ROBERT DIMATTIES, JR., Plaintiff-Appellant,

v.

SOMERDALE PARK SCHOOL and SOMERDALE BOARD OF EDUCATION, Defendants-Respondents.

No. A-3769-08T1.

Superior Court of New Jersey, Appellate Division.

Submitted March 10, 2010.
Decided April 8, 2010.

Drinkwater & Goldstein, LLP, attorneys for appellant (Stanley N. Drinkwater, III, on the briefs).

Methfessel & **Werbel**, attorneys for respondents (Edward L. Thornton, of counsel and on the brief; Amanda J. Schmesser, on the brief).

Before Judges Sabatino and J. N. Harris.

PER CURIAM.

This case involves a slip and fall that occurred more than fourteen years ago. At that time, plaintiff Robert DiMatties, Jr. was eight years old and attending the second grade at the Somerdale Park School located in Somerdale. After being dropped off at school by his mother, DiMatties navigated a sloping pathway towards the school building, lost his footing on what he was later told was black ice, and fell, striking his head on the pavement.

This action was commenced in January 2007, when DiMatties was nineteen years of age. He asserted that as a result of the fall—proximately caused by the negligence of defendants, Somerdale Park School and the Somerdale Board of Education (collectively Somerdale)—he has suffered frequent debilitating migraine headaches and memory loss, both of which have prevented or limited him from attending to his normal daily activities and affairs.

Following the expiration of discovery, Somerdale moved for summary judgment on several grounds, all bottomed upon the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 to 12-3 (TCA). The motion judge granted Somerdale's motion for summary judgment and dismissed plaintiff's complaint with prejudice. We reverse and remand for further proceedings.

I.

The following facts are derived from evidence submitted by the parties both in support of, and in opposition to, the summary judgment motion, viewed in a light most favorable to plaintiff. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

On December 12, 1995, plaintiff—after leaving his mother's car but still under her watchful eye—slipped and fell as he walked downhill on a paved walkway towards the school. There had been a light snowfall a few days earlier, but plaintiff did not see any noticeable ice or snow on the roads that day. Plaintiff struck his head when he landed; he recalled only that "I got out of the car, I was walking towards my class and then all I remember is that I fell and I woke up." He alleged that he was told by multiple people who quickly arrived at the scene that he had slipped on black ice: a frozen combination of snow, slush, and moisture that is hard to detect because it is transparent and takes on the color of the material upon which it lays, often wet asphalt.

An incident report was completed by a school administrator on the same day as the accident. This report stated that plaintiff "slid on ice, fell and hit his head on ice." The incident report also indicated that plaintiff was immediately transported by an ambulance to West Jersey Hospital, where he was released later in the afternoon with, as his mother informed the school, "a slight concussion." Plaintiff remained absent from school for more than a week.

Edward Boyd was employed at the time as the "[d]irector of maintenance/custodian/plumber/electrician" by Somerdale and worked at plaintiff's school. His responsibilities included removing snow and ice from the school's sidewalks and near its entrances. Boyd claimed that he followed a standard and regularized procedure for ensuring that the walkways and entrances of

the school grounds were clear of ice and snow; Boyd would conduct a walkthrough of the school grounds shortly after a snowfall or when temperatures dropped after it rained. He used a snow blower to clear snow and applied calcium chloride in order to melt any ice. At his deposition, Boyd said that he had no independent recollection of plaintiff's fall or its aftermath.

Shortly after this incident, plaintiff was subjected to a battery of examinations and tests, including: (1) x-rays of plaintiff's lumbar spine, left clavicle, and skull, which all returned normal findings; (2) an MRI of his cervical spine showed no irregularities; (3) a CT scan showed a "[n]ormal brain;" (4) an EEG was interpreted as a "[n]ormal BEAM study." Seven years later, on March 26, 2003, a follow-up MRI of the brain revealed "[n]o focal lesions in the brain."

Nevertheless, on February 6, 1996, plaintiff was further examined by Dr. Shiva Gopal, M.D., as part of a neurological consultation due to plaintiff's incipient problems. Dr. Gopal's report expressed the opinion that plaintiff had suffered a "[p]ost-concussive syndrome with persistent cephalalgia and cognitive behavioral and emotional changes."

Several weeks later, on June 30, 1996, licensed psychologist Dr. Michael J. Colis, Ph.D., noted that plaintiff had attentional difficulties which "are probably due to [his] persistent headaches, as well as the head injury." Dr. Colis also diagnosed plaintiff with post-concussion syndrome.[1]

Two years later, because plaintiff had still not achieved a level of normalcy, Dr. David J. Massari, Ph.D., also a licensed clinical psychologist, evaluated plaintiff. Dr. Massari observed "areas of significant variability in functioning, which appear to be due to fluctuations in [plaintiff's] attention/concentration skills and his impulsive response style." The psychologist's report, based upon an examination conducted on November 20, 1997, further noted that the variability was "likely to be the residuals of [plaintiff's] closed head trauma, as there does not appear to be any previous history of such variability."

Plaintiff suffered from persistent headaches, together with experiencing behavioral and emotional changes, in the years immediately following the fall. Plaintiff's doctors prescribed several different medications for his headaches, some of which worked sporadically, but most did not. Plaintiff also sought emergency care on several occasions caused by persistent, intense headaches. He would become nauseated and vomited from time to time due to the severe incidents. Light was not tolerable during some of these episodes, and he would be forced to wear eyeshades in an effort to relieve some discomfort.

Plaintiff eventually graduated from Sterling High School in 2006. He had worked at Pep Boys from 2005 until January 2007 when he was fired allegedly for missing work. Plaintiff claimed that his employment was terminated with Pep Boys after he missed approximately a month of work due to an employment-related back injury, and additionally because he called in sick when he was going to the hospital due to a migraine headache. Since then, plaintiff started up his own auto sales business in close proximity to where his father operates a motor vehicle repair shop.

Plaintiff's expert medical witness, Dr. Allen C. Zechowy, M.D., Ph.D., linked plaintiff's constant headaches to "the trauma sustained on [December 12, 1995]" at the Somerdale Park School. He noted plaintiff's frequent occurrences of headaches as necessitating hospital visits and unpredictable absences from work. His ultimate medical opinion stated, "Mr. DiMatties will need continued medical treatment on an indefinite basis to try to alleviate his posttraumatic headache condition."

Plaintiff's expert engineering witness, George A. Widas, P.E., rendered a preliminary report dated March 25, 2008. Widas pointed out that the manner of falling described by plaintiff "was consistent with the physical characteristics of a fall produced by inadequate frictional properties of the walkway surface." Specifically, he noted:

> The slip-resistant/frictional properties of the subject bituminous paved exterior walkway were characterized as 0.10 to 0.25, by the cited, readily available, recognized, accepted, authoritative references, standards and codes, as well as by empirical data.
>
> The slip-resistant/frictional properties of the walkways were required by the cited references, standards and codes to be minimally 0.50, and as high as 0.8 to 0.9 slip resistance, particularly for the circumstances of the subject injury event where Robert DiMatties was foreseeably trying to descend the steep 18 percent slope of the subject bituminous paved exterior walkway, where the cited references, standards and codes required a maximum slope of 8.33 percent for the subject ramp.

Among other things, Widas opined that defendants should have provided some type of warning for pedestrians regarding the "hazardous, unsafe, and unreasonably dangerous condition of the subject steeply sloped bituminous paved exterior walkway."

The failure to do so, in Widas's opinion, exacerbated the environmental conditions at the time of plaintiff's fall, which could have been further mitigated by "delineating the unsafe condition with safety pylons, or similar marking, at a cost of less than $40.00; and/or by sanding and salting in a timely manner, at no additional cost."

II.

Our review of a summary judgment determination is de novo, and we apply the same legal standard as the trial court. Chance v. McCann, 405 N.J. Super. 547, 563 (App. Div. 2009); Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Thus, we consider, just as the Law Division did, "`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 (2007) (quoting Brill, supra, 142 N.J. at 536). Summary judgment must be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show 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). If there is no genuine issue of material fact, we must then decide whether the Law Division's ruling on the law was correct. Walker v. Atl. Chrysler Plymouth, Inc., 216 N.J. Super. 255, 258 (App. Div. 1987).

In New Jersey, "the duty of school personnel to exercise reasonable supervisory care for the safety of students entrusted to them, and their accountability for injuries resulting from failure to discharge that duty, is firmly established." Caltavuturo v. City of Passaic, 124 N.J. Super. 361, 366 (App. Div.) (citing Jackson v. Hankinson, 51 N.J. 230, 235-236 (1968); Titus v. Lindberg, 49 N.J. 66, 73 (1967)), certif. denied, 63 N.J. 583 (1973). "This duty may be violated, not only in the commission of acts but also in a neglect or failure to act." Ibid.

The TCA defines the contours of sovereign immunity for public entities in New Jersey, and prescribes "the nature, extent and scope of state and local tort liability and the procedural requisites for prosecuting tort claims against governmental agencies." Wright v. State, 169 N.J. 422, 435 (2001) (internal quotations omitted). It is the public entity that bears the burden to plead and prove immunity under the TCA. Wymbs v. Twp. of Wayne, 163 N.J. 523, 539 (2000). Nevertheless, the TCA provides several types of immunity to public entities, some specific while others more broad. However, "the general rule [is] that public entities are immune from tort liability unless there is a specific statutory provision imposing liability." Kahrar v. Boro. of Wallington, 171 N.J. 3, 10 (2002) (internal citation omitted).

Before parsing statutory provisions that might provide a specific immunity in this case, we must first determine whether there is one that would impose liability, as required by Kahrar. N.J.S.A. 59:4-2 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:
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> 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
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> 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.
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> 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.
>
> [(Emphasis added).]

DiMatties premises Somerdale's liability on this statute.

As explained by statute, a "dangerous condition" is "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(a). A "substantial risk" is "one that is not minor, trivial or insignificant." Kolitch v. Lindedahl, 100 N.J. 485, 493 (1985) (citation and

internal quotation omitted).

For the purposes of our analysis, we must accept that the walkway at the school upon which plaintiff was injured was in a dangerous condition because Widas's report creates a genuine issue of material fact in that regard. On a motion for summary judgment, the question for the court is whether DiMatties has presented a prima facie case for liability pursuant to N.J.S.A. 59:4-2(a) or (b).

Defendants argue that liability cannot be established primarily because plaintiff has not demonstrated anything that was palpably unreasonable on Somerdale's part. Specifically, defendants assert that "[plaintiff] has taken absolutely no steps to meet the conditions of N.J.S.A. 59:4-3, which deals with actual and constructive notice."

As is apparent from Widas's report, the liability asserted against Somerdale is premised upon its failure to take steps to remediate or warn against the inherent dangers of the steeply pitched walkway on the school's property that allegedly violated several building code standards. To make a prima facie case of liability under N.J.S.A. 59:4-2(b), a plaintiff must demonstrate that: (1) the injury was proximately caused by the dangerous condition, (2) the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred; (3) the public entity had actual or constructive notice of the dangerous condition; and (4) the notice was a sufficient time prior to the injury to have taken measures to protect against the dangerous condition. We are satisfied that the first two requirements have been met for the purposes of this motion for summary judgment, and therefore turn to the third requirement, which is notice.

Pursuant to N.J.S.A. 59:4-3(a), a public entity has "actual notice" of a "dangerous condition . . . if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character." Alternatively, it has "constructive notice . . . only 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. 59:4-3(b). "Protect against" is defined to include "repairing, remedying or correcting a dangerous condition, providing safeguards against a dangerous condition, or warning of a dangerous condition." N.J.S.A. 59:41-(b).

For the purposes of a motion for summary judgment, we are satisfied that Somerdale had actual notice of the dangerous condition of the walkway by virtue of the fact that it routinely took action to ensure against recurring slippery conditions in cold weather situations, as noted by the narrative of its former director of maintenance Boyd. Whether there was actual notice of the black ice that allegedly contributed to plaintiff's injuries is more difficult to discern from the record. Nevertheless, we are satisfied from the motion record—after giving plaintiff the benefit of a generous and indulgent review—sufficient factual disputes still exist regarding the walking conditions on the date in question so as to consign the matter to a jury's review, making summary judgment inappropriate.

If, as is the case here, steps taken by a public entity to "protect against" a "dangerous condition" are at issue, the plaintiff must prove, pursuant to N.J.S.A. 59:4-2, that those steps were "palpably unreasonable," a term not specifically defined in the Act. In Kolitch, the Supreme Court adopted the following definition:

> For today's purposes we accept what was stated in Williams v. Phillipsburg, 171 N.J. Super. 278, 286 (App. Div. 1979), in which the court differentiated the term "palpably unreasonable" from ordinary negligence:
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> We have no doubt that the duty of ordinary care, the breach of which is termed negligence, differs in degree from the duty to refrain from palpably unreasonable conduct. The latter standard implies a more obvious and manifest breach of duty and imposes a more onerous burden on the plaintiff.
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> We conclude that the term implies behavior that is patently unacceptable under any given circumstance. As one trial court has suggested, for 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." 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); see also H. Margolis and R. Novack, Tort Claims Against Public Entities 55 (1984) (discussing Williams and Polyard). Moreover, the burden of proof with regard to the palpable unreasonableness of the State's action or inaction is on the plaintiff in a case of this type. Fox v. Twp. of Parsippany-Troy Hills, 199 N.J. Super. 82 (App. Div.), certif. den., [101] N.J. [287] (1985); H. Margolis & R. Novack, supra, at 54; Comment, The N.J. Tort Claims Act: A Step Forward?, 5 Seton Hall L. Rev. 284, 294 (1974).

> [Kolitch, supra, 100 N.J. at 493.]

See also Muhammad v. N.J. Transit, 176 N.J. 185, 195-96 (2003) (applying the same standard). The Supreme Court again recently addressed the issue of palpable unreasonableness in Ogborne v. Mercer Cemetery Corp., 197 N.J. 448, 458-59 (2009) (remanding for a jury trial on the question of whether the public entity's conduct of locking the cemetery gates while plaintiff was still inside created a dangerous condition and was palpably unreasonable).

Consequently, the question becomes whether—when giving DiMatties the benefit of all reasonable inferences from the facts in the record before us—a jury must conclude that Somerdale's actions in addressing the dangerous condition of the inclined walkway were not "palpably unreasonable." That this is a question of fact, Vincitore v. N.J. Sports & Exposition Authority, 169 N.J. 119, 130 (2001); Furey v. County of Ocean, 273 N.J. Super. 300, 313 (App. Div.), certif. denied, 138 N.J. 272 (1994), does not mean that every lawsuit governed by the "palpably unreasonable" standard must go to trial. As with any other fact question, summary judgment should be awarded when it is determined that the facts undeniably do not meet the high standard imposed by the Legislature. See, e.g., Black v. Boro. of Atlantic Highlands, 263 N.J. Super. 445, 452 (App. Div. 1993) (holding that although "the `palpably unreasonable' determination presents a jury question in the sense that it is no longer specifically assigned to the judge[,] . . . like any other fact question before a jury, [it] is subject to the court's assessment whether it can reasonably be made under the evidence presented").

Based upon our review of the record, we conclude that summary judgment was not appropriate in this case. Clearly, Somerdale recognized the inherent danger of the sloping walkway on its property and took almost-daily steps to surveil and remediate any hazardous conditions. Nevertheless, on the date in question, an icy trap apparently awaited plaintiff. Expert evidence suggested that the code violations related to the walkway's slope and its slip resistant/frictional properties, combined with the late-autumnal climatological conditions contributed to plaintiff's lost footing on the paved walkway. Cf. Reyes v. Egner, 404 N.J. Super. 433, 459 (App. Div.), certif. granted on other grounds, 199 N.J. 130 (2009) (treating violations of the New Jersey Uniform Construction Code "as non-dispositive of negligence but nevertheless evidential"). Based upon plaintiff's showing, a determination as to whether Somerdale needed to do more than merely plow and treat the walkway with calcium chloride —things such as erecting a warning sign or placing safety pylons on the walkway—is a jury question. Notwithstanding the high hurdle reinforced by the Court in Ogborne,[2] we do not necessarily believe that a verdict in defendants' favor is inevitable on the question of whether Somerdale's conduct was palpably unreasonable.

Defendants also argue that plaintiff has not surmounted the TCA's threshold requirement needed to recover pain and suffering damages. A central purpose of the TCA is to restrict the liability of public entities in tort. Velez v. City of Jersey City, 180 N.J. 284, 294 (2004). It limits recovery for pain and suffering claims based upon an explicit damages threshold. See DelaCruz v. Boro. of Hillsdale, 183 N.J. 149, 164-65 (2005) (damages threshold is applicable to all tort claims but is limited to pain and suffering damages). Specifically, N.J.S.A. 59:9-2(d) provides in relevant part:

> No damages shall be awarded against a public entity or public employee for pain and suffering resulting from any injury; provided, however, that this limitation on the recovery of damages for pain and suffering shall not apply in cases of permanent loss of a bodily function, permanent disfigurement or dismemberment where the medical treatment expenses are in excess of $3,600.00.

If the threshold is not met, the TCA bars recovery for pain and suffering. Ibid.

In considering N.J.S.A. 59:9-2(d), our Supreme Court has established a two-prong test to ascertain whether there has been a permanent loss of a bodily function. A plaintiff must show "(1) an objective permanent injury and (2) a permanent loss of a bodily function that is substantial." Knowles v. Mantua Twp. Soccer Ass'n, 176 N.J. 324, 329 (2003) (quoting Gilhooley v. Cty. of Union, 164 N.J. 533, 540-41 (2000)). Said another way, merely suffering an injury does not entitle a victim to noneconomic damages pursuant to the TCA; rather, much more must be established in order to secure pain and suffering damages.

With respect to the first requirement, temporary injuries— no matter how painful and debilitating—are not recoverable, and similarly, a plaintiff may not recover for mere subjective feelings of discomfort. Brooks v. Odom, 150 N.J. 395, 403 (1997). Regarding the second requirement, the Court reasoned that the Legislature did not intend to limit recovery only to total losses of bodily function, but, if the loss was not total, it nevertheless had to be "substantial." Id. at 406.

The determination of whether an injury is substantial is a fact-sensitive issue that cannot be resolved by per se rules. Gilhooley, supra, 164 N.J. at 541. Injuries that our courts have deemed substantial include (1) a massive rotator-cuff tear requiring surgical

repair that left plaintiff with a forty percent reduction in the range of the motion in her arm, Kahrar, supra, 171 N.J. at 15-16; (2) a fractured patella that "could not function without permanent pins and wires to re-establish its integrity," Gilhooley, supra, 164 N.J. at 541-42; (3) "injuries causing blindness, disabling tremors, paralysis and loss of taste and smell [because] such injuries, by their very nature, are objectively permanent and implicate the substantial loss of a bodily function (e.g., sight, smell, taste, and muscle control)," Id. at 541 (internal citation omitted); (4) "an injury that permanently would render a bodily organ or limb substantially useless but for the ability of `modern medicine [to] supply replacement parts to mimic the natural function,'" Knowles, supra, 176 N.J. at 332 (quoting Gilhooley, supra, 164 N.J. at 542-43); (5) disc herniation in the spine, causing severe back pain, "lack of feeling in [the] left leg and the inability to stand, sit, or walk comfortably for a substantial amount of time, engage in athletics, and complete household chores," Id. at 333; and (6) nasal airway impairment as a result of multiple fractures to the nose, causing permanent and constant difficulty breathing, Gerber v. Springfield Bd. of Educ., 328 N.J. Super. 24, 35-36 (App. Div. 2000).

Alternatively, injuries that our Supreme Court has found to be not substantial include: (1) permanent pain and limitation of motion in the neck and back where the plaintiff "can function both in her employment and as a homemaker" even though she has some difficulty performing routine household chores, such as vacuuming, Brooks, supra, 150 N.J. at 400, 406; (2) partial medial meniscectomy, partial synovectomy and chondroplasty of the patella where there was no "evidence that plaintiff's range of motion [wa]s limited, his gait impaired or his ability to ambulate restricted," Ponte v. Overeem, 171 N.J. 46, 54 (2002); and (3) injuries "causing lingering pain, resulting in a lessened ability to perform certain tasks because of the pain,. . . because `[a] plaintiff may not recover under the Tort Claims Act for mere subjective feelings of discomfort.'" Knowles, supra, 176 N.J. at 332 (quoting Gilhooley, supra, 164 N.J. at 540).

Applying these well-enumerated principles, we have no hesitancy in concluding that under the lens of summary judgment jurisprudence, the proofs of plaintiff's injuries reasonably could meet the TCA threshold for recovery of noneconomic damages. Indulgently read, the record reveals that DiMatties began suffering debilitating headaches almost immediately after the incident in 1995. Any suggestion that (1) his next fourteen years of complaints of severe headaches, photophobia, and nausea; (2) repeated trips to emergency rooms in order to deal with the physical effects of the headaches; and (3) ongoing attempts to find palliative medications are temporary—or result from dissembling and malingering—are best left for a jury. In like vein, plaintiff's alleged recurrent and incapacitating headaches that preclude a normal work-life schedule could be readily found by a jury to constitute a substantial loss of a bodily function for which noneconomic damages are recoverable.

We appreciate that the events that form the factual foundation of plaintiff's liability claim occurred more than fourteen years ago. The passage of time surely will impact upon both plaintiff's and defendants' ability to prosecute and defend their respective positions. Nevertheless, neither laches nor limitation of actions principles have been argued as a basis to deny plaintiff his day in court. See N.J.S.A. 59:8-8 (providing that when a child suffers an injury, an action may be commenced within two years of his or her eighteenth birthday); Margolis & Novack, Claims Against Public Entities, comment on N.J.S.A. 59:8-8 (2010).

We emphasize the limits of our decision. In reversing and remanding for further proceedings, we do not suggest that a jury is required to adhere to the most plaintiff-centric point of view. Rather, all that we conclude is that upon our review of the summary judgment motion record in this case, it is clear to us that there were sufficient genuine disputes of material fact, and therefore the grant of summary judgment was improvident.

Reversed and remanded for further proceedings.

[1] Dr. Colis's report described plaintiff's history and background as including the slip and fall on ice on December 12, 1995. However, in his summary, conclusions and recommendations, Dr. Colis attributed the post-concussion syndrome "to the December 12, 1995 motor vehicle accident." We assume the reference to a motor vehicle accident is a mere slip of the pen.

[2] "[W]hen the facts are reasonably debatable that a public employee's act or failure to act created a dangerous condition of property, and that condition of property creates an injury, the higher standard of palpably unreasonable conduct in N.J.S.A. 59:4-2 operates to trump the ordinary negligence standard." Ogborne, supra, 197 N.J. at 460.