Is Constructive Notice under the Tort Claims Act on Life Support?

by E. Drew Britcher and Jessica Choper

In response to the Supreme Court decision in *Willis v. Department of Conservation & Economic Dev.*,[1] partially abrogating the common law doctrine of sovereign immunity from tort liability, the Legislature adopted the Tort Claims Act.[2] This reestablished the general rule of immunity, but created narrow exceptions by specific statutory declaration of liability requiring a public entity or employee to answer for their violations of the standard of care.[3] The Tort Claims Act established the parameters for tort claims against the state, including notice and investigative provisions and substantive rules.[4] The purpose was to protect public entities and public employees from limitless claims recognizing the breadth of their public responsibilities, while permitting injured citizens to seek recompense from public entities for negligence under defined circumstances and impose some order on the subject.[5]

When it comes to claims of dangerous conditions on public property, N.J.S.A. 59:4-2 provides in pertinent part that:

> 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)

In the absence of actual notice, a plaintiff must establish that the public entity had constructive notice. The Legislature provided no clear statutory definition of constructive notice. However, by phrasing N.J.S.A. 59:4-3(b) in the manner chosen, it is clear the Legislature sought to ensure that a plaintiff who could not come forth with proof of actual notice would not be denied redress for injuries sustained on public property. As such, a plaintiff's claim against a public entity should not be defeated solely because the claimant cannot prove the public entity had actual knowledge of the alleged dangerous condition. N.J.S.A. 59:4-3(b) provides that a public entity is deemed to have constructive knowledge of a dangerous condition if the plaintiff can establish the condition 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. In the absence of a statutory definition of the phrases "exercise of due care," "such a period of time," and "such an obvious nature," judicial determination of what facts constitute constructive notice has varied.

In *Lodato v. Evesham Tp.*,[6] the plaintiff tripped and fell over a sidewalk slab raised by a tree root. The appellate court reversed the trial court's grant of summary judgment, satisfied that the proofs were sufficient to create a question of fact for the jury regarding whether the township had constructive notice under N.J.S.A. 59:4-3(b), even though actual notice of a dangerous condition could not be established. Facts pertinent to the court's analysis of constructive notice included evidence that the tree roots that caused the sidewalk to heave were so apparent the director of the Department of Public Works (DPW) conceded that "obviously" the tree required removal, the same condition existed for almost 18 years

before the accident, similar conditions existed throughout the neighborhood, and presumably DPW personnel previously removed trees in the immediate vicinity on at least two occasions.[7]

In *Grzanka v. Pfeifer*,[8] the court considered the issue of constructive notice in a case involving an accident that occurred because of an inoperative traffic signal caused by vandalism. Although the court precluded the deposition of an eyewitness and granted defendant summary judgment because it had no way of knowing when the vandalism occurred, it addressed the issue of constructive notice and identified evidence that would have sufficed.[9] The court explained that had the witness barred from deposition testified consistent with the statement given in the police report—that the light was out, it had been for a while, and he had been waiting for something like this to happen—there would have been a basis for a finding that the public entity had constructive knowledge.[10] If the malfunction was a condition that had been unattended for a significant period, it would obviously be one the city should have discovered and cured.[11]

The court's assessment of constructive notice within the context of the Tort Claims Act is also seen in *Milacci v. Mato Realty Co., Inc*.[12] The plaintiff alleged she fell on an "accumulation of sand and dirt" on the floor in a state office as she was exiting the building. The appellate court considered the plaintiff's description *prima facie* proof the condition existed for some period of time. A jury could infer from the description of an "accumulation of sand and dirt" alone that there was sufficient time for the state and custodial service to have discovered the condition, rendering the motion court's grant of summary judgment inappropriate.[13]

In *McGowan v. Borough of Eatontown*,[14] the court addressed constructive notice in the context of a case in which the plaintiff lost control of his vehicle when negotiating an icy patch on the highway near the entrance to the driveway of a restaurant.[15] Evidence showed the state had been alerted on a number of occasions to the icy conditions and that it would reoccur when the road was wet and cold enough to freeze. When notified, the state would customarily salt or sand the area.[16] Despite the absence of evidence regarding actual notice on the day of the accident, and the absence of any expert reports relevant to the construction of the highway, constructive notice existed because proofs showed the condition would re-occur under predictable circumstances, affording the state sufficient time and opportunity to correct the defect.[17]

Polzo v. County of Essex— A Restrictive View of Constructive Notice

However, in *Polzo v. County of Essex*,[18] the Court affirmed the grant to the county of summary judgment after ascertaining there was a lack of proof regarding constructive notice despite evidence that would seem sufficient under prior case law. The decision suggests a more restrictive approach in assessing whether a plaintiff has come forth with sufficient proof to meet the constructive notice requirement of the Tort Claims Act. The Court identified the distinction between actual and constructive notice, but in effect the decision placed such a high burden to prove constructive notice that it is hard to know what could have been produced, short of actual knowledge, that would have satisfied the constructive notice alternative.

The Tort Claims Act provides that a public entity is on actual notice when it actually knows of a roadway defect and knew or should have known of its dangerous character.[19] A public entity is on constructive notice when a dangerous condition is of such an obvious nature and has existed for such a period of time that the public entity should have discovered it through the exercise of due care.[20]

In *Polzo*, the plaintiff died as a result of injuries sustained when she lost control of her bicycle as she traveled over a depression in the shoulder of the roadway. Evidence showed the depression measured approximately two feet deep and one-and-one-half inches in depth.[21] The assistant Essex County supervisor of roads testified that if the county had knowledge of the depression it would have been repaired. Inspections were largely done in response to complaints or if repaving had not been done in years.[22] Five weeks before the accident, the county received a complaint of a pothole, repaired it, and allegedly inspected the entire length of the subject roadway, filling other potholes.[23] According to the plaintiff's expert, the county lacked a safe and proper procedure to identify and repair roadway surface defects; the defect should have been noticed by those responsible for maintenance; the defect was due to erosion of the underlying subsurface of the road; and the defect existed for months, if not years.[24]

Despite proof that the county allegedly inspected the entire roadway five weeks before the accident and the supervisor suggested the depression would have been repaired if the county knew about it, the court still found the plaintiff's proofs deficient. The Court ruled that even though the road crew was surveying the same roadway where the depression was located, it would not have been obvious to the reasonable observer that the depression presented a dangerous condition even if the depression was obvious to the naked eye based on the dimensions of its depth and width.[25] One might suggest that since the area was in the shoulder and only presented a potential for injury to a cyclist, the court simply chose not to

impose a duty to protect cyclists as a means of reconciling the decision, but that is not what is stated.

Rather than recognizing that the road crew's inspection for potholes five weeks before the accident provided proof of constructive notice, the Court stated there was no evidence to suggest the crew was looking for an imperfection in the shoulder that might destabilize a bicycle. Instead of accepting that the assistant director's statement that the depression would have been repaired if the county had knowledge of it could also provide a basis for a jury's finding of constructive knowledge, the Court stated the testimony did not mean the county was required to repair the depression or that it was a dangerous condition within the meaning of the statute.[26] Even though the plaintiff presented the opinion of an engineering expert, Dr. Kuperstein, who opined on the cause, dimensions, duration, dangerousness, and obviousness of the depression, the Court rejected the expert testimony in its entirety as a net opinion.[27]

The Court blurred the distinction between actual and constructive notice as evidenced by its finding that even if "the depression existed for an extensive period of time before the accident, as Dr. Kuperstein has opined, plaintiff has not presented any evidence that a bicycle rider, motorist, or pedestrian *complained* or was *previously injured* as a result of the depression."[28] Prior complaints or prior accidents may be essential elements in proving actual notice, but the *Polzo* Court arguably suggests those factors are prerequisites for constructive notice. However, if those factors existed, actual notice would also exist, leaving one to question where the distinction lies. The Tort Claims Act specifically provides that a plaintiff can successfully bring suit against a public entity with proof of constructive notice only.[29] Plaintiffs face a daunting challenge in determining what proof is needed for constructive notice because the distinction between actual notice and constructive notice is now arguably nonexistent. In the absence of proof of actual notice, plaintiffs face an indeterminate hurdle to recovery for injuries sustained as a result of a dangerous condition on public property.

Prior to *Polzo v. County of Essex*,[30] plaintiffs had a greater likelihood of satisfying N.J.S.A. 59:4-3(b) if sufficient proofs were forthcoming. Plaintiffs unable to prove actual knowledge were not destined to have their claim dismissed if they furnished evidence that could support a finding the condition complained of existed for such a period of time and was of such an obvious nature. Facts sufficient to raise a jury issue regarding constructive notice in cases prior to the Supreme Court's 2012 decision in *Polzo, supra*, may no longer be adequate.

Constructive Notice after *Polzo*

It remains unclear how courts will apply the *Polzo* Court's restrictive view of constructive notice.[31] However, a few cases decided afterward provide some insight. The district court addressed the issue of constructive notice in a diversity action involving a plaintiff's fall on a public street.[32] The plaintiff contended a jury could infer from photographs the size, depth and length of time the defect existed.[33] The court deemed the photographs insufficient because of their lack of clarity of the defect, and because the plaintiff failed to provide any certification attesting to the identity of the photographer and the date they were taken. The court decided it would have been impossible for a jury to determine whether the city should have been aware of the defect on the date of the fall, when the date of the photographs was unknown.[34]

The issue of constructive notice has also been addressed in several unpublished decisions since *Polzo*.[35] The appellate court in *Connelly v. AGL Resources*[36] reversed the grant of summary judgment to the borough of Metuchen, finding the existence of genuine issues of material fact regarding whether Metuchen possessed actual or constructive notice of an alleged dangerous condition. The plaintiff fell when she stepped into a hole in a crosswalk covered by leaves. Facts that created a legitimate inference of constructive notice of the dangerous condition included evidence that Metuchen assigned a police officer to direct traffic at the intersection of the fall; police regularly observed the avenue and notified the public works department to address problems; the plaintiff's expert described the depression as ancient and Metuchen regularly observed and reported conditions on the avenue where the fall occurred.[37] The facts relied upon by the *Connelly* court clearly supported an inference of constructive notice, yet they are akin to facts that could support an inference of actual notice as well.

In *Defreese v. Spizziri*,[38] the court affirmed the grant of summary judgment in a case involving a tree falling on the plaintiff's vehicle. The plaintiff contended that issues of fact existed regarding constructive notice based upon lack of due care regarding the inspection of dead trees and the existence of four prior reports addressing tree issues. Relying upon *Polzo,*[39] the court rejected the plaintiff's contention by declaring it lacked authority and expertise to dictate to public entities the ideal inspection program. It deemed the reports sporadic and insufficient to show constructive notice that the tree in question posed a dangerous condition to motorists.

In *Roura v. City of Newark*,[40] the plaintiff was injured when his motorcycle fell into a pothole on a city street. The appellate court reversed a jury verdict in the plaintiff's favor and remanded for a

new trial due to multiple errors in the case. The court found the plaintiff failed to present competent evidence that the city had actual notice of the pothole because there was no proof of prior accidents and only one instance of a prior complaint made to garbage truck employees at an unspecified time about the general condition of the street. The plaintiff argued that proof the city repaired 12 holes on the street 11 months before the accident, coupled with expert testimony that the pothole existed for more than one year, constituted proof the city should have discovered the obvious dangerous condition prior to the accident. Even though the court described constructive notice to be very much at issue in the trial, it recognized there was adequate evidence in the record to allow the jury to conclude the city had constructive knowledge of the pothole within sufficient time prior to the plaintiff's accident to have repaired it. The case then turned on whether the failure to repair was palpably unreasonable.

In *Tucker v. County of Union*,[41] the plaintiff was injured when she fell into a depression on the edge of a walking path, caused by broken macadam that was covered by leaves. In the absence of evidence of prior complaints or accidents at the site, the court determined actual notice could not be proven. In terms of constructive notice, the plaintiff relied solely upon photographs to prove the three-inch declivity was open, obvious and existed for a substantial amount of time. The court found that a plaintiff's unsupported lay opinion cannot meet the constructive knowledge standard, and affirmed the grant of summary judgment because of a lack of competent evidence to show the length of time the declivity existed. This decision reinforces the necessity that plaintiff's counsel retain an appropriate expert who can offer the opinion testimony it appears the court now requires.

Is it Time for a Nonprofit Public Interest Entity to Protect the Public?

While the Tort Claims Act purposefully created statutory exceptions where a public entity could be found liable if the statutory prerequisite of constructive notice were satisfied, the *Polzo* Court has arguably restricted the definition so severely that actual notice may be the plaintiff's only hope in many instances.

To protect the right of injured parties in the state, consideration must be given to the development of a public interest organization designed to ensure that actual notice is provided to governmental entities. As suggested by the court in *Lodato, supra*, to be effective actual notice must be given to a governmental body with actual authority to repair the dangerous condition. The creation of a nonprofit entity undertaking the effort to provide public entities detailed maps of all roadways in the state, while daunting, could accomplish this goal.

In New York, the Big Apple Pothole and Sidewalk Corp. was created to provide the required written notice to the city so an injured person could bring a civil action against the city for negligently maintaining sidewalks and fixing potholes.[42] Since 1982, the Big Apple Pothole and Sidewalk Corp. has provided New York City with written notice of sidewalk, curb and crosswalk defects in the five boroughs of New York.

A professional mapping company surveys all city sidewalks and curbs annually and maps defects. Big Apple provides the information to the city and to attorneys on behalf of injured individuals. Delivery of the maps to the transportation department serves to provide actual notice to the city of sidewalk defects, necessary because tort actions against the city were barred unless the city was notified within 15 days prior to the accident. With receipt of the maps, the city could also be able to identify hazards and fix them. Since the creation of the Big Apple Pothole and Sidewalk Protection Committee, the law shifted liability to adjacent property owners and the committee ceased producing maps, but they are still available to injured persons and their attorneys. In the digital age, this may be accomplished without a mapping company.

The creation of a nonprofit entity designed for the purpose of protecting the public from harm (hoping government entities will correct defects they are notified about) and arming injured persons with proof of actual notice to governmental entities (when they've failed to correct defects) may create a more realistic chance of having their case decided on the merits. While it may not be what the Legislature originally intended to be necessary or a perfect solution to the difficulties faced when bringing suit against a governmental entity, the author believes it is an effort worth consideration. ⚖

Endnotes

1. 55 N.J. 534, 540 (1970).
2. N.J.S.A. 59:1-1 to 14-4.
3. *Vincitore v. New Jersey Sports and Exposition Authority*, 169 N.J. 119, 124 (2001).
4. *Coyne v. State, Dept. of Transp.*, 182 N.J. 481 (2005).
5. *Marcinczyk v. State of New Jersey Police Training Com'n*, 203 N.J. 586, 596 (2010).
6. 388 N.J. 501, 503 (App. Div. 2006).
7. *Lodato*, 388 N.J. at 511- 512.
8. 301 N.J. Super. 563 (App. Div. 1997), *certif. denied*, 154 N.J. 607 (1998).
9. *Grzanka*, 301 N.J. Super. at 574.
10. *Id.*
11. *Id.*
12. 217 N.J. Super. 297 (App. Div. 1987).
13. *Milacci*, 217 N.J. Super. at 302-303.
14. 151 N.J. Super. 440, 444 (App. Div. 1977).
15. *McGowan*, 151 N.J. Super. at 445.

16. *McGowan*, 151 N.J. Super. at 448.
17. *DeBonis v. Orange Quarry Company*, 233 N.J. Super. 156, 168 (App. Div. 1989).
18. 209 N.J. 51 (2012).
19. N.J.S.A. 59:4-3(a).
20. N.J.S.A. 59:4-3(b). *Polzo*, 209 N.J. at 67.
21. *Polzo*, 209 N.J. at 57.
22. *Id*., at 58-59.
23. *Id*., at 59.
24. *Id*., at 60, 62, 68.
25. N.J.S.A. 59:4-1. *Polzo*, 209 N.J. at 73.
26. *Polzo*, 209 N.J. at 73-74.
27. *Polzo*, 209 N.J. at 59-60.
28. *Polzo*, 209 N.J. at 74.
29. N.J.S.A. 59:4(b).
30. 209 N.J. 51 (2012).
31. *Polzo*, 209 N.J. 51 (2012).
32. *Marenbach v. City of Margate*, 942 F. Supp. 488 (D. N.J. 2013).
33. *Marenbach*, 942 F. Supp. at 495.
34. *Id*.
35. 209 N.J. 51.
36. No. A-3863-10 (App. Div. Feb. 7, 2012).
37. *Connelly*, No. A-3863-10T3 (App. Div. Feb. 7, 2012), (slip op. at 4).
38. No. A-5094-11 (App. Div. July 24, 2013).
39. 209 N.J. 51.
40. No. A-2725-11 (App. Div. Nov. 13, 2013), *certif. denied*, 217 N.J. 293 (2014).
41. No. A-0522-12 (App. Div. Oct. 29, 2013).
42. *See Katz v. City of New York*, 87 N.Y. 2d 241, 243 (1995) (Maps prepared by Big Apple Pothole and Sidewalk Protection Committee, Inc. and filed with the Department of Transportation serve as prior written notice of defective conditions depicted thereon).

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