only disputed issue is whether the Turnpike Authority should have noticed "the weakened condition of the base of the tree[.]" Subjecting this question to N.J.S.A. 59:4-2(b), the judge rejected "out of hand" the claim that the Turnpike Authority had "actual notice."

However, the judge described the issue of constructive notice as "more difficult." After grappling with the testimony of the witnesses concerning the tree's condition, the judge found the Turnpike Authority's windshield inspection protocol "perfectly acceptable." The judge noted that "even" plaintiffs' experts agreed "that the most obvious defect in the tree to the human eye was behind the tree, and would not have been visible by a reasonable, careful windshield inspection."

The question of notice under N.J.S.A. 59:4-2(b) was

thoroughly examined by our Supreme Court in *Polzov.CountyofEssex*, 209 N.J. 51 (2012). In *Polzo*, the Court was asked to determine "whether a county can 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." *Id.* at 55.

The core facts of *Polzo* in many ways mirror the facts present here. Tall trees along the side of the Parkway are as ubiquitous as potholes are on roads, especially after a harsh winter. However, whereas potholes constitute per se defects to the condition of the road, trees are not inherently dangerous. Trees can become dangerous if weakened by vandalism or decay.

Writing for a unanimous Court in *Polzo*, Justice Albin applied the TCA's public policy considerations and held:

Liability attaches to a public entity only when a pothole or depression on a roadway constitutes a dangerous condition; the public entity either causes the condition or is on actual or constructive notice of it; and, if so, the public entity's failure to protect against the roadway defect is palpably unreasonable.

[*Ibid*, (citing N.J.S.A. 59:4-2).]

In so holding, the Supreme Court reversed a panel of this court which held that the county maintaining the road had a duty to seek out and repair potholes, including those located along the shoulder of the road. *Id.* at 56. Justice Albin explained why this court erred as follows:

[T]he County *did* appear to have a proactive program, even if it was less than ideal. The County did more than just respond to pothole complaints received by telephone. The County inspected roads based both on the date of the last overlay and a known history of pavement problems. Additionally, County workers repairing a complained-of pothole would inspect other portions of a roadway for defects and make necessary repairs. Plaintiff's expert has not shown that his conception of a routine road inspection program would have resulted in a more timely review of the roadway than the one done here five weeks before the accident.

*ThisCourtdoesnothavetheauthorityorexpertisetodictatetopublicentitiestheidealformofroadinspectionprogram,particularlygiventhelimitedresourcesavailabletothem.*

[*Id.* at 69 (emphasis added) (citing N.J.S.A. 59:1-2).]

Similarly, the record here is devoid of any evidence showing that before December 25, 2008, the Turnpike Authority received complaints that a particular tree around milepost 151.5 at the southbound lane was leaning or showed any other visible signs of decay. Just like the county in *Polzo*, the Turnpike Authority had in place a protocol for inspecting the 172-mile long Parkway that is substantially similar to protocols used in other states to inspect their highways. The windshield inspection protocol is a facially sensible approach to monitoring the Parkway. Courts do not have the authority to require that the Turnpike Authority improve or refine its method of inspection.

The TCA defines a dangerous condition as "a condition of property that creates a substantial risk of injury when such property *isusedwithduecareinamannerinwhichitisreasonablyforeseeablethatitwillbeused*." N.J.S.A. 59:4-1 (emphasis added). Eighty-foot tall trees are not inherently dangerous. The Garden State Parkway is a three-lane wide highway, running 172 miles north and south, with 300 miles of shoulder. The eighty-foot tall hickory tree that fell at milepost 151.5 on December 25, 2008, is one of thousands, if not millions, of similar trees abutting or near both sides of the Parkway. Neither this record nor the Parkway's history suggests that this tragedy occurs frequently.

The tree experts who forensically examined the remains of the tree stump years later expressed conflicting opinions about the tree's overall health and visible condition at the time it fell. All of the experts agreed, however, that the only reliable means of ascertaining the health of the tree would have required a close, 360-degree visual inspection of the trunk area. Given the length of the Parkway and the number of potential trees involved, it is patently unreasonable to expect the Turnpike Authority to conduct such an inspection. Therefore, as a matter of law, we conclude that, at the time of the accident, neither the Parkway nor the trees situated nearby constituted a dangerous condition under N.J.S.A. 59:4-1a because they were used with due care in a manner in which it is reasonably foreseeable that they would be used.

A public entity has constructive notice of a dangerous condition "only if the plaintiff establishes that the condition had existed for *suchaperiodoftime* and was of such an *obviousnature* that the public entity, in the *exerciseofduecare*, *shouldhave* discovered the condition and its dangerous character." N.J.S.A. 59:4-3b (emphasis added). "The mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" *Arroyov.DurlingRealty,LLC*, 433 N.J.Super. 238, 243 (App. Div. 2013) (quoting *Simsv.CityofNewark*, 244 N.J.Super. 32, 42 (Law Div. 1990)).

Plaintiffs did not satisfy this standard. Plaintiffs argue that the photographs obtained from Google, Pictometry, and other aerial-view providers depict the hazardous tree sticking out from among all other leafed trees "like a sore

thumb." They further claim the tree was openly visible and in this condition for ten years. Such claims are not supported by the competent evidence and the "diagnosis" of the tree is nothing more than pure conjecture. Finally, the conflicting opinions rendered by the tree experts do not create a jury issue. This court does not have the legal authority to question the efficacy of the Turnpike Authority's inspection program. *Polzo*, *supra*, 2 09 N.J. at 69.

Plaintiffs' remaining arguments lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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Notes:

[1]On February 4, 2011, the Law Division consolidated these two cases under one caption and designated trial docket number ESX-L-1368-10 to apply to all pleadings.

[2]*Seealso* New Jersey Turnpike Authority, *AboutNJTA:WhoWeAre*, http://www.state.nj.us/turnpike/who-we-are.html (last visited Apr. 24, 2017).

[3]When plaintiffs' counsel engaged Linson, his activities as a "Tree Expert" were governed by the Tree Expert Act, *N.J.S.A.* 45:15C-1 to -10. Effective January 16, 2010, the Legislature repealed the Tree Expert Act and replaced it with the Tree Experts and Tree Care Operators Licensing Act, N.J.S.A. 45:15C-11 to -32.

[4]According to its website, the American Society of Consulting Arborists (ASCA) formed in 1967. The ASCA states it is "dedicated to providing Consulting Arborists with the tools and knowledge they need to deliver a stronger work product to their clients." Among the list of services the ASCA claims it provides to its members are the "Diagnosis of Tree and Landscape Problems" and "Expert Witness and Litigation." ASCA, *AboutASCA*, http://archive.is/LeFGp (last visited Apr. 24, 2017).

[5]N.J.S.A. 59:4-2a is not relevant here because plaintiffs have not argued that a Turnpike Authority employee "created the dangerous condition." *Cf.Tymczyszynv.ColumbusGardens*, 422 N.J.Super. 253, 264 (App. Div. 2011), *certif.denied*, 209 N.J. 98 (2012) (holding a jury can find dangerous icy condition that caused plaintiff to fall was created by defendant's negligence).

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