**HOPE WRIGHT, Plaintiff-Appellant,**

**v.**

**PRITCHARD INDUSTRIES, INC., and CITY OF ENGLEWOOD, Defendants-Respondents.**

No. A-2812-09T1.

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

Argued November 29, 2010.
Decided March 14, 2011.

Pablo N. Blanco argued the cause for appellant.

Sarah X. Fang argued the cause for respondent Pritchard Industries, Inc. (Goldberg Segalla LLP, attorneys; Ms. Fang, on the brief).

Adam S. Weiss argued the cause for respondent, City of Englewood (**Methfessel** & **Werbel**, attorneys; Donald L. Crowley, of counsel and on the brief; Amanda J. Schmesser, on the brief).

Before Judges Sabatino and Alvarez.

## NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

PER CURIAM.

Plaintiff Hope Wright appeals the January 22, 2010 grant of summary judgment to defendants Pritchard Industries (PI) and the City of Englewood (the City), resulting in the dismissal of her complaint. For the reasons that follow, we affirm.

Plaintiff, a computer technician employed by the Englewood Board of Education (the Board), was injured in a bathroom stall, located in the basement of a building owned by the City, while she was at work on July 26, 2006. The injuries were inflicted when a heavy, old-fashioned metal stall door came loose and struck her left hand. The premises where the accident occurred are leased by the City to the Board and maintained by PI.

The trial court granted summary judgment to the City after discovery was completed because plaintiff did not produce evidence of any dangerous condition causing the stall door to fall, or any evidence that the City had actual or constructive notice of such a condition. Therefore, plaintiff could not make out a prima facie case under the Tort Claims Act (TCA), N.J.S.A. 59:4-2.

The trial judge also concluded plaintiff had no proof establishing PI had been negligent in its maintenance or inspection of the bathroom. Hence PI's motion for summary judgment was also granted. In fact, plaintiff did not know the reason the stall door fell, nor did she present proof anyone noticed a problem with the hinges or the door itself. Until the accident, plaintiff herself did not experience difficulties with the door, even though she used that bathroom regularly.

Now, for the first time on appeal, plaintiff contends her cause of action should have survived summary judgment by virtue of the doctrine of res ipsa loquitur. Additionally, she asserts, as she did in defense of the summary judgment application, that the City had a nondelegable duty of care to render the premises reasonably safe, that PI failed to properly maintain and inspect the premises, and that whether the City's conduct was palpably unreasonable and whether it had constructive notice of problems with the door, are jury questions. In sum, plaintiff contends she presented a prima facie case establishing a dangerous condition, constructive notice, and palpably unreasonable acts or omissions on the part of defendants.

### a.

On review of an order granting summary judgment, this court applies the same standards as the trial court. Prudential Prop. &

Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998). Summary judgment will be granted where the moving party can prove "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). On appeal, we decide, based on the record provided, whether a genuine issue of material fact exists. Prudential Prop. & Cas. Ins. Co., supra, 307 N.J. Super. at 167.

An issue of material fact is genuine when "the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . ., are sufficient to permit a rational fact[-]finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). Consequently, if it is possible that a fact-finder would decide in favor of the non-moving party, granting summary judgment is improper. Ibid. "`Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment[,]'" Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 87 (App. Div. 2001) (quoting U.S. Pipe & Foundry Co. v. Am. Arbit. Ass'n, 67 N.J. Super. 384, 399-400 (App. Div. 1961)); see also Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1999), nor will "`conclusory and self-serving assertions' in certifications without explanatory or supporting facts[.]" Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009) (quoting Puder v. Buechel, 183 N.J. 428, 440 (2005)). Our function is to decide whether a genuine issue of material fact exists based solely on the record, not to decide the plausibility of either side's position. Brill, supra, 142 N.J. at 540.

## b.

Plaintiff maintains the City owed her a duty of care as an invitee which it could not delegate to PI merely through the parties' maintenance contract. She asserts that because the City breached this duty of care, she is entitled to judgment as a matter of law. Assuming a non-delegable duty for the sake of argument, no breach of that duty was established on the part of either defendant.

An invitee is "a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public" or "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of the land." Restatement (Second) of Torts § 332 (1965). An employee is considered an invitee for purposes of premises liability. Id. at comment j. A landowner must "`use reasonable care to make the premises safe . . . .'" for invitees. Olivo v. Owens-Illinois, Inc. 186 N.J. 394, 406 (2006) (quoting Handleman v. Cox, 39 N.J. 95, 111 (1963)). This includes "making a reasonable inspection to discover dangerous conditions." Ibid. Although this duty of reasonable care is non-delegable, La Russa v. Four Points at Sheraton Hotel, 360 N.J. Super 156, 162 (App. Div. 2003) (citations omitted), a plaintiff bears the burden of proving the landowner did not follow the requisite standard of care. Feldman v. Lederle Laboratories, 132 N.J. 339, 349-50 (1993) (citations omitted).

Plaintiff has simply failed to meet this burden of proof. No witness, expert or otherwise, was produced as to causation. Although plaintiff testified at depositions that "employees used to get stuck" in the bathroom located on the first floor, she further testified that "[n]obody expected the door to fall off its hinge." She was herself unaware of any complaints regarding problems with the stall door.

To summarize, the record is devoid of facts establishing causation which would have been, or should have been, discovered on a reasonable inspection. Hence plaintiff cannot prove a dangerous condition which was known or discoverable through a "reasonable inspection." Having failed to establish causation, plaintiff cannot show a breach of duty on the part of either defendant. See Olivo, supra, 186 N.J. at 406.

## c.

Plaintiff further contends that although the City is a public entity, it is not completely immune from civil liability. She argues the evidence created a genuine issue of material fact as to whether the City's actions were "palpably unreasonable," defined as an "action or inaction" that is "plainly and obviously without reason or a reasonable basis. It must be capricious, arbitrary or outrageous." Model Jury Charge (Civil), § 5.20A, "Dangerous Condition of Public Property" (1996). See also N.J.S.A. 59:4-2. Plaintiff maintains this question of fact should have reached the jury.

Pursuant to N.J.S.A. 59:4-2, a public entity becomes liable for a plaintiff's injuries when the premises were "in a dangerous condition at the time of the injury," and the defendant's actions to rectify the safety hazard were "palpably unreasonable."

Plaintiff must establish "that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred," and that either "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 that the "public entity had actual or constructive notice of the dangerous condition . . . a sufficient time prior to the injury to have taken measures to protect against the dangerous condition." Ibid. The constructive notice requirement is satisfied "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.

Plaintiff advances the argument that only a jury should determine whether the City acted in a palpably unreasonable manner and had constructive notice. The general proposition is true, "except in cases where reasonable men could not differ." Wooley v. Bd. of Chosen Freeholders, 218 N.J. Super. 56, 62 (App. Div. 1987) (internal quotation omitted); see also Vincitore v. N.J. Sports & Exhib. Auth., 169 N.J. 119, 130 (2001).

Reasonable persons cannot differ as to whether the City acted in a palpably unreasonable manner or had constructive notice in this case. Even plaintiff was unaware of any problem with the bathroom stall door, although she used it frequently. The City had no knowledge, nor should it have had knowledge, of problems with the stall door. Hence, plaintiff cannot prevail on her TCA claim.

## d.

For the first time on appeal, plaintiff maintains the doctrine of res ipsa loquitur entitles her to present her case to the jury. She asserts that a bathroom stall door falling off its hinges is an occurrence that, by itself, logically suggests negligence in inspection and maintenance.

Plaintiff further asserts she is entitled to raise the issue at this stage in the proceedings. We do not agree. C.W. v. Cooper Health System, 388 N.J. Super. 42 (App. Div. 2006), relied upon by plaintiff, merely corroborates that, on appeal, she cannot raise arguments not previously made to the motion judge.

We review the record in the same fashion as does the trial court. Liberty Surplus Ins. Co. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007). We assess the correctness of the trial court's decision on the basis of the evidential material and legal arguments submitted on the summary judgment motion. Bilotti v. Accurate Forming Corp., 39 N.J. 184, 188 (1963); Scott v. Salerno, 297 N.J. Super. 437, 447 (App. Div. 1997), certif. denied, 149 N.J. 409 (1997). We cannot include in our analysis either evidence or legal arguments developed after the motion was decided. See Ji v. Palmer, 333 N.J. Super. 451, 463-64 (App. Div. 2000); Zeiger v. Wilf, 333 N.J. Super. 258, 269-70 (App. Div. 2000), certif. denied, 165 N.J. 676 (2000). Therefore, we will not consider the issue of res ipsa loquitur, except for the briefest of comments, because it is improvidently raised.

Res ipsa loquitur is "`an evidentiary rule that governs the adequacy of evidence in some negligence cases'": it "`is not a theory of liability.'" Cockerline v. Menendez, 411 N.J. Super. 596, 612 (App. Div.) (quoting Myrlak v. Port Auth. of N.Y. and N.J., 157 N.J. 84, 95 (1999)), certif. denied, 201 N.J. 499 (2010). Plaintiff must provide "`evidence that reduces the likelihood of other causes so that the greater probability [of fault] lies'" with defendant. Ibid. (quoting Jimenez v. GNOC Corp., 286 N.J. Super. 533, 545 (App. Div.), certif. denied, 145 N.J. 374 (1996)).

To make a prima facie showing of res ipsa loquitur, a party must demonstrate "that `(a) the occurrence itself ordinarily bespeaks negligence; (b) the instrumentality [causing the injury] was within the defendant's exclusive control; and (c) there is no indication in the circumstances that the injury was the result of the plaintiff's own voluntary act or neglect.'" Cockerline, supra, 411 N.J. Super. at 611 (quoting Bornstein v. Metro. Bottling Co., 26 N.J. 263, 269 (1958)). "The fact that there is no explanation for an accident does not, by itself, entitle a plaintiff to invoke res ipsa loquitur." Id. at 612 (citing Jimenez, supra, 286 N.J. Super. at 545). In other words, plaintiff must show that the injury-causing accident generally "does not happen in the absence of negligence." Szalontai v. Yazbo's Sports Café, 183 N.J. 386, 395 (2005) (internal quotation omitted).

Plaintiff contends she has established negligence by virtue of the peculiar occurrence itself. Factually, however, it is nothing more than speculation to attribute the cause of the bathroom stall door falling to any conduct or omissions on the part of either defendant.

Additionally, the stall door was not solely in defendants' exclusive control. Members of the public were permitted to use the

bathroom, as were other employees. Given the occurrence itself does not bespeak negligence and the instrumentality was not within defendants' exclusive control, even if plaintiff had raised the issue of res ipsa loquitur before the motion judge, she would not have made out a prima facie case.

Affirmed.