Superior Court of New Jersey

Appellate Division

Docket No. A-000389-24

AMANDA COSTIGAN and BRIAN COSTIGAN, *Plaintiffs-Appellants,* vs. TOWNSHIP OF UNION and UNION RECREATION DEPARTMENT, *Defendants-Respondents,* -and- JOHN DOE, a fictitious name, *Defendant.*	CIVIL ACTION ON APPEAL FROM THE FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, UNION COUNTY DOCKET NO. UNN-L-1963-22 Sat Below: HON. DANIEL R. LINDEMANN, J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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PRELIMARY STATEMENT

This action involves the severe personal injuries sustained by the Plaintiff/Appellant Amanda Costigan (hereinafter "Amanda") when she was caused to fall due to a one foot deep hole in the grass field at Volunteer Park, located at, and owned and operated by the Township of Union. Brian Costigan ("Brian"), the Co-Plaintiff/Appellant, is the husband of Amanda, and his claim is based on the loss of consortium of his wife.

On October 12, 2021 Amanda went to Volunteer Park located in Union New Jersey to observe her child play a soccer game. Amanda was accompanied by Brian. Amanda and Brian parked their car on Burnett Avenue, and they proceeded to the soccer field walking down the grass field from Burnett Avenue to the field. Amanda was walking adjacent to a retaining wall, when her foot got stuck in a hole in the ground. Amanda was unable to observe the hole as the grass had not been cut for three weeks. The hole was deep enough that when Amanda fell to the ground, her foot was still stuck in the hole.

Amand sustained a facture to her right leg tibia/fibula requiring an open reduction and internal fixation. The surgery was followed by a course of immobilization, crutches, and physical therapy.

After the accident, Brian and/or Amanda observed that an orange cone was placed over the hole, and sometimes later, the hole was removed. In contrast to Appellants, Matt Reed the supervisor of the Union Department of Public works

denied that there was a hole and testified that he observed a divot several yards away from where Amanda fell, and that was where he placed an orange cone. Appellants dispute that Mr. Reed's testimony is truthful.

The trial court, in rendering its decision, incorrectly applied the standard under *Brill v. Guardian Life Ins. CO. of Am.*, 142 N.J. 520 (1995), and adopted the conflicting and disputed testimony of the Township. The trial court below failed to view the evidence in light most favorable to the Plaintiffs as required by Brill,142 N.J. 520, and relied upon the testimony of Mr. Reed on behalf of the Township , which was contrary to the testimony of Appellants, numerous times in support of the trial court's decision to grant the Township's motion for summary judgment.

PROCEDURAL HISTORY

Appellants filed their complaint on July 6, 2022. Pa64. Appelles filed their Answer on August 11, 2022. (Pa250). Appellees filed their motion for summary judgments on July 5, 2024. (Pa51). Appellants filed their Opposition to Appellants' Motion for Summary Judgment on July 16, 2024. (Pa207, Pa209, Pa212, Pas 258-270, Pa143-158). The trial court granted Appellees' Motion for Summary Judgment on August 7, 2024. (Pa1). Appellants filed their motion for reconsideration on August 26, 2024. (Pa248). The trial court denied Appellants' application for reconsideration on September 13, 2024 (Pa19). Appellants filed the

Notice of Appeal on October 8, 2024. (Pa25), and subsequently amended the Notice of Appeal on October 15, 2024. (Pa37).[1]

STATEMENT OF FACTS

This action involves the severe personal injuries sustained by the Plaintiff/Appellant Amanda Costigan (hereinafter "Amanda") when she was caused to fall due to a hole in the grass field at Volunteer Park, located at, and owned and operated by Appellant Township of Union (hereinafter the "Township").

On October 12, 2021 Amanda went to Volunteer Park located in Union New Jersey to observe her child play a soccer game. (Pa209). Amanda was accompanied by her husband Plaintiff/Appellant Brian Costigan (hereinafter "Brian"). (Id). Amanda and Brian parked their car on Burnett Avenue, and they proceeded to the soccer field walking down the grass field from Burnett Avenue to the soccer field. (Id). Amanda was walking adjacent to a retaining wall, when her foot got stuck in a hole in the ground. (Pa91) (T23-6 to 16; T27-14 to T28-13). Amanda described the one foot deep hole as follows:

> Q Okay. Was it enough for your full entire right foot to go into the defect?
>
> A Yes.

[1] 1T refers to the August 2, 2024 Hearing Transcript, and 2T refers to the September 13, 2024 Hearing Transcript.

Q Okay. So you stepped into this with your right foot and your foot completely went into this hole which was about a foot deep; correct?

A Yes.

Q Okay. And that's when you proceeded to fall?

A Yes. It was very quick. Once -- it was so deep that my -- I -- the other foot kind of slip and then my whole body went on the leg. Like, my whole weight got in the leg. It was just quick. Once I hit the ground -- the -- the hole, I could hear -- I heard the noise already.

Q Okay. So you stepped into the hole with your right foot, and you say that your left foot slid forward; correct?

A Yes.

Q Okay. And I'm just trying to figure out the physics of your body at the time of the fall. So if your right foot was in the hole, correct, and left foot slid forward, does that mean you kind of fell backwards onto your backside?

A Yes. But first it was more towards the right side that I -- the weight went.

Q Right.

A Right and -- and then I end up on the floor -- back.

Q Okay. You ended up on your backside.

A Yeah. With the foot in hole still.

Q Okay. And what did you do immediately after -- did you fall completely on your back or did you just kind of fall into, like, a sitting position with your foot still in the hole?

A It was stressful. I -- I know end up all the way on the floor. I don't know, in the first was sitting. There is -- there is things that comes out of mind at that moment. It was -- I just remember screaming to my husband, call the ambulance. It was bad. I thought I had a bone out, so -- and I -- I end up lying up laying down, but I don't know if I sat down first.

I don't know if I sat down first.

Q Okay. And at what point -- and this may sound like a silly question, but just, you know, forgive me -- at what point did you actually notice the hole with your eyes?

A I will say I did not -- I broke my leg and then -- I don't know, I was more worried about my leg. I didn't even -- I knew it was hole, because it was so big, but I didn't notice before at all.

Q Okay. So it's safe to say that your foot went into the hole, you fell, and then you visually saw the hole?

A Yeah. I had to remove my feet from the hole, basically, to wait for the ambulance. Like, when I -- I think when I lay down, I had to take the foot out of the hole, kind of, to -- to lay down.

> Q Okay. And were you able to take your foot out of the hole without resistance? A It wasn't, like, thinking about taking out. I think just throwing myself on the floor to remove the weight from the fracture.
>
> Q Okay.
>
> A But it wasn't like I thought about it, it was just a reflection of my body.
>
> Q Okay.
>
> A The pain was really bad.
>
> Q And, forgive me, I may have already asked this. Was the hole itself, was it bigger than your ? About the same size?
>
> A It had to be the -- at least the size of my -- my shoe because I felt -- it didn't -- it didn't -- it wasn't just a piece of my feet that went in, it was
>
> Q The whole foot.
>
> A -- the whole foot. Yeah.

(Pa95 to Pa99: T27-24 to T31-4).

Amanda was unable to observe the hole as the grass had not been cut for three weeks. (Pa210) (Pa99: T31-10 to 20). The hole was deep enough that when Amanda fell to the ground, her foot was still stuck in the hole. (Pa210) (Pa97: T97-25 to T98-6). Sher testified as follows:

Q Did you take any pictures of the hole in which you fell at Volunteer Park?

A I -- I do have a picture of when I went back, and they actually put a cone on the hole -- the town -- I -- I believe it was the town. I don't know who put a cone up. Right after, I think my husband's been there trying to find the hole. The -- that night was very crazy. So we didn't look for the hole that night, but we went back, and in the location, we could -- we could see hole -- a hole there. But we also have a picture with -- were the -- I believe it's the Township put a cone there to alert people now after the -- after it happened.

- were the -- I believe it's the Township put a cone there to alert people now after the -- after it happened.

after the -- after it happened.

Q Would you say it was much bigger than your foot or closer to the same size as your foot?

A Approximately, the same size of my foot, but I wasn't paying attention on the -- at that moment. I was just about -- trying to figure out what happened.

Q That's understandable. And you didn't notice this hole prior to falling into it; that's correct, right?

A No.

> Q Is there any reason why you didn't notice this hole prior to falling into it?
>
> A My guess is the grass was tall enough to cover because it looked like just grass. Walking, I never saw any -- any hole.

(Pa118: T50-11 to 23). Amanda was unable to observe the hole as the grass had not been cut for three weeks. (Pa99: T10-14). The hole was deep enough that when Amanda fell to the ground, her foot was still stuck in the hole.

Amanda sustained a fracture to her right leg tibia/fibula requiring an open reduction and internal fixation. (Pa270 and Pa273). The surgery was followed by a course of immobilization, crutches, and physical therapy. (Pa105: T37-4 to 14). Amanda was in a cast for eight (8) weeks, followed by boot for six (6) months, and more than six (6) months of physical therapy. (Pa107 to Pa108: T39-14 to T40-20). Her injuries have permanently limited her mobility and she can no longer participate in any sports, go running, or even long walks. (Pa114: T46-19 to 25). In particular, Amanda and her husband loved dancing and would often go dancing on the weekends, (Pa115: T47-19 to 25). but after the accident, she could not longer enjoy this activity that her and her husband cherished (Pa114: T46-19 to 25). Amanda's treating physician, Frank A. Liporace, MD opined that "there are PERMANENT limitations that she [Amanda] has including but not limited to intermittent pain affecting ability for certain positions and activities. In addition, there is the possibility of developing further issues, including but not limited to

contracture, chronic pain, loss of further function, infection at surgical sites, implant complications, ankle arthritis." (Pa281).

After the accident, Brian and/or Amanda went back to the area where the Amanda's accident occurred to take photographs of the foot deep hole. and they observed that an orange cone was placed over the hole (Pa118: T-50-13 to 23), and sometimes later, the hole was removed. (Pa210). In contrast to Appellants, Matt Reed the supervisor of the Union Department of Public works denied that there was a hole and testified that he observed a divot several yards away from where Amanda fell, and that was where he placed an orange cone. (Pa55) (Pa147: T9-7 to 24).Appellants dispute that Mr. Reed's testimony is truthful. (Pa210).

In discovery it was ascertained that the grass area between Burnett Avenue and the soccer field is mowed every 2 to 3 weeks. (Pa146: T5-6 to 10). The area where Amanda fell is on a hill next to a retaining wall, and Mr. Reed testified that this area was hand cut with a weedwhacker. (Pa148: T14-3 to 5). Mr. Reed further testified that the area in question is inspected and repaired if a defect is found. (Pa151-152: T26-23 to T27-10). The last time the grass was cut was on September 20, 2021. (Pa148: T14-6 to 10). If the employees of the Defendant made proper observations, they would have observed the hole in the ground, a dangerous condition.

The trial court, in rendering its decision granting summary judgment in favor of the Township, relied upon the testimony of Mr. Reed numerous times in support

of the trial court's decision to dismiss Appellants Complaint, which was contrary to the testimony of Appellants. First, the trial court ignored and overlooked Appellants' testimony that the hole was a foot deep and enough to trap Amanda's foot and accepted the Township's description of the foot deep hole as a "divot." (Pa15). Second, the trial court adopted the Township's testimony and wrote that "the divot was so minor that when the Township was notified someone had tripped and fallen at Volunteer Park, Township employees scoured the area and placed a cone several yard away from the subject condition, rather than placing it at the subject condition . . . ." (Pa15), completely disregarding Appellants testimony that the cone was placed over the hole. Third, the trial court adopted the Township's testimony that the Township had routinely inspected the area where Amanda fell but the inspections did not reveal any conditions or potential hazard that warranted fixing or repair to find that Appellant could not prove that the Township created a dangerous condition. (Pa15). Finally, the trial court adopted the Township's testimony that the Township did not receive any reporting of dangerous conditions at the area where Amanda fell as conclusory evidence in finding that Appellants did not establish actual or constructive knowledge of the dangerous conditions. (Pa16).

LEGAL ARGUMENT

The Tort Claims Act states a public entity is liable if a plaintiff establishes: (1) public "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 (4) "a negligent or wrongful act or omission of [a public] employee . . . created the dangerous condition"; or "a public entity had actual or constructive notice of the dangerous condition . . . .” N.J.S.A. 59:4-2. Appellants provided credible testimony and evidence that on October 12, 2021, Amanda went to Volunteer Park that is managed by the Township and suffered severe injury when her foot was trapped in a one foot deep hole. Through discovery, it was established that the Township had either (a) created the one foot deep hole when the Township last cut the grass approximately three (3) weeks before the accident at issue or (b) the Township had inspected the area where Amanda suffered her fall but failed to discover the foot deep hole when the Township had cut the grass. The trial court, however, incorrectly applied the *Brill* standard on the Township’s motion for summary judgment by failing to view the evidence in light most favorable to Appellants, the non-movants, and incorrectly granted summary judgment to the Township.

1. THE TRIAL COURT ERRED BY INCORRECTLY APPLYING THE *BRILL* STANDARD OF REVIEW ON A SUMMARY JUDGMENT MOTION BY ADOPTING APPELLEES' TESTIMONY THAT WAS DISPUTED BY APPELLANTS AS THE GOVERNING FACTS. (Pa15-Pa17).

The trial court below failed to view the evidence in light most favorable to the Appellants, the non-moving party, as required by Brill v. Guadian Life Ins. CO. of Am., 142 N.J. 520 (1995). *R.* 4:46-2 provides that a court should grant summary judgment when "the pleadings, depositions, answer to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material facts challenged . . . ." "By its plain language, *Rule* 4:46-2 dictates that a court should deny a summary judgment motion only when the party opposing the motion has come forward with evidence that creates 'a genuine issue as to any material facts challenged." *Brill*, 142 N.J. at 528-529. *Brill* provides that "a determination whether there exists 'a genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential material presented, when viewed in 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*, 142 N.J. at 540. "The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" *Brill*, 142 N.J. at 540 (internal citation omitted). "Credibility

determinations will continue to be made by a jury and not the judge." *Brill*, 142 N.J. at 520. "It is critical that a trial court ruling on a summary judgment motion not 'shut a deserving litigation from his [or her] trial." *Brill* , 142 at 540

Whether the hole that trapped Amanda's foot and caused her severe injury existed was a genuine issue of material fact that the parties heavily contested. Amanda had testified that the hole was approximately one foot in depth and that her whole foot was caught within the hole, which caused her to fall and sustain severe injuries. Amanda further testified that when she returned to the site, she found an orange cone placed over the hole. The Township, however, denied that the one foot deep hole existed and stated that when the Township investigated the site of the Amanda's fall, the Township placed a cone several yards away from the hole because the Township could not locate the hole. Appellants asserted that Mr. Reed was not telling the truth in that he placed the cone where the Amanda fell and caused the hole to be repaired. More importantly, if no defect existed as alleged by the Township, it begs the question why did Mr. Reed not take a photograph of the area next to the retaining wall, or the area where he claims there were divots which he gave warning to with an orange cone, but was not such a defect that would be repaired.

Stewart v. New Jersey Turnpike Authority/Garden State Parkway, *249 N.J. 642* (2022), provides guidance on the determination of whether a plaintiff has established the existence of an issue of material fact regarding whether there was a

dangerous condition. In *Stewart*, the Supreme Court held that a plaintiff's observation that something metal appeared in the roadway did not support plaintiff's alleged dangerous condition that a height differential existed in the asphalt. the Supreme Court affirmed the trial court's determination that plaintiff failed to demonstrate "dangerous condition" and the only photograph that was provided did not show any height differential. *Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642 (2022).*

The disagreement between the Appellant and Appellee over existence of the hole is an issue of material fact that is ultimately for the jury to decide based on the credibility of the evidence provided by the parties. The trial court in finding that the hole was a divot that is minor and insignificant, however, failed to abide by the *Brill* standard and subsumed the fact-finding role of the jury and decided that the Township's testimony by Mr. Reed to be more credible than the testimony of Amanda. It appears that the trial court accepted defense counsel's argument that Amanda's certification was fictitious and self-serving solely to create a question of fact. Amanda's certification in opposition to the Township's motion for summary judgment, however, was competent evidence and was 100% consistent with the deposition of Amanda and her husband. Notwithstanding, the trial court adopted the Township's testimony and determined that "a small divot on a grassy knoll in a public park does not by itself rise to the level of creating a 'substantial risk of injury.'" (Pa15). In contrary, under the *Brill* standard, Amanda has provided

competent and credible testimony that the hole was a foot deep, and a rational fact-finder could have determined that the foot deep hole constituted a "dangerous condition" under the Tort Claims Act, which should have resulted in the denial of the Township's motion for summary judgment.

Similarly, the issue of whether the Township created the foot deep hole or if the Township had actual or constructive notice of the foot deep hole was highly contentious and a genuine issue of material fact that should have precluded the trial court from granting summary judgment. Mr. Reed, testifying on behalf of the Township, testified that the Park had been cut approximately three weeks prior to Amanda's fall and injury, and that the Township had a policy of consistently and routinely inspecting, cutting, and maintain the area where Amanda suffered her fall and injury. However, as the Appellants had aptly explained, while the Appellants do not know how long the defect existed, the Appellants do know by a common sense process of elimination that either the foot deep hole existed 3 weeks prior to Amanda's fall and injury and was missed when Township inspected the area, or the foot deep hole was created by the negligence of Township's employees three weeks prior to the subject occurrence. There is no activity on the hill between the road and the soccer field other than people walking to and from the field. The only other actions are municipal ones. It can be visualized how a riding lawnmower being operated on a steep hill next to a retaining wall could have a portion of the machine digging into the ground.

Finally, the trial court again subsumed the role of a jury and acted as the fact-finder and virtually adopted the Township's position as uncontested facts. The trial court overlooked and ignored the common sense process of elimination and wrote as follows:

> The record reflects the Township has policies and procedures in place which provide Volunteer Park will be inspected, cut, and maintained, once per week, weather permitting. See. Reed Deposition at 28. Moreover, Volunteer Park was cut prior to the incident was September 20, 2021. See, Reed Deposition at 14. Township employees consistently and routinely inspected, cut, and maintained the area where Plaintiff fell as per Township policy. See, Reed Deposition at 15. There is no evidence to demonstrate the Township deviated from these policies and procedures. The record reflects that inspection and maintenance never revealed any condition or potential hazard that warranted fixing or repair.

(Pa13). The trial court failed to apply the *Brill* standard and ruled that the mere fact the Township failed to find the foot deep hole or did not find the foot deep hole to be a hazardous was more credible than the Appellants' credible testimony and evidence that a foot deep hole in fact existed. The trial court, in rationalizing its finding that the Appellants failed to establish "constructive notice":

> The record reflects that the Township had no knowledge of any alleged condition in the location of Plaintiffs alleged incident. Township Clerk Eileen Birch alleges she never received any notices, reports, and/or complaints relative to any allegedly dangerous conditions at Volunteer Park or the surrounding area prior to the date of the incident. See. Certification of Eileen Birch at f 3. In addition, at no point prior to the incident did Plaintiffs notice the divot. See. Amanda Costigan Deposition at 52:12-21; See also. Brian Costigan Deposition at 15:7-9. These facts alone are sufficient to preclude actual notice as required by N.J.S.A. 59:4-3(a).

(Pa16). Again, the trial court ignored the common sense process of elimination and the fact that a foot deep hole could not have simply appeared out of thin air during the three week period between the Township's last inspection and when Amanda got her foot stuck in the foot deep hole and suffered severe injury. The trial writes that:

> Plaintiff pointing out that the area where Plaintiff fell was cut three (3) weeks prior to the accident is not sufficient evidence to prove the Township was on notice of the alleged divot. While Plaintiff is correct, it is common knowledge that holes "don't just appear in a grassy area without something causing the hole," **this evidence alone, much like the absence of a reporting of the divot, is just as much proof that there was nothing to report at the time of the cutting of the grass, showing the Township was *not* on notice of the divot.**

(Pa17). (emphasis added). The *Brill* standard, however, would require the trial court to deny summary judgment when there are disputed material facts that could lead to different findings by a rational fact finder. Since the trial court conceded that the common knowledge that a foot deep hole must have been created could have resulted in a finding that the Township either created the foot deep hole or had constructive notice of the foot deep hole, the trial court should have denied summary judgment based on the existence of a genuine issue of material fact.

2. THE TRIAL COURT ERRED IN FINDING THAT THAT THE HOLE DID NOT CREATED A "DANGEROUS CONDITION" UNDER THE TORT CLAIMS ACT. (Pa15).

In determining that the one foot hole did not constitute a "dangerous condition" under the Tort Claims Act, the trial court against subsumed the fact finding role of the jury, deprived the Appellants of their day in court, and replaced the jury's finding with the trial court's own fact finding. Under the Tort Claims Act, a "dangerous condition" is defined 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. 59:4-1a. Moreover, the Supreme Court has held that the issue of whether the dangerous condition was palpably unreasonable is a jury question. *Vincitore v. Sports & Expo. Auth.*, 169 NJ 119 (2001) (stating that "[w]hether property is in a "dangerous condition" is generally a question for the finder of fact). *See Roe ex rel. M.J. v. New Jersey Transit Rail Operations, Inc.*, 317 *N.J.Super.* 72, 77-78, 721 *A.*2d 302 (App.Div.1998) (stating that whether property was in a "dangerous condition" was question for jury), *certif. denied,* 160 *N.J.* 89, 733 *A.*2d 494 (1999). In certain cases, in order to ensure that legislatively-decreed restrictive approach to liability is enforced, a court may need to resolve question of whether public entity's property was in "dangerous condition" at time it caused injury as a matter of law; the pertinent inquiry, however, is whether reasonable minds could

differ as to whether condition was indeed “dangerous” as defined by Tort Claims Act. In certain circumstances, the question of a "dangerous condition" must be resolved by the court as a matter of law, in order that the "legislatively-decreed restrictive approach to liability" is enforced. *Cordy v. Sherwin Williams Co.*, 975 F. Supp. 639 (D.N.J. 1997) (citing Polyard v. Terry, 160 N.J. Super. 497, 508 (App. Div. 1978), aff'd o.b., 79 N.J. 547 (1979)). The pertinent inquiry is whether **reasonable minds** could differ as to whether the condition was indeed "dangerous" as defined by the Act. *Id.*

As previously established, if the trial court had properly applied the *Brill* standard on the motion for summary judgment, the trial court would have concluded that there is a genuine issue of material fact as to the size of the hole that trapped Amanda’s foot and led to her severe injury. If the trial court accepts for purposes of the summary judgment motion that a hole existed of a sufficient size that a foot would fit within the hole, and of a sufficient size to capture the foot even after a fall, reasonable minds could have certainly determined that the foot deep hole was a dangerous condition under the Tort Claims Act.

Moreover, there is no need for an expert in this case. New Jersey Rule of Evidence 702 provides that plaintiffs or defendants can present a qualified expert to offer opinion testimony if the expert’s scientific, technical, or other specialized knowledge will assist the judge or jury in understanding the evidence or determining a fact in issue. Under Rule 702, before expert witness testimony can

be admitted, the following three criteria must be met: 1. The testimony concerns a subject matter that is beyond the knowledge of the average juror. (emphasis added). A juror does not need an expert to opine that a hole in the ground as large as a shoe and deep enough to capture a foot and retain after a fall in a dangerous condition. This is an issue that can be readily understood by the average juror, as well is the failure to repair palpably unreasonable.

3. THE TRIAL COURT ERRED IN DETERMINING THAT THE APPELLANT FAILED TO ESTABLISH THAT THE TOWNSHIP HAD EITHER ACTUAL OR CONSTRUCTIVE NOTICE OF THE DANGEROUS CONDITION CREATED BY THE HOLE. (Pa15).

The trial court erred in determining that Appellant failed to demonstrate that the Township had either actual or constructive notice of the foot deep hole. Under *N.J.S.A.* 59:4-2(a), a publicy entity is liable for injury caused by a dangerous condition if "(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 (b) a public entity had actual or constructitve 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." If the dangerous condition is created by the public entity, then actual or constructive notice would not be required. If the dangerous condition was not created the public entity, then actual or constructive notice would be required.

N.J.S.A. 59:4-3 defines constructive knowledge as follows:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual konlwedge of the existence of the condition and knew or should have known its dangerous character.
>
> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 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.

Constructive notice can be demonstrated in different ways. Evidence that previous complaints have been made about a particular problem on public land, or that there have been other accidents in the same area due to the same cause, may help to establish actual or constructive notice of that dangerous condition. Schwartz v. Jordan, 337 N.J. Super. 550, 565, (App. Div. 2001)., Previous complaint is not necessary, however, to demonstrate constructive notice; instead, constructive notice can be reasonably inferred from the length of time a hole existed and the size of the hole. *See* Chatman v. Hall, 128 N.J. 394, 418 (1992) (explaining that the length of time a pothole existed, along with its alleged size, could support a reasonable inference that the defendant had either actual or constructive notice).

While Appellants do not know how long the defect existed, Appellants do know by a common sense process of elimination either that the defect existed 3 weeks prior to Plaintiffs accident and was missed when inspected, or it was caused by the negligence of Defendant's employees three weeks prior to the subject occurrence. Accordingly, the Appellants proffered two theories regarding the foot deep hole. First, the Appellants alleged that the foot deep hole existed prior to the Township's inspection nearly three (3) weeks prior to Amanda's fall, and the negligence of the Township was in their inspections failing to notice the foot deep hole during inspection, not reporting it and then the failure to repair it. Amanda testified that she was walking from her car to the soccer field at Volunteer field. From the roadway to the soccer field is a well-traveled grassy area adjacent to a retaining wall. Amanda did not see the one foot deep hole in the ground as it was covered with 3-week-old grass growth. The hole was so large that Amanda's foot was caught in the hole even when she fell to the ground. While it would be unreasonable to expect an inspection of every inch of a public park, in our particular case, the Township admitted that in fact the Township does inspect the area where the Amanda fell. In addition, the grass is cut every 2-4 weeks throughout the growing season. While most lawns are cut by way of large machines, the area where the Plaintiff was caused to fall cannot be mowed by machine but required use of a weedwhacker. (Pa148: T14-5). Anyone using a weedwhacker would have seen the hole in the ground with the slightest bit of

diligence. Matt Reed, the grounds supervisor of the Defendant testified at his testimony as follows:

> "Q. All right. Mr. Reed, you stated that you don't have any policy in place with respect to inspecting the fields. But you do or your guys do, in fact, inspect the fields when they cut the grass; is that correct?
>
> A. Correct.
>
> Q. Okay. So did you mean that there was no written policy in place?
>
> A. Yeah.
>
> Q. Okay. And how -- how exactly do they go about inspecting the field for defects or hazards?
>
> A. They'll get to a location and they'll cut the grass and they'll clean up garbage. And if there's anything that they see or -- or let's say they're cutting the grass and they hit -- they hit a dip or a rut or something, they'll notify me. And I'll go out there and I'll assess it and then I'll take actions if the ruts need to be filled and so on."
>
> Q. Okay. And that's a practice that all of the DPW guys are trained or taught to do with the fields?
>
> A. Yes. They're all told that if they see something

(Pa151 to Pa152: T26-15 to T27-10).

The failure to identify the dangerous condition when it was obvious is constructive notice. Appellant established constructive notice if "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). Under *N.J.S.A.* 59:4-3(b), the condition must have existed for such a period of time that the public entity should have discovered it." *Polzo v County of Essex*, 196 N.J. 569 (2008) quoting *Carroll v. N.J. Transit,* 366 *N.J.Super.* 380, 388, 841 *A.*2d 465 (App.Div.2004). The area where Plaintiff fell was cut 3 weeks prior to the accident. It is common knowledge that holes do not just appear in a grass area without something causing the hole. There is nothing that would have caused the hole to appear subsequent to the inspection three weeks prior.

In the alternative, if the foot deep hole did not exist during the inspection 3 weeks prior to Amanda's fall, it could only have been caused by the riding mower that the Township uses. The Appellants states the hole if it did not exist 3 weeks prior, it could only have occurred by reason of the acts of its employees. There is no activity on the hill between the road and the soccer field other than people walking to and from the field. The only other actions are municipal ones. It can be visualized how a riding lawnmower being operated on a steep hill next to a retaining wall could have a portion of the machine digging into the ground. Under this alternative theory, actual or constructive notice would not be required as the Township created the dangerous condition.

The trial court's reliance on *Polozo* was misplaced and the facts are vastly different. The issue in *Polzo* was their failure to inspect. In the matter subjudice, the Township took it upon itself to inspect the property. Appellants testified that there was a large depression of sufficient size to catch a foot; and to hold onto the foot even after Amanda fell; the municipality after the fact located the defect and put an orange cone over the defect; and thereafter repaired the defect. The issue of length a defect exists being an issue deals with limited municipal resources and when and where to inspect. This is not an issue in this case, the Township admitted to inspection. Appellants alleged that their inspection was defective or in the alternative, the Township employees caused the hole. Moreover, there is a big difference between observing the hole in the ground with 3 weeks of grass growth vs a fresh cut exposing the hole.

For establishing constructive notice, the trial court determined that since the Township inspected the area and did not find a dangerous condition, then none existed. This is false. It is not the trial court's functions to weigh the evidence but to determine whether there is a genuine issue for trial. Appellants submit that a hole in the ground larger than a human foot and of such depth to catch and hold a foot after a violent fall gives rise to a question of fact for a jury. The trial improperly disregarded Appellants' testimony and accepted the Township's contested testimony.

4. PLAINTIFFS SET FORTH A PRIMA FACIA CASE THAT THE INJURIES SUSTAINED BY AMANDA COSTIGAN MET THE CRITERIA OF THE NEW JERSEY TORT CLAIM ACT. (Pa8 to Pa14).

N.J.S.A. 59:4-2 provides that public entity is liable if a plaintiff establishes: (1) public "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 (4) "a negligent or wrongful act or omission of [a public] employee . . . created the dangerous condition"; or "a public entity had actual or constructive notice of the dangerous condition . . .” As set forth above, Appellants have established that a dangerous condition existed at the time of the injury and that Township either created the dangerous condition or had actual or constructive knowledge of the dangerous condition. The parties also heavily disputed over whether the injuries suffered by Amanda met the criteria 59. While the trial court discussed each side in its summary of both side’s arguments, the trial court did not make a determination as to this issue.

Title 59 covers this accident and permanent injury is a jury question, and not for the trial court to decide on Motion. When Amanda’s foot became stuck in the foot deep hole in the ground, it caused her to fall while her foot remained in the hole, causing her right tibia and fibula to break, requiring insertion of a rod and other hardware, as well as surgical scars in a total of 4 separate scars. Dr.

Liporace, the treating physician, opined that "There are PERMANENT limitations that she has including but not limited to intermittent pain affecting ability for certain positions and activities. In addition, there is the possibility of developing further issues, including but not limited to contracture, chronic pain, loss of further function, infection at surgical sites, implant complications, ankle arthritis." (Pa281). Furthermore Amanda that she has pains especially over the hardware, she is limited in playing with her children in such activities as basketball or tennis, she can't do Zumba, or limited running, dancing, etc.

A similar injury was addressed by the Supreme Court in *Gilhooley v. County of Union*, 164 N.J. 533 (1999). The Court stated "Gilhooley's reconstructed knee is properly characterized as a permanent injury resulting in a substantial loss of bodily function. The accident caused her to forever lose the normal use of her knee, which could not function without permanent pins and wires to reestablish its integrity. There is no doubt that the Legislature intended that pain and suffering damages could be awarded to those whose ability to use their bodily parts efficiently is restored through pins, wires, or any other artificial mechanism or device. The Court is satisfied that the Legislature intended to include within the notion of aggravated cases those involving permanent injury resulting in a permanent loss of a normal bodily function, even if modern medicine can supply replacement parts to mimic the natural function."

The plaintiff's limitation by reason of her accident and hardware installed satisfies the statutory requirements to be compensated for her injuries. In addition, whether the scars are a permanent disfigurement is a jury question pursuant to *Gilhooley v. County of Union.*

CONCLUSION

Based upon the foregoing, it is respectfully requested that this Court reverse the trial court's granting of summary judgment and allowing this matter to proceed to trial.

Dated: December 23, 2024

s/ Jon Rory Skolnick
Jon Rory Skolnick
Attorney for Plaintiffs/Appellants

Superior Court of New Jersey
Appellate Division

Docket No. A-000389-24

AMANDA COSTIGAN and BRIAN COSTIGAN, *Plaintiffs-Appellants,* v. TOWNSHIP OF UNION, UNION RECREATION DEPARTMENT and JOHN DOE, a fictitious name, *Defendants-Appellants*.	CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION, UNION COUNTY Docket No. UNN-L-1963-22 Sat Below: Hon. Daniel R. Lindemann, J.S.C. Date of Submission: January 27, 2025

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS TOWNSHIP OF UNION AND UNION RECREATION DEPARTMENT

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PRELIMINARY STATEMENT

This appeal arises out of an Order entered by the Superior Court of New Jersey granting Defendants-Respondents', Township of Union and Union Recreation Department (collectively, "Defendants") Motion for Summary Judgment dismissing Plaintiff-Appellants', Amanda Costigan ("Plaintiff") and Brian Costigan ("Mr. Costigan" and collectively with Plaintiff, "Plaintiffs"), Complaint with Prejudice as to Defendants. Therein, the trial court correctly determined Plaintiffs failed to vault the stringent threshold requirements to impose liability on a public entity pursuant to New Jersey's Tort Claims Act (the "TCA"), N.J.S.A. 59:4-1 to -10.

While affording Plaintiffs all reasonable inferences, the trial court was correct in determining, dismissal of Plaintiffs' Complaint as to Defendants was **required** given (i) no dangerous condition existed; and (ii) Defendants did not have actual or constructive notice of any purportedly dangerous condition. Further, given the accretive nature of the TCA's requirements, the trial court deemed it unnecessary to even address the merits of the remaining TCA elements raised in Defendants' Motion for Summary Judgment. Specifically, the trial court did not address Defendants' arguments that: (i) Defendants did not act palpably unreasonable; and (ii) Plaintiff failed to proof sufficient proof any injury is casually related and permanent. Notwithstanding, the trial court

properly determined, given Plaintiffs' failure to demonstrate even a single one of the necessary elements of the TCA, Plaintiffs' Complaint must be dismissed.

Accordingly, in affording Plaintiffs all reasonable inferences from the factual record, there is no genuine issue of material fact demonstrating Defendants' liability for Plaintiffs' alleged injuries. Plaintiffs failed to surmount the immunities and stringent requirements of the TCA and Plaintiffs' Complaint was properly dismissed. Therefore, and for the reasons established herein, it is respectfully submitted the Appellate Division should affirm the trial court's decision in its entirety.

PROCEDURAL HISTORY

On July 6, 2022, Plaintiff commenced this action by filing a Complaint in the Superior Court of New Jersey, Union Vicinage, bearing docket number UNN-L-1963-22. [Pa63-Pa68]. On August 11, 2022, Defendants filed an Answer with Separate Defenses. [Pa250-Pa259].

On July 5, 2024, Defendants filed a Motion for Summary Judgment (the "Motion"). [Pa51-Pa206]. On July 16, 2024, Plaintiffs filed Opposition to the Motion. [Pa207-Pa247]. On July 28, 2024, Defendants filed a Reply Brief in further support of the Motion. On August 2, 2024, the trial court held oral argument on the Motion. On August 7, 2024, the trial court entered an Order and Statement of Reasons granting Defendants' Motion and dismissing Plaintiffs' Complaint. [Pa1-Pa18].

On August 26, 2024, Plaintiffs filed a Motion for Reconsideration (the "Reconsideration Motion"). [Pa248-Pa249]. On September 5, 2024, Defendants filed Opposition to Plaintiffs' Reconsideration Motion. On September 13, 2024, the trial court held oral argument on the Reconsideration Motion. On September 13, 2024, the trial court entered an Order and Statement of Reasons denying Plaintiffs' Reconsideration Motion. [Pa19-Pa23].

Thereafter, on October 8, 2024, Plaintiffs appealed the trial court's rulings by filing a Notice of Appeal in the Superior Court, Appellate Division. [Pa25-Pa31].

COUNTER-STATEMENT OF FACTS

On or about October 12, 2021, Plaintiff was traversing upon the premises known as Volunteer Park in Union, New Jersey, when Plaintiff allegedly slipped and fell due to a divot in the ground adjacent to the retaining wall between Burnett Avenue and Volunteer Park. [Pa3]. Plaintiffs consistently walked in or around the area approximately once per week and did not report nor notice any issues relative to the subject condition at Volunteer Park in Union, New Jersey. [Pa 15].

On the date of the incident, walked down the grassy hill to Volunteer Park and ignored the path from Burnet Avenue to enter Volunteer Park. [Pa54]. Plaintiff chose not to walk the path to the soccer field and instead traversed on a grassy downslope not meant for foot and travel. [Pa54]. The Ground Supervisor for the Defendants' Department of Public Works, Matt Reed ("Reed"), confirmed there is a path from Burnet Avenue to Volunteer Park upon which Plaintiff was supposed to travel to enter the soccer field. [Pa54]. Despite same, Plaintiff chose not to travel along such path and instead chose to travel on a grassy hill. [Pa54].

However, Defendants did not have actual nor constructive notice of any allegedly dangerous condition. As to actual notice, Defendants did not receive any notices, reports, and/or complaints relative to any dangerous condition at or

near the subject area where Defendants fell. [Pa16]. At no point prior to the incident did Plaintiffs, or anyone else, notice the divot. [Pa16]. Plaintiffs never gave notice of the divot to Defendants. [Pa16].

Likewise, Defendants did not have constructive notice of the dangerous condition. There is no evidence demonstrating the length of time the divot existed prior to Plaintiff's incident. The only evidence demonstrating the appearance of the condition are photographs taken by Plaintiff the day after the incident. The divot is so minor and insignificant, when Defendants was notified someone had tripped and fell at Volunteer Park, Defendants' employees scoured the area and placed a cone several yards away from the subject condition at the location of an actual hole in the ground, rather than placing it at the subject condition, because Defendants did not consider the divot to be an actual hazard. [Pa15]. When Reed was asked why the cone was placed in a different area rather than at the subject condition, Reed testified "because [the subject condition] was not a hazard." [Pa15].

Moreover, Defendants' (in)actions were not palpably unreasonable under the circumstances. Reed inspected the area where Plaintiff fell and did not see any holes or divots. Defendants inspect the area to make sure there are no serious hazards and cuts the lawn of Volunteer Park every week, weather permitting. [Pa15]. The last time the lawn had been cut was September 20, 2021,

approximately three weeks prior to the incident. [Pa15]. Reed was shown a photograph of the subject condition and proclaimed, "that's not a hazard." [Pa15].

LEGAL ARGUMENT

I. STANDARD OF REVIEW.

The standard of review for a summary judgment motion is, "de novo, employing the same standard used by the trial court." Tarabokia v. Structure Tone, 429 N.J. Super. 103, 106 (App. Div. 2012) (citing Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167 (App. Div. 1998), certif. denied, 154 N.J. 608 (1998)). Under this standard, a party against whom a claim is made may move for summary judgment in its favor before the case is tried. R. 4:46-1.

Pursuant to R. 4:46-2, a party is entitled to summary judgment where "there is no genuine issue as to any material fact . . . and . . . the moving party is entitled to a judgment or order as a matter of law." The movant bears the "burden to exclude any reasonable doubt as to the existence of any genuine issue of material fact" regarding the claims asserted. Judson v. Peoples Bank and Trust, 17 N.J. 67, 74 (1954) (citation omitted).

The Supreme Court has cautioned that "a court should deny a summary judgment motion **only** where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995) (quoting R. 4:46-2(c)) (emphasis added). "That means a non-moving party cannot

defeat a motion for summary judgment merely by pointing to any fact in dispute." Ibid. Moreover, "when the evidence is so one-sided that one party must prevail as a matter of law the trial court should not hesitate to grant summary judgment." Id. at 540 (quotations omitted).

Additionally, summary judgment is mandated after:

> adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, **there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial**. The moving party is entitled to a judgment as a matter of law because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.
>
> [Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986) (internal quotations omitted) (emphasis added).

The standard for such a determination is "whether the competent materials presented . . . are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 529 (1995) (quoting R. 4:46-2). Immaterial or frivolous evidence is insufficient to defeat a motion for summary judgment. Ibid. Moreover, an issue that has only "a single, unavoidable resolution" is not "genuine" under R. 4:46-2. Id. at 540.

II. THE TRIAL COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS, AND SUBSEQUENT DENIAL OF PLAINTIFFS' RECONSIDERATION MOTION, WAS PROPER AND SHOULD BE AFFIRMED. [Pa1-Pa18]

A. The Trial Court Properly Determined No Dangerous Condition Existed and the Decision Should be Affirmed. [Pa14-Pa15, Pa21]

The trial court correctly found no dangerous condition existed as defined by the TCA. As set forth by the trial court, to establish a dangerous condition under the TCA, Plaintiffs are required to demonstrate: (i) a dangerous condition exists; (ii) such condition created a foreseeable risk of injury that occurred; and (iii) such dangerous condition proximately caused the injury." Garrison v. Twp. of Middletown, 154 N.J. 282, 286 (1998). In this matter, the trial court correctly applied the relevant case law in concluding no dangerous condition existed as a matter of law.

The TCA defines "dangerous condition" of public property 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(a) (emphasis added). The Appellate Division has noted that for a condition to present a "substantial risk of injury" it cannot be "minor, trivial or insignificant." Atalease v. Long Branch Twp., 365 N.J. Super. 1, 6 (App. Div. 2003). Whether property is in a dangerous condition is generally

a question for the finder of fact to decide. Vincitore v. Sports & Expo. Auth., 169 N.J. 119, 123 (2001). Thus, "the standard is whether any member of the general public who foreseeably may use the property would be exposed to the risk created by the alleged dangerous condition." Id. at 125.

Here, even affording Plaintiffs all reasonable inferences, the trial court found no dangerous condition existed. Specifically, the trial court concluded, "**the divot** on which Plaintiff has alleged to have tripped **was not a dangerous condition**." [Pa15]. As noted by the trial court, Plaintiffs' "only proofs with respect to the condition are photographs after the incident demonstrating a minor divot in the grass . . .." [Pa15]. By its own words, the trial court found, "[a] small divot on a grassy knoll in a public park does not by itself rise to the level of creating a 'substantial risk of injury' as required by the [TCA]." [Pa15].

As briefed *ad nauseum*, the alleged condition is simply a dirt patch located near Volunteer Park. The condition is so insignificant that when Defendants were notified someone had tripped and fallen at Volunteer Park, Defendants were unable to locate same. Likewise, when shown a photograph of the purported condition, Defendants' Grounder Supervisor stated, "that's not a hazard." [Pa15]. As summarized by the trial court,

> The **record reflects that the divot was so minor** that when the Township was notified someone

> had tripped and fallen at Volunteer Park, Township employees scoured the area and placed a cone several yards away from the subject condition, rather than placing it at the subject condition, as the DPW clearly believed this divot **not to be an actual hazard**. [Pa15 (emphasis added)].

Therefore, the trial court was correct in concluding Plaintiffs "failed to demonstrate the condition of the divot in the grass was a 'dangerous condition' pursuant to the TCA." [Pa14].

Further, while not explicitly addressed by the trial court, Plaintiffs improperly submitted a "sham" affidavit which expressly contradicted Plaintiffs' deposition testimony. The Sham Affidavit Doctrine "calls for rejection of the affidavit where the contradiction is unexplained and unqualified by the affiant." Shelcusky v. Garjulo, 172 N.J. 185, 194 (2002). Where, like here, a party submits an "offsetting affidavit in opposition to a motion for summary judgment when the affidavit contradicts the affiant's prior deposition testimony." Ibid. "In such circumstances, the alleged factual issue in dispute can be perceived as a sham, and as such it is not an impediment to a grant of summary judgment." Ibid.

Here, Plaintiff submitted a self-serving and contradictory certification in opposition to Defendants' Motion for Summary Judgment in hopes of creating an issue of material fact. For example, Plaintiff certified, "the divot could be seen by looking up from the bottom of the hill," and "any employee using

reasonable diligence would have observed the hole" and Plaintiff "do[es] not understand how the defendant's representative did not see a hole or divot." [Pa207 at ¶¶ 5-7].

However, Plaintiffs admitted in prior testimony Plaintiffs did not notice the divot prior to Plaintiff's fall. Likewise, there is no evidence showing the length of time the divot existed before the incident. Furthermore, Defendants' inspection of the property for potential hazards did not contemplate Plaintiff utilizing the grassy downslope as a shortcut to avoid the pathway to Volunteer Park.

Given the foregoing, it is clear the trial court, considering all competent evidence of record and affording Plaintiff all reasonable inferences, determined no dangerous condition existed. Thus, Plaintiff is unable to vault the strict requirements of the TCA and the trial court properly dismissed Plaintiff's Complaint with prejudice as to Defendants. Therefore, it is respectfully submitted the Appellate Division should affirm the trial court's Order in its entirety.

B. The Trial Court's Conclusion that Plaintiff Failed to Demonstrate the Alleged Condition was Caused by a Negligent or Wrongful Act or Omission of Defendants. [Pa15]

As detailed, Plaintiffs submitted no proof Defendants' employee's act or omission caused the alleged condition that resulted in Plaintiff's fall.

See, N.J.S.A. 59:4-2(a) (noting liability for public entities for a "negligent or wrongful act or omission of an employee of the public entity within the scope of his employment [that] created the dangerous condition"). The requirement a public entity have actual or constructive notice of a dangerous condition is "not applicable where public employees through neglect or wrongful act or omission within the scope of their employment create a dangerous condition." Atalese v. Long Beach Twp., 365 N.J. Super. 1, 5 (App. Div. 2003); N.J.S.A. 59:4-2(a). Whether a public employee created a dangerous condition through negligent acts or omissions so as to make notice requirement under the TCA inapplicable may be an issue of fact that must be decided by a jury. Tymczyszyn v. Columbus Gardens, 422 N.J. Super. 253, 265 (App. Div. 2011), certif. den. 209 N.J. 98 (2012).

As recognized by the trial court, "the record reflects the Township have policies and procedures in place which provide Volunteer Park will be inspected, cut, and maintained, once per week, weather permitting." [Pa15]. Moreover, "Township employees consistently and routinely inspected, cut, and maintained the area where Plaintiff fell as per Township policy." [Pa15]. "There is no evidence to demonstrate the Township deviated from these policies and procedures." [Pa15]. "The record reflects that inspection and maintenance **never revealed any condition or potential hazard** that warranted fixing

or repair." [Pa15].

Further, Plaintiffs submitted no evidence for the trial court to consider supporting Plaintiffs' baseless contention Defendants may have created the alleged condition. Given the foregoing, the incontrovertible record evidence makes clear no act or omission of a public employee could have created the alleged condition. Based thereon, the trial court correctly determined Plaintiffs "failed to prove . . . a negligent or wrongful act or omission of a public employee created the dangerous condition." [Pa15]. Therefore, Defendants cannot be held liable for Plaintiff's fall and the trial court's dismissal of the Complaint should be affirmed in its entirety.

C. The Trial Court Properly Concluded Defendants Did Not Have Notice, Actual or Constructive, and that Determination Should be Affirmed. [Pa15-Pa16]

As correctly determined by the trial court, Defendants did not have actual or constructive notice of any alleged condition prior to Plaintiff's alleged fall. As such, the trial court property concluded Plaintiffs were unable to meet the required "notice" element of the TCA and properly dismissed Plaintiffs' Complaint.

For Plaintiffs to recover pursuant to the TCA, there must be proof Defendants possessed either actual or constructive notice of the alleged dangerous condition which caused Plaintiff's injuries. The TCA defines

"actual" and "constructive" notice as follows:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
>
> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 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.]

In other words, to prove actual notice, a claimant must demonstrate not only that the public entity had actual knowledge of the existence of the condition, but also that the entity **knew or should have known** of its dangerous character. N.J.S.A. 59:4-3(a). "Whether a public entity is on actual or constructive notice of a dangerous condition is measured by the standards set forth in N.J.S.A. 59:4–3(a) and (b), not by whether [for example] 'a routine inspection program' by the [public entity] . . . would have discovered the condition." Polzo v. Cty. of Essex, 209 N.J. 51, 68 (2012) ("Polzo II"); see also Cherry v. City of Newark, Docket No. A-4162-14T1, 2017 WL 2152749 (N.J. App. Div. May 17, 2017) (where plaintiff's reliance on photographs taken after the accident and an alleged history of work permits and complaints

pertaining only to the surrounding area established neither actual nor constructive notice of the alleged dangerous condition).

In Cherry, the Appellate Division found the plaintiff had presented no competent evidence, much less expert proof, as to the length of time the alleged condition existed. 2017 WL 2152749 at *3. As such, the trial court correctly held Plaintiffs "failed to demonstrate the Township had actual or constructive notice of the divot that Plaintiff allegedly fell in." [Pa16].

As to actual notice, the trial court's determination accurately states the "record reflects [Defendants] had no knowledge of any alleged condition in the location of Plaintiff's alleged incident. "Township Clerk Eileen Birch alleges she never received any notices, reports, and/or complaints relative to any allegedly dangerous conditions at Volunteer Park or the surrounding area prior to the date of the incident." [Pa16]. In additional, as Plaintiff expressly testified to, "at no point prior to the incident did Plaintiff notice the divot." [Pa15]. As recognized by the trial court, "**[t]hese facts alone are sufficient to preclude actual notice as required by N.J.S.A. 59:4-3(a).**" [Pa16 (emphasis added)].

Further, it is uncontroverted Defendants "received no complaints nor requests for restoration of the divot from any source and Plaintiffs fail[ed]" to produce any evidence otherwise. [Pa16]. Therefore, as the trial court

concluded, Plaintiffs are "unable to prove the TCA's 'actual notice' requirement." [Pa16].

In the absence of actual notice, a plaintiff must establish proof as to whether the public entity had constructive notice of a dangerous condition to withstand summary judgment. Polzo I, 196 N.J. at 580-86. Constructive notice is provable "**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) (emphasis added); see also Cherry, 2017 WL 2152749.

It is Plaintiffs' **absolute burden** to establish the condition "existed for such a period of time and was of such an obvious nature the public entity, in the exercise of due care, should have discovered the condition and its dangerous character. Id. (internal quotations omitted). Further, the Court in Sims v. City of Newark, 244 N.J. Super. 32, 47 (1990), aptly explained: "[e]xistence of an alleged dangerous condition is not constructive notice of it." See also, Williams v. Phillipsburg, 171 N.J. Super. 278 (App. Div. 1979). Additionally, prior accidents at the same location of the dangerous condition can create an issue of fact as to constructive notice. Wymbs v. Twp. of Wayne, 163 N.J. 523, 536 (2000).

All competent evidence of record demonstrated Defendants had no constructive notice of any alleged condition. In the instant matter, Plaintiffs **have no proof of the length of time the alleged condition existed**. As previously stated, Township Clerk Eileen Birch did not have any notice as to the alleged dangerous condition by way of complaint or otherwise. [Pa16]. In the case at bar, Plaintiffs failed to submit any proof for the trial court's review as to how long any alleged condition was present, if at all, at the location of Volunteer Park.

On appeal, Plaintiffs merely raise the same frivolous argument already rejected by the trial court. As below, Plaintiffs "pointing out that the area where Plaintiff fell was cut three (3) weeks prior to the accident is not sufficient evidence to prove [Defendants were] on notice of the alleged divot," [Pa17], as there was no proof presented by Plaintiffs as to when the divot came into existence. Further, even as the trial court accepted Plaintiffs' contention that holes "don't just appear," the trial court further rejected this is a basis to find constructive notice on the part of Defendants. [Pa17]. Specifically, the trial court explicitly noted same "is just as much proof that there was nothing to report at the time of the cutting of the grass, showing [Defendants were] *not* on notice of the divot." [Pa17 (emphasis in original)].

Moreover, the trial court correctly decided Plaintiffs "have not adequately proved that the [alleged] condition was 'obvious'". [Pa17]. Plaintiffs testified they frequently traversed this area weekly for soccer practice and games and never noticed this divot prior to the incident. As noted by the trial court, the "fact that trained DPW workers did not report it indicates that the divot was not 'obvious.'" [Pa17]. "Further, if the divot were as 'obvious' as Plaintiff asserts, [Defendants] would have received more reports on the divot not only from workers, but the public." [Pa17]. However, as previously stated and as reflected by the record, there were no such reports.

Moreover, all facts demonstrate the condition was not "so obvious in nature" Defendants, "in the exercise of due care, should have discovered the condition and its dangerous character" as Plaintiffs failed to notice the condition prior to the incident, despite Plaintiffs traveling this subject location nearly every week for two years. Based on all of the above, the trial court appropriately held Plaintiffs' "proofs are lacking as to the length of time the alleged divot existed, thus [Defendants] are entitled to summary judgment." [Pa17].

Under these circumstances it is clear, Plaintiffs failed to carry the burden of proof as to "constructive notice." (e.g. McGrath v. Union Ave., Elementary

School, 2016 WL 2859487 (App Div 2016): "plaintiff put forward no evidence of the length of time the rod was detached . . .. No one testified that he or she saw the detached rod before the plaintiff's accident, including plaintiff herself, who visited the playground earlier that weekend. Nor was there circumstantial evidence that the rod had been detached for an extended period of time. For example, no one testified that the broken end of the rod had already accumulated rust. Nor did an expert opine, based on the metallurgical or other features of the rod, that it had been detached for an extended period of time;" See also, Cortese v. City of Asbury Park, 2005 WL 3691325 (App Div 2005)).

As Plaintiffs could not establish the length of time for the existence of the condition and, moreover, Plaintiffs travels this route almost every week and did not even notice the alleged condition themselves, Defendants could not be found to have constructive notice of the condition based on the obviousness of its "dangerous character." Defendants routinely inspected the area and never discovered anything resembling a dangerous condition at Volunteer Park. In addition, after the incident, Defendants' employees were sent to place a cone in the area to warn the public of the condition but placed a cone several yards away. When asked why the cone was put in a different area than the subject condition, Defendants' Ground Supervisor testified because the [subject condition was not] a hazard.

Therefore, the trial court properly concluded Defendants had no notice, actual or constructive, of the alleged condition and it is respectfully submitted this matter should be affirmed as Plaintiffs failed to overcome the stringent requirements of the TCA.

D. The Trial Court's Holding that Defendants Did Not Act Palpably Unreasonable Should Be Affirmed. [Pa23]

The trial court's determination Defendants did not act palpably unreasonable should be affirmed. Given Plaintiffs' failure to meet this requirement of the TCA, the trial court properly dismissed Plaintiffs' Complaint.

A "plaintiff bears the burden of proving that defendant acted in a palpably unreasonable manner." Coyne v. State, Dep't of Transp., 182 N.J. 481, 493 (2005) (citing Muhammad, 176 N.J. 185). "The term palpably unreasonable implies behavior that is patently unacceptable under any given circumstances and it must be manifest and obvious that no prudent person would approve of its course of action or inaction." Coyne, 182 N.J. at 493 (citing Kolitch v. Lindedahl, 100 N.J. 485 (1985)) (internal quotations omitted). The Third Circuit has explained that to be "palpably unreasonable" under New Jersey law, actions must be the result of "capricious, arbitrary, whimsical or outrageous decisions of public servants." Waldorf v. Shuta, 896 F.2d 723, 738 (3d Cir. 1990).

This creates a substantial barrier for Plaintiffs to overcome even if Plaintiffs can prove the existence of all four (4) previous requirements to impose TCA liability under N.J.S.A. 59:4-2; which, Plaintiffs cannot. It is well-established precedent a plaintiff will fail in their proofs if they cannot establish the public entity's failure to protect against the dangerous condition was "palpably unreasonable."

In other words, it is fully appropriate for a court to grant summary judgment when a plaintiff fails to make a showing sufficient to permit a rational fact-finder to resolve the issue of palpable unreasonableness in their favor. See Maslo v. City of Jersey City, 346 N.J. Super. 346, 350-51 (App. Div. 2002) (affirming summary judgment in favor of public entity where plaintiff failed to prove palpable unreasonableness). The Maslo Court clarified that the term "palpably unreasonable":

> implies behavior that is patently unacceptable under any circumstances, and that it must be manifest and obvious that no prudent person would approve of the public entity's course of action or inaction. Holloway v. State, 125 N.J. 386, 403-04, 593 A.2d 716 (1991); Kolitch v. Lindedahl, 100 N.J. 485, 493, 497 A.2d 183 (1985). Most recently, the Supreme Court reasserted this stringent view of the phrase "palpably unreasonable" in Wymbs v. Township of Wayne, 163 N.J. 523, 532, 750 A.2d 751 (2000). The term "palpably unreasonable" connotes "'behavior that is patently unacceptable under any given circumstance." Ibid. (quoting Kolitch, supra, 100 N.J. at 493, 497 A.2d 183).

[Id. at 349-50.]

The Maslo Court held that "[t]he burden of proving that a public entity's action or inaction was palpably unreasonable rests with the plaintiff." Id. Specifically, the Appellate Division held the defendant's failure to repair a declivity in their sidewalk that caused plaintiff's injury, absent prior complaints or reports, was insufficient to permit reasonable jurors to conclude that the defendant's inaction was palpably unreasonable. Id. at 351 (internal citations omitted).

In this matter, the trial court cited Polzo in holding, "this Court has found that the record does not demonstrate constructive notice, and accordingly . . . there cannot be a finding of "palpably unreasonable." [Pa23]. This is consistent with the relevant case law, which provides the issue of whether a defendant acted palpably unreasonable may be decided by the court as a matter of law upon application for summary judgment. See, Polzo II, 209 N.J. at 75 n. 12. ("Although ordinarily the question of whether a public entity acted in a palpably unreasonable manner is a matter for the jury, in appropriate circumstances, the issue is ripe for a court to decide on summary judgment"); Carroll, 366 N.J. Super. at 390-91 (holding there was no proof of palpable unreasonableness warranting jury consideration and affirming entry of summary judgment in favor of the public entity); Maslo, 346 N.J. Super. at 350-51

(affirming grant of summary judgment to public entity because plaintiff failed to sufficiently show that a rational factfinder could resolve the issue of palpable unreasonableness in plaintiff's favor); Black, 263 N.J. Super. at 452 (holding that a palpably unreasonable determination finding, "like any other fact question before a jury, is subject to the court's assessment whether it can reasonably be made under the evidence presented").

Here, the trial court properly determined Plaintiffs failed to satisfy the strenuous burden of proof required to prove Defendants acted palpably unreasonable. The competent evidence of record is entirely devoid of any evidence as to specific or general behavior by Defendants that can be considered palpably unreasonable. As more fully described above, Defendants had no notice, whether actual or constructive, of any alleged condition prior to Plaintiff's fall. Defendants cannot be held to have acted palpably unreasonably as to a condition it did not know existed.

However, even assuming *arguendo* Defendants had notice of an allegedly dangerous condition, there has been no action or inaction by Defendants that may be considered palpably unreasonable. Reasonable minds must agree that Defendants' actions or inactions cannot possibly be considered palpably unreasonable regarding the alleged condition prior to the incident. The exchanged discovery has been fruitless for Plaintiffs to prove Defendants'

actions or inactions related to the alleged dangerous condition were palpably unreasonable. Therefore, as Plaintiffs cannot meet the TCA's "palpably unreasonable" requirement, the trial court properly dismissed the Complaint on summary judgment.

Moreover, Plaintiffs have failed to carry Plaintiffs' burden by having no proof whatsoever that Defendants' policies and procedures are "patently unacceptable under any circumstances, and that it must be manifest and obvious that no prudent person would approve of the public entity's course of action or inaction." Under these circumstances in which: (i) there was no reported problem of the condition to Defendants; (ii) where Defendants regularly inspect and cut the grass of Volunteer Park; (iii) with policies and procedures in place in the event Defendants discover a dangerous condition, and (iv) where Plaintiffs provides no proof, whatsoever, of Defendants' action/inaction being patently unacceptable, the Court cannot find Defendants' action/inaction to be "palpably unreasonable."

Accordingly, Defendants are well-equipped and has procedures in place to receive complaints from residents regarding issues such as those alleged by Plaintiffs. However, Defendants have a finite number of resources and cannot be expected to continuously inspect and maintain all municipal property within the Township. Plaintiffs have failed to demonstrate any proof

to support a claim that said system is palpably unreasonable. Therefore, it is respectfully submitted the Appellate Division should affirm the trial court's determination.

CONCLUSION

Based upon the foregoing, Defendants respectfully submits the Superior Court's decision must be upheld in its entirety.

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