NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1215-12T1

CLAUDIA ELLIOTT,

Plaintiff-Appellant,

v.

MISTER MOLD, LLC,

Defendant,

and

TOWNSHIP OF BRIDGEWATER,

Defendant-Respondent,

and

THOMAS A. ECKERT and
MARTHA L. ECKERT,

Defendants/Third-Party
Plaintiffs-Respondents,

v.

TOWNSHIP OF BRIDGEWATER and
FRANK SCHILLING,

Third-Party Defendants.

Argued February 4, 2014 – Decided March 27, 2014

Before Judges Reisner, Alvarez and Ostrer.

On appeal from Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-1541-07.

George T. Dougherty argued the cause for appellant (Katz & Dougherty, LLC, attorneys; Mr. Dougherty, on the briefs).

Lisa M. Jarmicki and Alan Bart Grant argued the cause for respondent Township of Bridgewater (Riker Danzig Scherer Hyland & Perretti, LLP, and Mauro, Savo, Camerino, Grant & Shalk, PA, attorneys; Lance J. Kalik, Michael P. O'Grodnick, and Mr. Grant, of counsel and on the brief; Ms. Jarmicki, on the brief).

John M. Kearney argued the cause for respondents Thomas A. Eckert and Martha L. Eckert (Sellar Richardson, P.C., attorneys; Christopher W. Ferraro, on the brief).

PER CURIAM

Plaintiff Claudia Elliott appeals from the following trial court orders, concerning her 2007 Law Division complaint for damage to her property: orders dated December 18, 2009, and December 17, 2010, denying her motions to compel discovery of documents alleged to be privileged; an order dated December 8, 2010, granting summary judgment to defendant Township of Bridgewater (Township) and partial summary judgment to defendants Thomas A. and Martha L. Eckert (the Eckerts); an order dated June 4, 2012, dismissing plaintiff's complaint against the Eckerts for lack of proof of damages.

We review the trial court's discovery rulings for abuse of discretion. Pomerantz Paper Corp. v. New Comty. Corp., 207 N.J. 344, 371 (2011). We review the grant of summary judgment de novo, using the same legal standard employed by the trial court. Liberty Surplus Ins. Corp. v. Nowell Amoroso, P.A., 189 N.J. 436, 445-46 (2007); Prudential Prop & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div.), certif. denied, 154 N.J. 608 (1998); see Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Having reviewed the record with those principles in mind, we find no merit in plaintiff's appeal, and we affirm, substantially for the reasons cogently stated by Judge Edward Coleman in a series of opinions issued on December 18, 2009 (discovery), December 17, 2010 (discovery), December 8, 2010 (summary judgment and statute of limitations), and June 4, 2012 (summary judgment).

I

The facts are set forth at length in Judge Coleman's opinions and need not be repeated here in the same level of detail. To summarize, in 1985 plaintiff bought a house located at the base of a mountain.[1] Not surprisingly, when it rained, water flowed down the mountain onto her property. However, plaintiff claimed that her house did not experience any flooding

[1] A carriage house is also located on the property.

problems until April 1998, when Frank Schilling built a house on the upland lot next door. After she complained, Schilling dug a swale, or ditch, along the property line, to carry water from his property to the road.

The Eckerts bought the house from Shilling in October 1998. Plaintiff claimed that in the spring of 1999, the Eckerts filled in the swale, causing flooding on her property during heavy rainstorms.[2] Plaintiff claimed that from 1999 on, water from the neighboring property caused damage to her house and land, including the development of a serious mold problem inside the house, and the deaths of several valuable trees on the property. However, she did not file suit until 2007, and she was unable to produce proof of what damage occurred within the six-year statute of limitations, as opposed to at an earlier time.

Plaintiff also contended that the Township was liable for damage to her property, caused by poor drainage of the adjoining street and the Township's failure to require the Eckerts to build a higher berm and dig a deeper swale on their land. Plaintiff's property is located at the intersection of Foothill Road and Miller Lane, an old country road running steeply up

[2] The Eckerts denied that they filled in the swale, and claimed that they added a berm, or raised area at the edge of the swale, to further protect plaintiff's property from flooding. See Lyons v. Twp. of Wayne, 185 N.J. 426, 429 n.1 (2005).

the mountainside. Miller Lane was constructed with gravel-lined ditches, rather than paved gutters or storm drains, to channel rainwater down the sides of the road. Plaintiff and her neighbors complained to the Township that Miller Road drained poorly, causing flooding during heavy rainstorms.

In 1999, the Township improved Miller Lane with paved swales, instead of gravel-lined ditches, to carry the run-off. Plaintiff then complained that the Township "filled in" the swale in front of the Eckerts' driveway, at their request, so that they could drive their mobile home in and out of their driveway. She contended that this caused her property to flood.

According to the Eckerts, while the swale was being constructed, they asked the Township to make it somewhat shallower where it crossed in front of their driveway, so they could get their camping vehicle in and out without damage. The record supports their contention that the swale was not made level with the roadway; rather, it was made shallower but wider. We have viewed a video of Miller Lane, taken during a heavy rainstorm. The video clearly demonstrated that there was a paved swale in front of the Eckerts' house, and that it performed its intended function of receiving run-off water from the road surface and conveying it down the side of the road.

Plaintiff threatened litigation if the Township did not address the flooding on her property. In response, the Township arranged for tens of thousands of dollars worth of improvements to plaintiff's property, including funding for a mold remediation company,[3] and building a swale on her property just below the Eckerts' property line.

Although plaintiff owned several pieces of valuable real estate, with the support of Township officials she applied to the Council on Affordable Housing (COAH) for funding to repair her Miller Lane house.[4] The receipt of COAH funding was the centerpiece of a proposed settlement of her dispute with the Township. However, COAH withdrew the funding after The Star-Ledger ran an article questioning why plaintiff, who owned other property and vacationed in the Hamptons, was receiving funds earmarked for low and moderate income housing. Plaintiff also refused to grant the Township an easement on her property for the installation of catch basins designed to prevent flooding. At that point, the proposed settlement fell apart, and this lawsuit followed.

[3] Plaintiff also sued the mold remediation company, Mister Mold, but reached a settlement.

[4] On the COAH application, plaintiff listed no assets and under $20,000 in income. In her deposition she admitted making a $400,000 profit on the sale of one of her properties in 2004.

After extensive discovery, the trial court granted summary judgment to the Township and to the Eckerts. In his December 8, 2010 opinion, Judge Coleman found that the Township had Tort Claims Act (TCA) immunity against a lawsuit premised on failure to enforce its laws. See N.J.S.A. 59:2-4 ("A public entity is not liable for any injury caused by . . . failing to enforce any law."); Luchejko v. City of Hoboken, 414 N.J. Super. 302, 318 (App. Div. 2010), aff'd on other grnds., 207 N.J. 191 (2011). Therefore, plaintiff could not sue the Township for damages based on its alleged wrongful failure to require the Eckerts to build a higher berm or a deeper swale, which plaintiff claimed was a condition of the site plan approval for construction of their house.

Judge Coleman also found that plaintiff failed to produce evidence that the Township created or maintained a dangerous condition. He reasoned that Elliott failed to establish facts that could prove the Township acted in a "palpably unreasonable" manner within the meaning of the TCA, N.J.S.A. 59:4-2:

> Here, the Township's actions were not "palpably unreasonable" because they investigated her complaints and made a decision not to go forward with the repairs at this time. The flooding was not caused by any unreasonable action on the part of the Township. They paved the roadway and filled in part of the drainage swale so the Eckerts could get their vehicle in and out of the driveway without damage. It appears from the

> record, the roadway swales were not always present and Ms. Elliott bought the property at a time when there were no roadway swales.
>
> Ms. Elliott bought property at the bottom of a steep hill. The water flows down the hill. . . .
>
> . . . .
>
> The Township has immunity for discretionary activities. N.J.S.A. 59:2-3. A township's determination which roads to repair at any given time is discretionary given the Township's limited resources. During settlement negotiations it appears the Township had a proposed solution to alleviate the problem[,] however, that solution required Elliott to give Bridgewater Township an easement onto her property. Elliott has refused to donate the easement because the settlement failed once COAH [refused] to fund Ms. Elliott's repairs. The Township cannot go forward with their plan without an easement on Ms. Elliott's property. Therefore the Township has immunity for its decision not to repair the road.

The judge also reasoned that the Township could not "unilaterally construct a drainage installation on the Eckert[s'] private [p]roperty without their permission, absent a condemnation hearing. Plaintiff cannot force the Township to put an easement on the Eckert property." Thus, he rejected plaintiff's claim that the Township should have planned to put the catch basins on the Eckerts' property instead of on her property.

Addressing the claims against the Eckerts, relying on Russo Farms, Inc. v. Vineland Board of Education, 144 N.J. 84, 91 (1996), the judge reasoned that plaintiff could recover for damage caused up to six years prior to the filing of her September 28, 2007 complaint, but not for damage caused earlier than September 28, 2001. He found that plaintiff knew her property was being flooded as early as 1999, allegedly due to water flowing from the Eckerts' land, but she chose not to file suit until 2007.[5] He also found it was plaintiff's burden to prove that any particular element of her damages occurred after September 28, 2001:

> Forcing the Eckerts to defend against damages that occurred more than six years prior to the filing of Plaintiff's action would yield an unjust result and deprive the Eckerts of one of the fundamental safeguards that the statute of limitations was intended to provide to defendants.

Next, the judge found that plaintiff failed to "come forward with an expert to opine as to which damages occurred

[5] The record reflects that plaintiff complained about mold in her house as early as 1998 or 1999. According to plaintiff's deposition testimony, in either 1998 or 1999, she sought medical treatment for respiratory problems allegedly caused by mold. In November 2000, a home inspection showed the presence of mold throughout the house, and the inspection report stated "[i]t appears that recent construction on the lot above your property has been a contributing factor to this problem." In either January or March 2001 she made a claim on her homeowner's insurance for mold damage, but the claim was denied as excluded from coverage under the policy.

within the statutory period." He concluded that expert testimony was required for that purpose. For example, he noted that her experts opined, based on plaintiff's own factual assertions, that mold began growing in the house as early as 1998, and that her trees began dying as early as 2000. However, none of plaintiff's experts differentiated between damage caused before or after September 2001, and without expert testimony, a jury would be left to speculate:

> The average juror is not versed in the practice of examining alleged water damage that has accumulated over the course of over a decade and the subsequent assignment of an age to each particular defect that has transpired. As such, the aid of expert testimony is absolutely necessary in order to prevent the jury from engaging in mere guesswork as to the timeline of events. . . .
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> . . . Without the aid of expert opinion addressing this matter, Plaintiff is unable to establish the requisite causal connection between the Eckerts['] conduct and Plaintiff's claimed damages that took place during the prevailing statutory period.

As a result, the judge granted summary judgment in favor of the Eckerts.

II

In a series of overlapping arguments, plaintiff contends that there was a material factual dispute as to whether the Township's failure to address the water damage to her property

was palpably unreasonable; Miller Lane was in a dangerous condition which the Township unreasonably failed to correct; the Township acted unreasonably in failing to take enforcement action against the Eckerts for violating a condition of the land use approval granted to the prior owner; plaintiff was entitled to either discovery or an in camera review of reports from the Township's engineering experts; and the trial court erred in requiring her to prove which of her damages occurred within the six-year period preceding the filing of her complaint. See N.J.S.A. 2A:14-1 (six-year statute of limitations for injury to real property). Except as discussed below, these arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

First, we find no abuse of discretion in Judge Coleman's denial of plaintiff's motion seeking discovery of certain expert reports. He found that the Township retained the experts in preparation for impending litigation, but did not propose to use those experts as trial witnesses. The judge concluded that the experts' recommendations and opinions, rendered to the Township's attorney, were privileged. Further, the judge noted that plaintiff would be able to depose the experts concerning facts within their knowledge and did not need discovery of their communications with the Township's attorney. Here, it is clear

that the Township anticipated litigation, and its communications with the experts was protected by the attorney-client and work product privileges. See Rivard v. Am. Home Prods., Inc., 391 N.J. Super. 129, 154-55 (App. Div. 2007).

Next, we address the summary judgment motions. Under the TCA, a public entity may be liable for injury caused by a dangerous condition of its property. N.J.S.A. 59:4-2. A public entity's creation of a nuisance, by taking action that causes flooding, is actionable under the TCA, as the creation of a "dangerous condition." Russo Farms, supra, 144 N.J. at 98 (citing Birchwood Lakes Colony Club, Inc. v. Bor. of Medford Lakes, 90 N.J. 582, 593 (1982)); see Lyons, supra, 185 N.J. at 426.

Nonetheless, even if a public entity creates a nuisance, plaintiff must still prove that "the action the entity took to protect against the [alleged dangerous] condition or the failure to take such action was . . . palpably unreasonable." N.J.S.A. 59:4-2; Lyons, supra, 185 N.J. at 437 n.3. Therefore, even if plaintiff could prove that drainage problems on Miller Lane caused flooding on her property, she would still also have to prove that the Township's actions in attempting to mitigate the problem were palpably unreasonable.

In this case, we agree with Judge Coleman that plaintiff failed to prove that the Township acted in a palpably unreasonable manner. To the contrary, the Township spent tens of thousands of dollars to improve plaintiff's property, going so far as to spend COAH money to which she may not have been entitled. Plaintiff, on the other hand, rebuffed the Township's reasonable proposal that she donate an easement for the installation of catch basins on her property. We agree with Judge Coleman that the Township was not obligated to undertake the expense of purchasing an easement from plaintiff or the Eckerts. Pursuant to N.J.S.A. 59:2-3(c), the Township was "not liable for the exercise of [its] discretion in determining whether to . . . provide the resources necessary for the . . . construction or maintenance of facilities," including the Miller Road drainage project.

Further, the Township attempted to improve drainage on Miller Lane by replacing the irregular, dirt drainage ditches with paved swales. Plaintiff did not produce proof that accommodating the Eckerts' access concerns by installing a shallower, wider swale in front of their driveway was palpably unreasonable. See N.J.S.A. 59:4-2; Holloway v. State, 125 N.J. 386, 403-04 (1991) (citation omitted) (palpably unreasonable

conduct is "'behavior that is patently unacceptable under any circumstance.'").

In order to establish entitlement to damages from any injury to property, including from a nuisance, plaintiff must file suit within six years from the accrual of the cause of action, N.J.S.A. 2A:14-1. However, where the claim is against a public entity, plaintiff is subject to the two-year statute of limitations set forth in the TCA. N.J.S.A. 59:8-8; Russo Farms, supra, 144 N.J. at 106-07. Hence, with respect to her claims against the Eckerts, the statute of limitations was six years, but it was two years for her claims against the Township.

Where a nuisance causes repeated injuries, as for example, when a defective drainage system causes repeated flooding, plaintiff can invoke the doctrine of continuing nuisance and can recover damages caused by each new episode of flooding. However, plaintiff can only recover damages for injuries that occur "within the limitations period." Lyons, supra, 185 N.J. at 434 (quoting Russo Farms, supra, 144 N.J. at 100):

> [A] nuisance is continuous when "it is the result of a condition that can be physically removed or legally abated." One who suffers a continuing nuisance, therefore, is "able to collect damages for each injury suffered within the limitations period."
>
> [Id. at 434 (citations omitted).]

We agree with Judge Coleman that plaintiff needed to present expert testimony establishing that the mold and other damage allegedly caused by flooding from the Eckerts' property occurred within the six-year limitations period. She presented no such evidence.

We also agree with the Township that plaintiff's claims against the Township suffered from the same fatal defect, because she did not prove what damage occurred within the two-year limitations period applicable under the TCA. Even if plaintiff were given an equitable extension of the time limit back to 2003, when the Township began attempting to amicably resolve plaintiff's issues, she failed to apportion damages pre- and post-2003. See Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 171-73 (App. Div. 2007).

Affirmed.